STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

Opinion No. 25-UP-059

THE STATE,

RESPONDENT,

V.

DEVIN JAMEL JOHNSON,

PETITIONER

APPELLATE CASE NO. 2023-000131

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Devin Jamel Johnson requests that this Court grant rehearing because the Court may have overlooked or misapprehended the fact that the denial of nicotine to an addict until he gave a statement is an extraordinary factor weighing against that statement being deemed voluntary as was the threat that petitioner would never see his child again unless he "cooperated." This Court may have misapprehended the fact that given the totality of the circumstances, including these two major coercive factors, that petitioner's statement was not voluntary tendered.

Further, this Court may have overlooked the fact that the requirement that the defendant must prove prejudice where a qualified juror was wrongfully removed from his jury is intrinsically inconsistent with the focus being on the jurors' right to serve free of arbitrary exclusion or removal. It is also, respectfully, an unnecessary and illogical requirement. As petitioner stated in his brief: "Requiring a litigant to show the trial judge abused his discretion by improperly removing a juror where the state failed to meet its heightened burden in addition to showing the resulting jury was partial places an impossibly high burden upon a litigant." How can a litigant show a non-impartial jury from the mere sitting of an alternate juror? Brief at 21.

Motion to suppress

David Osborne interrogated petitioner on June 10, 2011, two days after Smalls' death. R. 31, l. 13 – R. 32, l. 16; R. 34, ll. 13-15. The five-hour interrogation began with Osborne requesting a buccal swab from petitioner pursuant to a search warrant. State's Exhibit #80 at 21:03. Immediately before and after Osborne swabbed petitioner's mouth, petitioner asked Osborne *if he could have a cigarette*. Initially, Osborne responded that he *may* be able to work that out. State's Exhibit #80 at 21:05-21:06.

A different officer then read the arrest warrants and left petitioner with the paperwork. State's Exhibit #80 at 21:08-21:12. After Osborne demanded petitioner's clothing, petitioner asked for water *and a cigarette*. Although Osborne agreed, he provided neither. R. 47, ll. 10-12; R. 48, ll. 12-14; State's Exhibit #80 at 21:13-21:14.

At first, petitioner told Osborne that he was at home in Orangeburg on June 8, 2011. R. 40, ll. 8-15; State's Exhibit #80 at 21:21-21:44. Forty-five minutes into the interrogation, Osborne became exasperated and aggressive. R. 40, l. 22 – R. 41, l. 15; State's Exhibit #80 at 21:45. When petitioner *again requested a cigarette* an hour into the interview, Osborne informed him *that*

individuals who cooperate get cigarettes, and individuals who fail to cooperate go to prison. R. 41, ll. 21-23; State's Exhibit #80 at 22:12. Osborne elaborated on this notion by telling petitioner that *if he cooperated, he would get a cigarette, but if he failed to cooperate, he would not.* State's Exhibit #80 at 23:46. At another point when petitioner *requested a cigarette*, Osborne refused stating a cigarette would not change the trouble he was in. State's Exhibit #80 at 22:29-22:30. An hour later, *petitioner begged for a cigarette*, comparing his nicotine habit to a heroin addict. At this, Osborne responded that if petitioner told him what happened, *they would walk outside and have a cigarette.* R. 48, ll. 20-24; State's Exhibit #80 at 23:20-23:21. Within minutes, petitioner *asked for a cigarette* yet again. Osborne responded, "*We are not going to have a cigarette until we get a truthful story out of you.*" State's Exhibit #80 at 23:24. Three hours into the interrogation, petitioner remained steadfast that he was in Orangeburg and *had requested a cigarette multiple times.* State's Exhibit #80 at 22:05; 22:12; 22:29; 23:20; 23:24; 23:46.

When the show of aggression did not work, Osborne switched gears and threatened petitioner with his ability to see his daughter again. R. 42, ll. 21-23. Osborne told petitioner he would never see his daughter again because he was facing a murder charge. R. 43, ll. 1-3. Osborne decided to try a new interrogation strategy – allowing petitioner to contact his mother and girlfriend using Osborne's phone. R. 43, l. 22 – R. 44, l. 7; State's Exhibit #80 at 00:20. Thereafter, approximately four hours into the interrogation, petitioner stated he was at Georgetown Apartments but denied he was involved in the shooting death of Smalls. R. 45, ll. 11-16.

During the hearing, Osborne admitted that petitioner asked him repeatedly for a cigarette. R. 36, ll. 3-8; R. 42, ll. 8-11. He further admitted that he had allowed individuals to smoke during interrogations. R. 36, ll. 13-15.

Osborne incredibly testified that he did not think "nicotine [was] that addictive." R. 47, ll. 22-23. While he admitted that heroin was "a very addictive substance," he was unwilling to even admit that nicotine was an "addictive substance." R. 47, l. 24 – R. 48, l. 5.

