

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0799

STATE OF WEST VIRGINIA,

Respondent,

v.

TIMOTHY RAY SUTHERLAND,

Petitioner.

BRIEF OF THE RESPONDENT,
STATE OF WEST VIRGINIA

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Comes now the State of West Virginia, by counsel, Barbara H. Allen, Managing Deputy Attorney General, and files this brief in response to the Petition for Appeal. In this case, the Petitioner, who severed the jugular vein and carotid artery of his sleeping victim with a butcher knife and then scrawled a Manson-esque message on the wall in the hope of framing someone else for the crime, seeks reversal of his conviction on the ground that the trial court erred in refusing to strike for cause a prospective juror who opined, in response to a voir dire question, that convicted murders should be imprisoned for life.

I.

ASSIGNMENT OF ERROR

1. Under the circumstances of this case, the court below did not commit reversible error when it refused to strike a potential juror for cause, after the juror had opined that convicted murders

should be imprisoned for life and indicated his agreement (by raising his hand) with the principle of *lex talionis*, “an eye for an eye and a tooth for a tooth.”

II.

STATEMENT OF THE CASE

A. FACTS OF THE CASE.

In the early morning hours of December 28, 2009, the Petitioner murdered his cousin, Stacie Smith, by plunging a butcher knife into her neck as she slept. The blow severed Stacie’s jugular vein and carotid artery; she was able to rise from her bed and stagger six to eight feet toward the kitchen before she collapsed and died in a pool of her own blood some three to five minutes after the attack. (App. I, 458, 484-85; App. II, 546-47, 693-94, 700, 702.)

The Petitioner was staying at Ms. Smith’s house. (App. I, 454-55, 462.) In his statement to the police, he said that he had been deeply hurt when Stacie called him a junkie. (App. II, 572-73.) Feelings wounded and high on ecstasy¹ and marijuana, the Petitioner “stomped out,” lit a cigarette, got a butcher knife and then, two or three minutes later, went into Stacie’s bedroom, carefully put his cigarette on the dresser, and stabbed her. (App. II, 573-74, 583.)

As Stacie died on the floor, the Petitioner grabbed her cell phone, credit card, money, and car keys. (App. II, 582-83.) Before locking the door behind him and leaving in Stacie’s vehicle, he wrote “Cheating Whore” on the living room wall “so people would think it was [Stacie’s boyfriend].” (App. I, 459; App. II, 585.)

¹The police found no evidence of this so-called ecstasy high – no ecstasy, no syringes, no nothing. (App. II, 598.)

He didn't stop to consider that he was locking Stacie's little boy in the house with his mother's corpse.

What he did stop to consider, and found time to do, was:

- 1) to attempt to frame someone else for the murder;
- 2) to take Stacie's money, credit card, and car keys so that he could try to "score some meth";
- 3) to throw away the murder weapon (which he had wrapped in a washcloth);
- 4) to take Stacie's cell phone apart so that it couldn't be tracked;
- 5) to pay a friend to get rid of the vehicle and the phone; and
- 6) to hole up at a Motel 6.

(App. II, 578, 582-83, 585-86, 589-92, 594.)

The Petitioner's primary defense was that he was high on drugs when he overreacted to Stacie's "junkie" comment and murdered her, i.e., that the crime wasn't premeditated and was committed in the heat of passion. (App. II, 570, 595.)

The Petitioner also tried to develop a mercy defense by emphasizing his remorse. In that regard, he maintained in his statement to the police that he had attempted to commit suicide before leaving Stacie's house, by taking a whole bottle of OxyContin. (App. II, 578.) He told the police that "I didn't mean for it to happen like that," and "I wish I could take it back," and "I tried to stop, but it was too late." (App. II, 577-78.)

Interestingly, although defense counsel attempted to drive home the remorse theme by questioning the police about Petitioner's emotional state and his "sobbing," Captain Don Scurlock testified that the Petitioner first became emotional only after being confronted with the evidence that

incriminated him and after realizing that “I’m going to spend the rest of my life in prison.” (App. II, 630-31.)

That remorse theme took yet another hit when Carisa MacConfre, a federal inmate who had been housed with the Petitioner at the Regional Jail, read a letter she had received from the Petitioner, a/k/a “T-Money,” warning her that:

I’m not the type to discriminate against bitches. In case you didn’t know, I’m here for cutting a bitch’s neck and killing her, so don’t f**ing dirty m**f**in’ my name . . . I tried to tell m**f**ers I’m a real-ass dude.

(App. II, 663-65.)

The Petitioner’s third defense was that there were other suspects with possible motives to harm Stacie: her boyfriend, Brent Michels, with whom she had a “turbulent” relationship, and Dr. Casto, with whom she’d (apparently) had an affair and who was (apparently) supplying her with OxyContin that she took herself and also distributed to others. (App. I, 496, 514-18; App. II, 618-20.) This evidence didn’t do much other than to drag the victim, Stacie, through the mud, since all of the physical evidence pointed to the Petitioner as the murderer, as set forth below, and the police had his full confession to the crime.

