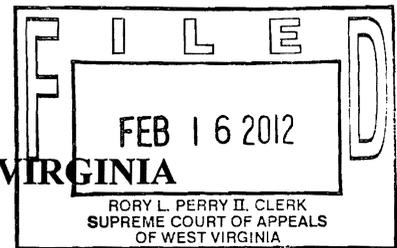


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0799



**STATE OF WEST VIRGINIA,
RESPONDENT,**

V.

**TIMOTHY RAY SUTHERLAND,
PETITIONER.**

Appeal from a final order of
the Circuit Court of Kanawha
County (10-F-328)

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The Court committed reversible error when it refused to strike a potential juror for cause despite his stated opposition to granting mercy for a person convicted of first degree murder.

STATEMENT OF CASE

Timothy Sutherland received a jury trial, but it wasn't a fair one. The trial court refused to remove an obviously biased juror from the jury panel in violation of Sutherland's right to a jury panel free from exception. Sutherland was then compelled to use a peremptory strike to correct the Court's error, and this is reversible error.

On December 30, 2009, Timothy Sutherland admitted to authorities that he killed his cousin and housemate Stacie Smith. Sutherland told police that when he stabbed Smith, he was intoxicated and upset that she called him a junkie. A.R. 565-97. After the incident, Sutherland took some of Smith's personal belongings and left the house in her truck. Id. Although Sutherland initially attempted to frame Smith's boyfriend for the murder, he eventually confessed to killing Smith and he also disclosed the location of the knife that he used. Id. At the conclusion of Sutherland's confession, he was charged with first degree murder and first degree robbery. At trial, Sutherland took responsibility for Smith's death, but argued that he did not possess the requisite *mens rea* to be guilty of first degree murder because he "was high and ... fueled by emotion." A.R. 450. Ultimately, Sutherland was convicted of first degree murder with a jury recommendation of no mercy, but he was acquitted of first degree robbery. A.R. 819-20.

During jury selection, the trial court denied two defense motions to strike potential juror Kevin Wong from the jury panel. See A.R. 376-85; 416-23. Mr. Wong

initially came to the court's attention when he admitted that he saw media coverage of Sutherland's case. Wong said he saw Sutherland on television "when they made their arrest and [Sutherland was] indicted. All I remember is that being in the courtroom on TV. . . . I didn't really pay a whole lot of attention to what the charges were or anything." A.R. 383. Wong couldn't remember how long it had been since he saw Sutherland on television but he did remember that he was wearing orange. *Id.* Wong, however, denied that this made him think Sutherland was guilty. He explained that "I didn't really pay any attention. I just recognized his face. I remember seeing it on TV." A.R. 383-84. At this point, the defense moved to strike Wong for cause because he saw Sutherland on TV in orange "and I'm assuming handcuffs, as well." A.R. 384. The State replied:

Judge, he stated that he could be fair and impartial. He didn't think anything of it. And I don't believe he should be struck for cause. He said he remembers seeing it; he made no opinions about it. It doesn't make him think that – he specifically says it doesn't make him think the defendant is guilty, one way or another. In fact, I don't even think he understood what that meant. So I would ask that you deny their motion.

A.R. 384-85. The Court denied the defense motion to strike Wong because of his exposure to media coverage.

Later during voir dire, defense counsel asked the panel of potential jurors about their attitudes regarding mercy for those convicted of first degree murder.

Mr. Collin: If you do find him guilty of first degree murder, you also have to decide whether or not to grant Mr. Sutherland mercy. Granting Mr. Sutherland mercy means that 15 years from now the Parole Board will take a look at his case; they'll hear from the victim's friends and relatives, people who were impacted by this crime; and then the Parole board will decide whether or not Mr. Sutherland ever gets to leave prison, and if he leaves prison, he'll be on supervised parole. . . . After telling you-all that, my first question for you is: Does anyone think if you intentionally murder someone, you should never leave prison?

A.R. 416-19. Wong raised his hand in response to this question as well. Defense counsel's colloquy with Wong ensued:

Mr. Collin: Mr. Wong, so, if you found Mr. Sutherland guilty of first degree murder, you could not recommend mercy?

Potential Juror Number 176, Mr. Kevin Wong: No, I just feel if somebody takes a life, and since you don't have the death penalty here in West Virginia, that's where he ought to stay."

