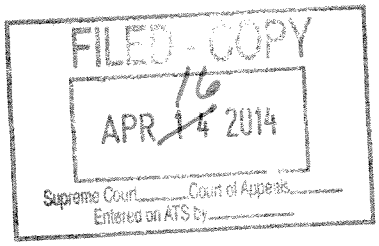
4-16-2014

Dunlap v. State Appellant's Brief Dckt. 41105

IN THE SUPREME COURT OF THE STATE OF IDAHO

TIMOTHY ALAN DUNLAP, Appellant, vs. STATE OF IDAHO, Respondent.	)	DOCKET NO. 41105-2013 (District Court Case No. CV-2011-108)



APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Sixth Judicial District for Caribou County Honorable Mitchell W. Brown Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a successive, capital post-conviction case raising claims of ineffective assistance of appellate counsel based upon federal constitutional claims that were omitted from Dunlap's consolidated appeal. Also included are the federal constitutional claims as independent claims. Dunlap appeals the district court (hereinafter referred to as the "PCR court") decision denying relief.

B. Course of the Proceedings

The relevant proceedings prior to this action include Dunlap's 2006 resentencing proceeding's direct appeal. A jury sentenced Dunlap to death on February 22, 2006. The State Appellate Public Defender's Office ("SAPD") substituted as counsel of record. Pursuant to Idaho's Special Proceedings in Capital Cases, the direct appeal was stayed until completion of the post-conviction relief action. Summary dismissal of the petition was granted in the state's favor on November 24, 2009. R. 12. In a consolidated appeal, Dunlap challenged both the judgment, conviction and the summary dismissal of his claims for post-conviction relief. The opening brief was lodged with this Court on February 25, 2011, and was subsequently accepted and filed on March 22, 2011. R. 936-1048. On April 7, 2011, the underlying petition in this action alleging ineffective assistance of appellate counsel was filed. R. 10-53. The State filed its motion for summary dismissal on May 21, 2012. R. 1291-1366. The State conceded that the petition was timely filed as to the appellate IAC claims, but argued that the petition was untimely as to the underlying substantive claims. R. 1301, 1304-05. The PCR court agreed with the State, finding the appellate IAC claims timely, but the underlying substantive claims untimely. R. 2262, 2265-66. The petition was summarily dismissed on May 8, 2013. R. 2255-2337. The

final judgment was entered on May 13, 2013. R. 2338. Dunlap timely appealed on June 10, 2013. R. 2340.

C. Concise Statement of the Facts

The Appellate IAC claims are based upon the trial record. Many of the claims challenge appellate counsel's failure to raise legal challenges to instructions or the application of statutes in Dunlap's case. One claim raises a three-part challenge to the capital *voir dire*. The relevant facts are set out below.

The selection process began with a written questionnaire. Each potential juror completed the questionnaire prior to the *voir dire* proceeding.[1] Numerous questions asked the jurors about opinions on the propriety of the death penalty. *See, e.g.*, R.1909-16.

The selection process then moved to a general *voir dire* that lasted less than four hours. R. 1605, 1734. Individual *voir dire* then began, but was limited by the resentencing court to five minutes per side with each juror. *Dunlap v. State*, 313 P.3d at 20 ("*Dunlap V*"), #32773, Tr. Vol. 02, Jury V02[2]. The jury was picked in a little over a day and a half, with about 6 and one half hours of individual *voir dire*.[3] Pertinent responses of individual venire persons are discussed in the relevant issue on appeal.

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[1] The questionnaires from jurors who sat on Dunlap's jury or questionnaires that are otherwise relevant to this appeal are in Questionnaire Vol. 6, and were attached as Exhibit 2 to the Amended Petition for Post-conviction Relief. R. 1814-2148.

[2] The PCR court granted the petitioner's motion to take judicial notice of the prior proceedings. R. 1053-54. A separate Motion to Take Judicial Notice is filed with this Court contemporaneously with the filing of this Brief.

[3] General *voir dire* and *voir dire* of the individual jurors who are relevant to this appeal are contained in the *voir dire* transcripts and were attached for the court's convenience as Exhibit 1 to the Amended Petition for Post-conviction Relief. R. 1602-1813.

II. ISSUES PRESENTED ON APPEAL

A. Whether each underlying substantive claim that is the subject of each ineffective assistance on appeal claim may be considered on the merits?

B. Whether Dunlap was denied federal constitutional rights when appellate counsel omitted violations of the Fourteenth Amendment Due Process Clause and the Sixth Amendment rights to an impartial jury and effective assistance of counsel, that: (1) the resentencing court erroneously applied *Witherspoon v. Illinois* and improperly excluded a juror for cause; (2) the resentencing court failed to exclude numerous jurors who were substantially impaired under *Morgan v. Illinois*; and (3) trial counsel was ineffective, under *Strickland v. Washington,* in conducting *voir dire* resulting in a biased jury composed of substantially impaired jurors and an improper exclusion for cause of a qualified juror?

C. Whether the preliminary jury instructions unconstitutionally restricted *voir dire*?

D. Whether the propensity instruction given to the jury was vague and ambiguous under the Eighth Amendment and also resulted in a violation of The Due Process Clause?

E. Whether the weighing instruction and verdict form lessened the State's burden of proof in violation of federal Ex-Post Facto and Due Process protections?

III. STANDARD FOR REVIEW

A. Procedural Review

A post-conviction action is a special proceeding, civil in nature. *State v. Bearshield*, 104 Idaho 676, 678 (1983), *Pizzuto v. State*, 146 Idaho 720, 724 (2008). The petitioner has the burden of proving the allegations in the petition by a preponderance of the evidence. *Stuart v. State*, 118 Idaho 865, 869 (1990).

When considering summary dismissal, "dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the relief requested." *State v. Payne*, 146 Idaho 548, 561 (2008). This Court exercises free review over questions of law. *Rhoades v. State*, 148 Idaho 247, 250 (2009).

B. Appellate Ineffective Assistance of Counsel

The governing law on the right to counsel on appeal is well established. Under the Fourteenth Amendment of the United States Constitution, criminal defendants have a right to counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 388 (1985). "A defendant is constitutionally entitled to the effective assistance of counsel on a direct appeal as of right." *Mitchell v. State*, 132 Idaho 274, 277 (1998) (citing *Evitts v. Lucey*, 469 U.S. at 394).

The *Strickland v. Washington* standard is the proper standard for evaluating appellate ineffective assistance claims. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). An ineffective appellate counsel claim requires proof of deficient performance and prejudice. *Id.* at 285-86, *Mitchell*, 132 Idaho at 277. Counsel's performance must fall below an objective standard of reasonableness sufficient to show a "reasonable probability that, but for counsel's errors, the result would have been different." *Mitchell*, 132 Idaho at 277 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)).

Appellate counsel can provide ineffective assistance under the *Strickland* standard when counsel omits a particular claim. Ineffective assistance of appellate counsel exists when "ignored issues are clearly stronger than those presented." *Smith v. Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985)). Other courts, in applying *Strickland*

to this type of claim, look to the strength of the omitted claim rather than reviewing counsel's performance on the presented claims.

One of the first appellate courts to apply the "firmly established" right to appellate counsel was the United States Court of Appeals for the Seventh Circuit. The circuit applied the two-prong analysis of *Strickland* to a claim that appellate counsel omitted issues on appeal. *Gray*, 800 F.2d at 646. The circuit recognized that a reviewing court should evaluate appellate counsel's choice of issues on appeal, not simply review the issues presented. *Id.*

> Had appellate counsel failed to raise a significant and obvious issue, the failure could be viewed as deficient performance. If an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial. Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal would be worthless.

Id.

Giving further guidance, the court stated that a reviewing court must determine whether "appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Gray*, 800 F.2d at 646. *See also Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989) ("counsel could be constitutionally deficient in omitting a dead-bang winner even while zealously pressing other strong (but unsuccessful) claims.").

This application of *Strickland* – examining the merits of the omitted claim – has been adopted in other circuits. *Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995). The Tenth Circuit has also held that "an appellate advocate may deliver deficient performance and prejudice

a defendant by omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims on appeal." *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) (citing *Page*, 884 F.2d at 302). While not precisely defined, "the phrase 'dead-bang winner' ... is an issue which is obvious from the trial record and one which probably would have resulted in a reversal on appeal." *Banks v. Reynolds*, 54 F.3d at 1515, n. 13 (citing *Cook*, 45 F.3d at 395). Meritorious claims are not "amenable to being winnowed out of an otherwise strong brief." *Banks*, 54 F.3d at 1515. Failing to raise such claims constitutes ineffective assistance on appeal. *Id.*

IV. ARGUMENT

A. The Underlying Substantive Claims Were Erroneously Dismissed Under § 19-2719

In asserting claims of ineffective assistance of appellate counsel for not raising various issues, Dunlap also raised an underlying substantive issue for each appellate IAC claim. R. 1562. The PCR court found that the underlying substantive issues were waived under I.C. § 19-2719, because they should have been raised in the direct appeal or the first post-conviction petition immediately following the re-sentencing proceeding. R. 2260.

Dunlap acknowledges that these claims could have been raised in the direct appeal, and that any failure to raise them therein may operate to waive the claims under § 19-2719(5). The only basis or excuse that Dunlap asserts for raising them in the successive petition in this case is that appellate counsel was limited on appeal by the page limits imposed by this Court. Dunlap argues that in a consolidated appeal of the re-sentencing and denial of post-conviction relief in the capital case of first impression for jury sentencing in Idaho, that the imposition of a 100 page limit violated due process under the Fourteenth Amendment and precluded appellate counsel from raising the substantive issues and exhausting them for federal habeas corpus review. U.S.

CONST. amend. XIV. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (for federal habeas review, claims must be presented to the state supreme court). This Court's page limit for the consolidated appeal of the criminal judgment and the post-conviction relief action impeded Dunlap's ability to pursue all issues in the state courts. Given the preclusive effect of that limitation on Dunlap's ability to appeal all meritorious issues and later seek federal habeas corpus relief on the omitted claims, this Court's page limitation in the consolidated appeal operated to deny effective counsel on appeal and, as to the omitted claims, constituted an independent federal due process violation. U.S. CONST. amends. VI and XIV.

B. Appellate Counsel Omitted Meritorious Issues Addressing Violations of the Sixth and Fourteenth Amendments As a Result of Errors by the Court and Counsel During *Voir Dire*

1. Governing Law on Juror Impairment

"It is well settled that the Fifth and Sixth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Impartiality means "a fair trial by a panel of impartial, 'indifferent' jurors", *Irvin v. Dowd*, 366 U.S. at 722, that is, a jury comprised of "nothing more than 'jurors who will conscientiously apply the law and find the facts.'" *Lockhart v. McCree*, 476 U.S. 162, 178 (1986). The right to an impartial jury entitles a criminal defendant to "a verdict of conviction or acquittal ... given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991). "Due process means a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

"[T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." *Witherspoon v. Illinois*, 391 U.S. 510, 523 n.20 (1968). Accordingly, in capital cases, the Sixth Amendment right to an impartial jury is violated

whenever a jury is empaneled that is "uncommonly willing to condemn a man to die." *Id.* at 521. An improper, death-prone jury exists when jurors who can conscientiously find the facts and make the statutorily mandated choice between life and death are erroneously excluded because of initially expressed reluctance to impose the death penalty. Such a jury also exists when jurors are permitted to serve despite pro-death biases that substantially impair their ability to consider mitigating evidence or impose a life sentence.