At the Petitioner’s trial, which commenced on March 15, 2011 and concluded on March 17, 2011, the evidence against him was overwhelming. The State not only had the Petitioner’s confession to the police, but also the testimony of the individual who was enlisted by the Petitioner to get rid of Stacie’s car and cell phone,² the murder weapon, the Petitioner’s DNA on the cigarette butt left on the dresser in Stacie’s bedroom, Stacie’s blood on the Petitioner’s pants, and the

²This witness, Joseph Hardwick, had pleaded guilty to accessory after the fact and was still serving his sentence at the time of his testimony. (App. II, 111.)

Petitioner's after-the-fact admission that he was a "real-ass dude" who was in jail "for cutting a bitch's neck and killing her." (App. II, 565-97, 644-50, 664-65, 678-82.)

On March 17, 2011, following brief deliberations, the jury found the Petitioner guilty of first degree murder, without a recommendation of mercy, and not guilty of robbery by violence or threat of violence. (App. II, 820.)

On April 15, 2011, the Petitioner was sentenced to life imprisonment. (App. II, 827-28.)

B. FACTS RELEVANT TO ASSIGNMENT OF ERROR.

On the first morning of trial, the trial court and counsel conducted a wide-ranging voir dire of the potential jurors. (App. I, 296-423.) As voir dire progressed, the court struck eleven jurors, three *sua sponte* and eight on motion. (App. I, 304, 313, 319, 332, 338-39, 343, 362-63, 366, 391, 396, 408-09.) The court denied three challenges for cause, two directed to the same juror, Kevin Wong. (App. I, 382-85, 406, 422-23.)³

The Petition for Appeal is based on the following exchange, which led to the second challenge for cause of Juror Wong.

MR. COLLIN: Thank you, Judge. After telling you-all [that mercy makes an individual eligible for parole in fifteen years], my first question for you is: Does anyone think if you intentionally murder someone, you should never leave prison?

(WHEREUPON, Potential Juror Number 176, Mr. Kevin Wong raised his hand.)

MR. COLLIN: Mr. Wong. Is there anyone else that thinks if you intentionally murder someone, you should never leave prison?

(WHEREUPON, there was no response by the potential jurors.)

³The first challenge to Juror Wong, based on the fact that he had seen news footage of the Petitioner at or near the time of his arrest, is not at issue herein.

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.

MR. COLLIN: I appreciate your honesty.

* * *

MR. COLLIN: Is there anyone here who agrees with the saying, "An eye for an eye and a tooth for a tooth?"

(WHEREUPON, Potential Juror Number 176, Mr. Kevin Wong raised his hand.)

MR. COLLIN: Mr. Wong. Is there anyone here who's heard of the saying, "An eye for an eye only makes the whole world blind?"

(WHEREUPON, there was no response by the potential jurors.)

(App. I, 418-19, 420.)

At this point counsel proceeded to the bench, where the Petitioner's counsel moved to strike the juror "based on his answer that he could never grant mercy." (App. I, 422-23.) The State objected, and following brief argument, the court denied the motion. (*Id.*)

The Petitioner used one of his peremptory challenges against Juror Wong, so he was not a member of the jury that convicted the Petitioner of first degree murder without a recommendation of mercy.⁴

⁴The State mentions this fact only to present a complete history of the case for the benefit of the Court. It is well established that "if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error." Syl. Pt. 2, in part, *State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009), citing Syl. Pt. 8, *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995). In this case, the State contends that the trial court did not err in refusing to strike Juror Wong for cause, *not* that any error was corrected.

III.

SUMMARY OF ARGUMENT

Contrary to the Petitioner's argument, which is based almost entirely on the cases of *State v. Greer*, 22 W. Va. 800 (1883), *State v. Williams*, 172 W. Va. 295, 305 S.E.2d 251 (1983), and *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002), there is no hard-and-fast rule of disqualification based on jurors' views of appropriate punishment in a criminal case, and no prohibition on follow-up questioning where the purpose of such questioning is to clarify the jurors' views, not to "rehabilitate" them. In the instant case, Juror Wong answered a broad question on voir dire, and defense counsel failed to ask any follow-up questions to determine whether his (Wong's) opposition to mercy was unalterable, i.e., whether he would refuse to consider mercy regardless of the circumstances and regardless of the instructions of the court. As a result, the record is insufficient for this Court to conclude that the trial court abused its discretion in refusing the Petitioner's motion to strike Juror Wong for cause.

