
NO. 33199

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

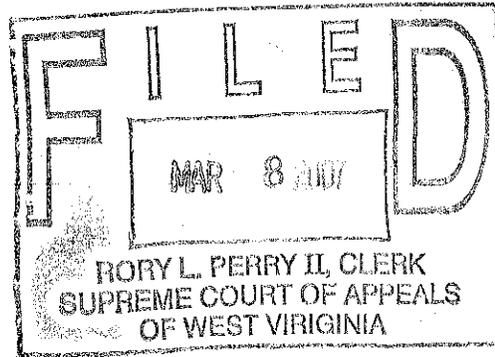
CHRISTOPHER LEE DAVIS,

Appellant,

v.

**THOMAS McBRIDE, Warden,
Mount Olive Correctional Complex,**

Appellee.



BRIEF OF APPELLEE

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I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal by Christopher Lee Davis (hereinafter "Appellant") from the January 17, 2006, final order of the Circuit Court of Kanawha County (Bloom, J.), denying him habeas corpus relief on his claim of racial bias in jury selection.

II.

PROCEDURAL HISTORY

On September 8, 2000, Appellant was convicted by a jury in the Kanawha County Circuit Court of one count of first degree murder in violation of West Virginia Code § 61-2-1, and malicious assault in violation of West Virginia Code § 61-2-9. (Tr. vol. IV, 684-85, Sept. 9, 2000; R. at 481, 484.) The jury recommended mercy for the murder conviction. (R at 481.) On January 11, 2000,

the judge sentenced Appellant to a term of life imprisonment with mercy for the conviction of first degree murder, and a term of not less than two nor more than ten years imprisonment for malicious assault in the State penitentiary, the terms to be served consecutively. (R at 573-74.) This Court denied Appellant's petition for appeal on September 20, 2001. (*See* Order, Sept. 20, 2001.)

Appellant filed a *pro se* petition for habeas corpus relief on July 22, 2003. (Habeas R. at 1.) On April 12, 2004, Appellant's current counsel was appointed by the Kanawha County Circuit Court. (*Id.* at 194-95.) An amended petition for habeas corpus relief was then filed on July 16, 2004. (*Id.* at 196.) After conducting an omnibus hearing on December 9, 2005, the circuit court entered a final order on January 17, 2006, denying Appellant any habeas corpus relief. (*Id.* at 226-35.) Appellant now appeals that order.

III.

STATEMENT OF FACTS

A. CRIMINAL ACTS OF APPELLANT.

In the early morning hours of September 9, 1999, Appellant carried a semiautomatic handgun on his person into a bar in the Kanawha City area of Charleston and killed Marine Sergeant Kraig Davis, and wounded the latter's younger brother, Kenneth Davis. This tragic crime occurred when Kraig Davis went out with Kenneth and his friend Brook Harless to a bar while he was at home on leave from Camp LeJeune and was preparing to be transferred to Iwo Jima, Japan. (Tr. vol. III, 397-98, Sept. 7, 2000.)

While Kraig and Kenneth Davis and Brook Harless were playing pool, Appellant's friend Grant Lewis picked up a pool cue, twirled it around and tossed it onto a pool table. The pool stick then bounced off of the table and struck an unrelated bar patron, Chad Wallbrown. (*Id.* at 393.) Mr.

Wallbrown then retaliated by punching Mr. Lewis in the chest. (Tr. vol. II, 215, Sept. 6, 2000; Tr. vol. III, 393, Sept. 7, 2000.) At this point, Mr. Lewis turned and walked away to the bar area. Mr. Lewis then went to where Appellant was sitting at the bar and spoke angrily to him for a couple minutes, telling him he was sucker punched. (Tr. vol. II, 259, Sept. 6, 2000.) Mr. Lewis appeared very upset, took off his shirt and continued talking to Appellant. (*Id.* at 270.) Appellant then got up from the bar and started toward the pool area. (*Id.* at 251.) At that point, Beverly Simley, an acquaintance of Appellant, and Jill Landers, the bartender that evening, attempted to calm him down and avert a confrontation but to no avail. (*Id.* at 251, 270-71.) Various witnesses testified that they saw Appellant walk toward the dance area of the bar and shoot Kraig Davis several times. (Tr. vol. II, 222, 252, 272, and 296, Sept. 7, 2000; Tr. vol. III, 399-401, Sept. 7, 2000.) These witnesses testified that there were initially two to three shots fired by Appellant, a pause and then more shots fired totaling approximately ten. (*Id.*) Upon being shot, Kraig Davis hit the floor and lay in a pool of blood. (Tr. vol. I, 274 and 296, Sept. 6, 2000; Tr. vol. III, 398.) Kenneth Davis then attempted to defend his brother by hitting Appellant with a pool stick and was shot as well. (Tr. vol. III, 400 and 403, Sept. 7, 2000.)