Critical to the guarantee of the right to an impartial jury "is an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Dennis v. United States*, 339 U.S. 162, 171-72 (1950); *Morford v. United States*, 339 U.S. 258, 259 (1950). *Voir dire* "plays a critical function" in protecting this right because "[w]ithout an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (White, J., plurality opinion), *quoted in Morgan*, 504 U.S. at 730-31.

It has long been established that jurors should be excused for cause if they harbor a bias towards death that impairs their ability to follow the law in capital sentencing proceedings. As early as 1919, the Supreme Court stated that jurors who would automatically impose a death sentence because they "were in favor of nothing less than capital punishment in cases of conviction for murder in the first degree" were unqualified to serve in a capital case and a challenge for cause should have been sustained. *Stroud v. United States*, 251 U.S. 15, 20-21 (1919).

A half-century later, the Court noted this point again in *Witherspoon*. *Witherspoon*'s principal holding was that the exclusion of potential jurors based solely on generalized

opposition to capital punishment violated the Sixth Amendment. But, the Court recognized that a juror's views on the death penalty, whether for or against, were relevant to his qualification to serve. The Court concluded that permitting "a juror who felt it his 'duty' to sentence every convicted murderer to death ... to serve ... 'while those who admitted to scruples against capital punishment were dismissed without further interrogation'" was a "'double standard' [that] 'inevitably resulted in [the] denial of due process.'" *Witherspoon*, 391 U.S. at 522 n.20 (quoting *Crawford v. Bounds*, 395 F.2d 297, 303-04 (4th Cir. 1968) and citing *Stroud*).

In the 1980s, the Court decided three more cases making clear that questions of life-qualification presented nothing new, unequivocally holding that jurors who would automatically impose a death sentence must be excused for cause; that death-qualification and life-qualification are part of the same inquiry; and that the inquiry into both of these forms of exclusions for juror bias in capital sentencing are a subset of the general rule of law that governs exclusions for juror bias in every other setting. *Adams v. Texas*, 448 U.S. 38 (1980); *Wainwright v. Witt*, 469 U.S. 412 (1984); *Ross v. Oklahoma*, 487 U.S. 81 (1988).

The Court granted certiorari in *Adams v. Texas* to answer the question of "whether Texas contravened the Sixth and Fourteenth Amendments as construed and applied in *Witherspoon* ... when it excluded members of the venire from jury service because they were unable to take an oath that the mandatory penalty of death or imprisonment for life would not 'affect [their] deliberations on any issue of fact.'" *Adams*, 448 U.S. at 40 (internal citation omitted). The Court held that the Texas statute was inconsistent with its holding in *Witherspoon* and struck down the statute.

Adams recognized that a potential juror's inability to return a verdict of *life* as well as the inability to return a verdict of death were equally relevant considerations. The Court recognized

that while it was likely fewer jurors would automatically impose death than those who could never impose death, jurors who were biased towards death would nevertheless be subject to a defense challenge for cause. *Adams*, 448 U.S. at 49.

In *Wainwright v. Witt*, the Court expressly reaffirmed the legal standard announced in *Adams*. The Court held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair *the performance of his duties as a juror in accordance with his instructions and his oath.*'" *Wainwright*, 469 U.S. at 424 (emphasis added) (quoting *Adams*, U.S. 448 at 45). Because there was "nothing talismanic" about juror exclusion simply because a case involved capital sentencing, and the *Adams* standard employed the "traditional reasons" for determining juror bias, *id.* at 423, a juror who could not vote for life, just as a juror who could not vote for death, would be excused for cause because "the juror's views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424.

In 1988, Chief Justice Rehnquist, citing *Witherspoon*, held that a juror who would not consider a life sentence was unqualified to serve in a capital case. *Ross v. Oklahoma*, 487 U.S. 81 (1988). In *Ross*, a potential juror stated during *voir dire* that if the jury found the defendant guilty, "he would vote to impose death automatically." *Id.* at 83-84. The trial court denied a defense challenge for cause. Defense counsel had peremptory strikes remaining and used one to challenge the juror. The *Ross* Court specifically held that automatically voting for death – just as automatically voting for life – would "prevent or substantially impair the performance of his duties as a juror," and thus the trial court erred in denying the challenge for cause. *Id.* at 85. The availability and use of a peremptory challenge by the defense, however, rendered the error

harmless. The Court unequivocally stated: "Had [the challenged juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned." *Id.* (citing *Adams*). Not only did the *Ross* Court affirm the validity of life-qualifying questions, it also recognized that the *Adams* standard – which the Court had stated in 1984 governed "*any* situation where a party seeks to exclude a biased juror," *Witt*, 469 U.S. at 423 (emphasis added) – compelled its holding. *Ross*, 487 U.S. at 85-86.

In *Morgan v. Illinois*, 504 U.S. 719 (1992), the Supreme Court repeated its views regarding "life-qualifying" a juror. The Court reversed the defendant's death penalty because the trial court denied the defendant's request to ask "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty?" *Morgan*, 504 U.S. at 723. The *Morgan* Court explained that a juror who "will automatically vote for the death penalty without regard to the mitigating evidence" is biased because that juror has expressed "an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude imposition of the death penalty." *Id.* at 738. "[S]uch a juror will not give mitigating evidence the consideration that the statute contemplates," *id.*, is not impartial, and should be excused for cause. *See also id.* at 738-39 (a factfinder who would "impose the death penalty without regard to the nature or extent of mitigating evidence ... is refusing in advance to follow the statutory direction to consider that evidence"). It was proper – indeed constitutionally necessary – to remove for cause "[a]ny juror to whom mitigating factors are ... *irrelevant*," *id.* at 739 (emphasis added), and that a capital defendant must be allowed the opportunity to ferret out those prospective jurors who "had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Id.* at 736 (emphasis added).

Although life-qualification is often discussed in terms of excluding jurors who would automatically impose a death penalty, *Morgan's* statement that such a juror "will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do", *id.* at 742 (emphasis omitted), makes clear that automatic opposition to a life sentence is sufficient *but not necessary* to exclude a juror for cause. Any substantial impairment in the juror's ability to properly consider the evidence of aggravating and mitigating circumstances as the instructions and the law requires mandates that the juror be excused for cause.

As noted above, an adequate *voir dire* is required to preserve a defendant's right to a fair and impartial jury. *See Morgan*, 504 U.S. at 729; *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *Dennis*, 339 U.S. at 171-72; *Morford*, 339 U.S. at 259. Thus, a *voir dire* aimed at uncovering the terminating issue of the trial is required for the government and the defendant to gather the information needed to exercise juror challenges – peremptory and cause – in an intelligent and informed manner. It is also necessary to ensure that the Court has sufficient information to determine whether the prospective juror is qualified to serve.[4] *See Morgan*, 504 U.S. at 729-730; *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

The question of excludable pro-death bias under *Morgan* and *Ross* applies at each step in the decision-making process that implicates the juror's willingness and ability to consider and

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[4] An adequate *voir dire* was precluded by the trial court's limitation of individual *voir dire* to five minutes. That limitation violated Dunlap's Sixth Amendment right to an impartial jury and the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amends. VI and XIV. *See, e.g., Morgan*, 504 U.S. at 729-30. However, that issue was raised by appellate counsel, and this Court has already decided it, albeit erroneously. *Dunlap V*, 313 P.3d at 19-20. Accordingly, the time limitation is not raised as an issue. The time limit on *voir dire* is discussed to the extent that the limited *voir dire* is intertwined with, or contributed to, the unconstitutional jury selection process, as noted here, and below, by counsel, R. 1408, and the trial court, R. 2309.

give mitigating effect to constitutionally relevant mitigating evidence. *E.g., Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) (the sentencer may not "refuse to consider … any relevant mitigating evidence" or "disregard the mitigating evidence [the defendant] proffer[s] on his behalf"; "The sentencer … may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.").

Thus, any juror whose views created a substantial impairment to his or her consideration of factors that could result in a life sentence or, having appropriately found the facts, created a substantial impairment in his or her ability to consider a life verdict should be excused for cause.

2. Facts in Support of the Argument

Before starting the resentencing trial, defense counsel and State's counsel each proposed a selection process. #32773, R. Vol. 3, pp. 504-07, 522-24, #32773, R. Vol. 4, pp. 570-74. The resentencing court selected the State's proposal: a questionnaire completed by each venire member; general *voir dire* with the entire venire panel; and individual *voir dire*. #32773, R. Vol. 4, pp. 602-603. Each potential juror completed a 27-page written questionnaire. Selected questions focused upon the individual venire member's views on the death penalty. *See e.g.,* R. 2163-2168. The resentencing court then conducted a general *voir dire* session with all the venire members. R. 1605-1706. Finally, counsel for the parties conducted a five-minute individual, sequestered *voir dire*. R. 1734-1813.

The State proposed the individual *voir dire* as the opportunity for "the parties [to focus on] … the death penalty and the exposure to pretrial publicity." #32773, R. Vol. 3, pp. 504-05. Questions concerning the fair assessment of aggravating and mitigating factors were anticipated. *Id.* at 505. The State also sought individual *voir dire* as a necessary procedure to ensure honest

and candid answers to views on the death penalty. #32773, R. Vol. 4, pp. 572. Both parties understood, in theory, that the individual *voir dire*, limited by the resentencing court to five minutes, was a focused effort to determine the prospective juror's position on automatic life imposition and automatic death imposition. In other words, individual *voir dire* was to determine which jurors were excludable under *Witherspoon* and *Morgan*.

3. Grounds for Relief

The record in this case establishes independent *Witherspoon* and *Morgan* violations, as well as trial counsel's ineffective assistance for failing to adequately question potential jurors and challenge the exclusion of one potential juror and the inclusion of eleven potential jurors under those same standards. It was ineffective assistance of appellate counsel to omit these claims from the appellant's brief.