This Court has decided a number of cases since it decided *O'Dell*, and all of them make clear that disqualification as a matter of law is the exception, not the rule. In this regard, *State v. Mills*, 219 W. Va. 28, 631 S.E.2d 586 (2005), is strikingly similar to the instant case. In *Mills*, two prospective jurors were asked whether they would be able to consider a life sentence with the possibility of parole eligibility after fifteen years, and responded in the negative. This Court affirmed the trial court's refusal to strike the jurors, based on follow-up questioning which resulted in both jurors' agreement that they would follow the instructions of the court and listen to all the evidence prior to making any decision.

In the instant case, defense counsel made a strategic decision not to follow up after Juror Wong's "bad" response – having earlier tried, unsuccessfully, to challenge him on other grounds – she just said thank you and left it at that. Since Juror Wong's response was not disqualifying as a matter of law, as counsel apparently thought, counsel's decision leaves this Court with a record that is insufficient to carry the Petitioner's "burden of showing that the prospective juror[] [was] actually biased or otherwise disqualified and that the trial court abused its discretion or committed manifest error" *State v. Phillips*, 194 W. Va. 569, 589-90, 461 S.E.2d 75, 95-96 (1995).

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State believes that this case is appropriate for consideration under Rule 19 of the Revised Rules of Appellate Procedure because it involves alleged error in the application of settled law. The State does not believe that oral argument is necessary.

V.

ARGUMENT

UNDER THE CIRCUMSTANCES OF THIS CASE, THE COURT BELOW DID NOT COMMIT REVERSIBLE ERROR WHEN IT REFUSED TO STRIKE A POTENTIAL JUROR FOR CAUSE, AFTER THE JUROR HAD OPINED THAT CONVICTED MURDERS SHOULD BE IMPRISONED FOR LIFE AND INDICATED HIS AGREEMENT (BY RAISING HIS HAND) WITH THE PRINCIPLE OF *LEX TALIONIS*, "AN EYE FOR AN EYE AND A TOOTH FOR A TOOTH."

Standard of review: "In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors, clearly erroneous as to whether the facts support the grounds relied upon for disqualification, and an abuse of discretion as to the reasonableness of the procedure employed

and the ruling on disqualification by the trial court.” *State v. Newcomb*, 223 W. Va. 843, 851, 679 S.E.2d 675, 683 (2009), citing *State v. Miller*, 197 W. Va. 588, 600-01, 476 S.E.2d 535, 547-48 (1996). See also *State v. Juntilla*, 227 W. Va. 492, 499, 711 S.E.2d 562, 569 (2011).

Further, “[w]hen a defendant seeks the disqualification of a juror, the defendant bears the burden of ‘rebut[ting] the presumption of a prospective juror’s impartiality’” *State v. Newcomb*, 223 W. Va. at 854, 679 S.E.2d at 686, citing *State v. Phillips*, 194 W. Va. at 588, 461 S.E.2d at 94.

At the outset, the State wishes to emphasize what this case is not about.

First, it is not about guilt or innocence; the Petitioner confessed to the crime, and the only question was whether his actions constituted first degree murder, second degree murder, or voluntary manslaughter. On appeal, the Petitioner does not challenge the sufficiency of the evidence to sustain a verdict of first degree murder.

Second, it is not about any rulings on suppression issues or any evidentiary rulings made during the trial. In this regard, although the Petitioner listed three assignments of error in his Notice of Appeal, he briefed only one of those issues: the trial court’s refusal to strike Juror Wong for cause. Therefore, all other issues have been waived. See, e.g., *State v. Simmons*, No. 35540, slip op. at 3 & n.4 (W. Va. Feb. 11, 2011) (Memorandum Opinion) (collecting cases); *Hardy v. B. H.*, No. 101540, slip op. at 6 & n.5 (W. Va. Nov. 18, 2011).

Finally, although Juror Wong raised his hand in response to a question about whether the jurors agreed with the concept of “[a]n eye for an eye,” see page 6, *infra*, this fact simply cannot be determinative in this case one way or the other. What did that raised hand mean? How fervently did the juror embrace the principle of *lex talionis*? The bottom line is that we don’t know, since Juror Wong wasn’t asked; we can only speculate, something neither the Petitioner nor the State is entitled

to do. Therefore, the State is concentrating its argument on what Juror Wong *said*, not what he might have been thinking.

The Petitioner's argument with respect to Juror Wong rises and falls on three cases: *State v. Greer, supra*; *State v. Williams, supra*; and *O'Dell v. Miller, supra*. As the State will demonstrate, *Greer* is inapposite for purposes of analysis in a non-death penalty case, and the Petitioner is reading *Williams* and *O'Dell* far too broadly. Further, the Petitioner fails to consider other post-*O'Dell* precedents from this Court which make it clear that (a) there is no hard-and-fast rule of disqualification based on jurors' views of appropriate punishment, and (b) there is a big difference between "rehabilitation" of a juror, condemned in *O'Dell*, and follow-up questioning of a juror to clarify his or her views. Finally, the Petitioner has completely failed to show prejudice, which is required in any case where he claims that his constitutional right to an impartial jury was violated.

