

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

MICHAEL P. CORNELIUS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001792

JOHNSON PETITION FOR WRIT OF CERTIORARI

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MAR 11 2019
S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred in crediting trial counsel with a strategic decision for not making a Batson motion against the State for predominantly striking black jurors where the strategic decision was based on an unconstitutional consideration—trial counsel’s fear of a retaliatory Batson motion because he struck seven white jurors?

STATEMENT

A Richland County grand jury indicted petitioner for armed robbery and on June 7, 2010, petitioner was tried before the Honorable G. Thomas Cooper, Jr. and a jury. App. 602, 1. Luck Campbell and Kathryn Ashton represented the State. App. 1. Tivis Sutherland represented petitioner. App. 1. The jury convicted petitioner. App. 477-78. Pursuant to South Carolina's recidivist statute, Judge Cooper sentenced petitioner to life imprisonment without the possibility of parole. App. 489.

On November 9, 2012, petitioner filed a PCR application. App. 491. On August 29, 2016, the Honorable Jocelyn Newman held a hearing. App. 522. Adam Hegler represented petitioner and Jessica Kinard represented the State. App. 522. On September 6, 2018, Judge Newman denied petitioner's PCR and this petition follows. App. 590.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. The Court reviews questions of law without deference to trial courts. Id. See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR court erred in crediting trial counsel with a strategic decision for not making a Batson motion against the State for predominantly striking black jurors where the strategic decision was based on an unconstitutional consideration—trial counsel’s fear of a retaliatory Batson motion because he struck seven white jurors.

Petitioner is black. At jury selection, the State used three out of its four peremptory strikes on black jurors. App. 32-40. The State was presented with only seven potential black jurors for the main jury and struck three of them. App. 32-40. When asked whether he had any objections regarding the selection of the jury, trial counsel replied, “None from the defense, Your Honor.” App. 40, ll. 1 – 3.

“[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.” Batson v. Kentucky, 476 U.S. 79, 85 (1986). “[T]he defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.” Id. “Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.” Id.

In Purkett v. Elem, 514 U.S. 765, 767 (1995), the United States Supreme Court set out the procedures for a trial court to follow when a party challenges a peremptory strike. The South Carolina Supreme Court adopted that procedure in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). The first step requires the moving party to make out a prima facie case of racial or gender discrimination.¹ At the second step, the burden of production shifts to the proponent of the

¹ Our Supreme Court has determined that “requesting a Batson hearing in effect sets out a prima facie case of discrimination.” State v. Chapman, 317 S.C. 302, 305-306, 454 S.E.2d 317, 319-320 (1995) overruled on other grounds by State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998).

strike to present a race or gender neutral explanation for the challenged strike. If a race or gender neutral explanation is provided, then the third step requires the trial judge to decide whether the moving party has proven purposeful racial or gender discrimination. Purkett, 514 U.S. at 767; see also State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

According to the United States Supreme Court, the “second step of this process does not demand an explanation that is persuasive, or even plausible.” Purkett, 514 U.S. at 767-68. The proponent of the strike does not carry “any burden of presenting reasonably specific, legitimate explanations” for the strikes. Adams, 322 S.C. at 123, 470 S.E.2d at 371. Unless discriminatory intent is inherent in the explanation, it is deemed race neutral at step two. Purkett, 514 U.S. at 768. During the third step, the moving party “must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination.” State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006) (citing Adams, 322 S.C. at 124, 470 S.E.2d at 372). “This burden is generally established by showing similarly situated members of another race were seated on the jury.” Id. “Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext.” Id. If the trial judge determines the race and gender neutral explanations were mere pretext, then the trial court must quash the jury panel and select a new jury. Id.

Here, trial counsel failed to make a Batson motion and the State’s reasons for exercising its strikes against mostly black jurors was not explored. This alone satisfies the deficient performance prong in this post-conviction relief actions. Strickland v. Washington, 466 U.S. 668 (1984). Despite the lack of any Batson motion, the PCR court credited trial counsel with a strategic

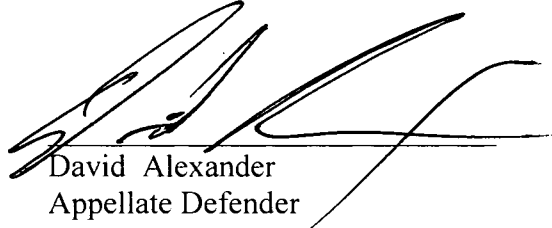
reason—that he struck seven white jurors and feared a reciprocal Batson motion from the solicitors. App. 598. Trial counsel struck only white jurors. App. 32-40.

The PCR court erred in crediting trial counsel with a legitimate strategic reason for not making a Batson motion. Just like the State, a criminal defendant may not engage in racial discrimination in exercising peremptory strikes. Georgia v. McCollum, 505 U.S. 42, 59 (1992). Trial counsel's actions likely violated the equal protection clause. See State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014) (upholding granting of State's Batson motion where defendant struck ten white jurors). An asserted strategic reason that violates the Constitution cannot be valid and should not be countenanced in PCR.

Petitioner also can demonstrate Strickland prejudice. “A pattern of exclusion of minority venirepersons provides support for an inference of discrimination.” Turner v. Marshall, 63 F.3d 807, 812 (9th Cir. 1995), overruled by Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999). Petitioner showed that the State used three of its four strikes against potential black jurors. App. 32-40. The State only struck one white juror. App. 32-40. The fact that the State did not strike every black juror presented should not be dispositive. Petitioner has demonstrated prejudice and the judgment of the PCR court should be reversed.

CONCLUSION

For the foregoing reasons, petitioner's convictions should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of March, 2019.

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MICHAEL P. CORNELIUS,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Paul Cornelius states:

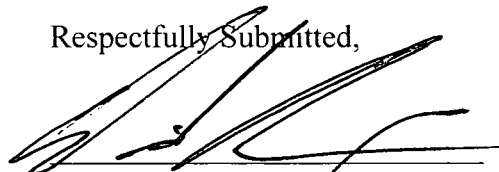
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before the Honorable Jocelyn J. Newman, which was held on August 29, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Michael Paul Cornelius.

Respectfully Submitted,

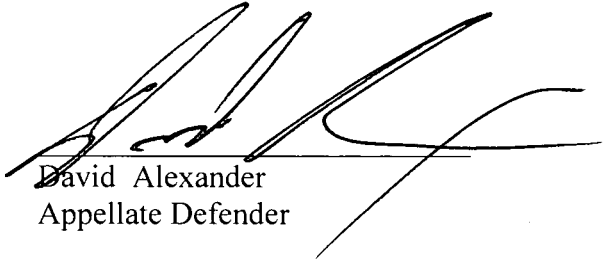


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of March, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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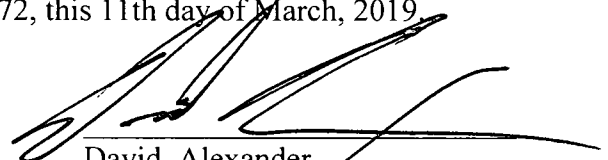
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Michael Paul Cornelius, #210317, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of March, 2019.


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of March, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.