The *Witherspoon* and *Morgan* violations are clearly stronger than the second issue raised by appellate counsel in Appellant's Opening Brief. R. 956-58. That appellate claim was based upon the resentencing court's refusal to exclude two biased jurors for cause. *Id.* These jurors were removed with peremptory strikes and did not sit on the jury. #32773, Tr. Vol. 4 at 187-88. The biased jury and due process issue raised by appellate counsel was foreclosed under *Ross v. Oklahoma*. 487 U.S. at 83-84, 85-86. "[W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Ross*, 487 U.S. at 88. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.*

Claim selection and winnowing claims in the interest of a more targeted appellate brief and advocacy, *see Jones v. Barnes*, 463 U.S. 745, 751-53 (1983), neither justifies nor excuses the

abandonment of clearly stronger, winning claims. *See Smith v. Robbins*, 528 U.S. at 288; *Gray v. Greer*, 800 F.2d at 646. Here, appellate counsel failed to include clearly stronger claims and in doing so was ineffective. Appellate counsel should have omitted Issue II from its brief, R. 956-58, in favor of the clearly stronger, winning issues set forth below.

a. Potential Juror McMinton was Improperly Excluded Under *Witherspoon*

The resentencing court's exclusion of potential juror McMinton based upon *Witherspoon*, R. 1812-13, was an incorrect application of the law. Appellate counsel should have raised this claim. The PCR court erred in dismissing this claim as a matter of law. Reasonable inferences drawn in petitioner's favor establish that a constitutional violation resulted in the improper dismissal of a juror.

Constitutionally adequate selection of a capital jury balances the state's right to include jurors open to imposing death with the defendant's right to include jurors open to choosing life and giving effect to mitigating evidence. The error claimed here is the improper exclusion of a potential juror based upon her general opposition to the imposition of the death penalty. *Witherspoon*, 391 U.S. at 520-21, *Adams*, 448 U.S. at 48, *Witt*, 469 U.S. at 423.

This challenge is limited and applies only to those potential jurors who, in advance of trial, would not even consider returning a verdict of death. *Witherspoon*, 391 U.S. at 520. "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519. A jury "[c]ulled of all who harbor doubts about the wisdom of capital punishment – of all who would be reluctant to pronounce the extreme penalty – such a jury can speak only for a distinct and dwindling minority." *Id.* at 520. In *Adams*, 448 U.S. 38, the Supreme Court described the standard for *Witherspoon* exclusions: "unless those views [on capital punishment]

would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" the juror may not be challenged for cause. *Id.* at 45.

The burden is on the proponent of the exclusion to establish a juror lacks impartiality. *Witt,* 469 U.S. at 423. Here, the State moved to exclude McMinton based upon *Witherspoon.* R. 1812-13. McMinton's views on the death penalty, as documented by her questionnaire and answers in *voir dire*, did not establish she was substantially impaired and unable to perform the duties as instructed.

Venire member McMinton completed her questionnaire, including the questions designed to identify her views on the implementation of the death penalty. In relevant part, McMinton's questionnaire answers confirm she favored the death penalty and would consider imposing the death penalty as guided by the law and her oath as a juror. Counsel received the juror questionnaires in advance of the group and individual *voir dire* and specifically questioned McMinton about her questionnaire response, indicating her feelings about the death penalty. *See,* R. 1809.

In her juror questionnaire, R. 2149-76, McMinton provided the following answers:

- Ms. McMinton disagreed that "murder is murder, and understanding motives and circumstances is not important." R. 2163, sub-part d.
- She disagreed that "only the worst murderers should be executed." *Id.*, sub-part j.
- She agreed that "it doesn't matter what kind of childhood a murderer had.", R. 2164, sub-part dd, and that "people who kill should be punished no matter what the circumstances are." R. 2165, sub-part aaa.
- She disagreed that "life in prison without the possibility of parole is not a harsh enough penalty for murder." R. 2164, sub-part bb.

- She agreed that she was "uncomfortable about having to decide about executing someone", that she "would review all the evidence before [she] made a decision in this case" and that she "would listen to all the evidence before [she] made a decision in this case." R. 2165-66, sub-parts kkk, ooo, ppp.

- She agreed that she "could vote for the death penalty in some cases if [she] were on a jury." R. 2164, sub-part cc.

McMinton's attitude about the death penalty was articulated through additional responses to the questionnaire. In the narrative, she wrote: "When they are guilty of taking a life then they should be willing to give a life." When asked if she "supports or opposes the death penalty", she stated that she supports it. She did not feel that her views on the death penalty would prevent or substantially impair her ability to view the facts impartially or to impose the death penalty. R. 2166.

The questionnaire included an explanation of the sentencing process. "The Jury will decide what sentence the Defendant shall receive. The Judge will instruct the Jury on the law applicable to this case and it is the Jury's duty to follow the law as given by the Judge. *Will you follow the instructions upon the law given by the Judge even if you thought the law was different or disagree with the law as instructed by the Judge?*" McMinton answered "yes" to this question. R. 2163 (emphasis added). In the concluding answer to this part of the questionnaire, McMinton answered: "I generally favor the death penalty, but I would base a decision to impose it on the facts and the law in the case." R. 2168.

The answers and information provided in the questionnaire were under penalty of perjury. R. 2176, 2150. Unlike a typical *Witherspoon* juror, McMinton expressed general support for the death penalty and no reservations based upon general objections or religious

scruples. McMinton clearly established she could follow the law and abide by her oath as a juror through her questionnaire answers. *Adams*, 448 U.S. at 48.

Defense counsel began the individual *voir dire* for McMinton with questions about her position on the death penalty, that someone guilty of taking a life "should be willing to give a life." She agreed that her position was an "eye for an eye, tooth for a tooth" proposition. R.1809, l. 14-22. On her own initiative, McMinton asked for clarification regarding whether Dunlap had mental problems. *Id.*, l. 23. After counsel responded that was "something ... we are going to talk about", *id.* l. 24-25, she stated, "Well, on that fact I don't think I could give you a verdict of death. There is just no way. I know about mental illness and there is just no way." R. 1810, l. 1-3. Her first answer on the impact of mental illness is not the complete answer. That complete answer is developed through the prosecution's questioning.

The State's counsel asked if McMinton "would be willing to follow the law" even if she disagreed with it. R. 1811, l. 13-16. She agreed to do so, affirming her questionnaire answer. *Id.*, l. 17. Unwilling to accept this unequivocal answer, the deputy attorney general asked a series of questions designed to commit McMinton to a result should certain evidence be introduced. The State then "staked-out" the juror with an improper question that assumed mental health evidence could not outweigh the aggravating evidence and used that as the basis for excluding her.

The deputy attorney general inquired:

> Q. If the facts and evidence in this case indicated that the death penalty was appropriate, and that [sic] being that the *aggravating factors* of this crime *were not outweighed* by any mitigation, would you refuse to give the death penalty just based on evidence that he might have had some mental problems?
> A. That is a hard one to answer. I am not sure.
> Q. I guess my question is, *would you give more weight* to the fact that there may be mental illness than you would the other evidence?

A. On my past experience with my stepsister, I would have to say yeah.

Q. So if there is evidence of any sort of mental problems, you could not give the death penalty?

A. I could not.

R. 1811-12, l. 22-10 (emphasis added).

Based upon McMinton's answers to the questionnaire and individual *voir dire*, the State was not entitled to exclude McMinton for cause under *Witherspoon*. On at least two occasions, McMinton affirmed under penalty of perjury that she could follow the law with regard to sentencing determinations and she clearly stated her willingness to give death in some circumstances.

The State's true objection was that McMinton would give weight to a mitigating factor that it believed was present in the case. Under Idaho's sentencing scheme, the jury is entitled to find mitigating evidence. I.C. §19-2515. Each juror is entitled to give as much weight to the mitigating evidence as is warranted. Each juror can determine whether the mitigating evidence outweighs the aggravating evidence so that imposition of the death penalty is unwarranted. I.C. §19-2515 (7)(b).

The State's basis for cause was that "if [mental illness] evidence was presented, she couldn't give the death penalty. So for that we are challenging her for cause." R. 1812, l. 13-15. The court agreed, "... if there is any mental problem she couldn't give the death sentence, I think that disqualifies her as a juror. I don't think that would be the law." *Id.* at l. 20-22.[5] The law is, however, clear and clearly in favor of Dunlap.

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[5] Dunlap was denied due process under the Fourteenth Amendment by the exclusion of Juror McMinton and the Court's refusal to allow any follow-up questions. R. 1813. He was also denied the effective assistance of counsel under the Sixth Amendment by trial counsel's failure to request the opportunity to rehabilitate McMinton or to object to the State's motion to excuse her for cause. *See infra* at 43.

A juror does not express the "general objections to the death penalty" by indicating some type of mitigating evidence carries weight, great weight or even the ultimate weight in her decision-making. This is not the same as being "irrevocably committed ... to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Gray v. Mississippi*, 481 U.S. 648, 657-58 (1987) (internal citations omitted) (citing *Witherspoon*). McMinton's expressed view was an indication that she would follow the law in giving meaningful consideration to mitigation, as is required of any juror sitting on a capital case. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (footnotes omitted, emphasis in original).

The PCR court rejected Dunlap's appellate IAC claim for not raising the *Witherspoon* issue based on McMinton's "unwillingness to impose the death penalty if mental health issues were established." R. 2292. The court acknowledged that McMinton was generally "supportive of the death penalty"; however, "when presented with the concept of an accompanying mental health issue," the court stated that she became "rigid and inflexible." R. 2293.

McMinton was by no means an automatic vote for life and excludable under *Witherspoon*. Though generally inclined to give death for murder, she was willing to give

substantial mitigating weight to evidence of mental health issues and reconsider her general support of death to give life if mental health evidence was presented. If jurors who would vote to impose death 90% of the time are not automatically in favor of death in all instances and therefore not substantially impaired in favor of death and against the consideration of mitigating evidence, *e.g., United States v. Fulks*, 454 F.3d 410, 428 (4th Cir. 2006), then McMinton, who generally favored death, was not automatically in favor of life in all instances and was not substantially impaired in her ability to consider death simply because she would give great mitigating weight to mental health evidence.

In fact, the ability to give effect to mitigating mental health evidence is not only desirable, but required.

> Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or *to emotional and mental problems, may be less culpable than defendants who have no such excuse* ... (emphasis added)
>
> In light of this principle it is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. *Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.* (emphasis original)

Abdul-Kabir, 550 U.S. at 251-52 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184-85 (1988) (O'Connor, J., concurring), quoting *California v. Brown*, 479 U.S. 538, 545 ((1987) (O'Connor, J., concurring)) (internal quotation marks omitted). In removing potential juror McMinton for cause because she gave powerful weight to mitigating mental health evidence, even though she generally favored the death penalty, the resentencing court erred and violated *Witherspoon*.

The court in *Fulks* determined that the generally pro-death juror was not substantially impaired in favor of death, even though he gave mitigating evidence less weight, because he could consider giving life in some instances. Similarly, generally pro-death juror McMinton was not substantially impaired in favor of life just because she personally gave mitigating evidence of mental health issues more weight. Her willingness to give a life sentence based on a different evaluation of the relative weight of the mitigating evidence is not a basis for removing her from the jury. "[A]lthough a juror must be willing and able to consider mitigating evidence," she "is entitled 'to determine the weight to be given' to any such evidence." *Fulks*, 454 F.3d at 428 (quoting *Eddings*, 455 U.S. at 115). McMinton did not meet the standards to be excluded under *Witherspoon.*

The resentencing court relied upon answers to improper stake-out questions and ignored McMinton's willingness both to give death in some instances and to consider, weigh and give effect to the mitigating evidence to reach her sentencing decision. It was error to excuse her for cause as a *Witherspoon*-excludable juror. The PCR court, relying upon the resentencing court's flawed reasoning, similarly erred in rejecting the appellate IAC claim.

