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Byram v. Ozmint 339 F.3d 203 (4th Cir. 2003)

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I. Facts

Jason Scott Byram ("Byram") stabbed Julie Johnson ("Johnson") at around 3:00 a.m. to silence her while he was robbing her family's house. Byram left a fingerprint in the house and the dying Johnson told the police that the attacker acted alone. Acting on the evidence collected, the police arrested Byram that afternoon and he confessed to the crime. Byram was convicted by a jury in South Carolina state court "of murder, first-degree burglary, attempted armed robbery, and grand larceny of a motor vehicle."[1]

During the sentencing phase of trial, Byram's defense counsel, Douglas Strickler ("Strickler") and Lee Coggiola ("Coggiola"), presented mitigating evidence.[2] Strickler and Coggiola employed the services of a forensic psychiatrist, a forensic psychologist, a social worker, and an investigator in preparing Byram's mitigation evidence.[3] The social worker, Evelyn Califf ("Califf"), met with Byram five times and reviewed his school and foster care records.[4] Califf was certified by the trial court as an expert in adoptions and learning disabilities and testified during sentencing about Byram's abusive childhood, slow development, difficulties in school, and his "dull normal" intelligence.[5] In addition, the investigator, Patti Rickborn, helped prepare the mitigation evidence, contacted Byram's natural and adoptive family members, and obtained Byram's adoption records.[6] Despite the evidence and testimony produced by the defense team, the jury recommended the death penalty.[7] After reviewing the jury's recommendation, the trial judge sentenced Byram to death.[8] The Supreme Court of South Carolina affirmed the conviction and sentence and subsequently denied Byram a rehearing.[9]

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1. Byram v. Ozmint, 339 F.3d 203, 205 (4th Cir. 2003).

2. *Id.* at 206. The court noted the experience that both Strickler and Coggiola had in representing capital defendants, which included Strickler's involvement in two death penalty cases and Coggiola's work at the Death Penalty Resource Center. *Id.* at 205. The court noted that Strickler had logged 623.5 hours preparing Byram's case, and Coggiola testified that she had met with Byram at least thirty times prior to the trial. *Id.* at 205–06.

3. *Id.* at 206.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Byram*, 339 F.3d at 206.

8. *Id.*

9. *Id.*; *see* State v. Byram, 485 S.E.2d 360, 367 (S.C. 1997) (affirming the state trial court

Byram was denied postconviction relief by the state courts and he filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina.[10] The district court granted summary judgment in favor of the State but issued Byram a certificate of appealability ("COA").[11] Byram then appealed to the United States Court of Appeals for the Fourth Circuit.[12]

II. Holding

The Fourth Circuit affirmed the district court's summary judgment dismissal.[13] First, the court held that the state court did not unreasonably apply *Batson v. Kentucky*[14] by finding that defense counsel's peremptory challenges were permissible strategic decisions.[15] Second, the court held that the state court did not unreasonably apply *Strickland v. Washington*[16] when it found that defense counsel's mitigation evidence investigation was adequate and did not prejudice the defense.[17]

III. Analysis

Byram presented two claims to the Fourth Circuit: (1) his counsel rendered ineffective assistance during jury selection when they "used peremptory challenges to strike potential jurors for reasons of race," which violated the Equal Protection Clause of the Fourteenth Amendment; and (2) his counsel rendered ineffective assistance during the sentencing proceedings when they failed to investigate or present adequate mitigation evidence.[18] The Fourth Circuit stated that for a writ of habeas corpus to issue the state court must have rendered a decision that was " 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' "[19] The court noted that in *Williams v. Taylor*[20] the Supreme Court

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proceedings).

10. *Byram*, 339 F.3d at 206.

11. *Id.*

12. *Id.*

13. *Id.* at 211.

14. 476 U.S. 79 (1986).

15. *Byram*, 339 F.3d at 208–09; *see* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that peremptory challenges based solely on race are constitutionally impermissible on equal protection grounds).

16. 466 U.S. 668 (1984).

