STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANNY RYANT,

PETITIONER

APPELLATE CASE NO. 2013-0004000

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in affirming the trial judge's finding that rap sheets for the jury venire, run by the State, constituted attorney work product to which defense counsel was not entitled?

STATEMENT

In May 2010, the Orangeburg County Grand Jury indicted Danny Ryant, Jr. for murder, armed robbery, and burglary first degree, indictments #2010-GS-38-817. 818, 819. On December 10 – 17, 2010, Ryant and four of his co-defendants: Christian Coleman, Ralph Bernard Coleman, Walter Lee Harris and Mario Montez Shivers, proceeded to jury trial before the Honorable Edgar Dickson. Ryant was represented by attorney Douglas Mellard. Christian Coleman was represented by attorney Richard Lackey. Ralph Coleman was represented by attorneys Jillian Ullman and Mark Wise. Christian Coleman was represented by attorney Richard Lackey. Walter Harris was represented by attorney Scott Palmer. Mario Shivers was represented by attorney Joshua Koger. The jury returned verdicts of guilty on the three charges as indicted for all five defendants. Judge Dickson sentenced Ryant to 40 years for murder, 40 years concurrent for burglary first degree and 30 years concurrent for armed robbery. A timely notice of intent to appeal was served on December 20, 2010.

The direct appeal was perfected and on December 5, 2012, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Ryant, No. 2012-UP-647 (Ct.App. Filed December 5, 2012). A petition for rehearing was filed and subsequently denied on January 25, 2013. On March 27, 2013, Petitioner filed a petition for writ of certiorari with this Court addressing solely the issue of whether the Court of Appeals erred in affirming the trial judge's finding that the rap sheets for the jury venire, run by the state, constituted attorney work product to which defense counsel was not entitled. The State filed a return on April 26, 2013. On April 16, 2014, this Court granted the petition for writ of certiorari and directed the parties to file briefs pursuant to Rule 242(i), SCACR. This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in affirming the trial judge's finding that rap sheets for the jury venire, run by the State, constituted attorney work product to which defense counsel was not entitled.

Prior to trial, co-defendant Ralph Coleman moved to require the State to provide defense counsel with the rap sheets for the jury venire from the National Crime Information Center [NCIC]. (R. p. 215, lines 6 – p. 216, lines 1-21). Counsel specifically stated:

> I would motion your Honor to have the State to allow us to look at their jury book. They keep a jury book of all of the rap sheets on any potential jurors. My basis for this motion, your Honor, is the State has the ability to do an NCIC on any person they choose. The defense attorney has no ability, we could do a SLED report at a cost of, I think, twenty-five dollars a piece. Obviously, as appointed attorneys we certainly don't have the funds within our office, nor as public defenders do I think have the ability to get a funding order to do a rap sheet on two hundred people, which is what the list of the jury pool is.

(R. p. 215, lines 6-18). Appellant Ryant joined in the motion. (R. p. 220, lines 18-20). The State objected characterizing the rap sheets as work product to which defense counsel was not entitled. (R. p. 216, lines 23 – p. 217, lines 1-3). The judge agreed stating, "Okay, Alright. Before I go to that, Ms. Ullman, I do think it's their work product or part of their investigation thing, so I'm going to deny your motion on that, but I will note your objection to that and preserve your reasoning for the record. Okay?" (R. p. 217, lines 19-23).

After the jury was selected, all defendants challenged the jury pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed2d 69 (1986). (R. p. 299, lines 14 – p. 300, 301, lines 1-24). The State struck seven jurors, six of whom were black. (R. p. 301, lines 4-6). According to the State, the first juror was struck because she had been arrested. (R. p. 302, lines 8-12). Another juror was struck, according to the State, because he had a record and on his

questionnaire[1] he failed to check that he had been convicted of a crime. (R. p. 303, lines 10-19). This information would have been contained on the rap sheets and defense counsel could have verified the reasons given by the State had the rap sheets been provided. Defense counsel, however, was not provided with the rap sheets and had no way to challenge the State's purported reasons for the strikes. Counsel told the judge, "Yes, Sir, I appreciate the reasons. I'm not sure that I can argue that any of them are – but I just thought it should be place [sic] on the record and explained." (R. p. 304, lines 12-15).