Appellate counsel raised an issue that was foreclosed by *Ross v. Oklahoma*, while omitting this clearly stronger issue. *See supra* at 14-15. *Cf.* R. 956-58 (weaker issue raised in prior appeal). The PCR court further erred in suggesting that Dunlap failed to show the *Witherspoon* issue was clearly stronger than an issue raised by appellate counsel. *See* R. 2294. Dunlap expressly argued below that the issues raised in his petition in that case were "clearly stronger claims" than the issue raised by appellate counsel regarding two jurors struck with peremptory challenges rather than for cause. Dunlap specifically argued that the issue raised by appellate counsel was foreclosed by *Ross* and had "no merit." *See* R. 2237-38.

If appellate counsel had raised the claim that McMinton's exclusion violated *Witherspoon*, the result of the appeal would have been different. In failing to raise this clearly stronger, meritorious jury selection claim, appellate counsel was ineffective, having raised instead the clearly weaker claim that was foreclosed under *Ross*. An incorrect exclusion of a juror based upon *Witherspoon* is fundamental constitutional error and results in reversal of the sentence. *Witherspoon*, 391 U.S. at 522-23. The wrongful exclusion of even one juror for cause, based on an improper death qualifying exclusion under *Witherspoon*, is *per se* reversible error. *Davis v. Georgia*, 429 U.S. 122 (1976). *Witherspoon* error is never harmless error, *Gray v. Mississippi*, 481 U.S. at 660, and Dunlap's sentence must be reversed.

b. Numerous Substantially Impaired Jurors Served in Violation of *Morgan*

While the State is entitled to a jury comprised of individuals willing to consider the death penalty, it is not entitled to one containing a juror who will automatically vote for death in every case. *Morgan*, 504 U.S. at 729. Failing to remove this type of juror for cause results in constitutional error and the sentence must be overturned. *Id.* at 728-29 (citing *Ross*, 487 U.S. at 85). Like *Witherspoon* error, the inclusion of a *Morgan*-impaired juror is structural error mandating reversal.

Sentencing jurors cannot refuse to consider and give effect to an entire class of mitigating evidence. "The sentencer ... may determine the weight to be given relevant mitigating evidence. But *they may not give it no weight by excluding such evidence from their consideration.*" *Eddings*, 455 U.S. at 114-15 (emphasis added). Deeming mitigating evidence irrelevant, by stating that it "doesn't matter," violates this basic tenet by effectively excluding the evidence from the juror's consideration, even if they invoke the mantra at *voir dire* that they will consider and weigh the evidence.

In *Morgan*, the potential juror answered questions aimed at general fairness and "follow[ing] the law." *Morgan*, 504 U.S. at 723-24, 734. These general statements were insufficient, standing alone, to establish the potential juror was impartial. *Id.* at 734-35. "As to general questions of fairness and impartiality, [impaired] jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concerns unprobed." *Id.* at 735. For example, when a juror states that mitigating evidence of a difficult childhood "doesn't matter," such a juror effectively removes such evidence from consideration, even if the juror dogmatically asserts that he or she can be fair and will consider and weigh "all" of the evidence.

In Dunlap's resentencing, the details of the questionnaires along with the individual *voir dire* establish *Morgan*-impaired jurors were seated on the jury that imposed death. Jurors who sat on Dunlap's jury were substantially impaired because they were either automatic death penalty ("ADP") jurors or were unable to give effect to mitigating evidence. This constitutional violation requires reversal of the sentence and had this claim been raised in appellate briefing, the result would have been different.

i. Dunlap's Jury Contained Morgan-Impaired Automatic Death Penalty Jurors

The empaneled jury contained many jurors who were ADP jurors, in violation of Dunlap's Sixth Amendment right to an impartial jury and his Fourteenth Amendment due process rights. Examination of the questionnaires and individual *voir dire* for seated jurors reveals not just a bias in favor of the death penalty, but that many were ADP jurors. Subsequent statements by jurors that they would follow the law and the resentencing court's instructions did not establish that Dunlap had a fair and impartial jury. Automatic life or death-voting jurors "by definition are ones who cannot perform their duties in accordance with law, their protestations to

the contrary notwithstanding." *Morgan*, 504 U.S. at 735. This Court has previously found the five-minute individual *voir dire* was sufficient, not an abuse of discretion and precluded the need for additional *voir dire* to support any *Morgan* challenges. *Dunlap V*, 313 P.3d at 19-20. The record evidence presented in support of these claims should also be deemed sufficient. Based on the answers in the record, numerous jurors were substantially impaired under *Morgan* and should not have been permitted to serve. Their presence on the jury violated the Due Process Clause of the Fourteenth Amendment.

Appellate counsel was ineffective in failing to raise this issue, omitting it in favor of the clearly weaker issue referenced earlier in this claim. *See supra* at 14-15. The PCR court erred in finding otherwise for the reasons set forth below.

Cathy Canaday was an ADP juror who should have been excused for cause. In response to how she would feel about the defense putting on mitigating evidence, Canaday said only "it won't be the easiest case." R. 1794-95. She claimed she could listen to the evidence and weigh it, *id.* at 138, but when asked if she was fair and could be "open-minded", she responded only "[t]o a point." *Id.* Asked to clarify that response, "[t]o what point is that?", she said "[b]eing fair human nature-wise. I mean, I have my own set of *absolutes* and rules." *Id.* (emphasis added). Counsel made no attempt to determine her "set of absolutes and rules," even when she concluded her *voir dire* examination by stating that she "pretty much sticks with my own [views]." *Id.* at 140.

Canaday's own views and "set of absolutes and rules" were plainly described in her questionnaire under penalty of perjury. Among her views were the following: She agreed that "[m]urder is murder, and understanding motives and circumstances is not important"; she strongly disagreed that "only the worst murderers should be executed"; and she strongly agreed

that "society would be stronger if the death penalty were imposed more often." R. 2079. Most significantly, she agreed both that life imprisonment without parole ("LWOP") "is not a harsh enough penalty for murder" and that "[e]xecutions are needed to protect the public." She strongly agreed that "I support ... the death penalty." R. 2080. She strongly agreed that she "could vote for the death penalty in some cases if I were on a jury," and disagreed that it "would be hard for me to vote to kill someone." *Id.* She disagreed that she had any "concerns about the wisdom of the death penalty." R. 2081. Canaday agreed that "[n]ot executing murderers is disrespectful to victims," *id.*, and that "[s]omeone already convicted of a murder is likely to kill someone else." *Id.* She agreed that "[p]eople who kill should be punished no matter what the circumstances are." *Id.* Canaday was already set on the existence of an aggravating circumstance, believing that someone who has already been convicted of a murder is likely to kill someone else. *Id.*

In response to, "How do you feel about the death penalty?", she wrote, "I believe in the death penalty. I believe if the crime warrants it, it should be administered. We need some deter[r]ent to murder and crime" R. 2082. Based on her *voir dire* and questionnaire responses, Canaday was not qualified to sit on Dunlap's jury and should have been excluded for cause.

Canaday's self-description of being fair "to a point" as defined by her "own set of absolutes and rules" defines her as a *Morgan* excludable juror. She demonstrated the dogmatic view of fairness and impartiality that the United States Supreme Court warned against taking at face value. She rejected each of the subsequent clarifications that "saved" the ADP juror in one of the cases relied upon by the PCR court for explication of the *Morgan* ADP standard, *Treesh v. Bagley*, 612 F.3d 424, 438-39 (6th Cir. 2010) (juror would consider motives and circumstances of murder, whether defendant had developmental difficulties as a child or was mentally

retarded). *See* R. 2297. Canaday's beliefs as set forth in her questionnaire revealed an unwillingness to understand the motives and circumstances of a murder and stated that a defendant's childhood "didn't matter," both of which exclude consideration of mitigating evidence. She believed life imprisonment without the possibility of parole was insufficient punishment for murder and would not narrow the class of murderers subject to the death penalty to only the worst murderers. Her answers established she would automatically impose death and should have been excluded.

The PCR court erred in stating that the questioning at *voir dire* showed that "Canaday had not made up her mind on whether to give Dunlap the death penalty." R. 2307. The court relied on Canaday's willingness to give Dunlap "due benefit by listening to the evidence" presented at trial, R. 2306, as the only basis for stating that Canaday had not made up her mind and was not an ADP juror. A willingness to sit in the jury box and listen to the evidence does *not* mean that the juror has not made up her mind already. One can listen to evidence that "doesn't matter," e.g., evidence of Dunlap's childhood, R. 2080, but that doesn't mean Canaday's mind wasn't already made up. Canaday had already stated that she was only "fair to a point," that she had her own absolutes and rules, and that she sticks to her own views. Canaday's views are well stated in her questionnaire: LWOP is not a harsh enough punishment for murder.

Canaday is an ADP juror and the PCR court erred in finding otherwise. The resentencing court erred in allowing Canaday to sit on the jury, and appellate counsel was ineffective in failing to raise this *Morgan* claim on direct appeal.

While Canaday is the most obviously ADP juror who sat on Dunlap's jury, other jurors were also substantially impaired under *Morgan*.

Juror Craig Crandall's questionnaire responses appear to show a bias toward imposing the death penalty in all circumstances. Counsel did ask Crandall about his questionnaire answer regarding how he felt about the death penalty, which stated that "if a person commits a crime punishable by the death penalty . . . so be it." When asked what "so be it" meant, Crandall responded, "You know, I would just think that if the crime fits the punishment then that is how it ought to be." R. 1762. The PCR court suggested that Crandall's "so be it" statement means he will follow the law. R. 2303. The PCR court's interpretation is unreasonable in light of all of Crandall's responses at *voir dire* and in the questionnaire. In response to the question "how do you feel about the death penalty," the statement, "if a person commits a crime punishable by death, so be it," more reasonably means the person should get the death penalty.

Although Crandall agreed that LWOP is always a reasonable option for a jury, R. 1764, he agreed with the questionnaire statement that LWOP "is not a harsh enough penalty for murder." R. 1940. Further, Crandall disagreed with the statement that "only the worst murderers should get death." R. 1939. Crandall strongly disagreed with the statement, "I have concerns about the wisdom of the death penalty." R. 1941. He disagreed that he is "uncomfortable about having to decide about executing someone." *Id.* He disagreed that "[e]very defendant is innocent and remains so unless the State can prove otherwise." R. 1939. He agreed that "people who kill women should be given harsher treatment." R. 1940. Given all of these feelings in a case with a woman victim, particularly his expressed feeling that LWOP was not harsh enough, Crandall also was an ADP juror.

The PCR court found otherwise based on Crandall's agreement with a leading question from counsel that LWOP is always a reasonable option for the jury. R. 2303-04. Juxtaposed against Crandall's personal belief that LWOP "is not a harsh enough penalty for murder," R.

