

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

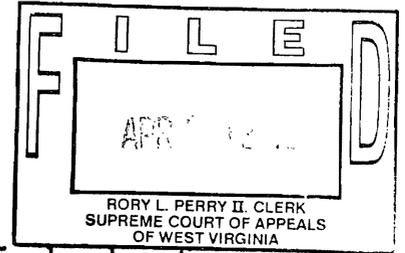
DOCKET NO. 11-0799

**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 REPLY BRIEF

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- I. Potential juror Wong should have been stricken for cause because he clearly stated that he would not grant mercy to a person convicted of first degree murder.
 - A. Once Wong clearly stated his bias against mercy, he should have been disqualified as a matter of law.

The State strenuously and repeatedly claims throughout its brief that Wong's statements against mercy are inconclusive and vague. Despite these protestations, the record is clear that Wong's opposition to mercy is unambiguous. During *voir dire*, defense counsel asked the potential jurors if they believe that if a person "intentionally murders someone" he should never leave prison. A.R. 418. Wong raised his hand in response to this question. A.R. 419. To clarify Wong's response, defense counsel pursued the following colloquy:

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.

Id. Not only did Wong state his opposition to mercy, he explained his rationale for it: he is opposed to mercy because West Virginia does not have the death penalty.

On appeal, it is convenient for the State to claim that the record is insufficient and Wong's statements relating to mercy are vague, inconclusive, and therefore not disqualifying. However, the facts do not support the State's argument because the parties present during *voir dire* obviously understood Wong's position. During the discussion of the motion to strike Wong, the trial prosecutor Don Morris stated that Wong has "a personal opinion that if you kill somebody, you ought not ever get out of prison." A.R. 422. It is absolutely clear from this statement that prosecutor Morris understood Wong's unalterable opposition to mercy. Morris did not argue that Wong's statement was unclear

or inconclusive. Rather, he attempted to justify it, claiming “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.” Id. This is obviously an incorrect statement of the law relating to jurors on a first degree murder case. Jurors in a first degree murder case cannot have fixed opinions either for or against mercy; and failure to strike a biased juror is not cured by use of a preemptory strike. 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); 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 § 62-3-15 (2011); W.Va. Code § 62-3-3 (2011). Unfortunately, the Court followed the prosecutor’s erroneous interpretation of the law and refused to strike Wong for cause.

Given this legal blunder by the prosecutor and the Court, it is no wonder that the State now switches gears on appeal, claiming that the record is insufficient rather than following the prosecutor’s incorrect arguments below. Respondent’s Brief (R.B.) 7-8. However, the State’s current position that Wong never clearly stated an opposition to mercy is not based upon a reasonable reading of the record. The Court and the prosecutors clearly understood Wong’s unabashed opposition to mercy, and the Court erred when it refused to strike him for cause because of it.

B. O’Dell does not require clarification of an already clear statement of bias.

Once Wong explicitly stated that he is against mercy because West Virginia does not have the death penalty, the defense has no additional burden of “clarifying” this answer. See Syllabus Point 5, O’Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002);

R.B. 9-14, 21-22. After Wong's colloquy with defense counsel, he should have been disqualified as a matter of law. See id.

The State, however, apparently asks this Court to twist the meaning of O'Dell to impose a burden upon the defense, rather than the Court, "to make a full inquiry" into "the circumstances and grounds relating to a potential request to excuse a prospective juror" despite a clear disqualifying answer. See R.B. 21-22; Syllabus Point 3, O'Dell. Wong gave two disqualifying answers during *voir dire* about his attitude toward mercy. A.R. 418-19. Once Wong clearly stated his disqualifying bias or prejudice, defense counsel had no duty under the law to keep asking him questions. See Syllabus Point 5, O'Dell. Either the Court or the prosecutors could have attempted further inquiry to "clarify," or more likely attack, Wong's position on mercy, but they did not. The prosecutors waived their chance to question Wong further and instead argued, wrongly, that his prejudice against mercy was not disqualifying as a matter of law. A.R. 422. This Court must correct the trial court's legal error and reject any attempt by the State to blame the defense for the inability of the prosecutors to "clarify" Wong's already clear statement of bias against mercy.

Despite the clarity of Wong's statement, and the parties' understanding of it at the time he made it, the State implies that Wong should not have been disqualified unless he uttered the talismanic incantation: "I am unalterably opposed to a recommendation of mercy in any circumstances in which a verdict of guilty is returned." See R.B. 12; State v. Williams, 172 W.Va. 295, 308, 305 S.E.2d 251, 264 (1983). However, such a stringent requirement runs contrary to common sense and would allow many biased jurors to remain on a jury panel despite their obvious bias or prejudice. See also Syllabus

Point 1, State v. Flippo, 212 W.Va. 560, 565 S.E.2d 170 (2002) (“a search may be lawful even if the person giving consent does not recite the talismanic phrase: ‘You have my permission to search.’”).