17. *Byram*, 339 F.3d at 209–11; *see* Strickland v. Washington, 466 U.S. 668, 687 (1984) (creating a two-pronged test for determining ineffective assistance of counsel).

18. *Byram*, 339 F.3d at 207; *see* U.S. CONST. amend. XIV (providing that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

19. *Byram*, 339 F.3d at 206 (quoting 28 U.S.C. § 2254(d)(1) (2000)); *see* 28 U.S.C. § 2254(d)(1)

held that an application of clearly established federal law by a lower court is unreasonable if it identifies the correct legal rule but unreasonably applies it to the defendant's case.[21]

A. *The* Batson *Issue*

Byram first argued that his defense counsel rendered ineffective assistance when they used nine out of ten peremptory challenges to exclude white jurors and then used four additional challenges to exclude white jury alternates.[22] The Supreme Court previously held that the Constitution prohibits both the prosecution and the defense from using peremptory challenges for race-based reasons.[23] In *Miller-El v Cockrell*,[24] the Supreme Court restated the three-part test for determining whether a violation of *Batson* has occurred.[25] First, a party opposing a challenge must make a prima facie showing that a peremptory challenge has been used based on a juror's race.[26] Second, if the first part of the test is satisfied, the party making the challenge must offer a race-neutral reason for excluding the juror.[27] Third, in light of the evidence submitted, the trial court is required to determine whether the party opposing the challenge "has shown purposeful discrimination."[28]

During the state postconviction relief ("PCR") proceedings, Strickler testified that he was aware of studies showing that African American jurors were less likely to vote for the death penalty than jurors of other races.[29] Strickler further testified that his personal experience led him to believe that African

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(2000) (providing that a writ of habeas corpus following the conclusion of state court proceedings can only be granted if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law"; part of AEDPA).

20. 529 U.S. 362 (2000).

21. *Byram*, 339 F.3d at 207; *see* Williams v. Taylor, 529 U.S. 362, 407–08 (2000) (holding that an application of clearly established federal law is unreasonable if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case").

22. *Byram*, 339 F.3d at 207. The court properly refrained from revealing Byram's race in the written opinion because the Fourteenth Amendment rights at issue in this case were those of the jurors not to be excluded and not Byram's right to have a same-race jury.

23. *Id.*; *see* Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that the Constitution forbids the defendant from using peremptory challenges to exclude potential jurors because of their race); *Batson*, 476 U.S. at 89 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.").

24. 537 U.S. 322 (2003).

25. *Byram*, 339 F.3d at 207; *see* Miller-El v. Cockrell, 537 U.S. 322, 328–39 (2003) (restating the three-part test created in *Batson*).

26. *Miller-El*, 537 U.S. at 328 (citing *Batson*, 476 U.S. at 96–106).

27. *Id.* (citing *Batson*, 476 U.S. at 97–106).

28. *Id.* at 328–29 (citing *Batson*, 476 U.S. at 98, 106).

29. *Byram*, 339 F.3d at 207.

American jurors were more likely to express their opposition to the death penalty.[30] As further evidence of Strickler's racial bias in selecting jurors, Byram pointed to Strickler's trial notes, which indicated "whether certain members of the venire were black or white."[31] The Fourth Circuit noted that "[i]n *Batson* inquiries 'the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.' "[32] Further, the court stated that the best evidence of counsel's intention when challenging jurors is the demeanor of the attorney at the time of the challenge, a credibility determination best made by the trial judge.[33]

At trial, the prosecution "requested a *Batson* hearing to determine the reasons for defense counsel's peremptory challenges of white jurors."[34] The trial judge required defense counsel to give the reasons behind each juror's challenge because the Solicitor was dissatisfied with Strickler's explanation of their "rating system," in which they first determined the suitability of a juror, then tried to seat jurors who scored high on the scale.[35] After receiving race-neutral explanations for each challenged juror, the trial judge held that there was insufficient evidence of a racial motive behind the challenges to invalidate the peremptories.[36]

