STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP001639-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK D. ZOLLIECOFFER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable William S. Pocan Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The circuit court erred in denying Mr. Zolliecoffer's motion for substitution of counsel and an adjournment of the scheduled jury trial.

It is well-settled that the circuit court "must recognize a presumption" in favor of the defendant's Sixth Amendment right to retained counsel of choice. *Wheat v. United States*, 486 U.S. 153, 164 (1988). This presumption can be overcome, however, when the circuit court appropriately exercises its discretion by balancing that right against other important interests. *United States v. Sellers*, 645 F.3d 830, 834 (7th Cir. 2011); *State v. Prineas*, 2009 WI App 28, ¶ 13, 316 Wis. 2d 414, 766 N.W.2d 206.

"The key […] is whether the court has indeed balanced those interests, or instead has acted arbitrarily." *Sellers*, 645 F.3d at 835. In so doing, this Court must consider those reasons put forth by the circuit court as well as "the whole of the circumstances surrounding" the request. *Id*. at 835-836.

The State claims that the circuit court appropriately exercised its discretion in this case by conducting a "thorough" inquiry into Mr. Zolliecoffer's request. (State's Br. at 8). Mr. Zolliecoffer disagrees. Most notably, the circuit court never inquired as to how much time Attorney Flanagan required in order

to finalize investigation and adequately prepare for trial. That omission matters and is strong evidence of arbitrariness. *United States v. Williams*, 576 F.3d 385, 390 (7th Cir. 2009) (quoting *Carlson v. Jess*, 526 F.3d 1018, 1026 (7th Cir. 2008). In fact, Attorney Flanagan openly suggested that he was not envisioning a significant set over, telling the court that the scheduled date was only "a little bit soon." (58:4).

The State points to the existence of prior adjournments. (State's Br. at 8). However, the totality of the circumstances suggests that those were necessary and appropriate—in fact, the State conceded as much with respect to an earlier request for a continuance. (54:14).[1] It is unclear why valid requests for continuances should therefore be dispositive.

The State also points to both the age of the case and the timing of the motion. As to the age of the case, the court's calendar—while important—does not have unchecked veto power over the defendant's right

[1] The State also points to a prior request for new appointed counsel. It argues that "It is of no import that his second motion for substitution was for retained counsel." (State's Br. at 12). The State conflates the two distinct tests for substitution, just like the circuit court did in this case. While the circuit court was empowered to take a request for appointed counsel less seriously, it was constitutionally required to presume that Mr. Zolliecoffer's motion for retained counsel should be honored. It did not do so.

to counsel of choice. Moreover, any such concerns are substantially mitigated by the other comments made by the circuit court, which indicate that the court was inflexibly privileging external scheduling constraints over Mr. Zolliecoffer's constitutional rights.

For example, the court seems to have been pushing the case to trial largely because no other trials were likely to be heard on the scheduled date. (58:11). Thus, while there was "[n]ormally" a possibility that Mr. Zolliecoffer's case would be "bumped" anyway, the circuit court's lack of other scheduled matters dictated that the case needed to "go on Monday." (58:11). The court expressed ambivalence, however, should other intervening scheduling issues arise that Monday—in that case, an adjournment would be reconsidered. (58:11). This is highly arbitrary decision making and not consistent with a reasoned exercise of discretion.

As to the timing of the motion, that too is not dispositive; it is the circumstances underlying the request which are important. *Sellers*, 645 F.3d at 836. Here, as argued in the brief in chief, those circumstances were not adequately considered—the need for further investigation and an apparent breakdown in attorney-client communication.[2]

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[2] The State does not address the investigation angle and makes glancing reference to the existence of an apparent breakdown in communication. Here, retained counsel averred, on behalf of his client, that there had been a breakdown. (58:4). The Court did not personally address Mr. Zolliecoffer. (continued)

Finally, the State's reliance on a finding of delay is also misplaced, as that finding is unsupported by record evidence and is instead premised in part on the circuit court's earlier comments suggesting a made up mind on that matter.

The State also includes a lengthy comparison and contrast with the persuasive authority cited in Mr. Zolliecoffer's brief in chief, *Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008). (State's Br. at 9-12). The facts of the two cases are obviously different—as the request for a substitution and continuance will be motivated by different facts and circumstances in each case, it should not be surprising that there are similarities, and differences, between the two fact patterns. However, what binds the two cases together is an overriding arbitrariness on the part of the lower court—an inflexible privileging of the court's calendar over the defendant's constitutional rights. Here, the court's comments clearly evince arbitrariness and fail to demonstrate that the court adequately considered the totality of the circumstances or even attempted to balance competing interests.

Appointed counsel did not substantially add to that record and, after a brief off the record colloquy, told the court that his client had nothing to say on the record. (58:10). At the end of the hearing, retained counsel renewed his allegation of a breakdown and asked the court to make a more searching inquiry. (58:13). The court did not do so.

Accordingly, this Court should find that the circuit court erroneously exercised its discretion and remand for a new trial.

II. This Court should reverse and remand for a new trial due to the State's decision to illegally remove black jurors from the panel.