In this case, defense counsel explained to the jurors that if they found Sutherland guilty of first degree murder, they would have a choice of voting for mercy or no mercy. A.R. 415-18. The jurors were then informed that if Sutherland is convicted of first degree murder with a recommendation of mercy, he would be eligible for parole in fifteen (15) years. Id. The jurors were further told that if Sutherland is sentenced to life with mercy, “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.” A.R. 416. This satisfies the Court’s concern in Williams that jurors should be informed of their discretion to grant mercy and the consequences thereof. Williams, 172 W.Va. at 308, 305 S.E.2d at 264.

After this introductory discussion, the jurors were asked if any of them thought that “if you intentionally murder someone, you should never leave prison.” A.R. 418-19. Wong raised his hand to this question. On individual *voir dire*, Wong was then asked “if you found Mr. Sutherland guilty of first degree murder, you could not recommend mercy?” Wong replied “[n]o, 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.” This colloquy with Wong is specific enough to determine that Wong is opposed to mercy under any circumstance. Williams at 308, 264. Wong was absolutely clear that since West Virginia does not have the death penalty, he only believes in life without parole for persons convicted of first degree murder. A.R. 418-19.

Neither the Court nor the prosecutors conducted any additional *voir dire* of Wong and his opposition to mercy is uncontradicted in the record. Therefore, the trial Court abused its discretion when it denied the motion to strike Wong for cause, thus forcing the defense to use a preemptory strike to remove Wong from the jury panel. W.Va. Code § 62-3-3 (2011); 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); Syllabus Point 7, State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983).

II. In the absence of compelling legal arguments, the State asks the Court to ignore the rule of law in favor of expediency.

The State's position appears to be that Sutherland is a bad man unworthy of mercy; therefore, the ends justify the means. R.B. 2-5, 17, 23. This is an undesirably cynical and incorrect view of our legal system. The issue is not whether a properly selected jury would have granted Sutherland mercy, but whether Sutherland was afforded the properly qualified jury to which he was entitled.

It is patently obvious that Sutherland was denied his right to a jury panel free from exception when the Court forced him to use a preemptory challenge to remove Wong from the jury panel. If this Court finds that there is no reversible error in this case, one hundred twenty-nine (129) years of precedent on *voir dire* in murder cases will be rendered meaningless in an effort to keep a "bad man" behind bars. This Court should not take the path of least resistance that the State urges; it should instead uphold the rule of law that guarantees every criminal defendant a jury panel free from exception. See State v. Greer, 22 W.Va. 800 (1883); State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); W.Va. Code § 62-3-3 (2011). Although the State valiantly attempts to make its

case against a reversal, only a change of facts would allow the State to prevail in this case.

A. The cases on which the State relies are not on point.

The State attempts to support its position by making straw man arguments with inapplicable, factually distinct voir dire cases. In these cases, none of the jurors' statements of bias or prejudice are as unequivocal and unambiguous as Wong's in the instant case. See State v. Hatley, 223 W.Va. 747, 679 S.E.2d 579 (2009) (juror indicated he could be fair and impartial despite relationship with prosecutor); State v. Mitchell, No. 101577, slip op. at 2 (W.Va. Apr. 18, 2011) ("all jurors confirmed repeatedly their ability to be fair"); State v. Juntilla, 227 W.Va. 492, 499, 711 S.E.2d 562, 569 (2011) (juror did not indicate unequivocal opposition to mercy when he stated that it was "unlikely" that he would vote for mercy "but ... I would have to hear the case through"); State v. Newcomb, 223 W.Va. 843, 679 S.E.2d 675 (2009) (both challenged jurors indicated an ability to be unbiased); State v. Cowley, 223 W.Va. 183, 189, 672 S.E.2d 319, 325 (2008) ("juror acknowledged in clear and unequivocal terms that there are 'two sides to every story' and that she could serve without any bias or prejudice"); State ex rel. Quinones v. Rubenstein, 218 W.Va. 388, 396, 624 S.E.2d 825, 833 (2005) ("both challenged jurors indicated upon individual questioning by the court that they could be fair and unbiased as jurors"); State v. Mills, 219 W.Va. 28, 33, 631 S.E.2d 586, 591 (2005) (challenged jurors said they would "consider mercy" after initially saying they would not); State v. Hutchinson, 215 W.Va. 313, 319, 599 S.E.2d 736, 742 (2004) (juror's "statement that he may be uncomfortable 'making a decision with another man's life' [is] not ... a statement

of clear bias or prejudice”); State v. White, 227 W.Va. 231, 707 S.E.2d 841 (2011) (challenged jurors did not unequivocally state bias or prejudice).

Voir dire cases are heavily fact-dependent. They depend on the words chosen by the challenged jurors and the context in which they are spoken. None of the cases cited by the State are factually similar enough to the instant case to excuse the trial court’s refusal to excuse Wong for cause.