With all this in mind, we turn first to the cases upon which the Petitioner relies.

In *State v. Greer*, a case decided 129 years ago, this Court held that the trial court had not erred in striking for cause a juror who had "conscientious scruples" that would prevent him from imposing the death penalty. The State contends that *Greer*, being a death penalty case, is inapposite. Legally, conceptually and in every other way, then-Justice Thurgood Marshall had it right when he said ". . . that execution is the most irremediable and unfathomable of penalties; *that death is different.*" *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (emphasis supplied), citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In similar vein, this Court long ago cautioned that ". . . the availability of discretionary trial-management bifurcation in a West Virginia murder case does not mean that the body of case law that has developed in capital punishment jurisdictions around death-penalty/sentencing-phase proceedings is now applicable to the trial of West Virginia

murder cases.” *State v. Rygh*, 206 W. Va. 206, 296 n.1, 524 S.E.2d 447, 448 n.1 (1999). Similarly, this Court noted that in death penalty cases, “sentencing statutes must provide specific guidelines for determining when the death penalty may be imposed, in order to direct and limit the discretion of the ultimate sentencing authority.” *State v. Miller*, 178 W. Va. 618, 621-22 & n.7, 363 S.E.2d 504, 508 & n.7 (1987), citing *Sumner v. Shuman*, 483 U.S. 66 (1987), and *Spaziano v. Florida*, 468 U.S. 447 (1984). In mercy/no mercy cases however, the rule is different, because any instruction could interfere with the jury’s “. . . unfettered discretion of making the determination of mercy based solely on their impression of the defendant and the circumstances of the case.” *State v. Miller*, 178 W. Va. at 622, 363 S.E.2d at 508.

In short, *Greer*, *supra*, represents a line of analysis that was altered in 1965, when West Virginia abolished the death penalty. And, in any event, *Greer* is factually different from this case in that the juror in question was asked follow-up questions to determine whether his feelings about the death penalty were unalterable. Here, in contrast, Juror Wong was asked one broad question about life imprisonment and then defense counsel, apparently satisfied with a “bad” response and having unsuccessfully tried to disqualify this juror earlier on other grounds, decided to say thank you and leave it at that. *See* pages 13-14, *infra*.⁵ (Interestingly, when several jurors subsequently raised their hands in response to a question about whether they were more likely to grant mercy if a defendant expressed remorse, defense counsel didn’t leave that one alone but rather attempted to “firm this up” into something resembling a commitment.) (App. I, 419-20.)

⁵Counsel did subsequently ask the panel whether anyone “agree[d] with the saying, ‘An eye for an eye and a tooth for a tooth . . . ,’” but again, when Juror Wong raised his hand, counsel asked no further questions. (App. I, 421.)

In *State v. Williams*, *supra*, this Court did not hold that a juror who voices opposition to the concept of a mercy verdict is disqualified as a matter of law, as the Petitioner implies in his brief. Rather, the Court held that “. . . a defendant charged with murder of the first degree is entitled to question the potential jurors on voir dire to determine whether any of them are *unalterably* opposed to making a recommendation of mercy *in any circumstances* in which a verdict of guilt is returned.” *Id.*, 172 W. Va. at 307, 305 S.E.2d at 263 (emphasis supplied).

In the instant case, the trial judge allowed a full and fair voir dire – he gave defense counsel great latitude – and there is nothing in the record to indicate that he would have refused to allow follow-up questioning of Juror Wong in order to ascertain whether his views were unalterable, i.e., whether he would refuse to consider mercy regardless of the circumstances and regardless of the instructions of the court. Thus, the ultimate holding of *Williams* – which the Petitioner ignores – comes into play:

The inquiry must go to the willingness of the prospective jurors to exercise their discretion to determine the penalty. Counsel may not use the voir dire to suggest a verdict to the jury or to elicit a commitment from the jury to return a particular penalty in the event of conviction. In addition, the questions should be specific enough to adequately inform the jury of the substance of counsel’s inquiry.

We do not think the question offered by counsel meets these requirements. Counsel did not specifically inquire into whether any of the prospective jurors would be unwilling to make a recommendation of mercy in *any* circumstance in which an accused was found guilty of first degree murder. Moreover, counsel made no attempt to explain to the jury that they were vested with the discretion to make the recommendation or the consequences of such recommendation. The question was simply too vague to elicit the proper information from the prospective jurors. Although counsel or the court, in its discretion, might have offered a more specific inquiry which would go to the willingness of the jurors to exercise their discretion in this matter, the record before us does not show an abuse of discretion by the trial court which would warrant reversal.

Id. at 307-08, 305 S.E.2d at 263-64 (emphasis in original, internal citations omitted).