The judge erred in finding that the rap sheets of the jury venire constituted attorney work product. In Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010), the South Carolina Supreme Court wrote:

> The attorney work product doctrine protects from discovery documents **prepared** in anticipation of litigation, unless a substantial need can be shown by the requesting party. *See* Rule 26(b)(3), SCRCP; Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Generally, in determining whether a document has been prepared "in anticipation of litigation," most courts look to whether or not the document was prepared because of the prospect of litigation. *See* Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 984 (4th Cir.1992) (document "must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim," as contrasted to "materials **prepared** in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes."); In re Grand Jury Subpoena, 357 F.3d 900, 907 (9th Cir.2004) (document "should be deemed 'in anticipation of litigation' ... if ... [it] can be fairly said to have been **prepared** or obtained because of the prospect of litigation." (citation omitted)); In re Kaiser Aluminum & Chemical Co., 214 F.3d 586, 593 (5th Cir.2000) (primary motivation behind creating the document must be to aid in possible future litigation). (emphasis added).

[1] It is unclear from the record whether defense counsel had access to the referenced questionnaire.

According to the Federal Bureau of Investigation [FBI] website, www.fbi.gov/about-us/cjis/**ncic**, "The **National Crime Information Center**, or NCIC, was launched on January 27, 1967 with five files and 356,784 records. By the end of 2009, NCIC contained more than 15 million active records in 19 files. NCIC averages 7.5 million transactions per day. NCIC helps criminal justice professionals apprehend fugitives, locate missing persons, recover stolen property, and identify terrorists. It also assists law enforcement officers in performing their official duties more safely and provides them with information necessary to aid in protecting the general public."

Rap sheet information collected on NCIC is not collected in anticipation of litigation. The purpose of NCIC is to assist law enforcement with public safety issues. The rap sheet itself is distinguished from notes taken by an attorney during the jury qualification process about potential jurors or information gathered by jury consultants in preparation for trial which would qualify as work product. The rap sheet itself, however, is not attorney work product. See Losavio v. Mayber, 178 Colo. 184, 496 P.2d 1032 (1972).

As counsel argued, the State has the ability to run an NCIC check on the entire jury venire. Defense counsel, on the other hand, does not have that ability and requesting a South Carolina Law Enforcement Division [SLED] background check for each member of the jury venire would be cost prohibitive. (R. p. 215, lines 9-18). Additionally, if defense counsel had the ability to verify, by having a copy of the jurors' rap sheets, the State's reason for a particular strike, there is a reasonable likelihood that in many cases counsel would not have to make a Batson motion in the first place. Based on traditional concepts of fairness, reasonableness and

judicial economy, the judge should have required the State to provide defense counsel an opportunity to view the rap sheets of the jury venire.

Addressing this issue the Court of Appeals wrote:

> As to whether the trial court erred in finding Ryant was not entitled to the criminal records checks the State had compiled on prospective jurors: State v. Childs, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989) (holding a defendant is not "entitled to criminal records checks or records of arrest" of potential jurors because "[n]o right to discovery exists in a criminal case absent statute or court rule"); Rule 5(a)(1), SCRCrimP (providing the State is required to disclose specific information, such as: statements of a defendant, a defendant's prior record, documents and tangible objects the prosecution or defense may use as evidence at trial, and reports of examinations and tests); Rule 5(a)(2), SCRCrimP (exempting from discovery "internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case"); Childs, 299 S.C. at 474, 385 S.E.2d at 841 (holding a trial court does not abuse its discretion in denying a discovery request if no statute or court rule requires disclosure of the particular information).

State v. Ryant, No. 2012-UP-647 (Ct.App. Filed December 5, 2012).

The present case is distinguished from State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989) because of the subsequent challenge by the defense to the State's jury selection based on Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Addressing the issue of whether defense counsel was generally entitled to discovery of criminal records checks and arrest records of the jury venire in Childs this Court wrote, "No right to discovery exists in a criminal case absent statute or court rule. State v. Matthews, supra; State v. Miller, 289 S.C. 316, 345 S.E.2d 489 (1986). Because there is no statute or court rule requiring a disclosure of this

information, we hold that the trial judge did not abuse his discretion in denying appellant's request." Childs, 299 S.C. at 474, 385 S.E.2d at 841. In Childs this Court did not find that the records constituted work product as the trial judge found in this case. The present case is distinguished from Childs. To the extent that Childs stand for the proposition that defense counsel ins never entitled to the disclosure of juror conviction and arrest records contained in a rap sheet, this court should modify that ruling in Childs and reverse here.