Kraig and Kenneth Davis did absolutely nothing to provoke being shot by Appellant. (*Id.* at 406.) Before the shootings took place, Kraig Davis was seen standing in front of Appellant with his arms down and palms extended to the front and was heard saying, "We don't want any trouble." (Tr. vol. II, 221, Sept. 6, 2000.)

After this occurred, Appellant and Mr. Lewis ran out of the bar through the back door. (Tr. vol. II, 224, 274, and 297, Sept. 6, 2000.) Appellant turned himself in to the Kanawha County

Sheriff's Department on September 10, 1999. (*Id.* at 341-42.) At the trial, Appellant testified on his behalf and admitted shooting Kraig and Kenneth Davis. (Tr. vol. IV, 567 and 582-85, Sept. 8, 2000.)

Kraig Davis was pronounced dead at 3:02 a.m. on September 9, 1999. (Tr. vol. II, 359, Sept. 6, 2000; R. at 237.) An autopsy was conducted later that morning. (Tr. vol. II, 359-67, Sept. 6, 2000; R. at 186-190.) It was discovered that Kraig Davis suffered three gunshot wounds to the face and neck. (*Id.*) The cause of death was the gunshot wounds, and the manner of death was homicide.

B. PEREMPTORY STRIKE AT ISSUE.

Voir dire began in this case on Tuesday, September 5, 2000. When this process began, Juror Barbara Patterson (hereinafter "Juror Patterson") stated that she had to take her son to college in Miami, Florida, the following Monday. (Tr. vol. I, 28, Sept. 15, 2000; Habeas R. at 230.) Further during this process, Juror Patterson told the court that she personally knew two witnesses on the defense's witness list, Reverends Richard Bullet and Cornell Byers. (Tr. vol. I, 39, Sept. 5, 2000; Habeas R. at 230.) With respect to Reverend Bullet, she stated that she knew him as she was growing up and that he and her husband were fellow pastors and performed ministerial tasks together. (Tr. vol. I, 39, Sept. 5, 2000.) Regarding Reverend Byers, Juror Patterson explained that he and her husband were "real good friends." (*Id.*; Habeas R. at 230.) When asked if these personal relationships would have any bearing on whether she found them truthful or not, Juror Patterson initially stated, "No, I don't believe so." (Tr. vol. I, 40, Sept. 5, 2000; Habeas R. at 230.) On this basis, the trial judge ruled that there were no grounds to strike her for cause. (Tr. vol. I, 41, Sept. 5, 2000; Habeas R. at 230.)

However, as *voir dire* progressed, Juror Patterson raised her hand for the trial judge's attention and said to him, "Judge, the longer I sit here, I don't think I can be impartial." (Tr. vol. I,

59, Sept. 5, 2000; Habeas R. at 230.) The court was going to strike Juror Patterson for cause when Appellant's counsel asked the judge to postpone that decision while he be given the opportunity to consider withdrawing the two witnesses in question. (Tr. vol. I, 59-60, Sept. 5, 2000; Habeas R. at 230.) At that point the judge refrained from striking Juror Patterson for cause.