1940, his acknowledgment that a hypothetical jury reasonably could choose LWOP does not change the fact that Crandall never would. Crandall's statement that he would base a decision on whether to impose death on the facts and the law, R. 2303, without more does not establish he is not ADP. *Morgan*, 504 U.S. at 734-35. Crandall never suggested there was any murder which in his opinion would not warrant death. He would not narrow the class of murderers subject to execution to only the worst murderers. To the contrary, his answers established that he would automatically give death in Dunlap's case.

Much like Crandall, juror Lonnie Taggart believed that LWOP was not a harsh enough punishment for murder, R. 2136, and disagreed that only the worst murderers should get death. R. 2135. As many *Morgan*-impaired jurors will say, he believed he could follow the law and do the weighing process and be a fair and impartial juror. R. 1805. While he did say that he had not made up his mind yet as to whether Dunlap should get the death penalty, R. 1807, and that there might be a situation that would be unjust to give the death penalty, *id.*, he gave no indication of what sort of situation that might be. The PCR court erred in relying on those statements in concluding that Taggart was not ADP. *See* R. 2303-04. Given Taggart's written responses that LWOP was not a harsh enough penalty for murder, and that he would not narrow the death penalty to the worst murderers, he was *Morgan*-impaired.

Jurors Corey Kunz and Mat Gronning stated they could make a choice other than the death penalty in instances that were not death eligible crimes. They each suffered from the same basic impairment and the PCR court below ruled erroneously as to each.

During *voir dire*, Kunz stated that he "hadn't given . . . a lot of thought" to what kind of mitigating factors would make the death penalty unjust, but "someone talked about intent." R. 1780. There was no follow-up to this response, which appears to be a statement that death would

be unjust when the defendant lacked intent. Often, a defendant's lack of "intent" includes circumstances where that lack of intent is either a complete defense to first degree murder, or at least precludes death as a sentence for the crime. *See, e.g., Enmund v. Florida*, 458 U.S. 782 (1982).

Moreover, Kunz agreed both that "[p]eople who kill should be punished no matter what the circumstances are," and that "[s]omeone already convicted of a murder is likely to kill someone else." R. 2025. He disagreed with the concept that "only the worst murderers should be executed." R. 2023. He agreed that "society would be stronger if the death penalty were imposed more often," *id.*, that executions "are needed to protect the public," and that the "law goes too far in protecting the rights of criminals." R. 2024. Kunz strongly agreed that he "supports the use of the death penalty," *id.*, and strongly disagreed that he had any "concerns about wisdom of the death penalty." R. 2025. Kunz clearly was predisposed on the propensity aggravating circumstance and was an ADP juror.

The PCR court found that Kunz was not an ADP juror because he supported the death penalty and acknowledged there were "circumstances under which the death penalty could be an appropriate penalty." R. 2300. According to the court, "This shows that Juror Kunz did not think the death penalty was appropriate in all circumstances." *Id.* Nothing in Kunz's statement indicates what circumstances those might be. His *voir dire* response appears to suggest that his version of mitigating circumstances are a lack of intent, a complete defense to the crime. R. 1780. In that light, contrary to the PCR court's findings, Kunz's willingness to weigh the facts, look at the evidence and come to his own decision, does not establish that he can give effect to mitigation and is not an ADP juror.

Like Kunz, Mat Gronning was willing to consider a sentence other than death for non-capital, lesser degrees of homicide. During his *voir dire* examination, Gronning provided the following answers:

> Q. We are trying to determine your opinion on the death penalty. One of the questions is how do you feel about the death penalty? You wrote, "In some cases it is fair and warranted." You generally support the death penalty. What does that mean?
>
> A. Well, basically I think you take it case by case. In my opinion, you know, if someone has thought it out, planned it, and then they execute it the way they had it planned, I think it is different than something of a spur-of-the-moment type thing. That is kind of what I mean by that.

R. 1748, l. 11-20. Gronning's answer is another case of a juror believing that the circumstances where death is not appropriate are limited to instances of a lesser degree of murder, a non-deliberate, non-premeditated murder that would not even be eligible for the death penalty.

The PCR court found Gronning was "obviously" not ADP because he said in some cases the death penalty was "fair and warranted" and he acknowledged cases where it would not be appropriate. R. 2301. However, the *voir dire* question did not specify the kind of cases where the death penalty would not be appropriate. R. 1749. As previously shown, Gronning differentiated between degrees of murder, contrasting the premeditated "planned out" first degree murder from the un-planned, "spur of the moment" murder. Finding Gronning was not ADP based on that response was error.

Gronning disagreed with the concept that "only the worst murderers should be executed." R. 1883. He agreed that "society would be stronger if the death penalty were imposed more often," *id.*, and that executions "are needed to protect the public." R. 1884. Gronning disagreed that "it would be hard for me to vote to kill someone," *id.*, or that he would be "uncomfortable about having to decide about executing someone." R. 1885.

In light of these responses, Gronning's willingness to listen to the evidence and decide whether Dunlap should get the death penalty does not equate to him being qualified as an impartial juror. Having indicated that the mitigating evidence that would matter to him was evidence of a defense to the crime, Gronning was substantially impaired under *Morgan*. In finding otherwise, the PCR court erred.

ii. Dunlap's Jury Contained *Morgan*-Impaired Jurors Unable to Give Effect to Mitigating Evidence

A number of other jurors who sat on Dunlap's jury were substantially impaired under *Morgan* because they could not give effect to mitigating evidence. Examination of the questionnaires and individual *voir dire* for seated jurors reveals the admission by many jurors that could not consider and give weight to mitigating evidence relating to Dunlap's childhood. As previously shown, *supra* at 11-13, 20-22, the inability to give effect to mitigating evidence, by treating it as irrelevant evidence that "didn't matter," renders a juror substantially impaired under *Morgan*, *Lockett, Eddings* and *Abdul-Kabir*. Many of Dunlap's jurors were so impaired.

Question 26 (dd) on the juror questionnaire sought the juror's agreement or disagreement with the statement: "It doesn't matter what kind of childhood a murderer had." *See generally* page 15 of each juror's questionnaire, R. 1814-2148. Numerous jurors agreed under penalty of perjury that the kind of childhood a murderer had "doesn't matter." Those jurors were substantially impaired in their ability to give effect to mitigating evidence.

Juror Canaday agreed that it "doesn't matter what kind of childhood a murderer had," R. 2080, and therefore could not give effect to mitigating evidence of a defendant's childhood. So did Mat Gronning. R. 1884. Thus, Gronning, too, indicated that he could not give effect to mitigating evidence and, was substantially impaired.

Juror Michael Nally strongly agreed that "It doesn't matter what kind of childhood a murderer had." R. 2052. Nally was a strongly pro-death penalty juror, like Canaday and Gronning, who could not give effect to this type of mitigating evidence. Nally Questionnaire, R. 2051-56. He strongly agreed that "[m]urder is murder, and understanding motives and circumstances is not important"; and he disagreed that "only the worst murderers should be executed." R. 2051. Nally agreed that the "law goes too far in protecting the rights of criminals." R. 2052. Nally strongly agreed that "[p]eople who kill should be punished no matter what the circumstances are," and agreed that "[s]omeone already convicted of a murder is likely to kill someone else." R. 2053. The PCR court's reliance on statements by Nally that he was "fairly objective" and could give both sides a "fair shake," R. 2304, overlooks the primary point in *Morgan*, that jurors may honestly believe they are impartial even though they are substantially impaired in favor of death. Likewise, Nally's willingness to engage in the "weighing process," relied upon by the PCR court to show he was not ADP, R. 2304, is no different than the juror's willingness to "follow the law" in *Morgan*, another talismanic invocation that fails to establish a juror is impartial under *Morgan*.

Juror Hagen Beckstead likewise believed that it "doesn't matter what kind of childhood a murderer had." R. 2108. While Beckstead explained that he could be fair and consider giving both life and death, R. 1798-99, he was unaware that his view rejecting any mitigating effect of a murderer's childhood made him substantially impaired under *Morgan*. It is for this reason that the PCR court's finding that he was not ADP, R. 2305, is erroneous. Like so many others of Dunlap's jurors, Beckstead could honestly say he would consider and weigh the evidence without realizing that he was substantially impaired based on his belief that Dunlap's childhood

"didn't matter." *See Morgan*, 504 U.S. at 735-36 (jurors substantially impaired if mitigating evidence is "irrelevant").

Three other jurors responded that a murderer's childhood was not important, an answer that indicates their inability to consider and give effect to certain mitigating evidence. *See* Questionnaires of Chandis Lindsay, Kristine Robinson and Eric Christensen, R. 1829, 1912, 1996. All of these jurors indicated strong support for the death penalty. R. 1828-30, 1911-13, 1995-96. To the extent their questionnaire responses show that they considered evidence of Dunlap's difficult childhood irrelevant, like Beckstead, these jurors were substantially impaired under *Morgan.*

The PCR court found that Lindsay and Robinson were not substantially impaired because they stated they could "weigh" the mitigating evidence. R. 2299, 2302. The PCR court erroneously stated that Dunlap made no assertion of bias against Christensen, other than his general support of the death penalty, R. 2305, when in fact the PCR court had previously noted that Dunlap had challenged Christensen on the ground that he "found no distinction between the class of murders eligible for execution, disagreed that upbringing could be mitigating and that childhood experiences did not matter in mitigation." R. 2299 n. 20 (quoting Dunlap's Supplemental Response Brief at 17 ¶2, *see* R. 2231). *See also* R. 1418, 1419 (identifying Lindsay, Robinson and Christensen as substantially impaired based on inability to consider mitigating effect of murderer's childhood, and seven jurors overall who had the same impairment).

Seven jurors indicated their substantial impairment as jurors in their questionnaire responses that Dunlap's childhood "didn't matter" to them. The irrelevance of this mitigating evidence to these jurors likewise precluded their service as jurors, notwithstanding their response

that they would listen to the evidence, weigh it, and follow the law. *See Morgan*, 504 U.S. at 729, 739.

Five jurors were pre-disposed on the existence of the aggravating factor of propensity to commit murder. Kim Lindstrom and Kristine Robinson indicated their predisposition on the propensity aggravating circumstance with their agreement on their questionnaires that "[s]omeone already convicted of a murder is likely to kill someone else." R. 1858, 1913. Further, the PCR court noted that Lindstrom never stated directly whether she would give death automatically to those guilty of murder, but responded instead that it was a moral and legal question. Finding this sufficient under *Morgan* was error. Simply stating a willingness to follow the law is insufficient to preclude an ADP finding, and recognizing that there is a moral question likewise does not preclude one from being ADP. Indeed, many jurors are ADP because they believe the moral question asked with respect to the death penalty is answered by "eye for an eye" philosophy. *Witherspoon*, 391 U.S. at 536 (Black, J. dissenting). In addition to Lindstrom and Robinson, jurors Canaday, Nally and Kunz shared the belief that someone convicted of murder is likely to kill someone else. R. 2081, 2053, 2025. Given their strong support for the death penalty, these answers further establish they were substantially impaired.