A. A remand for a hearing is not legally required.[3]

The State concedes that the circuit court failed to adequately address Mr. Zolliecoffer's properly made challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986). (State's Br. at 15). The State asks, however, that this Court remand the matter for a hearing instead of granting a new trial. (State's Br. at 16). In support, they rely heavily on a non-precedential dissenting opinion. (State's Br. at 16).

Mr. Zolliecoffer disagrees with the State. While the circuit court failed to take the objection seriously and did not make detailed findings, the explanations of the prosecutor can be evaluated in light of the available record and do not depend on more nebulous

[3] The parties have some disagreements about the standard of review. Mr. Zolliecoffer has acknowledged the controlling case law requiring this Court to conduct a more deferential review. (Brief in Chief at 40). However, he has also preserved an argument that the standard of review should be more independent. Mr. Zolliecoffer prevails under either analysis.

credibility and demeanor considerations. In fact, the pretextual explanations are clearly exposed as such when compared against the record. In this circumstance, a remand for a hearing is therefore inappropriate—an approach that is consistent with other case law.

For example, in *Snyder v. Louisiana*, 552 U.S. 472 (2008), the United States Supreme Court confronted an alleged *Batson* violation where the lower court appears to have made a superficially deficient record in denying the motion. *Id*. at 479. Notwithstanding this fact, the Supreme Court did not hesitate to declare a clear *Batson* violation and to remand for a new trial. *Id*. at 486; *State v. Snyder*, 982 So.2d 763 (La. 2008) (per curiam) (interpreting the Court's holding as requiring a new trial.)

In *Snyder*, the prosecutor offered two justifications for striking a black juror. *Snyder*, 552 U.S. at 479-80. The first was that the juror appeared "nervous." *Id*. The lack of on the record findings problematized this justification: the Court could not "presume that the trial judge credited the prosecutor's assertion." *Id*. The second reason concerned the juror's allegedly competing obligations. *Id*. at 482. The Court undertook a searching review of the entire record, scrupulously evaluating this justification and finding it to be "suspicious" in light of other evidence in the record. *Id*. at 483. The Court found this justification was a pretext and asserted that "the record does not show that the prosecution would have pre-emptively challenged [the juror]

based on his nervousness alone." Accordingly, it reversed the conviction. *Id*. at 486.

Likewise, in *State v. Lamon*, 2003 WI 78, 262 Wis. 2d 747, 664 N.W.2d 607, the Wisconsin Supreme Court was also confronted with a circuit court that dealt with a *Batson* challenge without making thorough findings. *Id*.,¶ 16. The majority nonetheless engaged in a searching review of the record in order to assess the adequacy of the prosecutor's explanation for his actions, ultimately finding that the denial of the motion was reasonable in light of that record. *Id*., ¶ 93.

Similarly, the Eleventh Circuit, in a habeas case, also refused to remand a case involving what it believed to be a clear *Batson* violation notwithstanding the lack of any findings from the lower court. *McGahee v. Alabama Dept. of Corrections*, 560 F.3d 1252, 1260-61 (11th Cir. 2009). The Ninth Circuit has also reversed a conviction in the absence of clear findings when the record clearly established that the explanations at issue "were pretexts for purposeful discrimination." *United States v. Alanis*, 335 F.3d 965 (9th Cir. 2003).

Of course, there are other cases from other jurisdictions in which courts have also seen fit to send cases back for further proceedings when appropriate findings have not been made. *See for example United States v. McMath*, 559 F.3d 657 (7th Cir. 2009); *Dolphy v. Mantello*, 552 F.3d 236 (2d Cir. 2009). However, these cases are distinguishable,

largely because they depend on intangible or hard to review evidence: In *McMath*, the debated centered on a juror's "unhappy" expression during voir dire, for example. *McMath*, 559 F.3d at 666.

In this case, however, the prosecutor did not offer demeanor-based objections to either juror. The case does not depend on intangibles. It is easily assessed on the basis of reviewable evidence in the transcripts. In many ways, the case is therefore cleaner than *Snyder* as it does not involve troublesome questions about vague concepts of "nervousness." That approach is also consistent with *Lamon*, which strongly suggests that when the proffered reasons can be explored on the basis of the record before the Court, a remand will not be required.[4]

This case would therefore appear ripe for review by this Court, given the straightforward nature of the issues presented and the clarity of the appellate record, which amply supports Mr. Zolliecoffer's position.

[4] This approach is probably best articulated by the Colorado Supreme Court, which views express findings as not always necessary for appellate review, as the Court's task is essentially to determine whether the lower court's denial of the motion is supported by the record before it. *People v. Beauvais*, 393 P.3d 509, 519 (Co. 2017).

B. A remand for a hearing would be an undesirable outcome in this case.

In addressing remedy, this Court should also ask whether a remand for a hearing will be both realistically workable and capable of producing a legitimate outcome. The answer to both questions is a flat no.