A.R. 419. Defense counsel continued voir dire, and Wong further expressed that he "agrees with the saying, 'an eye for an eye and a tooth for a tooth.'" A.R. 421.

Based upon these answers relating to mercy, the defense again moved to strike potential juror Wong for cause. The following exchange transpired:

Mr. Collin: Your Honor, I'm going to move to strike Mr. Wong, because of based on [sic] his answer that he could never grant mercy.

Ms. Akers: Judge – And if you require further voir dire of Mr. Wong, that's fine, but what Mr. Wong has said to us up here is that he can be fair and impartial and that he can listen to all the facts.

Mr. Collin: (Unintelligible) whether a person can grant mercy.

Mr. Morris: Judge, first of all, they haven't been instructed on the law. The law is there to follow. He's got a personal opinion that if you kill somebody, you ought not ever get out of prison. There's nothing wrong with having that opinion. I don't think that shows any bias or prejudice. If they don't like him on the jury they can certainly use one of their preemptive challenges. He's not saying he can't follow the law.

Mr. Collin: He said he couldn't consider mercy.

The Court: I'm going to leave him on the jury panel.

A.R. 422-23. Despite Wong's statements of belief that a murderer should never leave prison, he could not vote for mercy, and he believes in an "eye for an eye," the Court conducted no additional colloquy with Wong and denied the motion to strike for cause.

A.R. 418-21. This forced the defense to use a peremptory strike to remove Wong from the panel. A.R. 423-24.

Although prosecutor Akers claimed that “Mr. Wong has said to us ... that he can be fair and impartial and that he can listen to all the facts,” Wong did not actually say this. A.R. 423. This is Akers’ interpretation of Wong’s response to questions about seeing Sutherland on television. See A.R. 382-85. Wong never said that he could be unbiased about granting mercy; he said just the opposite. Moreover, prosecutor Morris’ assertion that Wong did not say “he can’t follow the law” is simply wrong. Wong made an unequivocal statement that he cannot consider granting mercy and there is no evidence in the record to the contrary.

SUMMARY OF ARGUMENT

The trial court committed reversible error when it refused to strike Kevin Wong from the jury panel because of his opposition to granting mercy to a person convicted of first degree murder. The Court’s error forced Sutherland to use a peremptory challenge to strike Wong from the jury panel and this violates Sutherland’s right to a panel of jurors free from exception.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) because it will likely aid in the Court’s decision-making process. A Rule 19 argument is requested in this case because of the novel facts involved in the Court’s erroneous application of otherwise settled law.

ARGUMENT

The trial court committed reversible error when it refused to strike potential juror Wong for cause. Wong’s unabashed opposition to granting mercy makes him legally

unsuited to sit on a jury in a first degree murder case. See Syllabus Point 7, State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); Syllabus Point 5, State v. Greer, 22 W.Va. 800 (1883); W.Va. Code § 62-3-15. The Court’s refusal to strike Wong for cause denied Sutherland the only appropriate remedy to ensure that the jury panel was “free from exception” without the use of a peremptory strike. W.Va. Code § 62-3-3; see Syllabus Point 8, State v. Phillips, 194 W.Va. 569, 461 S.E.2d 75 (1995); Syllabus Point 2, State v. Newcomb, 223 W.Va. 843, 679 S.E.2d 675 (2009).

When considering a motion to excuse a prospective juror for cause, a trial court must make a full inquiry into the grounds for the request and “resolve any doubts in favor of excusing the juror.” Syllabus Point 3, in part, O’Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002). If a prospective juror makes a “clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law.” Syllabus Point 5, in part, O’Dell. Although the party challenging a juror’s qualifications “bears the burden of persuading the trial court that the juror is partial,” when a trial court refuses to excuse a prospective juror for cause, this Court will intervene “when it is left with a clear and definite impression that a prospective juror would be unable [to] faithfully and impartially to apply the law.” Syllabus Point 6, in part, State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996).