Morgan impairment is sometimes called "reverse *Witherspoon*" impairment. *Morgan*-impaired jurors who cannot give effect to mitigating evidence are substantially impaired in their ability to consider a sentence other than death. *Witherspoon* jurors are substantially impaired in their ability to consider a sentence other than life. If a juror is impaired under *Witherspoon*, based on a finding that a juror gives dispositive weight to a particular type of mitigating evidence in favor of life, then the converse applies in the reverse-*Witherspoon* context: a juror who disregards a particular type of mitigating evidence and is unable to give it any mitigating effect

on the ground that "it doesn't matter," is substantially impaired in favor of death. *See Eddings*, 455 U.S. at 114-15 (the sentencer may not "refuse to consider ... any relevant mitigating evidence" or "disregard the mitigating evidence [the defendant] proffer[s] on his behalf"; "The sentencer ... may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."). If potential juror McMinton was substantially impaired because she gave strongly mitigating effect to a particular type of mitigating evidence – i.e., mental illness – then jurors who could not give any mitigating effect to a particular type of mitigating evidence – Dunlap's difficult childhood – are no less substantially impaired. If the exclusion of McMinton was correct, then these jurors were likewise impaired and should have been dismissed for cause.

For all of the reasons set forth in this section, Dunlap was denied an impartial jury in violation of *Morgan*, the Sixth Amendment and the Fourteenth Amendment's Due Process Clause. The seating of even one *Morgan*-impaired juror is grounds for reversal. *Ross v. Oklahoma*, 487 U.S. at 85; *Morgan*, 504 U.S. at 729. Appellate counsel was ineffective in not raising these issues on appeal.

c. Trial Counsel Provided Ineffective Assistance in the Voir Dire Examinations, Exercise of Challenges for Cause and Opposition to Unsupported Excusal for Cause

The PCR court erred in its treatment of Dunlap's appellate IAC claim for failing to raise an IAC *voir dire* trial claim. The court held that the introductory paragraph, R. 1573 ¶30, is wholly conclusory and appeared to treat it as an individual claim. R. 2288. The court asserted that there "are no admissible facts in the record to support Dunlap's claim that trial counsel's general performance during *voir dire* fell below an objective standard of reasonableness as required by *Strickland*." *Id.* However, the court acknowledged that Dunlap made specific

allegations of trial IAC relating to the conduct of *voir dire* and jury selection that should have been raised on appeal. *Id.* Nevertheless, the court found there is "no basis to find" that trial counsel's general performance on *voir dire* "fell below an objective standard of reasonableness," based merely on the introductory paragraph of the claim, ¶30. R. 2289.

The PCR court did address aspects of trial counsel's inadequate *voir dire* regarding Juror McMinton and the jurors who sat on the jury, but Dunlap notes that paragraph 30 and the conduct of the *voir dire* by trial counsel is all part of one trial IAC claim that appellate counsel failed to raise. Paragraphs 31, 32 and 33 all raise allegations of trial ineffectiveness, which must be read *together* with ¶30. With that clarification, it is obvious that Dunlap cited numerous facts and specific allegations of admissible evidence in ¶¶30-33 of the Amended Petition. These allegations, all apparent from the record, including the *voir dire* and questionnaires submitted under penalty of perjury, include counsel's failure to follow up on obvious red flags in statements made by the prospective jurors in *voir dire* and in their questionnaires, failure to move to exclude many jurors for cause, and failure to rehabilitate juror McMinton and oppose the State's motion to exclude her for cause.

The PCR court ascribed a tactical decision to both trial counsel's conduct of *voir dire* and appellate counsel's failure to raise the trial IAC *voir dire* claim on appeal. With respect to the entire claim as a whole, ¶¶ 30-33, regardless of the court's treatment of ¶30 by itself, Dunlap was denied effective counsel at *voir dire* and on appeal.

The PCR court's decision that appellate counsel strategically chose to pursue other claims with more "viable" issues, R. 2294, 2309, is clearly wrong, as appellate counsel raised one claim that was frivolous and contrary to *Ross v. Oklahoma*. *See supra* at 14-15. As to the proof of prejudice from trial counsel's ineffectiveness, the seating of biased jurors in violation of *Morgan*

or the wrongful removal of a juror under *Witherspoon* is structural error mandating reversal and prejudice is presumed. *See supra* at 23-24, 36-37.

While the resentencing court's unreasonable temporal limitation is certainly responsible in part for the truncated individual questioning, those limits cannot excuse trial counsel's failure to explore issues presented in the jury questionnaire responses of jurors who ultimately were seated on Dunlap's jury. Trial counsel spent valuable limited time on completely irrelevant matters, such as the Super Bowl, a juror's ranch and amount of snow there, and the Simpsons and other t.v. shows. R. 1736, 1747-50, 1762. Counsel wasted some of the limited *voir dire* time on questions the prosecutor had already asked. *Id.* at 1792-93, 1796.

Nor can the time limits excuse trial counsel's failure to move to strike for cause those prospective jurors who stated on their questionnaires that they would not meaningfully consider certain mitigating evidence and/or indicated that they would automatically vote for death. Many jurors who sat and decided Dunlap's sentence indicated that their ability to meaningfully consider a sentence less than death would be substantially impaired. *See supra* at 23-37.

Trial counsel was ineffective in not examining numerous jurors during the individual *voir dire* about answers on their questionnaires, highlighted in the *Morgan* sections, *supra* indicating a bias toward imposing death and an inability to consider and give effect to mitigation. The State argued below that the failure to inquire was a strategic decision, based on the limited time. The limited time made it no less important that questions, aimed at ferreting out bias in favor of the death penalty and against mitigating evidence, be asked; the failure to do so was inexcusable. This was a resentencing trial with guilt already decided. Yet counsel failed to ask critical questions related to sentencing, while often wasting precious time on general conversation unrelated to issues in the case. Based on the answers in the record from the questionnaires and

limited *voir dire*, numerous jurors were substantially impaired under *Morgan* and should not have been permitted to serve. Their presence on the jury violated the Due Process Clause of the Fourteenth Amendment. The failure to ask clarifying questions of those jurors or to move to exclude them for cause based on the existing record in their questionnaire responses violated Dunlap's right to the effective assistance of counsel under the Sixth Amendment as applied by *Strickland.*

Despite the extensive record evidence of seated jurors who were substantially impaired as ADP jurors and because they could not consider and give effect to certain mitigating evidence, defense counsel failed to inquire into these areas or move to exclude the jurors for cause. ADP jurors are obviously prejudicial to the defense. *Cf. Anderson v. State*, 196 S.W.3d 28, 40-41 (Mo. 2006) ("No competent defense attorney would intentionally leave someone on the jury who indicated a strong preference for the death penalty" and would hold the defense to a higher standard of proof; any strategy to put such a person on the jury is "wholly unreasonable"). The only question before the jury was whether Dunlap would receive a sentence of life without parole or death. R. 1713-14. No reasonable strategic reason existed for failing to seek dismissal for cause or make further inquiry of such *Morgan*-impaired jurors. Given a record rife with apparently impaired jurors, trial counsel illuminated his lack of understanding of capital *voir dire* and incompetence regarding *Morgan* dismissals when he explained that he thought the inquiry of whether a prospective juror would automatically vote for death "would be a question for somebody from the Attorney General's Office to ask." R. 391. This ignorance of the controlling law cannot be turned into "strategy." *Strickland*, 466 U.S. at 688-91. No reasonable strategy supports trial counsel's abdication of their role in exploring and disqualifying *Morgan* jurors.

With respect to a juror's claimed ability to be "open-minded and fair to a point," Parmenter acknowledged that such an answer was a red flag worthy of further inquiry, because it indicated there was a point where the juror "failed to be open-minded." R. 398. Juror Canaday gave just such an answer, yet Parmenter failed to follow-up on her obvious ADP biases, on the points where she was not able to be fair and open-minded, and on her personal "absolutes," as shown *supra* at 25-28, and finally failed to move to strike her for cause. Counsel wasted some of the limited *voir dire* time on questions about Canaday's background in psychology and whether she could "consider" psychological evidence, R. 1796, even though the prosecutor had already asked the same basic questions. R. 1792-93. Trial counsel's *voir dire* of Canaday was deficient and prejudicial.

Where jurors' questionnaire responses indicate that they would automatically vote for the death penalty after a murder conviction, failure to *voir dire* adequately on the jurors' ability to fairly assess the sentence to determine whether the jurors were qualified to serve is ineffective assistance of counsel. *Knese v. State*, 85 S.W.3d 628, 632-33 (Mo. 2002) (en banc). At issue in *Knese* was trial counsel's failure to even read the questionnaires. *Id.* While the facts of *Knese* are different, the underlying duty to question a juror's strongly indicated ADP beliefs triggered by reading the questionnaire remains applicable. Although trial counsel read the questionnaire responses in this case, he was still ineffective. Allowing substantially impaired jurors to remain on the jury is structural error that requires the death sentence be vacated. *Id.* at 633. In the ineffective assistance context under *Strickland*, the failure to move for cause or engage in further *voir dire* regarding the problematic questionnaire responses substantially undermines confidence in the outcome and establishes prejudice. *Id.*

Trial counsel should have moved to exclude for cause all of the *Morgan*-impaired jurors previously discussed. In addition to the plainly ADP jurors, *see supra* at 23-32, a number of jurors clearly indicated in their questionnaire that it did not matter to them what kind of childhood a murderer had. *See supra* at 23-25, 32-37. Childhood experiences, whether some form of abuse, mental problems, isolation or neglect is mitigating evidence that a sentencer may not refuse to consider. *Eddings*, 455 U.S. at 113-16. A juror in a death penalty case may not refuse to consider mitigating evidence outright. *Morgan*, 504 U.S. at 728-29. Wholesale refusal to consider any aspect of a defendant's childhood by these jurors constituted substantial impairment. Where the questionnaire response and completed *voir dire* established the substantial impairment of the ability to consider mitigating evidence of Dunlap's childhood, defense counsel should have moved to exclude the jurors for cause. To the extent that the impairment was only established through the questionnaire, it was not rebutted in the *voir dire* and defense counsel still should have pursued the "for cause" disqualification of the *Morgan*-impaired jurors and clarified the impairment through further questioning.

Similar analysis applies to other impairments, such as a belief that the death penalty is not appropriate for an un-premeditated, "spur of the moment" murder. *See* discussion of Gronning, *supra*. Counsel did not follow-up or move to exclude for cause, even though Gronning also volunteered that he coached the victim's brother. R. 1751. Similarly, trial counsel made no follow-up or motion to exclude based on Juror Kunz's statement that death would be unjust when the defendant lacked intent. *See* discussion of Kunz, *supra*.