Defense counsel argued to suppress the statement based upon the totality of the circumstances. First, counsel noted the interrogation "went on for almost 5 hours." R. 54, l. 19. Second, the denial of nicotine to an addict affected petitioner's understanding and ability to voluntarily waive his rights. R. 54, l. 23 – R. 55, l. 4. Third, as Osborne mentioned during the interrogation, petitioner was not familiar with the criminal justice system. R. 55, ll. 5-9. Fourth, the officers threatened petitioner with the loss of his daughter due to his arrest for murder in order to further manipulate and reduce his will. R. 55, ll. 10-15; R. 56, ll. 20-25. Finally, defense counsel explained how the police promised appellant an opportunity to smoke a cigarette if he would simply give them the information they desired. R. 55, ll. 16-22.

This Court should respectfully reconsider its holding that there was evidence to support the trial judge's denial of appellant's motion to suppress. The denial of nicotine to someone addicted to nicotine should not be viewed any differently than denying drugs to a drug addict until he confessed. The addict's ability to function is dependent on his body receiving that needed drug. Promising the addict that he will get his fix when he gives a statement is incredibly coercive, and this Court respectfully overlooked that fact. Petitioner's statement was not voluntary because it was not the product of a free and deliberate choice rather than *intimidation*, *coercion*, or deception. Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986).

This Court also overlooked the fact that threatening to take away the defendant's child unless he gave a statement is also unduly coercive and a cruel interrogation tactic. See State v.

Corns, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992) (holding a statement was involuntary where the police threatened a suspect that his wife could be arrested and their children could be taken away from them). It is apparent that "a statement may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.'" State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007) (quoting State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990)).

The detectives repeatedly used petitioner's six-year-old daughter as leverage to get him to talk. For example, Kosarko told petitioner that if persisted in "lying," then he would never see his daughter again. State's Exhibit #80 at 22:01; see also State's Exhibit #80 at 21:35; 21:46; 22:06; 22:30; 00:09.

Given the totality of the circumstances in this case, including the length of the interrogation, petitioner's lack of familiarity with the criminal justice system, and most importantly the deliberate and tactical withholding of nicotine from an addict as well as the threat of the loss of his daughter if he failed to cooperate should have resulted in a conclusion that petitioner's statement was not voluntarily tendered. For these reasons, rehearing should be granted.

Petitioner should not have to prove prejudice from the wrongful removal of a qualified non-biased serving juror who everyone agreed was innocent of any misconduct or attempt to deceive.

Respectfully, petitioner submits the Court erred, and should respectfully reconsider its decision which added a requirement that a defendant show prejudice resulting from the improper removal of a juror as it did in State v. Coaxum, 410 S.C. 320, 330-31, 764 S.E.2d 242, 247 (2014).[1] Here, Juror Backman revealed during the trial that he knew a witness who had testified. His failure

[1] Overruled on other grounds State v. Rowell, 444 S.C. 109, 906 S.E.2d 554 (2024); *Certiorari denied* Coaxum v. South Carolina, 575 U.S. 974 (2015).

to acknowledge this fact during voir dire was innocent, given that the judge acknowledged that he may have named the witness as being "Vanessa Morton," instead of Vanessa "Bumcum Morton." The solicitor agreed that Juror Backman's failure to disclose his knowledge of the witness was "innocent." Further, Juror Backman said his knowledge of this witness would absolutely not influence his opinion. *The only evidence in this case was that Juror Backman's initial failure to disclose was innocent.* He should not have been removed, and forcing petitioner to prove that the alternate who replaced Backman was biased to show prejudice is respectfully an unrealistic and unnecessary hurdle. Juror Backman had the right to serve unless there was cause to remove him. Although petitioner did not have a right to be tried by a jury of particular individuals, it should not follow that a chosen juror should be removed without cause and that the defendant must then prove the alternate was biased to obtain a new trial.

In keeping with the precedent established in State v. Stone, 350 S.C. 442, 448-449, 567 S.E.2d 244, 247-248 (2002), the analysis should go no further than determining whether the trial court abused his discretion in determining whether the moving party met its "heightened burden" of showing "the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges." Again, requiring a litigant to show the trial judge abused his discretion by improperly removing a juror where the state failed to meet its heightened burden, in addition to showing the resulting jury was partial, places an impossibly high burden upon a litigant.

Here, Juror Backman's failure to disclose his knowledge of Vanessa Bumcum Mortan was innocent and unintentional. All parties agreed the failure to disclose was unintentional, and the judge so found. Second, the judge asked during voir dire if any potential juror were "related by

blood or marriage ... ha[d] any business dealing with ... [were] socially or casually acquainted with" Vanessa Morton. The juror's note showed he knew the witness as "Vanessa Buncom [sic]."