The State later brought this issue back up with the court. The prosecutor stated that she was concerned with Juror Patterson's prior remark that she was not feeling as if she could be impartial because of the two witnesses she knew through her husband's ministry. The prosecutor said that despite the fact that Appellant's counsel indicated that he was not going to be calling the two pastors as witnesses, she was concerned that Juror Patterson may think that Appellant was not going to get a fair trial due to the fact that the two defense witnesses would have been called to testify but for her presence on the jury. (Tr. vol. I, 65-66, Sept. 5, 2000.) In light of these and other concerns of both parties, the trial judge brought the jurors back in so that they could be individually questioned by the prosecution and the defense. (*Id.* at 70.)

The prosecutor then questioned Juror Patterson as to whether her partiality may be compromised if Appellant's counsel called the two pastors as witnesses, to which she answered, "Some." (*Id.* at 105.) When she was asked to elaborate on this feeling, Juror Patterson explained, "Well, those two men, I do know are men of God, so I would really have to take what they say and believe it." (Tr. vol. I, 105, Sept. 5, 2000; Habeas R. at 230.)

The State later used one of its peremptory strikes to remove Juror Patterson from the case. When asked by the court why she removed this juror, the prosecutor gave the following reasons:

- 1) Juror Patterson was acquainted with two of the defense witnesses and indicated that her husband had a ministerial relationship with at least one of them. Additionally, the juror described these potential witnesses as "men of God";

2) Juror Patterson initially expressed concerns about her ability to be impartial in light of the two witnesses in question and was observed making facial expressions and body language that indicated that she did not want to serve as a juror;

3) Juror Patterson indicated that she would be unavailable for an entire week beginning the following Monday; and

4) Juror Patterson was observed patting one of the Appellant's family members on the back.

(Tr. vol. I, 133-34, Sept. 5, 2000; Habeas R. at 231.) The prosecutor also noted that Appellant's counsel struck a potential juror who indicated that he personally knew one of the State's witnesses, Detective Ranson—a potential juror that when asked if he could set his personal relationship aside and remain objective and fair, stated that he indeed could. (Tr. vol. I, 134, Sept. 5, 2000.)

The jury panel was then excused for the day and a recorded conference took place in the judge's chambers regarding the alleged contact Juror Patterson had with a member of Appellant's family. Juror Kenneth Davis (not the decedent's brother and second victim in this case) testified on this matter. Juror Davis stated that he heard verbal communication between Juror Patterson and a family member of Appellant. Additionally, he saw Juror Patterson pat the Appellant's family member on the shoulder. (*Id.* at 145-46.)

At this conference, Appellant's counsel voiced concern about striking Juror Patterson because she was the only potential juror who was black, and Appellant was black. (*Id.* at 152-53.) The prosecutor said to the judge in this conference that if any of the other 26 jurors gave the responses that Juror Patterson did regarding their ability to be impartial because they knew witnesses for the defendant, the State would strike him or her. The prosecutor further stated that race had absolutely nothing to do with the decision to strike Juror Patterson. (*Id.* at 154.) Appellant's counsel then moved to restore Juror Patterson to the jury panel on the basis of *Batson v. Kentucky*, 476 U.S.

79, 106 S. Ct. 1712 (1986). The judge overruled this motion, finding a credible legitimate explanation for the State's action. (Tr. vol. I, 153-55, Sept. 5, 2000.)

IV.

RESPONSE TO ASSIGNMENT OF ERROR

Appellant's assignment of error is quoted below, followed by the State's response:

The trial court erred in rejecting Appellant's *Batson* challenge because the State's main reason for striking the only black potential juror was that this juror knew two possible defense witnesses, who were not going to be called to testify at trial.

The State's Response

The trial court did not err in overruling Appellant's *Batson* challenge to the State's peremptory strike of Juror Patterson because the prosecutor offered credible, nonracial reasons for the strike. Therefore, this peremptory strike did not violate Appellant's constitutional rights and habeas relief should be denied.

V.

ARGUMENT

DESPITE JUROR PATTERSON BEING THE ONLY AFRICAN AMERICAN IN THE JURY PANEL, THE PROSECUTION'S PEREMPTORY STRIKE TO REMOVE HER WAS BASED ON CREDIBLE, NONRACIAL REASONS. THUS, THIS STRIKE SURVIVES A *BATSON* CHALLENGE, AND APPELLANT'S CONSTITUTIONAL RIGHTS WERE IN NO WAY VIOLATED.