In short, *Williams* stands for the proposition that the trial court must do exactly what the trial court did in this case: allow counsel to question the prospective jurors about their views on the issue of penalty. *Williams* does not allow counsel to ask one broad question and then call it a day, without ascertaining whether the juror's views are so fixed that he could not recommend mercy under any circumstances, or explaining that the jurors are vested with discretion to take into account, *inter alia*, "... their impression of the defendant and the circumstances of the case." *State v. Rygh*, 206 W. Va. at 622, 363 S.E.2d at 508.

In Syl. Pt. 5, *O'Dell v. Miller*, *supra*, this Court held that "[o]nce a prospective juror has made 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 and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." In *O'Dell*, the juror in question was not only a former client of the defendant doctor but also a current client of the law firm representing the defendant.

The Court also held, however, in Syl. Pt. 4 of *O'Dell*, that "[i]f a prospective juror makes an inconclusive or vague statement during voir dire reflecting or indicating the possibility of a disqualifying bias or prejudice, further probing into the facts and background related to such bias or prejudice is required."

Thus, the question in this case is whether the statement of Juror Wong was a "clear statement" or an "inconclusive or vague statement." The State contends that it was the latter, because the juror was never asked whether his opposition to mercy was unalterable, i.e., whether he would refuse to consider mercy regardless of the circumstances and regardless of the instructions of the court. As a concomitant, the State contends that further questioning of Juror Wong would not

have constituted “rehabilitation,” forbidden under *O’Dell*; rather, it would have served to either confirm that Juror Wong should not serve, or confirm that he was not disqualified by virtue of any bias or prejudice. Defense counsel made the tactical choice to ask no follow-up questions, leaving this Court with a record that is insufficient to support any finding that the court below abused its discretion.

This Court has decided a number of cases since it decided *O’Dell*, and all of them make clear that disqualification as a matter of law is the exception, not the rule. We turn now to the post-*O’Dell* case law.⁶

In *State v. Hutchinson*, 215 W. Va. 313, 599 S.E.2d 736 (2004), the trial court had refused to strike several prospective jurors for cause, on various grounds: one worked closely with a witness, and also made a statement that he would be uncomfortable making a decision on the life of any person; another had been friendly with the decedent; and another was a former deputy sheriff.

With respect to the first juror, the Court held that the statements at issue were not clear statements of bias or prejudice, and that “. . . on balance, Mr. Mullens’ answers during *voir dire* do

⁶The State will deal with the post-*O’Dell* criminal cases, while noting that the civil cases follow the same trend: there’s a big difference between a clearly disqualifying response on voir dire and a response that requires follow-up inquiry. See, e.g., *Thomas v. Makani*, 218 W. Va. 235, 624 S.E.2d 582 (2005) (whether a juror should be excused for cause is within sound discretion of the trial court, and juror’s initial statement that he might possibly “lean toward” defendant doctor was not disqualifying in light of full inquiry of juror that followed); *Murphy v. Miller*, 222 W. Va. 709, 671 S.E.2d 714 (2008) (trial court erred in refusing to strike juror, where juror expressed distaste for medical malpractice actions, adversity toward damages for pain and suffering, prejudice based specifically upon his own experience as a defendant in a medical malpractice action brought against him in his capacity as a dentist, and a belief that a medical malpractice action should be based only upon a deliberate act); *Mikesinovich v. Reynolds Memorial Hospital*, 220 W. Va. 210, 213, 640 S.E.2d 560, 563 (2006) (trial court erred in refusing to strike juror whose “earning power, household income, and family welfare was directly and specifically dependent in part on one of the parties to the lawsuit”).

not raise any doubts that he would have been able to assess the evidence in an impartial manner.” *Hutchinson*, 215 W. Va. at 319, 599 S.E.2d at 742. With respect to the second and third jurors, whose statements were reviewed by this Court under a plain error standard,⁷ the Court found that “. . . we cannot say that the trial court’s failure to *sua sponte* strike the potential jurors was in fact ‘error’ much less ‘plain error.’” *Id.* at 320, 599 S.E.2d at 743.

Hutchinson was the first of a line of post-*O’Dell* cases in which this Court began to clarify that a juror’s initial “bad” answer is seldom a stop-the-presses moment. There is a vast difference between “rehabilitating” a juror and asking questions to ascertain exactly where he or she stands, which is what defense counsel failed to do in the instant case.

In *State v. Mills*, 219 W. Va. 28, 631 S.E.2d 586 (2005), two prospective jurors were asked whether they would be able to consider a life sentence with the possibility of parole eligibility after fifteen years, and responded in the negative. This Court did not find the initial answers to be automatically disqualifying; rather, the Court cited the follow-up questioning, which resulted in both jurors’ agreement that they would follow the instructions of the court and listen to all the evidence prior to making any decision.

