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SUPREME COURT OF LOUISIANA

No. 04-K-1312

STATE OF LOUISIANA

VS.

ANTHONY SCOTT

**ON DIRECT APPEAL TO THE 23RD JUDICIAL DISTRICT COURT
PARISH OF ASSUMPTION**

JOHNSON, J., dissents and assigns reasons:

The defendant in a capital case is entitled under the Sixth and Fourteenth Amendments to an impartial jury in both the guilt and the penalty phase. *Morgan v. Illinois*, 504 U.S. 719, 112 S. Ct. 2222, 1191 L.Ed.2d 492 (1992). The party seeking to exclude the juror has the burden to demonstrate, through questioning, that the juror lacks impartiality. *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879). The key to deciding cause challenges against prospective jurors based on their views in favor of or against the death penalty is the determination of impartiality. Perhaps the most difficult tasks for the trial judge in ensuring the impartiality of a capital jury are; (1) handling the death qualification portion of the voir dire and (2) ruling on challenges for cause to a prospective juror who has expressed his or her views toward the death penalty.

I believe that the trial court erroneously denied the challenge for cause as to juror James Butler. During voir dire, Butler made it clear that “anyone who shoots and kills another person should receive the death penalty”. Juror Butler never abandoned his opinion that the only appropriate sentence for a person guilty

of murder was death sentence.

The seminal decision on the death qualification of prospective jurors was *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), in which the Court examined an Illinois law that authorized a cause challenge for jurors who voiced general misgivings about the death penalty. Based on that statute, nearly half of the veniremen in the case had been excused for cause. Rejecting the broad statutory authorization for challenging jurors with “conscientious scruples against capital punishment,” the Court reversed the death penalty. The Court held that this statutory procedure did not result in an impartial jury as required by the Sixth Amendment, but resulted instead in a jury “uncommonly willing to condemn a man to die.” *Id.* at 521, 88 S.Ct. 1770. The Court emphasized that veniremen cannot be excluded for cause simply because they indicate there are some kinds of cases in which they would refuse to recommend capital punishment, and that a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him.

The *Witherspoon* decision thus involved the issue of a limitation on a state's power to exclude jurors, rather than the issue of the appropriate grounds for challenging capital jurors. However, the Court in a footnote indicated that nothing in the decision prevented approval of a death penalty imposed by a jury from which were excluded only “those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial ..., or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.” *Id.* at 522-23 n. 21, 88 S.Ct. 1770 (emphasis

in original).

In Louisiana, a juror in a capital case must be willing to consider the imposition both of a death sentence and of a life sentence, based on all of the evidence and on the instructions given by the trial judge. At the conclusion of the evidence, a juror must find beyond a reasonable doubt the existence of at least one statutory aggravating circumstance, and then must *consider* any mitigating circumstances (statutory or otherwise) *before* determining whether or not the death sentence should be imposed. La.Code Crim. Proc. art. 905.3. See *Blystone v. Pennsylvania*, 494 U.S. 299, 307, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (“[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence.”). While a juror has the discretion to assign whatever weight the juror deems appropriate to any aggravating and mitigating circumstance established by the evidence, the juror *must* be willing to consider mitigating evidence relevant to the character and propensities of the defendant (which is the focus of a capital sentencing hearing) and must be willing to fairly consider a life sentence. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

In the instant case, the State cannot argue that Juror Butler, stated a willingness to consider life, even in the abstract, because the jurors were never asked that specific question. Juror Butler was never queried as to whether he could seriously consider the sentence of life imprisonment, which is the law. *State v. Jacobs*, 99-1659 (La. 6/29/01), 789 So.2d 1280. Here, the trial judge sought to take an active role in voir dire. What should have been asked was “Can you likewise return the sentence of life imprisonment without benefit of parole, probation, or suspension of sentence?” The omission of this query is error patent with a pro-death juror like Butler. Under these circumstances, where Butler

actually served on the jury that sentenced the defendant to death, the defendant was forced to accept an obnoxious juror .

For the foregoing reasons, I dissent from the majority opinion.