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ROSS v. OKLAHOMA 108 S.Ct. 2273 (1988)

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ROSS v. OKLAHOMA

108 S.Ct. 2273 (1988)

In a five to four decision (Chief Justice Rehnquist, joined by Justices White, O'Connor, Scalia and Kennedy) the Supreme Court held that: 1) where defendant used peremptory challenge to remove juror who should have been removed for cause, claim that the jury was not impartial had to focus on the jurors who ultimately sat and not on the juror who should have been removed for cause; 2) failure of trial court to remove the juror for cause, with the result that the defendant had to use a peremptory challenge to remove the juror, did not deprive defendant of his right to an impartial jury; and 3) defendant's right to due process was not violated by arbitrarily depriving him full compliment of peremptory challenges under state law, where state law required that defendant use peremptory challenges to cure erroneous refusals by the trial court to excuse for cause.

Affirmed

Justice Marshall dissented and filed an opinion in which Justice Brennan, Justice Blackman and Justice Stevens joined.

FACTS

Bobby Lynn Ross was charged with and subsequently convicted of capital first degree murder. In the course of robbing a motel in Elk City, Oklahoma, petitioner killed a police officer. By statute, Oklahoma provides nine peremptory challenges to both parties in capital trials. Okla. Stat., Tit. 22, §655 (1981).

During the selection of the jury, petitioner claimed that he was forced to resort to using one of his peremptory challenges to remove a potential juror whom should have been excused by the trial court for cause under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1986). The trial court denied the petitioner's motion to remove for cause a prospective juror Huling, who had declared that he would vote to impose death automatically if the jury found petitioner guilty. The defense used a peremptory challenge and the juror was excused. All nine of the defense peremptory challenges were used. The defense did not challenge for cause any of the twelve jurors who were ultimately selected. However, at the close of jury selection the defense objected to the composition of the jury empaneled (the jury was all-white) stating this jury would deny the defendant, who is black, a fair and impartial trial by his peers. The trial court overruled the objection. The jury found petitioner guilty and sentenced him to death, and the Oklahoma Court of Appeals affirmed.

CASE HISTORY

Following the sentencing hearing, petitioner appealed to the Oklahoma Court of Criminal Appeals. The court rejected petitioner's argument that the trial court had committed reversible error in failing to excuse Huling for cause. The court did agree with petitioner that the trial court was in error by not removing

Huling for cause since the juror stated he was unwilling to follow the law during the penalty phase and would automatically vote for imposition of the death sentence. Since defense counsel was able to have this juror excused through use of a peremptory challenge the wrong of the trial court had been corrected. Though defense counsel did ultimately use all of their peremptory challenges there were no objections in the "record to show that any juror who sat on the trial was objectionable, we are unable to discover any grounds for reversal." 717 P.2d 117, 120 (1986).

HOLDING

The U.S. Supreme Court granted certiorari to consider the Sixth and Fourteenth Amendment implications of the trial court's failure to remove Huling for cause and petitioner's subsequent use of peremptory challenge to strike Huling. 482 U.S. _____, 107 S.Ct. 3209, 96 L.Ed.2d 969 (1987).

In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Court held that "the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.*, at 424, 105 S.Ct., at 852, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). There is no dispute by the Court that Huling should have been excused for cause and that the trial court erred in failing to do so. The issue before the Court was whether this violated petitioner's constitutional protection.

It is well settled that a defendant has the right to be tried by an impartial jury. This guarantee is set forth in the Federal Constitution. The Court stated "had Huling sat on the jury that ultimately sentenced the petitioner to death, and had the petitioner properly preserved his right to challenge the trial court's failure to remove Huling for cause, the sentence would have to be overturned." This was not the case, Huling did not sit on the jury. For the petitioner to make a valid constitutional claim he must focus not on Huling, but on the jurors who ultimately sat. "The Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Lockhart v. McCree*, 476 U.S. 162, 184, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986).

The Court agreed with petitioner's claim that the failure to remove Huling may have resulted in a jury panel different from that which decided the case. This assertion does not, however, entitle petitioner to reversal. There is no need to speculate whether or not Huling would have been removed, he was in fact removed. Petitioner argues the use of his peremptory challenge and subsequent loss of that challenge for later was a violation of his constitutional rights to an impartial jury. The Court explained that the peremptory challenges are not of constitutional dimension, they are a means to achieve the end, an

impartial jury. Therefore, so long as the jury which is empaneled is impartial, there is no constitutional violation. The nine peremptory challenges allowed in capital cases heard in Oklahoma are created by statute and are not required by the Constitution. The "right" to a peremptory challenge is only denied if the defendant does not receive that which is provided under the statute, the petitioner was allowed to use his nine challenges, therefore, there was no denial of this "right."