On federal habeas review, the district court upheld the trial court's determination and found that it was not an unreasonable application of *Batson*.[37] For the Fourth Circuit to overturn the district court's determination, the court must have found the trial court's application of *Batson* to be "objectively unreasonable."[38] The court held that a "juror's inclination to impose the death penalty is a legitimate consideration in counsel's exercise of peremptory challenges."[39] Thus, the court affirmed the district court's determination that the trial court's application of *Batson* was not an unreasonable application of clearly established federal law.[40]

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30. *Id.*
31. *Id.*
32. *Id.* at 208 (quoting *Miller-El*, 537 U.S. at 339) (internal citation omitted).
33. *Id.*
34. *Id.*
35. *Byram*, 339 F.3d at 208.
36. *Id.*
37. *Id.* at 208–09.
38. *Id.* (citing *Miller-El*, 537 U.S. at 340–41).
39. *Id.* (citing United States v. Barnette, 211 F.3d 803, 811 (4th Cir. 2000)).
40. *Id.* at 208–09; *see* 28 U.S.C. § 2254(d)(1) (2000). Although not cited by the Fourth Circuit, the Supreme Court has held that an appellate court should defer to the trial court's determination that counsel's challenges were not racially motivated unless that determination was clearly erroneous. *See* Hernandez v. New York, 500 U.S. 352, 363–65, 372 (1991) (plurality opinion) (upholding the trial court's finding that the exclusion of two Latino jurors was sufficiently explained by counsel using race-neutral criteria).

B. *Application of* Strickland

Byram also claimed that his counsel rendered constitutionally ineffective assistance because they "did not have a coherent strategy for developing all available mitigation evidence."[41] According to Byram, this failure did not allow the jury to hear evidence of Byram's brain damage from fetal alcohol syndrome ("FAS") and of the abuse and neglect he suffered as a child.[42] Byram argued that this failure violated his Sixth Amendment right to effective assistance of counsel and undermined confidence in the sentencing proceedings.[43]

In *Strickland*, the Supreme Court created a two-pronged test for deciding ineffective assistance of counsel claims.[44] "First, the defendant 'must show that counsel's performance was deficient.' "[45] To prove deficient performance, the defendant must show that " 'counsel's representation fell below an objective standard of reasonableness.' "[46] The Fourth Circuit noted that the Supreme Court has held that limited investigations may be permissible as justification for strategic decisions when " 'reasonable professional judgments support the limitations on investigation.' "[47] For the second prong of the *Strickland* analysis, a defendant must prove that counsel's deficient performance prejudiced the defense.[48] A defendant proves prejudice by showing that " 'counsel's errors were so serious as to deprive the defendant of a fair trial.' "[49] The Fourth Circuit was required to " 'reweigh the evidence in aggravation against the totality of available mitigating evidence' " to determine if Byram was prejudiced during the sentencing proceedings.[50] The court undertook a preliminary analysis of the two-pronged test in order to determine if the state court's application of *Strickland* was unreasonable under § 2254(d)(1).[51]

The court observed that the Supreme Court has held that "[i]t is the responsibility of counsel to adequately investigate and present evidence in mitigation."[52]

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41. *Byram*, 339 F.3d at 209.

42. *Id.*

43. *Id.*; *see* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence").

44. *Byram*, 339 F.3d at 209; *see Strickland*, 466 U.S. at 687 (holding that to prove ineffective assistance of counsel defendant "must show that counsel's performance was deficient" and that the deficiency prejudiced the defense to such a degree so "as to deprive the defendant of a fair trial").

45. *Byram*, 339 F.3d at 209 (quoting *Strickland*, 466 U.S. at 687).

46. *Id.* (quoting *Strickland*, 466 U.S. at 688).

47. *Id.* (quoting Wiggins v. Smith, 123 S. Ct. 2527, 2541 (2003)) (citation omitted).

48. *Id.*; *see Strickland*, 466 U.S. at 687 (holding that deficient performance of counsel must have prejudiced the defense so as to deny the defendant a fair trial).

49. *Byram*, 339 F.3d at 209 (quoting *Strickland*, 466 U.S. at 687).

50. *Id.* (quoting *Wiggins*, 123 S. Ct. at 2542).