1. The Standard of Review.

"To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, 'the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury

selection practice that permits “those to discriminate who are of a mind to discriminate.” Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.’ [Citations omitted.] *Batson v. Kentucky*, 476 U.S. 79 at 96, 106 S.Ct. 1712 at 1722, 90 L.Ed.2d 69 [at 87-88] (1986).”

“The State may defeat a defendant’s prima facie case of a violation of equal protection due to racial discrimination in selection of a jury by providing nonracial, credible reasons for using its peremptory challenges to strike members of the defendant’s race from the jury.”

Syl. Pts. 2 and 3, *State v. Bass*, 189 W. Va. 416, 432 S.E.2d 86 (1993) (quoting Syl. Pts. 2 and 3, *State v. Marrs*, 180 W. Va. 693, 379 S.E.2d 497 (1989)).

Striking even a single black juror for racial reasons violates equal protection, even though other black jurors remain on the panel. The focus of the trial court’s analysis should be on whether the State’s reason for a challenged strike is pretextual, and not on the overall composition of the jury.

Syl. Pt. 12, *State v. Rahman*, 199 W. Va. 144, 483 S.E.2d 273 (1996).

The general standard of appellate review has been stated by this Court as follows:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Phillips v. Fox, 193 W. Va. 657, 661, 458 S.E.2d 327, 331 (1995) (citing *Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264 (1995)). In post-conviction habeas review,

“Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.” Syllabus Point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975).

Syl. Pt. 1, *State ex rel. Wensell v. Trent*, 218 W. Va. 529, 625 S.E.2d 291 (2005) (*per curiam*); accord Syl. Pt. 2, *State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W. Va. 11, 528 S.E.2d 207 (1999).

2. **The Prosecution Presented Credible, Nonracial Reasons for Using a Peremptory Strike to Remove Juror Patterson from the Jury. Therefore, the State Defeated Appellant's Prima Facie Case of an Equal Protection Violation Based on Racial Discrimination, and His Habeas Appeal Should Be Denied.**

Appellant contends that the trial court erred in overruling his *Batson* challenge to the State's peremptory strike to remove Juror Patterson in the selection process. He states that this amounted to a violation of his rights to equal protection, due process and a jury of his peers. However, this habeas corpus claim has absolutely no merit when the trial record is examined and the law is applied. The State's reasons for using a peremptory strike to remove Juror Patterson were both credible and nonracial. Ultimately, Appellant's only ground for challenging the trial court's ruling on this matter is that he is African American and Juror Patterson was the only African American on the panel of potential jurors. This is no basis to challenge a court's ruling on a peremptory strike on constitutional grounds, however.

The United States Supreme Court's holding in *Batson, supra*, was followed and applied by this Court in such cases as *Bass, supra*. There is no dispute that Appellant satisfied the elements to establish a prima facie case for racial discrimination in accordance with *Bass* in the prosecution's use of a peremptory strike to remove Juror Patterson in this case. Appellant is an African American, and the State used a peremptory strike to remove a potential juror who was an African American as well—in fact, the only such potential juror on that panel. Appellant relied on the fact, as to which there is no dispute, that peremptory challenges constitute a jury selection practice that permits “those

to discriminate who are of a mind to discriminate.” But the prosecution was able to establish credible and nonracial reasons for its peremptory strike in order to defeat the prima facie case of an equal protection violation as *Bass* requires. As noted above, the State articulated that the peremptory strike to remove this black juror was utilized because she personally knew two of Appellant’s potential witnesses, her husband had close relationships with them in their roles as ministers, she was observed making facial gestures and body language that indicated she did not desire to participate in the jury, she stated that she would be unavailable to serve for a week beginning the following Monday due to previously scheduled travel plans that she could not avoid, and she was observed communicating with a member of the Appellant’s family. (Tr. vol. I, 133-34, Sept. 5, 2000; Habeas R. at 231.) These reasons were thoroughly discussed and examined in both bench conferences and a recorded conference in the judge’s chambers. It was clearly established that the prosecution’s reasons for the strike were not pretextual and were indeed credible and nonracial. In its Conclusions of Law of the Final Order denying Appellant any habeas relief, the circuit court noted that Appellant’s counsel did establish a prima facie case sufficient to shift the burden to the prosecution, yet it concluded that the State was able to provide a neutral, non-pretextual, non-discriminatory challenge to Juror Patterson being placed on the jury. (Habeas R. at 234.) Additionally, the court noted in this Final Order denying habeas relief that this Court rejected this exact claim by Appellant when it refused his petition for a direct appeal of this case. (*Id.*)