The Court held that even though the trial court did err by not excusing juror Huling for cause, this error did not impair the petitioner's right to trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution. The decision of the Oklahoma Court of Criminal Appeals was affirmed.

DISSENT

Justice Marshall, joined by Justices Brennan, Blackman and Stevens, opened his dissent by stating that "A man's life is at stake. We should not be playing games." There is no debate whether or not the trial court erred when it refused to strike the juror, it was error and the dissent feels reversible error. The loss of this peremptory challenge did affect the make up of the impaneled jury. There is no way to determine that the composition of that jury would have been the same if the defendant had not used this challenge. The issue is not whether the error was "corrected" by the challenge, rather, the trial court erred and this error could have had a significant affect on the jury ultimately impaneled.

The dissent relied on, *Gray v. Mississippi*, 481 U.S. _____, _____, 107 S.Ct. 2045, 2055, 95 L.Ed.2d 622 (1987), where the Court found there was a Sixth Amendment violation requiring the resentencing of the defendant in a capital case if "the composition of the jury panel as a whole could possibly have been affected by the trial court's error." In *Ross* the trial court, rather than exclude a qualified juror, refused to excuse a biased juror. The defense attempted to correct the court's error by using a peremptory challenge and argued this deprivation fell within the Sixth Amendment protection outlined in *Gray*. The dissent therefore concluded that the result reached by the majority was in direct contradiction with the holding in *Gray*.

APPLICATION TO VIRGINIA

Virginia permits only four peremptory challenges, and the jury selection process virtually ensures they will all be used. A similar error, like the one committed by the trial court in *Ross*, would require a Virginia defendant to use one fourth of his peremptory strikes to correct that error. If a *Ross* situation arises, there may be insufficient peremptory strikes to remove all prospective jurors whom the defense has unsuccessfully challenged for cause. In any event, *Ross* suggests that defense counsel should; a) use all peremptory strikes, b) ask for more, c) identify one juror who is to sit that would have been stricken if a peremptory strike were available, d) note and preserve the objection on both federal and state grounds. (Elizabeth P. Murtagh)

FRANKLIN v. LYNAUGH

487 U.S. _____, 108 S.Ct. 2320 (1988)

FACTS

Donald Franklin was accused of capital murder of a woman who had been abducted, stabbed, robbed, and possibly raped, and who subsequently died of her wounds in a hospital. Franklin was convicted of capital murder, *Franklin v. State*, 693 SW2d 420 (Tex. Crim. App. 1985) and sentenced to death under the Texas Special Issue sentencing scheme. The jury at Franklin's sentencing trial answered two special issues: 1) whether the jury found beyond a reasonable doubt that Franklin's conduct causing the death was committed deliberately and with the reasonable expectation that the death of the decedent or another could result, and 2) whether the jury found beyond a reasonable doubt that there was a probability that Franklin would commit criminal acts of violence that would constitute a continuing threat to society. Affirmative answers to the two issues would automatically require imposition of the death penalty. Franklin's only proffered mitigating evidence was his good conduct while in jail before and after the crime. Franklin's requested instructions, which were not given, specified that any mitigating evidence should be taken into ac-

count when answering the Special Issues.

The Court of Criminal Appeal of Texas affirmed the judgment. *Franklin v. Texas*, 693 SW2d 420 (1985, Tex. Crim.). Franklin petitioned for habeas corpus relief based on a claim that the two special issues, absent his requested instructions, unconstitutionally limited the jury's consideration of mitigating evidence. (See summary of *Mills v. Maryland*, *Supra* at p.). The United States District Court for the Western District of Texas denied Franklin's petition. *Franklin v. Texas*, 475 U.S. 1031 (1986). In the subsequent habeas petition, certiorari was granted in part by *Franklin v. Lynaugh*, 108 S.Ct. 221 (1987), and affirmed by this case.

HOLDING

- a) Residual doubts as to the defendant's identity, responsibility for the death, and intent to cause death as mitigating circumstances.