51. *Id.* at 209 (citing *Miller-El*, 537 U.S. at 338); *see* 28 U.S.C. § 2254(d)(1) (2000) (providing standard for issuance of writ of habeas corpus).

52. *Byram*, 339 F.3d at 209 (citing *Williams*, 529 U.S. at 395).

However, the investigation for mitigating evidence is required only to be reasonable and a reviewing court must give deference to counsel's strategic decisions concerning the presentation of evidence.[53] The court must assume that " 'counsel's conduct falls within the wide range of reasonable professional assistance.' "[54] The court found that Byram did not meet the burden of *Strickland* and that defense counsel's performance did not fall "below an objective standard of reasonableness."[55] The court pointed out that Strickler and Coggiola devoted a significant amount of time to preparing Byram's case.[56] Further, Strickler and Coggiola employed a forensic psychologist and a forensic psychiatrist ("the experts"), each of whom provided reports after examining Byram.[57] Strickler and Coggiola concluded that the evidence produced by the experts' examinations would have been more damaging than helpful to the defense and decided not to present the experts' testimony.[58] The court found counsel's choices to be reasonable because such evidence " 'is a double-edged sword that might as easily have condemned defendant to death as excused his actions.' "[59]

The court distinguished Byram's case from the facts in *Wiggins v. Smith*,[60] in which defense counsel was found to have conducted an inadequate investigation into mitigating evidence.[61] In *Wiggins*, the Supreme Court found that defense counsel ended their " 'investigation at an unreasonable juncture.' "[62] Specifically, defense counsel possessed evidence that would have led a competent attorney to conduct a further investigation.[63] Unlike *Wiggins*, the court in *Byram* found that Strickler and Coggiola conducted an adequate investigation to justify their strategic decision to limit their investigation and not present all the mitigating evidence in their possession.[64] In addition to the psychiatric experts, defense counsel employed a social worker who produced a psychosocial assessment of Byram for use during the sentencing proceedings and hired a private investigator to help develop mitigating evidence.[65] According to Strickler and Coggiola, the

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53. *Id.*; *see* Matthews v. Evatt, 105 F.3d 907, 919 (4th Cir. 1997) (holding that counsel is only required to make a reasonable investigation into possible mitigating evidence).

54. *Byram*, 339 F.3d at 209 (quoting *Strickland*, 466 U.S. at 689).

55. *Id.*

56. *Id.* at 209–10.

57. *Id.* at 210.

58. *Id.*

59. *Id.* (quoting Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998)).

60. 123 S. Ct. 2527 (2003).

61. *Byram*, 339 F.3d at 210; *see Wiggins*, 123 S. Ct. at 2538 (finding that defense counsel's investigation fell well short of established professional norms).

62. *Byram*, 339 F.3d at 210 (quoting *Wiggins*, 123 S. Ct. at 2538).

63. *Wiggins*, 123 S. Ct. at 2538.

64. *Byram*, 339 F.3d at 210–211.

65. *Id.* at 210.

evidence culled by the experts, the social worker, and the investigator did not reveal any basis for presenting FAS as evidence in mitigation.[66]

The court further differentiated Byram's case by stating that Byram's counsel did not put on a "halfhearted mitigation case" as Wiggins's counsel did.[67] The jury in *Byram* heard "extensive testimony and arguments regarding Byram's troubled childhood and adolescence."[68] According to the court, Strickler devoted significant time and effort to Byram's case and provided credible explanations at the PCR proceedings for their strategic choices.[69] The court found no reasonable probability that had defense counsel conducted a more exhaustive investigation the outcome of the trial would have been different.[70] In conclusion, the court held that Byram failed to show that the state court's application of *Strickland* was unreasonable.[71]

IV. Application in Virginia

A. Batson

Under *Byram*, a defendant can dismiss pro-death penalty jurors using peremptory strikes.[72] Defense counsel may exclude those jurors who express an inclination to impose the death penalty so long as race is not considered, thus avoiding a conflict with *Batson* and *Georgia v McCollum*.[73] The analog to this position is that prosecutors can likewise exclude anti-death penalty jurors without fear of coming under a *Batson* attack. If a prosecutor were to exclude African American jurors he decided were anti-death penalty, his actions could be justified in the same manner by proffering a race-neutral explanation. Thus, while it seems that defense counsel can eliminate pro-death jurors without relying solely on race, it must be understood that the Commonwealth can employ the same tactic.