Appellant cites *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317 (2005), which held that when a prosecutor gives a non-pretextual reason for a strike, the court must sometimes look beyond the case at hand, and the strike may be looked at in light of all relevant circumstances. (*Id.* at 239, 125 S. Ct. at 2325.) However, all of the relevant circumstances were examined in this case. The

prosecutor gave several nonracial reasons for the strike, and the trial judge was satisfied with them being non-pretextual after a thorough examination. (Tr. vol. I, 153, Sept. 5, 2000.) As previously stated, the prosecutor told the judge at the conference in his chambers that if any of the other 26 potential jurors said they personally knew witnesses or expressed the same concerns about their ability to be impartial, the State would have moved to strike them as well. (*Id.* at 154.) Further, it was established that Appellant's counsel struck a potential juror who indicated that he personally knew one of the State's witnesses. By contrast, when all relevant circumstances were observed in *Miller-El*, it was established that there was different treatment given to black and white panel members with similar views regarding questions about the death penalty in the State's decisions to preemptively strike various black jurors. (*Id.* at 241-48, 125 S. Ct. at 2327-29.) Additionally, it was discovered that the prosecution in *Miller-El* used peremptory strikes to remove 91 percent of the potential African American jurors. (*Id.* at 241, 125 S. Ct. at 2325.)

Appellant cites two instances in the case at bar where white jurors were kept on the panel when they stated that they knew someone on the witness list of either of the two parties. (*See* Appellant's Brief at 13-14.) Specifically, Appellant cites that Juror Hayes knew Dr. Kessell and Juror Akers knew Mr. Arlo Cook—both being witnesses for the State. However, when questioned during *voir dire* Juror Hayes stated, "I am a nurse at CAMC and I know Dr. Kessell. I know of him; I've never worked with him." (Tr. vol. I, 41, Sept. 5, 2000.) Likewise, Juror Akers answered regarding his knowledge of Mr. Cook, "Mr. Cook; one of the witnesses; I don't know him personally. I believe that they lived in our neighborhood at one time. No, he is just somebody that I know of. I wouldn't know this gentleman if I saw him." (*Id.* at 43.) It is without question that these "relationships" between the State's witnesses and these two jurors fall short of the close

personal relationships of Reverends Bullet and Byers communicated by Juror Patterson. Additionally, Jurors Hayes and Akers communicated no ambivalence or doubt regarding their ability to be impartial as Juror Patterson did. Accordingly, there was no disparate treatment given Juror Patterson vis-a-vis these two white jurors as was demonstrated in *Miller-Ell, supra*.

Further, when the *Miller-El* Court looked beyond the case, it was discovered that the Dallas County Prosecutor's Office had a longstanding history of racial discrimination in its use of peremptory strikes to exclude minorities from juries including a process known as "jury shuffling" and a manual on discriminatory practices. (*Id.* at 253-65, 125 S. Ct. at 2332-39.) When looking beyond the case at bar, Appellant is unable to cite any evidence, let alone a pattern, of such discriminatory practices in jury selection by the State.