If the *voir dire* alone did not establish these impairments, then the substantial impairment evidenced in the questionnaires made under penalty of perjury, and not rebutted at *voir dire* by the resentencing court, State or trial counsel, established the substantial impairment.

Further, trial counsel failed to oppose the State's motion to strike McMinton for cause. R. 1809-13. Trial counsel's failure to oppose the State's motion and failure to attempt to rehabilitate this juror fell well below acceptable *voir dire* practice and resulted in the improper exclusion under *Witherspoon* of a qualified juror. The PCR court wrongly credits this failure to trial counsel strategy. R. 2294. James Archibald questioned McMinton for the defense at *voir dire*. R. 1809. Archibald admitted he did not remember the *Witherspoon* case or any broad principles from case law as to who could or could not sit on a capital jury. R. 564. Moreover, the defense case primarily relied on Dunlap's having mental problems. For the defense to allow the prosecution to successfully remove a juror who found mental problems mitigating, without objection, is simply not strategic and cuts against the defense theory of the case. R. 1812.

Trial counsel repeatedly failed on numerous occasions to follow-up on areas identified in juror questionnaires. Counsel failed to question jurors on their beliefs regarding automatic imposition of the death penalty, their inability to give meaningful consideration to mitigating evidence, their exposure to publicity or the prior verdict, or their relationships with witnesses or the victim. R. 1734-1813. The PCR court's reliance on answers by jurors that they could be fair and impartial and follow the law by weighing the evidence does not meet the requirements of *Morgan*. Many of these jurors honestly believed that they could be fair and impartial, and listen to the evidence and weigh it, but given their responses in *voir dire* and in questionnaires, they were nevertheless substantially impaired in their ability to give effect to mitigating evidence.

The removal of potential juror McMinton for cause and the seating of substantially impaired jurors in violation of *Morgan* resulted in a biased jury, a fundamentally unfair trial and prejudicial, structural, fundamental error. Dunlap was denied his rights under the Due Process Clause, *Morgan,* and *Witherspoon* and to an impartial jury under the Sixth Amendment, as well

as to the effective assistance of counsel under *Strickland* and the Sixth Amendment. Appellate counsel was ineffective in failing to raise these claims on appeal.

C. Unconstitutional Restriction on *Voir Dire* In Preliminary Instruction P-3

Preliminary Instruction P-3 violates due process. Appellate counsel should have raised this legal error on appeal. This Court reviews the legal challenge *de novo*. *Rhoades*, 148 Idaho at 250.

Preliminary Instruction P-3, paragraph 16, violated *Witherspoon*, *Morgan*, the Due Process Clause of the Fourteenth Amendment, and the Sixth and Eighth Amendments. The instruction overly emphasized the need to exclude jurors who were inclined to render a life sentence unless they could follow the law as given in the instructions. The instruction ignored the same requirement that jurors who were inclined to render a death sentence had to follow the law as given. This instruction, in combination with the limited time[6] for *voir dire* to explore individual views on the death penalty, led to the seating of jurors who were substantially impaired in their ability to follow the instructions. The limited time for individual *voir dire*, combined with Instruction P-3's emphasis on juror impairment tethered primarily to an inability to give the death penalty, led to the seating of jurors who were not life qualified in violation of the Sixth, Eighth and Fourteenth Amendments. In failing to challenge Instruction P-3, appellate counsel was ineffective.

During *voir dire*, Preliminary Instruction P-3, paragraph 16, was read to the venire panel. In pertinent part, it stated:

> Because your verdict could lead to imposition of the death penalty, your attitude toward the death penalty is a proper subject of inquiry by the court and the attorney.

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[6] As previously noted, this Court upheld the five minute limitation on *voir dire* in *Dunlap V.*

> *The fact that you may have reservations about, or conscientious or religious objections to, capital punishment does not automatically disqualify you as a juror in a capital case. Of primary importance is whether you can subordinate your personal philosophy to your duty to abide by your oath as a juror* and follow the law I give to you. If you are willing to render a verdict that speaks the truth as you find it to exist, *even though such verdict may lead to the imposition of the death penalty*, you are qualified to serve as a juror in this case. If, however, you possess such strong opinions regarding capital punishment, no matter what the opinions may be, that you would be prevented from or substantially impaired in the performance of your duties as a juror, you are not qualified to serve as a juror.
>
> It is up to each of you, using the standard described to search your conscience to determine whether you are in a position to follow the law as I give it to you and render a verdict as the evidence warrants. Only by your candor can either the accused or the State of Idaho be assured of having this extremely serious case resolved by a fair and impartial juror.

R. 172 (emphasis added).

Jurors who will automatically vote for a life or a death sentence, regardless of the evidence, are substantially impaired in their ability to follow the law and sentencing instructions, or obey their oath as jurors. *Adams v. Texas*, 448 U.S. at 45 ("a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"). *See Morgan v. Illinois*, 504 U.S. 719 ("reverse-Witherspoon" *voir dire* of jurors' inability to consider a life sentence is constitutionally required). *Cf. Witherspoon v. Illinois*, 391 U.S. 510 (removal of jurors merely because of general scruples against capital punishment denies due process right to impartial jury; juror may be excluded for cause if would automatically vote against the death penalty).

Preliminary Instruction P-3, paragraph 16, as read by the resentencing court, emphasized the problems faced by jurors who had concerns about imposing the death penalty. While the instruction addressed the notion that the nature of the juror's "strong opinion" about capital

punishment was irrelevant, ("no matter what those opinions may be"), those words rang hollow in light of the resentencing court's selective examples. The instruction's language was addressed to those jurors with "reservations about, or conscientious or religious objections to, capital punishment." R. 172. Moreover, the instruction conveyed the impression that only objections to capital punishment were an obstacle to service on the jury; the instruction stated "[i]f you are willing to render a verdict that speaks the truth as you find it to exist, even though such verdict may lead to the imposition of the death penalty, you are qualified to serve as a juror in this case." *Id.* This instruction misstated the law and failed to instruct jurors who automatically favored or strongly leaned toward the death penalty that they too were substantially impaired in their ability to serve as jurors unless they could follow the instructions and their oath. Merely being able to "consider" the mitigating evidence is insufficient; a juror must be able to give effect to mitigating evidence. This instruction, together with the limited and ineffective *voir dire* of a panel rife with "automatic death penalty" jurors, led to the seating of a jury that was not impartial, in violation of the Sixth, Eighth and Fourteenth Amendments.

The PCR court suggests that Dunlap pointed to no jurors who were impaired in their ability to follow the law and their oath, R. 2286, when in fact, Dunlap raised the issue of particular jurors who were substantially impaired under both *Morgan* and wrongly excluded under *Witherspoon*. *See supra* at 23-37. Based on the conduct of voir dire, the limited inquiry allowed, and the pro-death bias of the panel, this instruction added to the general focus on excusing life-leaning jurors and minimizing the concerns regarding death leaning jurors. Instruction P-3 failed to explain adequately that jurors could not serve on the jury if they were automatically predisposed in favor of the death penalty. Under the circumstances of this case, in

particular, but on its face as well, this instruction is improperly one-sided and should be disallowed as an unconstitutional instruction under *Witherspoon* and *Morgan*.

Attacking Preliminary Instruction P-3 would have strengthened appellate counsel's claim regarding the inadequacies of individual *voir dire*, and it was ineffective for appellate counsel not to raise the issue. Like appellate counsel's failure to challenge the individual *voir dire*, the failure to challenge this instruction was ineffective, particularly in light of the much weaker jury selection issue, foreclosed by *Ross*, which was raised instead.

D. Vague and Ambiguous Propensity Instruction Violates the Fifth, Sixth and Eighth Amendments

Dunlap alleged appellate counsel provided IAC because counsel did not challenge Jury Instruction 11 as vague and ambiguous. As with the preceding claims, determining prejudice under *Strickland* requires this Court to review the merits of the claim. Because this claim raises a legal challenge, this Court conducts a *de novo* review. *Rhoades*, 148 Idaho at 250.

Instruction 11 failed to define the future danger or "propensity to murder" aggravating circumstance in a constitutional manner. The instruction stated:

> The phrase "exhibited a propensity to commit murder which will probably constitute a continuing threat to society" means conduct showing that the defendant is more likely than not to be a continuing threat to society. The state is required to prove the existence of this propensity beyond a reasonable doubt. Such finding cannot be based solely upon the fact that you found the defendant guilty of murder. In order for a person to have a propensity to commit murder, the person must be a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. Propensity requires a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

R. 152.

Dunlap recognizes the prior decision of this Court approving this language, but raises this issue to preserve it for review. *Creech v. State*, 105 Idaho 362, 370-71, 670 P.2d 463, 471-72

(1983). This instruction is vague and ambiguous, fails to adequately narrow the class of murderers eligible for the death penalty, and insufficiently channels the jurors' sentencing discretion in violation of the Due Process Clause of the Fourteenth Amendment, and the Fifth, Sixth and Eighth Amendments.

The phrase "less than the normal amount of provocation" is undefined, ambiguous and confusing. It allows the jury unfettered discretion and encourages the risk of wholly arbitrary and capricious action in violation of the Eighth Amendment. Because it is reasonably likely that a juror would interpret the phrase "normal amount of provocation" to justify or lessen the degree of the homicide, it is reasonably likely that a juror would exclude from the class of first degree murderers those who killed with the "normal amount of provocation." Thus, the use of the phrase "one who kills with less than the normal amount of provocation" likely was understood to mean one who commits a first degree murder. Accordingly, the instruction fails to narrow the class of first degree murderers eligible for the death penalty in any respect in violation of the Eighth Amendment. *See*, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988) (aggravating circumstance is unconstitutionally broad or vague if it does not channel or limit the sentencer's discretion in imposing the death penalty); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (aggravating circumstances must "genuinely narrow the class of persons eligible for the death penalty" in a way that reasonably "justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder"). The aggravating circumstance violates the Eighth Amendment.

The inclusion of the vague and ambiguous phrase "less than the normal amount of provocation" in the definition relieves the jury of determining beyond a reasonable doubt the existence of the "propensity" aggravating circumstance, which is the functional equivalent of an

element of the offense, in violation of the Fifth and Sixth Amendments. *See Ring v. Arizona*, 536 U.S. 584 (2002) (aggravator functional equivalent of element); *Morissette v. United States*, 342 U.S. 246, 275 (1952) (removal of element from jury violates right to jury trial). Submitting the cause to the jury on this flawed definition violates Dunlap's right to a properly instructed jury. *See e.g., Boyde v. California*, 494 U.S. 370, 379-80 (1990) (instructing jury to convict on impermissible legal theory is reversible error) (citing to *Bachellar v. Maryland*, 397 U.S. 567, 571 (1970)).