Thus, it was abundantly clear to all that the juror's failure to disclose that he knew the witness was unintentional and innocent as the inquiry by controlling precedent at the time dictated. Although the "intentional versus unintentional analysis" was abandoned in State v. Rowell, 444 S.C. 109, 906 S.E.2d 554 (2024), the agreement that Backman's failure to disclose was innocent strongly weighs against any claim that he was biased. Nevertheless, the judge determined the juror should have been removed based upon the solicitor's self-serving indication, on second-thought, that she would have exercised a peremptory strike against the juror. The state failed to provide a coherent strategy for its exercise of peremptory challenges.

Initially, the solicitor told the judge she would *not* have exercised a strike against Juror Backman. However, during her short walk from the bench to counsel's table, the solicitor changed her mind and told the judge she "usually" strikes jurors who know potential witnesses. This change of heart was not consistent with her initial admission that she would not have struck the juror based upon the revelation.

In fact, the limited inquiry made by the judge showed simply that the juror knew the witness and that the juror's knowledge of the witness would "absolutely not" impact the juror's ability to be fair and impartial. The solicitor requested no additional voir dire regarding the relationship to support her self-serving flip-flopping on whether she would have exercised a peremptory strike.

Surely, the relationship between Juror Backman and the witness was a "scant acquaintance," much like the one described in Stone, supra. Backman was not aware of the proper spelling of the witness's name nor of her married name. He told the judge simply that he knew her. He provided no additional details, and none were requested.

This "scant" relationship could not support a challenge for cause, as the trial judge found, nor could it support a material factor in the exercise of the state's peremptory challenges, contrary to the trial judge's findings, which were based upon his own personal experiences as opposed to any information provided by the solicitor. Cf. Stone, supra.

Once the trial judge was made aware of the case law dictating that a mere acquaintance between a juror and a witness could not serve as a material factor in the exercise of a peremptory strike, the trial judge attempted to backpedal on his explanation for removing Juror Backman. The judge first noted how witness Bumcom was "odd" and that if he had been the solicitor he would have considered her oddness in deciding whether to strike potential jurors who were familiar with her.

As stated in the brief, the record failed to support the judge's report of Bumcom's peculiar personality or mannerisms during her testimony. However, even when given an opportunity to explain why she would have exercised a peremptory challenge against Juror Backman, the solicitor made no reference to Bumcom as a witness or anything being "different" about her. It was only during the judge's post hoc rationalization for his prior decision to remove Juror Backman that any reference to Bumcom's disposition was made. Due to the solicitor's failure to even mention Bumcom's personality while testifying, it was clear this was not a consideration by the state in the exercise of its peremptory strikes. The trial judge's consideration of its view of Bumcom's character and any impact her character would have had on the judge as a lawyer was error.

Finally, the judge's attempt to explain his decision to remove Juror Backman because he was allegedly sleeping was improper. As the record showed, the judge initially indicated he was unsure whether Juror Backman was sleeping. Respectfully, this Court will remember that it was only when the judge became aware of the case law indicating the juror's knowledge of a witness

was *not a material factor* in the exercise of a peremptory challenge that the judge changed tracks and decided that Juror Backman was in fact sleeping during the trial. His earlier findings discredit his later post hoc rationalizations. At any rate, the fact that Juror Backman's eyes were closed at times did not require his removal from the jury. See State v. Hurd, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996); State v. Smith, 338 S.C. 66, 515 S.E.2d 263 (Ct. App. 1999).

This Court should respectfully grant rehearing because the juror should not have been removed, and petitioner should not have to "show a *prejudicial* abuse of discretion" to receive a new trial. As this Court acknowledged, "[t]he right to serve on a jury . . . belongs to the potential juror, not a litigant." The removed juror in this case was denied his right to serve on the jury where his failure to disclose his knowledge of the witness was innocent, there was no indication he was biased, and where his knowledge of the witness would have had absolutely no affect on the juror's ultimate opinion of petitioner's guilt or innocence.

This Court should respectfully grant rehearing, and grant petitioner a new trial.

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ATTORNEY FOR PETITIONER

This 6th day of March, 2025.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEVIN JAMEL JOHNSON,

PETITIONER

APPELLATE CASE NO. 2023-000131

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Devin Jamel Johnson, #359432, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 6th day of March, 2025.

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ATTORNEY FOR PETITIONER

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Subject: 2023-000131 The State v. Devin Jamel Johnson
Date: Thursday, March 6, 2025 11:36:00 AM
Attachments: 2023-000131 The State v. Devin Jamel Johnson Petition for Rehearing.pdf

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Good Morning,

Attached for service in the above-referenced case is the Petition for Rehearing which will be filed today, March 6, 2025, with the Court of Appeals via email filing.

Respectfully,

Kaylynn
Kaylynn Warren
Administrative Assistant
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