Appellant argues that when a lone black juror is removed from a jury panel through a peremptory strike and it results in an all white jury, it requires additional scrutiny. (*See* Appellant's Habeas Brief at 12.) Yet, this has never been the standard, and Appellant cites no authority to support this. In *Bass, supra*, this Court upheld a peremptory strike on a *Batson* challenge where a lone black juror was removed by the State when it was discovered that he personally knew the defendant from attending two of the latter's political functions and that the juror's wife was employed by an organization that filed an ethics complaint against the prosecutor. The law is absolutely clear that when one gives a credible, nonracial reason for a peremptory strike to remove a juror when the other party establishes a prima facie challenge based on race, the strike will be upheld. In addition to *Bass*, this Court has upheld other peremptory strikes when a prima facie violation on racial grounds is established and defeated by credible, nonracial reasons similar to the strike in the present case. *See State v. Mangum*, 195 W. Va. 163, 465 S.E.2d 163 (1995) (given

reason that black juror knew investigating officer in case where peremptory strike removed him was deemed credible and racially neutral); *State v. Kirkland*, 191 W. Va. 586, 595-96, 447 S.E.2d 278, 286-88 (1994) (prosecutor's reason for peremptory strike removing last remaining black juror from panel, because he knew defendant's girlfriend who was a witness for the State and acknowledged he had no problem with people carrying firearms, was ruled to be credible and racially neutral). Further, in a plurality opinion, the United States Supreme Court held,

A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866 (1991). So as long as there is indeed a credible, nondiscriminatory reason given to use a peremptory strike to remove a juror who is a member of a racial minority—even if it is the only member of the panel who is a minority—it will survive constitutional scrutiny unless it is so obvious that it is a sham based on all relevant circumstances as in *Miller-El, supra*. Accordingly, the removal via peremptory strike of Juror Patterson should be upheld due to the credible, nonracial reasons given by the State in this case.

Appellant attempts to strengthen his argument of a peremptory strike of Juror Patterson being on racial grounds by stating that “[t]he State knew during the pretrial that these two possible defense witnesses *were not going to be called as witnesses.*” (Appellant’s Brief at 14; emphasis in original.) Yet this is not accurate. When the prosecutor raised the issue of bias or prejudice regarding Juror Patterson after questioning her, Appellant’s counsel merely stated that he was considering not calling the two defense witnesses in question. When the prosecution pressed the issue of removing Juror Patterson, Appellant’s counsel stated, “Wait a minute before you do that [remove Juror Patterson],

your Honor; give me the opportunity to consider withdrawing my representations that I will be calling those two persons as witnesses.” (Tr. vol. I, 59-60, Sept. 5, 2000.) During the conference in the judge’s chambers, Appellant’s counsel stated that he told the court that he would recall the two defense witnesses in question and not use them. However, the judge corrected him, saying that the recall was only mentioned in hypothetical terms, using the words “what if.” To this, Appellant’s counsel replied, “Well, of course.” (*Id.* at 149.) Thus, this alleged “knowledge by the prosecutor of the witnesses being recalled at pretrial” misrepresents the issue at hand. But regardless of this, the State also articulated a credible, nonracial reason for removing Juror Patterson despite Appellant not calling the two defense witnesses, in that she may have felt Appellant was not receiving a fair trial due to their not testifying because of her presence on the jury. (*Id.* at 66.)

The habeas court’s findings of fact on this issue were not clearly erroneous, and it did not abuse its discretion in denying Appellant habeas relief on this basis.

3. Juror Patterson Should Have Been Removed For Cause.

When all of the facts and circumstances are examined in this case, Juror Patterson should have actually been removed from the jury panel by the court for cause. West Virginia Code § 56-6-12 mandates the following:

Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause. And in every case, unless it be otherwise specially provided by law, the plaintiff and defendant may each challenge four jurors peremptorily.

(Emphasis added.)

Additionally, West Virginia Code § 62-3-3 (in part) provides that both parties are entitled to an unbiased panel before exercising their peremptory strikes:

In a case of felony, twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors, *free from exception*, be completed, from which panel the accused may strike off six jurors and the prosecuting attorney may strike off two jurors. . . .

(Emphasis added.)

On the issue of a trial court removing a juror for cause due to bias or a relationship to either party in a case, this Court has held, “Jurors who on *voir dire* of the panel indicate possible prejudice, should be excused, or should be questioned individually by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse.” Syl. Pt. 2, *O’Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002). The Court in *O’Dell* went on to state that “[t]rial courts have an obligation to strike biased or prejudiced jurors for cause.” *Id.* at 288, 565 S.E.2d at 410. From the initial stage of the *voir dire* process, Juror Patterson made her bias evident. She initially stated that her husband had a personal relationship with two defense witnesses in that they crossed professional paths as ministers. Additionally, she said that she had a close relationship with one of the prospective defense witnesses throughout her life growing up. As this process continued, she raised her hand and said, “Judge, the longer I sit here, I don’t think I can be impartial.” At that point, Juror Patterson should have been excused for cause.