In this case, Wong was unequivocal that he does not believe that murderers should ever get out of jail. A.R. 418-19. This is consistent with Wong’s stated belief in the death penalty and the ancient biblical maxim “an eye for an eye, a tooth for a tooth.” A.R. 421. Based upon Wong’s statements of belief about mercy, defense counsel asked the Court to remove Wong from the jury panel because “he said he couldn’t consider

mercy.” A.R. 418-23; see Syllabus Point 7, State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); Syllabus Point 5, State v. Greer, 22 W.Va. 800 (1883); W.Va. Code § 62-3-15. The Court, however, denied the defense motion without further inquiry. This is error, and it is not even a close call. Wong was absolutely clear that he is “unalterably opposed to making a recommendation of mercy” in a first degree murder case. Syllabus Point 7, Williams; see A.R. 418-21. The trial court should have resolved any doubt about Wong’s impartiality in favor of granting the motion to strike. See Syllabus Point 3, O’Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002). Further, as a matter of law, Wong’s transparent bias against mercy requires disqualification from the panel. See Syllabus Point 5, O’Dell. As Justice Cleckley astutely points out, “[b]arring equal protection considerations ... it cannot be overemphasized that no error is committed even when a qualified juror is struck as long as the remaining panel members are qualified. Rather, our cases demonstrate that a trial court risks error only when it refuses to strike jurors whose impartiality is questionable.” Phillips, 194 W.Va. at 589, 461 S.E.2d at 95.

Although in general it is true, as prosecutor Morris claimed, that “there’s nothing wrong with” having “a personal opinion that if you kill somebody, you ought not ever get out of prison,” this is certainly not true for potential jurors in a first degree murder case. A.R. 422; see Syllabus Point 7, Williams; Syllabus Point 5, Greer. Morris’ position that “if they don’t like him on the jury, they can certainly use of one of their peremptory challenges. He’s not saying he can’t follow the law” reflects a clear misunderstanding of well-established precedent. Id.; Syllabus Point 8, State v. Phillips, 194 W.Va. 569, 461 S.E.2d 75 (1995); Syllabus Point 2, State v. Newcomb, 223 W.Va. 843, 679 S.E.2d 675 (2009); W.Va. Code § 62-3-3. This Court has consistently held that criminal defendants

are guaranteed an unbiased jury panel “free from prejudice respecting the penalties which may be imposed upon a finding of guilt.” Williams 172 W.Va at 307, 305 S.E.2d at 263; Syllabus Point 5, State v. Greer, 22 W.Va. 800 (1883); see State v. Mills, 219 W.Va. 28, 33-34, 631 S.E.2d 586, 591-92 (2005). Sutherland also has a statutory “right to reserve his ... peremptory challenges until an unbiased jury panel is assembled.” Syllabus Point 8, Phillips; W.Va. Code § 62-3-3. Simply put, Wong’s refusal to countenance mercy makes him legally unqualified to decide the penalty for a person convicted of first degree murder. See Williams at 307, 263; Greer at 809-10. The Court erred, therefore, when it denied the motion to strike Wong, thereby forcing Sutherland to use a peremptory challenge to remove a biased, unqualified juror. A.R. 424. In sum, the motion to strike Wong for cause was proper because his personal belief about mercy made him unable to faithfully and impartially apply the law. See Syllabus Point 6, State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996); W.Va. Code § 62-3-15. The Court’s failure to strike Wong for cause, in turn, forced the defense to use a peremptory strike to remove Wong from the jury panel, and this is reversible error. See Syllabus Point 8, Phillips; Syllabus Point 7, Williams; Syllabus Point 5, Greer.

CONCLUSION

WHEREFORE, Petitioner Timothy Sutherland prays that this Court will reverse his conviction and remand for a new trial.

Signed: _____



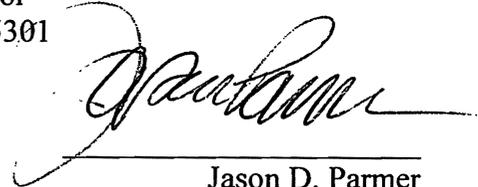
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CERTIFICATE OF SERVICE

I, Jason D. Parmer, hereby certify that I have served the foregoing petition for appeal by first class mail on the 17th day of February, 2012 upon:

Benjamin Yancey, III
Assistant Attorney General
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301

A handwritten signature in black ink, appearing to read "J. Parmer", written over a horizontal line.

Jason D. Parmer
Counsel for Petitioner