

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

John C. Few, Circuit Court Judge

RECEIVED

MAY 5 2006

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The state's argument that the removal of Juror Kyzer was harmless error is untenable under *Gray v. Mississippi*, 481 U.S. 648 (1987). If the state is arguing for a change in the law on harmless error, that is still true given that the exact manner of jury selection is always subject to change in practice in our state.

The state argues that “even if the judge erred in excluding the juror [Kyzer] any error was harmless” because “here the jurors were *ultimately* struck in the order they were qualified.” Respondent’s brief at 50 (emphasis added). Appellant respectfully submits such a harmless error analysis cannot stand given the per se reversible error holding of *Gray v. Mississippi*, 481 U.S. 648 (1987). However, even if it could, given the practical reality that the manner of jury selection is always subject to change after all of the jurors are qualified that this Court recognized in *State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582 (2007) such a harmless error analysis would still be impracticable.

In *State v. Bryant*, 372 S.C. 305, 313, 642 S.E.2d 582, 587 (2007) this Court held that “because a trial court is given enormous discretion in conducting a criminal trial, we logically conclude that [an] ‘established practice’ [of selecting a jury] does not refer to only one method of impaneling a jury.” Therefore, *any* -- the “jurors are struck in order” harmless error -- argument that the wrongful exclusion of a *Wainwright v. Witt*, 469 U.S. 412 (1985) *Uttecht v. Brown*, ___ U.S. ___, 127 S.Ct. 2218 (2007) qualified juror (here Juror Kyzer) can be harmless error under *Gray v. Mississippi*, 481 U.S. 648 (1987) cannot withstand Constitutional scrutiny given the reality of jury selection in this state recognized in *State v. Bryant*, 372 S.C. 305, 313, 642 S.E.2d 582, 587 (2007)

This is a wrongful removal of a Wainwright v. Witt, 469 U.S. 412 (1985) Uttecht v. Brown, ___ U.S. ___, 127 S.Ct. 2218 (2007) qualified juror case under the analysis founded in Gray v. Mississippi, 481 U.S. 648 (1987), it is not a harmless error denial of the right to question a juror *voir dire* case or a case involving a qualified juror who never would have served anyway as to state cites to in State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) and State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990). Respondent's brief at 50. The error in wrongfully excluding Juror Kyzer, a death qualified juror, was not harmless under Gray v. Mississippi, 481 U.S. 648 (1987) -- it was reversible error.

Further, regarding the underlying premise, Juror Kyzer was a qualified juror as the following exchange indicates:

- Q. [If you were a juror in the penalty phase of the trial, would you - - and that's after the defendant has been convicted of murder, if he is convicted. Would you automatically impose a life sentence or would you consider all of the evidence that might be offered in the way of aggravating the crime and also all the evidence that might be offered in way of mitigating the crime and would you be able to consider imposing the death penalty?
- A. Yes, sir.
- Q. You think you could consider it?
- A. I'd consider it, yeah.
- Q. All right. And then the question would be: having - - if you decided that the death penalty was appropriate, would you be able to put your name on that line?
- A. Yes, sir.

Tr. 942, l. 17 – 943, l. 16.

During subsequent questioning by the solicitor Kyzer was asked if he could sign his name to the death penalty verdict form sentencing someone to death or if his feelings would interfere with that ability. Kyzer responded that his feelings would interfere with “it some.” Tr. 945, ll. 2 – 9. However, on re-cross examination by defense counsel Kyzer said he would consider both options - - the death penalty or life imprisonment. Tr. 947, ll. 4 – 6. Kyzer *again said* he could sign his name to the death penalty form with the other jurors. Tr. 947, ll. 17 – 22.

Juror Kyzer was qualified, he had the right to serve, and his removal was not harmless. Gray v. Mississippi, 481 U.S. 648 (1987) See, also, Powers v. Ohio, 499 U.S. 400, 406 (1991)(the right of the individual juror to serve and participate in the administration of justice and the harm to the community as a whole by the wrongful exclusion of a qualified juror must be taken into account). *Citing* Duncan v. Louisiana, 391 U.S. 145, 147-158 (1968).

CONCLUSION

By reason of the arguments in appellant's brief, and in this reply brief, appellant's conviction and his death sentence should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written in a cursive style.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital

ATTORNEY FOR APPELLANT.

This 5th day of May, 2008.