Strickler's testimony in the PCR proceedings and his explanations for the challenges were inconsistent.[74] He revealed in the PCR proceedings his bias towards retaining African American jurors for their alleged anti-death penalty

66. *Id.* For a complete discussion and analysis of *Wiggins*, see generally Terrence T. Egland, Case Note, 16 CAP. DEF. J. 101 (2003) (analyzing Wiggins v. Smith, 123 S. Ct. 2527 (2003)).

67. *Byram*, 339 F.3d at 211 (quoting *Wiggins*, 123 S. Ct. at 2538).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 211.

72. *Id.* at 208; *see Barnette*, 211 F.3d at 811 (allowing the peremptory challenge of decidedly anti-death penalty jurors).

73. *See Batson*, 476 U.S. at 89 (forbidding the use of peremptory challenges by prosecution based on race); *McCollum*, 505 U.S. at 59 (forbidding the use of peremptory challenges by defense based on race).

74. *Byram*, 339 F.3d at 207–08.

inclination, yet at trial Strickler explained his challenges in race-neutral terms as the result of either the potential jurors' statements or their relationship with the trial actors.[75] The court, while ruling that Strickler's challenges were valid, gave no weight to Strickler's testimony in the PCR hearings that revealed an inconsistency in his rationale between the *Batson* hearing at trial and the PCR proceedings.[76] Thus, the court implied that race can be a consideration, so long as at trial there is a race-neutral explanation for the challenges.[77]

B. Wiggins

Defense counsel must also be aware of the impact *Byram* has on the gathering of mitigation evidence. *Byram* stands for the proposition that so long as defense counsel properly uses the resources provided by the Commonwealth, such as a mitigation specialist, fact investigator, or psychiatrist, any ineffective assistance of counsel claim concerning the investigation of mitigation evidence will fail.[78] If, on the other hand, the resources are used improperly, the ineffective assistance claim can prevail.[79] In *Wiggins*, defense counsel failed to employ a mitigation specialist when the state provided funds for that very purpose.[80] The Supreme Court found that this was an indication of performance that fell below professional norms.[81] When defense counsel has access to the tools needed to cultivate a mitigation defense, failure to utilize them will most likely amount to ineffective assistance.

V. Conclusion

Defense counsel must be aware that the ability to challenge potential jurors with pro-death penalty views may be nullified by the counter-ability of the Commonwealth to challenge anti-death penalty members of the venire. Further, the importance of the investigation and presentation of mitigating evidence in the

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75. *Id.*

76. *Id.* at 208–09 (holding that credibility of attorney's explanation of challenge is best assessed by the trial court).

77. *Id.* It is interesting to note that if, as Strickler believed, African American jurors were likely to express openly their opposition to the death penalty, then the African American jurors who were not challenged were presumably pro-death penalty jurors. *Id.* at 207. Thus, his intention to retain anti-death penalty jurors was frustrated by his own racial bias.

78. *Id.* at 209–11; *see* Egland, *supra* note 66, at 111 (arguing that *Wiggins* makes the appointment of a mitigation specialist in all capital cases mandatory). *See generally* Daniel L. Payne, *A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43 (2003). Please contact the Virginia Capital Case Clearinghouse at (540) 458-8557 for a motion requesting the appointment of a mitigation specialist.

79. *See Wiggins*, 123 S. Ct. at 2536–37 (stating that failure to utilize forensic social worker when funds were available for that purpose fell below Maryland and ABA professional standards).

80. *Id.* at 2533.

81. *Id.* at 2536–37.

sentencing phase of a capital trial cannot be overstated. However, it is clear, at least in the Fourth Circuit, that there is a threshold level of investigation that defense counsel can meet to assure that the court will not question strategic decisions.

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