First, as addressed above, the requested records are not attorney work product or internal prosecution documents made by the prosecution or other prosecution agents in connection with the investigation or prosecution of the case. Second, once the prosecution relied upon those records in the use of a peremptory strike that is later challenged pursuant to Batson, defense counsel was entitled to see those records. Childs did not address the required disclosure in the context of a Batson motion. Similarly in Kelley v. State, 602 So.2d 473 (Ala.Crim. App. 1992) the Court of Criminal Appeals of Alabama found that arrest and conviction records of potential jurors do not qualify as the type of discoverable evidence that falls within the scope of *Brady* material. While there was a Batson motion made in Kelley, the request for juror records was not made in the context of the Batson motion as in the present case. The juror records request in Kelley is more like the general discovery request found in Childs. Neither the Childs case nor Kelley case prevent this Court from finding that the defense was entitled to the criminal and arrests records of potential jurors in the context of a Batson motion.

In State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1559, 103 L.Ed.2d 861 (1989), a capital murder case cited by the Court in Childs, the trial judge required the prosecution to provide defense counsel with criminal records checks of potential jurors. In Matthews the defendant moved for disclosure of criminal records, prior jury

service records, and the results of any other investigation concerning backgrounds, attitudes or characteristics of potential jurors. The trial judge granted the defendant's motion, but only as to criminal records checks the prosecution had gathered on prospective jurors. In the present case Petitioner only sought disclosure of the rap sheets of the potential jurors.

As conceded by counsel in her argument to the judge, other states have found that the prosecution was not required to disclose criminal records and arrest records of potential jurors. (R. p. 215, line 24, - p. 216, lines 1-21). Counsel correctly noted, however, that many of the cases from other states finding that disclosure was not required were death penalty cases involving extensive voir dire in which much of the information contained in the criminal and arrest records would have been provided. See Albarran v. State, 96 So.3d 131 (Ala.Crim.App. 2011). It is important to note that voir dire in non-capital criminal cases in South Carolina is extremely limited.

In the return to the petition for writ of certiorari Respondent, in support of the position that defense counsel is not entitled to the criminal and arrest records of the potential jurors, cites Couser v. State, 383 A.2d 389 (Md.1978) (Return p. 14, 15). In Couser the defendant requested disclosure of the juror dossier compiled by the prosecution. While the judge did not require disclosure of the dossier, the judge **did** require disclosure of the criminal records of the prospective jurors contained in the dossier. In Couser the Court of Appeals of Maryland wrote, "While properly concluding that the appellant's assertion of an absolute right to inspect this data was not well founded, the trial judge required disclosure of the criminal records of prospective jurors contained in the dossier; he also required that the prosecutor disclose any instances known to him in which a prospective juror may have lied under oath on his voir dire examination." 383 A.2d at 398.

Also in the return Respondent argues that the request for criminal and arrest records of potential jurors was unreasonable because during voir dire the jurors were asked if any member of the jury panel had been prosecuted. (Return p. 15). The prosecution's purported reason in striking Juror #198 was an **arrest,** not a prosecution for shoplifting. Voir dire did not cover arrests. The information requested was not available to defense counsel from another reasonable source. The requested records would have supported the prosecution's purported race neutral reason for the strike. The Batson motion may have been completely avoided and unnecessary if defense counsel had access to the criminal and arrest records the State relied upon to support the strike.

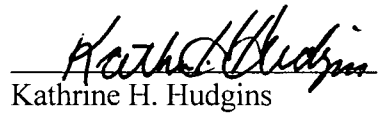
Repondent's reliance on State v. Wright, 803 So.2d 793 (Fla.App. 4 Dist. 2001) for the proposition that the request for rap sheets for all of the potential jurors was overbroad is misplaced as Wright involved a request for criminal records of all 100 **witnesses** and not was not limited to the 30 **witnesses** the prosecution intended to call at trial. There is nothing in the record before this Court that would prohibit the prosecution from providing the rap sheets of all potential **jurors** to defense counsel.

The trial judge erred in finding that the requested juror rap sheets constituted attorney work product. The rap sheets are not work product and in the context of the Batson motion made in this case, the trial judge refusal to require the State to disclose the rap sheets of the potential jurors constitutes an abuse of discretion.

CONCLUSION

Based on the above argument, this Court should reverse the finding by the Court of Appeals, reverse the conviction and remand for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
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This 20th day of May, 2014

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CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201this 20th day of May, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of May, 2014.

Rhonda Renee Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021