B. The State attempts but fails to minimize the precedential value of State v. Greer.

Somewhat incredulously, the State asks this Court to disavow the seminal case in West Virginia holding that jurors in a murder case cannot have fixed opinions about potential punishments that would prevent them from performing their duty as jurors. R.B. 10-11; see State v. Greer, 22 W.Va. 800 (1883). First, the State relies on inapplicable United States Supreme Court precedent to support its contention “that *Greer*, being a death penalty case, is inapposite ... [because] death is different.” R.B. 10, citing Ford v. Wainwright, 477 U.S. 399, 411 (1986) (emphasis removed); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Because “death is different,” Wainwright found fact-finding procedures in a habeas corpus proceeding to be inadequate and Woodson invalidated a death sentence because there was no mitigation hearing. *Id.* Neither of these cases have any relevance to Greer. There is nothing in the Greer opinion indicating that the Court wrote Syllabus Points 5 and 6 out of a special concern for the gravity of the death penalty.¹ Rather, these Syllabus Points were written to ensure that jurors in a

¹ Syllabus Point 5, State v. Greer, 22 W.Va. 800 (1883): “In empaneling a jury in a capital case a proposed juror examined on his *voir dire*, who in answer to a question propounded by the court says, he has conscientious scruples against inflicting the death-penalty, is incompetent and is properly rejected by the court, although he says he will be governed by the law and the evidence.”

murder case are able to impartially perform their duty and fix a penalty based upon the facts and circumstances of the case rather than their own biases and prejudices. See W.Va. Code § 62-3-15 (2011); Syllabus Points 5 and 6, Greer, 22 W.Va. 800; Williams, 172 W.Va. 295, 307, 305 S.E.2d 251, 263 (1983).

Next the State claims, without any exposition or citation, that Greer “represents a line of analysis that was altered in 1965, when West Virginia abolished the death penalty.” R.B. 11. However, State v. Williams was decided in 1983 and it follows Greer as precedent for our murder case *voir dire* rule that “potential jurors must be free of any scruples or personal opinions which would preclude them from considering the complete range of possible penalties or from exercising their discretion to fix punishment.” Id. The abolition of the death penalty in 1965 is discussed in Williams and it is given absolutely no weight. Id. The Williams court could have created a new rule and distinguished Greer because it is a death penalty case, but it did not do so. Therefore, it is at a minimum specious for the State to argue now, twenty-nine (29) years after Williams, that this Court should disavow Greer because it is a death penalty case.

Finally, the State makes the inaccurate and irrelevant claim that Greer is factually distinct from the instant case because “the juror [in Greer] was asked follow-up questions to determine whether his feelings about the death penalty were unalterable” but in the instant case only “one broad question about life imprisonment” was asked by defense counsel, and “apparently satisfied with a ‘bad’ response ... decided to say thank you and

Syllabus Point 6, Greer: “Since our statute gives a jury a discretion, when they find a prisoner guilty of murder in the first degree, to say he shall be punished by imprisonment in the penitentiary, it is more important to the State, that juries should have no conscientious scruples against inflicting the death penalty.”

leave it at that.”² R.B. 11. This is a questionable reading of the facts of Greer and the characterization of Wong’s *voir dire* is simply wrong. Wong answered two questions, not one, about his attitude toward mercy; and the questions and answers were specific, not general. A.R. 418-19. More importantly, the record is clear that prosecutor Morris recognized Wong’s opposition to mercy. A.R. 422. Rather than question him further about his attitude toward mercy, Morris simply chose to make an erroneous legal argument, claiming that there’s no problem with Wong having a fixed opinion against mercy because the defense can use a peremptory strike to remove him from the jury panel. Id.

Moreover, the State’s argument about the number of questions asked by the defense during *voir dire* is a red herring. Once Wong clearly stated that he is opposed to mercy, he is disqualified as a matter of law. See Syllabus Point 5, O’Dell, 211 W.Va. 285, 565 S.E.2d 407 (2002). There is no predetermined number of times that Wong needs to say he is biased before the Court should believe him. The State could have attempted to “clarify” Wong’s answers as long as the Court would allow, but it did not do so. It is not the job of the defense to clarify an already clear statement of bias against mercy. Neither the Court nor the prosecutors elicited any ambiguity in Wong’s stated opposition to mercy. Therefore, the record is absolutely clear that Wong was unqualified

² It is not clear how many questions were asked of Juror Duff in the Greer case. The relevant excerpt from Greer, 22 W.Va. at 809, is as follows:

The second bill of exceptions was to the ruling of the court sustaining the challenge to W.S. Duff, who was sworn on his *voir dire*, having been regularly drawn as a juror. The question was propounded by the court “whether he had any conscientious scruples against inflicting the death penalty in a proper case?” To which answer was made that “he had conscientious scruples against inflicting the death penalty; that he would be governed by the law and evidence, but was opposed to inflicting capital punishment.”

to be left on the jury panel in this case and the Court committed reversible error when it refused the defense motion to strike him for cause.

CONCLUSION

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

Signed: _____

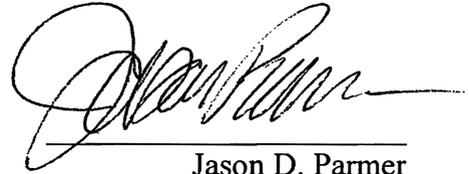


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CERTIFICATE OF SERVICE

I, Jason D. Parmer, hereby certify that I have served the foregoing petitioner's reply brief by first class mail on the 23rd day of April, 2012 upon:

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