The remarks at issue in the present case did, at first blush, appear to create an issue of possible bias against the potential for a recommendation of mercy in a first degree murder case. In the opinion of this Court, however, the initial responses to the questionnaire were not so clearly disqualifying as to prevent attempts at explanation, as contemplated by syllabus point five of *O’Dell*. On the contrary, the remarks appeared to have been the result of confusion on the part of the jurors caused by the questionnaire itself and were of the nature contemplated by this Court in syllabus point four of *O’Dell*, to the extent that the responses were inconclusive or vague and permitted additional inquiry into the basis for the statements. The lower court, by engaging in modest questioning, was able to ascertain the basis for the confusion.

⁷Defense counsel had not moved to strike these prospective jurors.

Based upon this Court's review of this issue of prospective jurors and their alleged unwillingness to find the Appellant entitled to mercy, this Court finds no abuse of discretion by the lower court and affirms its decision with regard to these prospective jurors. Once the issues surrounding a potential recommendation of mercy were explained to the prospective jurors, their responses provided assurance to the court that they were indeed willing to follow the instructions of the court and to recommend mercy if the circumstances as proved at trial justified such a result. They demonstrated no bias or prejudice toward the accused, and the lower court's refusal to strike them for cause was not in error.

Id., 219 W. Va. at 34, 631 S.E.2d at 592.

The instant case is strikingly similar to *Mills*, with one difference: here, defense counsel didn't even attempt to follow up on Juror Wong's statement, apparently content to rely on her contention that the statement was "clearly disqualifying" in and of itself. Further, after defense counsel made her motion to strike and the State made its response, counsel did not request additional voir dire to ascertain whether the juror's views were unalterable, which would have resolved the ambiguity one way or the other. As *Mills* again demonstrates, a bad answer to a broad voir dire question – especially when given by a juror you've already tried, unsuccessfully, to get rid of – should not be treated as an aha! moment and an insurance policy in the event of conviction. Rather, the juror should be asked follow-up questions to resolve the ultimate issue: whether the juror would refuse to consider mercy regardless of the circumstances and regardless of the instructions of the court.

In *State ex rel. Quinones v. Rubenstein*, 218 W. Va. 388, 624 S.E.2d 825 (2005), a habeas corpus action, the trial court had refused to strike one juror for cause who had over the course of years retained the legal services of both the prosecutor and the assistant prosecutor, and another juror for cause who indicated that he had serious concerns with people who use alcohol and drugs since both of his children had died, one due to a drunk driver. This Court found that neither juror's

statements were “. . . clear statements . . . indicating the presence of a disqualifying prejudice or bias . . .,” and thus *O’Dell* was not implicated. The Court further found, relying on Syl. Pt. 7, *State v.*

Phillips, supra, that:

A trial court’s failure to remove a biased juror from a jury panel does not violate a defendant’s right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Section 14 of Article III of the West Virginia Constitution. In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice.

State ex rel. Quinones, 218 W. Va. at 396, 624 S.E.2d at 833.

In the instant case, the Petitioner has utterly failed to demonstrate prejudice. First, nothing in the record demonstrates that “[Juror Wong was] actually biased or otherwise disqualified and that the trial court abused its discretion or committed manifest error when it failed to excuse [him] for cause.” *State v. Phillips, supra*, 194 W. Va. at 589-90, 461 S.E.2d at 95-96. Second, nothing in the record indicates that the jury which actually sat in the Petitioner’s case was anything other than fair and impartial. Third, the evidence against the Petitioner was overwhelming, and he does not even attempt to make an insufficiency argument with respect to guilt. With respect to mercy, his so-called “remorse” during the taking of his statement was shown to be the result of his realization that he’d wrecked his own life, not that he’d taken Stacie Smith’s life. Further, all of his actions after severing Stacie’s jugular vein and carotid artery – trying to frame her boyfriend for the crime, taking her car and money so that he could try to find some drugs, locking her little boy in the house with the corpse of his mother, trying to ditch the evidence, and later describing himself as a “real-ass dude” who was in jail for “cutting a bitch’s neck” – did not bode well for a recommendation of mercy no matter who was on that jury.

In *State v. Cowley*, 223 W. Va. 183, 672 S.E.2d 319 (2008), a sexual assault case, the trial court had refused to strike a juror for cause who had stated that her service might cause her to flashback to her previous experience of being sexually abused, and further stated that she “thought” she could remain unbiased and unprejudiced. This Court first noted that the voir dire inquiry was made primarily by the appellant’s counsel, not by the trial judge – which is the situation in the case at bar. The Court then found that based on a complete reading of the record, which included the juror’s acknowledgment that there are “two sides to every story” and that she could serve without bias and prejudice, “. . . we cannot say that the circuit court abused its discretion in denying the appellant’s motion to strike juror Melinda T. for cause.” *Id.* at 189, 672 S.E.2d at 325.