Instead of being removed from the jury for cause due to this bias or prejudice, Juror Patterson was improperly kept on the panel and questioned further, during which she seemed to change her mind regarding her ability to be impartial. (Tr. vol. I, 106-07, Sept. 5, 2000.) This further probing

and attempt to rehabilitate this juror should never have occurred. This Court in *O'Dell, supra*, also held, "Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, after retractions or promises to be fair." (*Id.*, Syl. Pt. 5.) It is apparent that further questioning and attempts at rehabilitation improperly took place in this case with respect to Juror Patterson. Fortunately, this issue was rectified by the prosecution's peremptory strike to remove her and the judge's subsequent overruling of Appellant's *Batson* challenge.

This Court may affirm a decision by a circuit court for different reasons than those relied upon by the court in making its ruling.

"This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

Syl. Pt. 4, *White v. Haines*, 215 W. Va. 698, 601 S.E.2d 18 (2004); Syl. Pt. 3, *State v. Boggess*, 204 W. Va. 267, 512 S.E.2d 189 (1998). *See also Wolfe v. Alpizar*, 219 W. Va. 525, ___, 637 S.E.2d 623, 626 (2006) ("While we agree with the end result reached by the circuit court, we affirm its decision based on a different legal theory than that espoused in its order.") (*see n.4 and cases cited therein*).

In light of this, the decision of the trial court to overrule Appellant's *Batson* challenge of the peremptory strike to remove Juror Patterson should be upheld, despite removal for cause being the proper legal theory to be utilized.

4. Peremptory Strikes Should Not Be Abolished.

Appellant concludes his brief by arguing that the West Virginia Supreme Court of Appeals should consider the elimination of peremptory strikes. In support of his argument, Appellant cites various cases where the United States Supreme Court has grappled with the sometimes troubling issue of challenges to peremptory strikes. Additionally, Appellant relies on the legal theories set forth in the concurring opinions of the late Justice Thurgood Marshall in *Batson, supra*, and of Justice Stephen Breyer in *Miller-El, supra*, as a basis for this Court to consider abolishing peremptory strikes. Although Justices Breyer and Marshall have written engaging opinions, there is simply no legal authority for eliminating the practice of peremptory strikes. In fact, our legal system has long recognized the value and virtues of the use of peremptory strikes:

The central function of peremptory challenge is to enable a litigant to remove a certain number of potential jurors who are not challengeable for cause, but in whom the litigant perceives bias or hostility. The function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try a case will decide on the basis of the evidence placed before them, and not otherwise.

United States v. Annigoni, 96 F. 3d 1132, 1136 (9th Cir. 1996) (citing *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 845 (1965)). In light of this longstanding value placed on peremptory challenges by our judicial system, Appellant's cure is worse than the disease and will create even bigger problems if carried out.

Appellant concludes his argument for this Court to consider the elimination of peremptory strikes by pointing out the lack of diversity in West Virginia vis-a-vis other states and, in turn, the practice's more significant impact on minority jurors here. The State does concede that the lack of

racial and ethnic diversity here is unfortunate. However, this demographic characteristic should in no way be grounds for this Court to eliminate the use of peremptory strikes.

Finally, inasmuch as the right to peremptory strikes is statutory, the Appellant's request should be directed to the Legislature, and not to this Honorable Court.

VI.

CONCLUSION

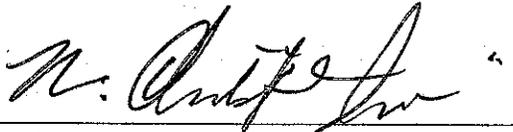
For the foregoing reasons, the Final Order of the Circuit Court of Kanawha County denying Appellant habeas relief should be affirmed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 8th day of March, 2007, addressed as follows:

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A handwritten signature in black ink, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH