IN THE SUPREME COURT FOR THE STATE OF DELAWARE

ISAIAH W. MCCOY,	)	**Nos. 558, 2012 and 595, 2012**
Appellant,	)	**(CONSOLIDATED)**
	)	
	)	**Court Below: Superior Court**
V.	)	**of the State of Delaware, in and for**
	)	**Kent County**
	)	
	)	**Cr. ID. No. 1005008059A**
STATE OF DELAWARE,	)	
Appellee.	)	
	)	

APPELLANT'S SUPPLEMENTAL MEMORANDUM ON APPEAL

Appellant, Isaiah McCoy, by and through the undersigned counsel, submits this supplemental memorandum in response to the Court's October 28, 2014 Scheduling Order. For the reasons previously briefed and argued before the Court, along with those outlined below, Appellant respectfully requests that this Court vacate Appellant's convictions.

BACKGROUND

On October 11, 2012, Appellant was sentenced to death by the Superior Court after having been found guilty of Counts 1 through 6 of the indictment against him. Appellant timely appealed, briefing ensued, and oral arguments were held before this Court on September 24, 2014. Subsequently, the Court remanded the case pursuant to *Jones v. State*, 938 A.2d 626, 632 n.18 (Del. 2007) and, on

October 27, 2014, the Superior Court issued its opinion on remand from the Court. This Court then issued the parties a scheduling order for supplemental memoranda in response to the Superior Court's opinion.

STANDARD OF REVIEW

This Court reviews the Superior Court's findings of fact for clear error "where the trial court *properly* conducts the three part *Batson* analysis." *Jones v. State*, at 634 (emphasis added). However, if a trial court's analysis is inadequate or all relevant circumstances are not considered, this Court need not defer to any credibility determinations that were made. *Miller-El-1 v. Dretke*, 545 U.S. 231, 340 (2005) (finding that even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review and that a court can disagree with a lower court's credibility determination and conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence); *see also Riley v. Taylor*, 277 F.3d 261, 286 (3d Cir. 2001); *Smulls v. Roper*, 467 F.3d 1108, 1115 (8th Cir. 2006) ("we conclude the trial court's apparent finding of no purposeful discrimination cannot be accorded the normal presumption of correctness because of its refusal to consider all relevant circumstances as required by clearly established federal law").

SUMMARY OF ARGUMENT

Among the issues on appeal is whether Appellant's right to a fair trial was violated when the Superior Court denied, *sua sponte*, Appellant's preemptory challenge to a prospective juror. Specifically, Appellant argues that (1) the court should have struck this juror *for cause*; (2) the court should have accepted, but arbitrarily denied, Appellant's preemptory; and (3) while *Batson v. Kentucky*, 476 U.S. 79 (1986) was not raised, even assuming *arguendo Batson* was at issue, the court nevertheless erroneously denied Appellant's preemptory. Appellant reiterates these arguments on appeal and urges the Court recognize that the Superior Court: (1) did not properly apply *Batson* and (2) its after-the-fact factual findings are clearly erroneous.

ARGUMENT

The Opinion On Remand Improperly Applies Batson

In a conclusory and sparsely cited opinion, the Superior Court asserts it was engaged in a *Batson* analysis during its voir dire inquiry of Mr. Hickey. A close analysis of the court's opinion and the record demonstrates that the court did not properly apply *Batson* and that its findings are clearly erroneous.

First, the court neglects to conduct an analysis of whether, as required under *Batson*, there was a *prima facie* showing that Appellant's preemptory was made on the basis of race when it *sua sponte* initiated its inquiry. Statistics are relevant in

determining whether a defendant has made a *prima facie* showing of discriminatory intent. *See Jones v. State*, 938 A.2d 626, 632 n.18 (Del. 2007) ("*Batson's* citation of *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 51 L.Ed.2d 498 (1977), in connection with the assessment of a *prima facie* case, *Batson*, 476 U.S. at 96,106 S. Ct. 1712, indicates that statistical disparities are to be examined." *U.S. v. Alvarado*, 923 F.2d 253, 255 (2d Cir.1991).)

Here, the court engaged in no statistical analysis (e.g., initial jury pool number, number of jurors questioned, racial classification and percentages of all the jurors struck versus those allowed to remain) to explain its *sua sponte* actions. The court's simple conclusion that Appellant was attempting to strike a fifteenth Caucasian juror is not enough. There is no context upon which to base this as evidence of discriminatory intent. Assuming the court has demonstrated that *Batson* was even at issue, neither the court nor Appellee has met *Batson's* first prong.

Next, under *Batson's* second prong, to rebut the *prima facie* case, the proponent of a strike "must provide a 'clear and reasonably specific' explanation of 'legitimate reasons' for his use of the challenges that are 'related to the particular case.'" *Jones*, *supra*, at 632 (citing *Robertson*, 630 A.2d at 1089-90 (citing *Batson*, 476 U.S. at 98, 106 S. Ct. 1712)). The reasons for the strike need

not rise to the level of a strike *for cause*. *Id. (*citing *Dixon v. State*, 673 A.2d 1220, 1224 (Del. 1996)).

Here, the court incorrectly generalized and mischaracterized Appellant's race neutral reason for his preemptory: "Defendant offered that because Mr. Hickey's wife was formerly employed by the Smyrna corrections facility, she would have a bias against prisoners which would likely create the same bias for her husband." Remand Opinion at 11. Appellant's reasons for his preemptory were, as required, much more clear and specific. First, he was concerned about the prospective juror's demeanor ("had to look up and think") when considering one of the court's questions. (A-2152). Second, Appellant stated his concern that Mr. Hickey's wife was a *counselor* at Smyrna, not simply an employee. (*Id.*). Counselors, he noted, are treated in a "very disrespectful way, throwing things on them like feces and things of that nature." (*Id.*). Moreover, Appellant noted that around the time that she was a counselor there a colleague had been raped by an inmate. (*Id*.). While *Batson's* second prong only requires a determination whether a stated reason for a strike is race neutral, the court is obligated to properly *credit* that reason. Only then can it properly evaluate that reason under *Batson's* third prong.

Finally, the court, without citation, conducted a conclusory third-prong *Batson* analysis of its generalized version of Appellant's race neutral reason. In so

doing, the court relied almost entirely on Appellant's supposed behavior (e.g., "smirking") and previous strikes, for which it had already overruled a *Batson* challenge. *Batson's* third prong requires the court do much more. The judge must decide whether the "defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98. *Miller-El v. Dretke* instructs courts to "consider all relevant circumstances" in step three to make a final decision in evaluating the *Batson* challenge, including, for example, a statistical analysis of the prosecutor's peremptory challenges (percent of the Caucasian venire persons struck), a side-by-side comparison of various similarly situated venire persons, how the defendant spoke to and questioned members of different races, and whether there is any evidence of past discriminatory peremptory challenges by the defendant. *Miller-El*, 545 U.S. at 240-241. While race-neutral reasons for peremptory challenges often involve subjective assessments of a juror's demeanor (e.g., nervousness and inattention), the question is whether the defendant's reason is credible and withstands scrutiny. *Snyder*, 552 U.S. at 482. The court's opinion is devoid of this required analysis of Appellant's clear and specific reasons for his preemptory.

Appellant was concerned about the prospective juror's demeanor when considering a question very important to the defense. Furthermore, Appellant's experience told him that counselors at correctional facilities are treated particularly poorly by inmates. Moreover, and importantly, the prospective juror's wife was a

counselor at a time when a colleague was raped at Smyrna. The trial court rejected Appellant's peremptory challenge without conducting any probing questioning or soliciting any other information to rebut the proffered race-neutral reasons for striking the juror. The trial court's decision must be overruled. *Rice v. Collins,* 546 U.S. 333, 338 (2006)

CONCLUSION

Wherefore, for the reasons set forth previously and above, this Court should reverse Appellant's convictions and sentence.

Respectfully submitted,

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