Again, *Cowley* demonstrates the clear trend of the post-*O’Dell* cases: although this Court adheres to its holding in *O’Dell*, it continues to clarify that there’s a vast difference between a statement that is automatically disqualifying and one that allows – indeed, requires – follow-up questioning. In the instant case, as in *Hutchinson*, *Mills*, *Quinones* and *Cowley*, Juror Wong’s “bad” answer to a broad voir dire question did not require that he be excused on the spot. Rather, defense counsel should have asked follow-up questions to see whether this juror’s opposition to mercy was unalterable. Her decision not to do so was a strategy choice that leaves this Court with a record that is insufficient to carry the Petitioner’s “. . . burden of showing that the prospective jurors were actually biased or otherwise disqualified and that the trial court abused its discretion or committed manifest error” *State v. Phillips*, *supra*, 194 W. Va. at 589-90, 461 S.E.2d at 95-96.

In *State v. Hatley*, 223 W. Va. 747, 679 S.E.2d 579 (2009), where the defendant had been convicted of first degree robbery as a result of a purse-snatching, this Court reversed the conviction on the ground that the trial court erred in refusing to strike a juror for cause. The juror had recently

been represented by the prosecutor, and stated that he would hire him (the prosecutor) again in the event he needed to have legal work done. On these facts, the Court found that the juror “. . . had established a relationship of trust with the prosecuting attorney . . .,” requiring disqualification. *Id.* at 752, 679 S.E.2d at 585.

Hatley is the only post-*O'Dell* criminal case the State has found in which this Court has found an abuse of discretion in the trial court's refusal to strike a juror for cause. It is readily apparent that *Hatley* is completely distinguishable from the instant case, as the *Hatley* juror was disqualified by virtue of his *status*, i.e., his attorney-client relationship of trust with the prosecutor, not by virtue of anything he said. Here, in contrast, Juror Wong gave a “bad” answer to a broad voir dire question, but was never questioned further by defense counsel to ascertain whether his views would make him unable to consider all of the evidence and to follow the instructions of the court.

In *State v. Newcomb, supra*, the trial court had refused to strike for cause several jurors who indicated that police officers should be given a preference over non-police officers insofar as their credibility is concerned, and a juror who expressed unease about sitting on a murder case and a belief that her in-laws, who had faced murder charges in the same county, should have received greater punishment. After reviewing its earlier decision in *O'Dell*, as well as a number of post-*O'Dell* decisions, this Court set forth a more nuanced test for reviewing issues involving the trial court's refusal to strike a juror for cause:

For clarification purposes, and in light of the myriad syllabus points surrounding the issue of when to dismiss a prospective juror for cause, we now hold that: When a prospective juror makes a clear statement of bias during voir dire, the prospective juror is automatically disqualified and must be removed from the jury panel for cause. However, when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias of prejudice exists.

Likewise, an initial response by a prospective juror to a broad or general question during voir dire will not, in and of itself, be sufficient to determine whether a bias or prejudice exists. In such a situation, further inquiry by the trial court is required. Nonetheless, the trial court should exercise caution that such further voir dire questions to a prospective juror should be couched in neutral language intended to elicit the prospective juror's true feelings, beliefs, and thoughts – and not in language that suggests a specific response, or otherwise seeks to rehabilitate the juror. Thereafter, the totality of the circumstances must be considered, and where there is a probability of bias the prospective juror must be removed from the panel by the trial court for cause.

Newcomb, 223 W. Va. at 859-60, 679 S.E.2d at 691-92.

Applying this test to the totality of the circumstances in *Newcomb*, this Court found that the trial court had not abused its discretion in refusing to strike the jurors.

Applying this test to the totality of the circumstances in the instant case should lead to the same conclusion. Juror Wong's response to a broad or general question during voir dire was not, in and of itself, sufficient for this Court to determine whether a bias and prejudice existed requiring Mr. Wong's disqualification as a matter of law.

Finally, in a trio of cases decided by this Court in 2011, the Court has re-affirmed that absent unusual circumstances, a trial court's refusal to strike a juror for cause is a matter committed to its sound discretion. "An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law." *State v. White*, 227 W. Va. 231, 241, 707 S.E.2d 841, 851 (2011), citing Syl. Pt. 6, *State v. Miller*, *supra*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

In *State v. White*, *supra*, the trial court had refused to strike two jurors for cause, one who had a relationship with the lead detective's mother, and one who gave an equivocal answer about whether

she would consider psychological testimony in the same manner she would consider police testimony. On appeal, this Court considered the totality of the jurors' statements on voir dire (giving short shrift to any argument that the statements were disqualifying as a matter of law under *O'Dell*), noting that "[t]he challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause." *White*, 227 W. Va. at 241, 707 S.E.2d at 851. The Court concluded that:

Because we find no indication that either prospective juror Lemon or prospective juror Scott would have been 'unable faithfully and impartially to apply the law,' we conclude that the trial court did not abuse its discretion in refusing to disqualify them.