As to practicality, the frailties of human memory cannot be overstated. This case involves an otherwise "run of the mill" felony jury trial from the busiest criminal court system in our State. Mr. Zolliecoffer's case was not high profile and, in all likelihood, not high priority for any of the institutional actors involved. Jury selection for this otherwise routine case was conducted in May of 2017—meaning that, by the time this Court issues a decision, at least two years (and thousands of intervening cases) will have passed.

Milwaukee County uses a rotating judicial calendar, meaning that the case will be remanded to a branch overseen by a different judge.[5] It is unclear whether the assigned prosecutor still works for the prosecutorial entity in question, given that office's notorious turnover rate.[6] Such concerns have led

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[5]https://county.milwaukee.gov/EN/Courts/Chief-Judge/List-of-Court-Officials

[6]http://archive.jsonline.com/news/crime/district-attorneys-office-facing-retention-funding-problems-b99742084z1-382529581.html

reviewing courts to express skepticism as to the wisdom of a remand. *See Snyder*, 552 U.S. at 486; *People v. Snow*, 746 P.2d 452, 458 (Cal. 1987).

As to legitimacy of outcome, that too poses a problem. Here, the State proposes that the Court send this matter back so that more magic words can be sprinkled into the record—with those parties involved being fully cognizant that the nature of those words will determine whether or not Mr. Zolliecoffer's criminal conviction will be erased and the difficult process of a retrial commenced. This scenario is apt to produce skewed outcomes, even from well-meaning actors.[7] Moreover, there is a real concern present when the challenged actor—the prosecutor—is allowed to supplement his earlier, clearly deficient justifications. *See Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (asserting that, in *Batson* inquiry, the prosecutor must "stand or fall on the plausibility of the reasons he gives"—not, it would seem, the reasons he thinks up after remand.)

Finally, there is the issue of judicial and political legitimacy. In this case, the circuit court was confronted with a contemporaneous objection citing one of the more famous United States Supreme Court decisions of the last fifty years. As an elected official who was at that time hearing exclusively felony

[7] "[W]here there has been the passage of considerable time between the event and the attempt to reconstruction, there may be present an increased danger of perfectly innocent confabulation." *Gray v. State*, 562 A.2d 1278, 1284 (Md. 1989).

cases—and who is situated in a racially segregated community—it is frankly unacceptable that the circuit court was unable to take counsel's objection seriously and to make the findings which it was the court's "duty" to make. *Alanis*, 335 F.3d at 967. ("The Supreme Court has emphasized that the trial court has a *duty* to proceed to step three to answer the 'critical question' of whether the prosecutor's justifications for peremptory strikes are persuasive.")

The State proposes a "no harm, no foul" approach in its brief, urging this Court to remand the case instead of doing the difficult work of determining the merits of Mr. Zolliecoffer's claim. Simply put, this Court should not so easily dole out "second chances" when the circuit court appears to have squandered its opportunity to fairly resolve the controversy at issue. When the record permits it—as this case does—the Court should not reward shirking. It should exercise its authority scrupulously instead of rewarding judicial abdication by lower courts.

Accordingly, Mr. Zolliecoffer asks this Court to review the reasons stated in light of the record developed.

C. The record plainly belies the assertions of the prosecutor.

Here, the prosecutor's reasons are clearly anchored in readily reviewable facts. With respect to Juror #1, the prosecutor conceded that the strike was a "weaker" one and gave an explanation rooted in

record-based evidence—that there was a concern about her ability to understand. (60:45-46). As pointed out in the brief in chief, that argument is belied by record evidence indicating the juror's ample understanding of the process at hand. With respect to Juror #21, the prosecutor offered a confusing mélange of alleged justifications, each of which have been easily rebutted by other record-based evidence, as argued in the brief in chief. Thus, an evaluation of these strikes does not necessitate further proceedings. They should be clearly assessed and rejected as mere pretext.

The pretextual nature of these justifications is further exposed by the prosecutor's heavy reliance on race throughout the jury trial, including his eventual arguments to an all-white panel that they should set aside their "white guilt" coupled with his personal assurances that the panel of white jurors would not be "racist" for voting to convict a black man. (62:71; 62:74). The prosecutor appears to have purposefully excluded people of color from the panel in order to more effectively argue that Mr. Zolliecoffer was playing his "race cards" and therefore selfishly ruining "legitimate" claims of racial discrimination. (62:41). The Court should also take notice of his clearly disingenuous commentary when confronted with the *Batson* challenge. For example, the prosecutor pretended ignorance as to the legal merits of defense counsel's challenge and claimed not to know which jurors had been black. (60:45).

It is well-settled that "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478. In reviewing those circumstances—in conjunction with pretextual arguments belied by the record—the evidence of a *Batson* violation is clear and overwhelming. Accordingly, this Court should reverse and remand for a new trial.

CONCLUSION

Mr. Zolliecoffer therefore respectfully requests that this Court reverse and remand for a new trial due to an unreasonable and arbitrary denial of his request to substitute counsel of choice and to obtain a continuance. In addition, the record is clear that otherwise qualified jurors were removed from the jury based solely on their racial identity. Accordingly, a new trial is warranted.

Dated this 19th day of February, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,834 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of February, 2019.

Signed:

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Christopher P. August
Assistant State Public Defender