In the PCR court below, the court assumed the validity of the instruction in part because it is an approved Idaho Criminal Jury Instruction ("ICJI") of the Idaho Supreme Court. R. 2270. This is a case of first impression litigating jury instructions written to fill the void left by the elimination of judge sentencing in capital cases post-*Ring*. That the instructions have been previously approved does not automatically render them constitutional. Like any presumption, the presumption that the ICJI instructions are correct may be rebutted, as Dunlap has done. *Carney v. Heinson*, 133 Idaho 275, 281 (1999) (rebutting common law presumption); *Politte v. Department of Trans.*, 126 Idaho 270, 271 (1994) (rebutting statutory presumption), *Idaho County Nursing Home v. Idaho Dept. of Health and Welfare*, 124 Idaho 116, 117-18 (1993) (same), *Evans v. Hara's, Inc.*, 123 Idaho 473, 477 (1993) (same).

The PCR court found that appellate counsel was not ineffective in failing to raise this issue. R. 2270-71. Relying on the notion that winnowing issues is evidence of competence on appeal, and that Dunlap had not pointed the court to clearly weaker issues, the court rejected the claim. The PCR court erred. As set forth repeatedly in prior sections of the brief, Dunlap did point the court to a clearly weaker issue in his briefing below. He informed the court that an issue raised by appellate counsel was foreclosed under *Ross v. Oklahoma*. R. 2236-37. *See*

supra at 14-15, 22-23. Accordingly, the PCR court's assertion that no weaker issue had been disclosed, R. 2271 n. 11, is simply incorrect. Because this is a clearly stronger, winning issue, appellate counsel was ineffective in not raising it.

E. Ex Post Facto and Due Process Challenges to Sentencing Determination

Dunlap challenged Instruction 14 and the verdict form as violating the Ex Post Facto and Due Process Clauses of the United States Constitution. The PCR court rejected this claim. The court found the instruction, based upon a statutory amendment, was merely procedural, not substantive. R. 2276-78. Because the changes to Idaho Code § 19-2515(3), are substantive, the PCR court erred.

Instruction 14 and the verdict form improperly instructed the jury on the sentencing law, I.C. § 19-2515, that applied at the time of the resentencing proceeding, rather than the law that applied at the time of the crime and entry of Dunlap's guilty plea.[7] *See* R. 157 (Jury Instruction 14) and R. 159-61 (Jury Verdict Form). The statutory version of I.C. § 19-2515 in effect at the time of Dunlap's offense and plea was more favorable, and imposed a greater burden of proof on the State with respect to the finding and weighing of aggravating and mitigating circumstances. The failure to instruct on the earlier version of the statute violated the Ex Post Facto and Due Process Clauses of the state and federal constitutions.

At the time of Dunlap's offense and plea, I.C. § 19-2515(c) (Michie 1984) provided:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds

[7] Recognizing that Dunlap was subject to the version of I.C. § 19-2515 in effect at the time of his offense, the State specified that it was "using the language of the *statutory aggravating factors* contained in I.C. § 19-2515 that existed at the time of the crime, entry of the plea and original sentencing." R. 163-65.

> *that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.*

Id. (emphasis added) (the "offense statute").

The version of I.C. § 19-2515(3)(b) (Michie 2006) in effect at the time of Dunlap's resentencing, and applied by the Court in this case, provided as follows:

> Where a statutory aggravating circumstance is found, the defendant shall be sentenced to death *unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust.* The jury shall not direct imposition of a sentence of death unless it unanimously finds at least one (1) statutory aggravating circumstance and unanimously determines that the penalty of death should be imposed.

Id. (emphasis added) (the "resentencing statute").

The statute in effect at the time of Dunlap's resentencing further provided that at the conclusion of the presentation of evidence and arguments in mitigation and aggravation, the jury must return a special verdict stating:

> (i) Whether the statutory aggravating circumstance has been proven beyond a reasonable doubt; and
> (ii) If the statutory aggravating circumstance has been proven beyond a reasonable doubt, whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling that the death penalty would be unjust.

I.C. § 19-2515 (8)(a) (Michie 2004).

Under the offense statute the State had to show not only that a death sentence was not "unjust," but more significantly, that the mitigating circumstances did not "outweigh the gravity of any aggravating circumstance found." I.C. § 19-2515(c) (Michie 1984). Under this statute, when the mitigating circumstances "outweigh" the aggravating circumstance, death may not be imposed. *State v. Sivak*, 119 Idaho 320, 325, 806 P.2d 413, 418 (1990) ("If the trial court finds that the mitigating circumstances presented outweigh each statutory aggravating circumstance

found, the imposition of the death penalty would be unjust."). Under the resentencing statute this latter requirement was eliminated.

The PCR court focused upon a questionable possibility that a jury might find death unjust, even when the mitigating circumstances did not outweigh each aggravating circumstance. R. 2277. The statute applied at Dunlap's resentencing provided only that once a statutory aggravator had been proven beyond a reasonable doubt, if mitigating circumstances were presented, weighed against each aggravator and found to be "*sufficiently compelling*" such that the imposition of death would be unjust, then death would not be imposed. According to the PCR court, this language allowed Dunlap's jury to find that even if the mitigating evidence was outweighed by the aggravating circumstance, that the mitigating evidence might still be "sufficiently compelling" to make the imposition of death unjust. Thus, the PCR court found that the new statute did not impose a more onerous standard for avoiding the punishment of death.

The PCR court ignored the substantive benefit of the prior law, the converse proposition that when mitigating circumstances did outweigh the aggravator, that death could not be imposed. *See Sivak*, 119 Idaho at 325. Under the court's interpretation, a jury could give death under the new statute, merely by finding that death would not be unjust even when the mitigators outweighed the aggravators. This was a substantive change in the law to the State's benefit and Dunlap's detriment.

The change in the statute to require a showing that the mitigating circumstances are "sufficiently compelling to make imposition of death unjust" unmoored the standard for death from whether or not the mitigating circumstances "outweigh" the aggravating circumstances. While the fact-finder under the new statute might find mitigating circumstances "sufficiently

compelling" to make death unjust even when the aggravating circumstance outweighs the mitigating circumstance, that is merely a more lenient result under the new statute which therefore does not violate the ex post facto clause. The new statute violates the ex post facto clause because it can also result in increased punishment on Dunlap, who could not have been sentenced to death under the old statute when the mitigating circumstances outweighed the aggravating circumstance, but may be sentenced to death in those circumstances under the new statute if the fact-finder finds nevertheless that the mitigating circumstances are not sufficiently compelling to make death unjust.

The PCR court also found that no ex post facto violation exists because the change in the statute was merely procedural. R. 2278. The court relied upon *State v. Lovelace*, 140 Idaho 73, 77-78, 90 P.3d 298 (Idaho 2004). R. 2277.

Lovelace merely addressed the ex post facto argument that *Ring* effected a substantive change in the law by transforming statutorily defined aggravating circumstances into elements of the offense. This Court dispensed with this attack by stating that the "revised death penalty scheme only provides new procedures for determining the aggravating circumstances redefined as the functional equivalent of elements of capital murder of which Lovelace had notice." *Lovelace*, 140 Idaho at 78, 90 P.3d at 303. *Lovelace* did not address substantive statutory changes that altered the facts and quantum of proof required for imposition of the death penalty. The PCR court erred in extending it to the issue raised here.

The application of the new statute at Dunlap's resentencing violated the prohibition against ex post facto laws. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). The elimination of the prior Idaho law's provision, that death is unjust when the mitigating evidence outweighs the aggravating circumstance, deprived Dunlap of a "defense available according to law at the

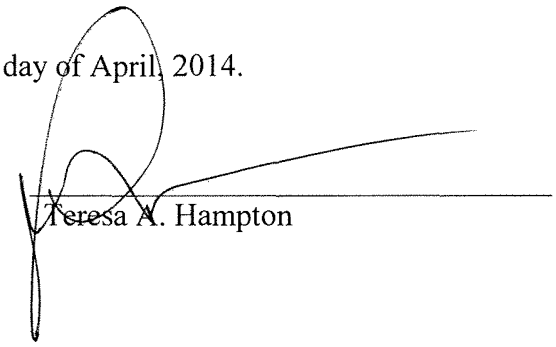
time when the act was committed," and therefore "is prohibited as ex post facto." *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925), quoted in *Dobbert v. Florida*, 432 U.S. 282, 292 (1977). *See also State v. Byers*, 102 Idaho 159, 165-67, 627 P.2d 788, 794-896 (1981) (repealing corroboration requirement in sex crime cases but holding that to apply the repeal to an analysis of the defendant's conviction "would be the equivalent of applying an ex post facto law, and is within the prohibitions of Article I, § 10 of the United States Constitution and Art. I, § 16 of our Idaho Constitution").

The new version of the sentencing statute imposed a lesser burden on the State, and allowed the State to obtain a death sentence on evidence that would not have been sufficient to allow a death sentence under the statute in effect at the time of Dunlap's offense. The statute applied at Dunlap's resentencing imposed a higher burden upon defense counsel to avoid a death sentence in violation of the Ex Post Facto Clause and the Fourteenth Amendment. Appellate counsel erred in not raising this clearly stronger, winning issue and omitting the weaker issue foreclosed by *Ross*.

V. CONCLUSION

Dunlap has demonstrated that appellate counsel provided ineffective assistance of counsel. Numerous meritorious claims were omitted while a clearly foreclosed claim was presented to this Court. There is a reasonable probability of a different result of the appeal but for those errors. The sentence must be vacated and Dunlap is entitled to a new sentencing trial with competent counsel. Alternatively, the summary dismissal should be vacated and the matter remanded for further proceedings in the district court or any such other relief deemed appropriate by this Court.

Respectfully submitted this 14th day of April, 2014.



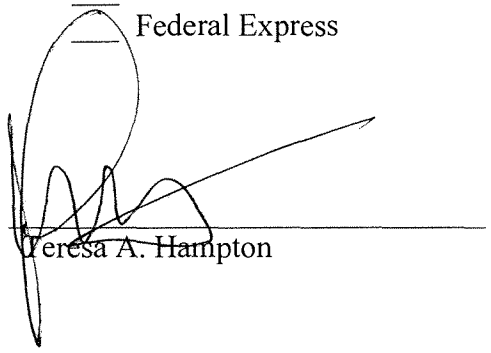
Teresa A. Hampton

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2014, I caused to be served two true and correct copies of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit
Statehouse Mail, Room 10
PO Box 83720
Boise, ID 83720-0010

_X_ U.S. Mail
___ Hand Delivery
___ Facsimile
___ Federal Express



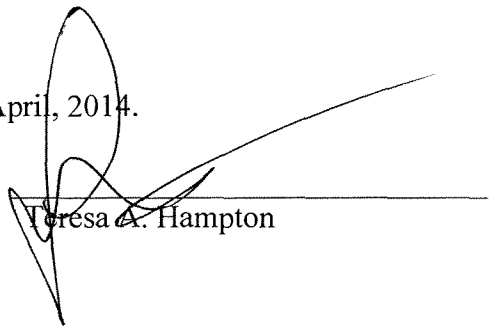
Teresa A. Hampton

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

L. LaMont Anderson
Lamont.anderson@ag.idaho.gov

Dated and certified this 14th day of April, 2014.



Teresa A. Hampton