Id. (citations omitted).

To similar effect is *State v. Mitchell*, No. 101577 (W. Va. Apr. 18, 2011) (Memorandum Decision), where the trial court had refused to strike three jurors for cause, one whose husband had provided evidence to the Kanawha County Prosecutor in an embezzlement case, and two who were related to law enforcement officers. As it had in *White*, this Court again noted the limited scope of appellate review, citing Syl. Pt. 6, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996), and affirmed the trial court's ruling, finding that "[t]he record shows that all three jurors confirmed repeatedly their ability to be fair in the proceedings" *Mitchell*, slip op. at 2.

And in *State v. Juntilla*, 227 W. Va. 492, 711 S.E.2d 562 (2011), this Court's most recent examination of the issues raised by *O'Dell* and its progeny, a prospective juror in a first degree murder case expressed his belief that West Virginia should have a death penalty, and stated that ". . . it would probably be unlikely that I would feel any mercy but I would have to, you know, I would have to hear the case through." 227 W. Va. at 499, 711 S.E.2d at 569. This Court, citing *O'Dell* for the proposition that ". . . a trial court is required to consider the totality of the

circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror . . .,” concluded that upon an examination of the entire voir dire, the circuit court had not erred in denying a motion to strike the juror for cause.

Here, as in *Juntilla*, an examination of the entire voir dire shows that the court below did not abuse its discretion in denying the motion to strike Juror Wong. Without any follow-up questions having been asked to ascertain whether Juror Wong’s conservative views on punishment were unalterable, the record is simply not sufficient for this Court to conclude that the court below committed reversible error.

In summary, the cases upon which the Petitioner relies, *Greer*, *Williams* and *O’Dell*, do not support his claim that Juror Wong should have been struck for cause as a matter of law. The line of cases decided by this Court subsequent to *O’Dell* – most of which are studiously ignored by the Petitioner in his brief⁸ – makes it clear that “clearly disqualifying” answers by a juror are the exception, not the rule, and that the trial court is vested with broad discretion in determining whether to strike a juror. In the instant case, Juror Wong’s answer to the broad mercy question posed by defense counsel fit squarely into the analysis set forth by this Court in *State v. Mills*, *supra*, 219 W. Va. at 34, 631 S.E.2d at 592: “[t]he remarks at issue in the present case did, at first blush, appear to create an issue of possible bias against the potential for a recommendation of mercy in a first degree murder case. In the opinion of this Court, however, the initial responses to the questionnaire

⁸*State v. Newcomb*, *supra*, and *State v. Mills*, *supra*, are cited only to support the Petitioner’s argument that his use of a peremptory challenge does not “cure” any error. The State agrees with this, *see* page 6, n.4, *infra*, but does not agree that the trial court committed error.

were not so clearly disqualifying as to prevent attempts at explanation, as contemplated by syllabus point five of *O'Dell*.”

Here, as in *Mills*, defense counsel should have asked follow-up questions to ascertain whether the juror’s views were unalterable, and counsel’s failure to do so leave this Court with a record that is insufficient to sustain the Petitioner’s claim of bias and prejudice.

VI.

CONCLUSION

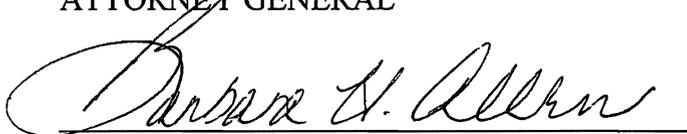
The judgment of the Circuit Court of Kanawha County should be affirmed. The Petitioner, who murdered the mother of two young children for no better reason than she hurt his feelings by calling him a junkie – which he admits he was – had a fair trial and was convicted by a fair and impartial jury. The jury’s failure to attach a recommendation of mercy to its verdict cannot have been a surprise, given the nature of the crime and the Petitioner’s efforts to frame someone else for committing it. The Petitioner was indeed, in his own words, a “bad-ass dude.”

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



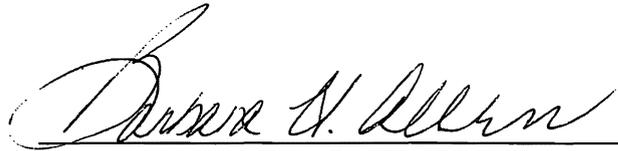
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CERTIFICATE OF SERVICE

I, Barbara H. Allen, do hereby certify that a copy of the within "Brief of the Respondent, State of West Virginia" was served on all counsel of record by United States mail, first-class postage prepaid, on the 21st day of March, 2012, addressed as follows:

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A handwritten signature in cursive script, reading "Barbara H. Allen", written over a horizontal line.

BARBARA H ALLEN