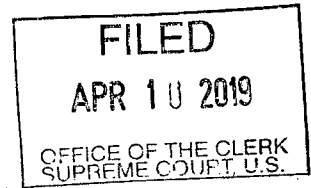


No. 18-9637

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT TRAVIS JENKINS — PETITIONER
(Your Name)

vs.

STATE OF KANSAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

KANSAS SUPREME COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBERT TRAVIS JENKINS #109454
(Your Name)

EDCF PO Box 311
(Address)

El Dorado, KS 67042
(City, State, Zip Code)

479-561-7698
(Phone Number)

QUESTION(S) PRESENTED

[1] On appeal, Jenkins contends the verdict should be set aside because the prosecutor intentionally excluded potential jurors during the selection process at the start of the trial based on their race. Seldom will the discriminatory actor admit the illicit purpose - the approach imposes shifting burdens of production of circumstantial evidence. The inquiry advances in three stages. If these stages and steps are incompletely executed, should a Batson violation be presumed? Jenkins being a U.S. Citizen is guaranteed Equal protection of the law. As the Purkett Court explained: "At that [third] stage, implausible or fantastic justification may (and probably will) be found to be pretexts for purposeful discrimination." 514 U.S. at 768. On appeal, Jenkins argued the district court's procedure regarding the strikes of J.C. and N.P. followed the form of the first two steps of the Batson procedure, yet completely failed to address the third step, requiring, as the minimal remedy, the case be remanded to the district court to perform the proper analysis under the full Batson framework. Generally, when a district court skips, collapses, or prematurely ends Batson's third step in making its ruling, the remedy is to remand the case back to the district court for proper analysis, as that largely credibility-based determination rest best with the district court. See Purkett v. Elem, 514 U.S. 765, 770, 115 S.Ct. 1769, 131 L. Ed. 2d 834 (1995) (Remanding case with direct Batson Steps); State v. Bolton, 271 Kan. 538, syl 114, 23 P.3d 824 (2001) ("Under the facts of this case, ... because there is no record to be reviewed by the appellate court, we are therefore required to remand for a proper Batson hearing.") Should the lower court followed the above case law instead of making a ruling based upon the poor record produced by the trial lawyers?

[2] Did the closing argument the prosecutor produced deprive Jenkins of a fair trial? The lower courts provided: "the comments were not directly tied to trial testimony unlike Doyle." "Since the argument was not linked to trial testimony, did the prosecutor inflame the jury resulting in a verdict based on something other than evidence? Did the prosecutor shift the burden of proof? The prosecutor is testifying, comparing Jenkins and Winters post arrest silence with Hashi and Jama. This testimony was not provided through cross-examination of Jenkins or Winters, so should it have been considered by the Jury? Jenkins and Winters invoked their rights to remain silent. They gave their side of the event at trial. The prosecutor saying that no one on the other side could explain until ten months later gave the Jury something other than trial testimony to hang their hats on. U.S. v. Cannon, 88 F.3d 1495 HN4: "An improper argument is less likely to have affected the verdict in a case when the evidence is overwhelming than in a case where the evidence is weak. There were a number of discrepancies across the states witnesses accounts. In a videotaped statement taken shortly after the events, Hashi outlined for investigators what happened. He identified his passport and a set of keys as among the items taken from him, although he later found them at home. He also at least implied the face of the cell phone was cracked before the robbery, an implication inconsistent with his earlier account. There is also no eye-witness testimony that Jenkins took anything from the person of Hashi. Therefore the evidence in this case is weak. Did the prosecutor lend credibility to his case during closing argument? U.S. v. Cannon HN4: ("A single mistep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated.")

[3] Should Battery have been a lesser included jury instruction?

[4] Did cumulative error deny Jenkins of a fair trial?

[5] Did the trial court lack Jurisdiction during the prosecution? Was the jurisdiction faked, made-up, or fabricated?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Bradley E. Ambrosier, district court Judge.

Russell Hasenbank, county attorney, Derek Schmidt, attorney general, for appellee.

Before GREEN, P. J., MALONE and ATCHESON, JJ.

The Supreme Court of the State of Kansas

LAWTON R. NUSS, chief Justice.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at No. 117,026; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the COURT OF APPEALS OF THE STATE OF KANSAS court appears at Appendix _____ to the petition and is

☐ reported at No. 117,026; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was March 1, 2019.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: Not informed possible, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including Not informed possible (date) on N/A (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, section (1), to the United States Constitution. "... nor shall any state deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws."

State of Kansas v. Sanford, 250 Kan. 592, 830 P.2d 1477 (1992) "In Kansas, all crimes are statutory and the elements necessary to constitute a crime must be gathered wholly from the statute. An information which omits one or more of the essential elements of the crimes it attempts to charge is jurisdictionally and fatally defective, and a conviction based on such an information must be reversed."

K.S.A. 22-3502
Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)

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K.S.A. 21-5413(a)(1)

State v. Lumbraera, 252 Kan. 54, 845 P.2d 609 (1992)

Sixth Amendment to the United States Constitution.

K.S.A. 22-4503(D)

STATEMENT OF THE CASE

Except as otherwise stated below, Jenkins incorporates the facts from the Court of Appeals' opinion pursuant to Rule 8.03(a)(4)(D). The Supreme Court of the State of Kansas gave no reason for its denial of Jenkins petition, but listed several cases beneath its order. Since it did not specify, Jenkins incorporates the opposing opinion of the Court of Appeals.

The Court of Appeals erred in finding remand for a new trial, or at a minimum, remand to conduct a proper proceeding pursuant to *Batson v. Kentucky*, was unnecessary when the district court proceedings were wholly inadequate, and included the state responding "Enlope" when asked to provide a race-neutral reason for striking juror. During jury selection, Jenkins objected pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) to the state's use of peremptory strikes against minority venirepeople. The proceedings following failed to comply with *Batson's* Framework for reviewing challenges and displayed confusion over *Batson* protections, eventually reaching a point where the state responded "Nope, just striking her. Just didn't like her." Would rather leave somebody else on the jury" when asked to provide a race-neutral reason for a strike. (R. XI, 162-63.) Judge Atcheson, writing for the panel majority (hereafter referred to as "the opinion"), concluded that because of the way the lawyers and district court handled the *Batson* challenges in this case, the proceedings were essentially unreviewable and remand for a new trial or to conduct a proper *Batson* proceeding was inappropriate. *State v. Jenkins*, No. 117,026, Slip Op. at 13, 2018 WL 2375788, at *7 (Kan. App. 2018) (Unpublished Opinion).

This Court should now grant review of this issue, and ultimately reverse the decision of the lower courts, for three reasons: 1) To provide clarity to district courts on how to resolve *Batson* challenges, as the record in this case shows is needed; 2) To clarify that when the record is insufficiently established, as the opinion found here, remand to perform a full *Batson* analysis is the proper remedy; and 3) To reverse Jenkins' conviction and remand for fair trial as the record in this case is at a minimum sufficient to show purposeful discrimination.

The statutory changes to the mental culpability requirements enacted during the 2012 recodification require revisiting this Court's holding in *State v. Frierson*, 298 Kan. 1005, 1018, 319 P.3d 515 (2014). The Court of Appeals erred in finding the prosecutor's impermissible Doyle violation and expression of personal opinion on the credibility of a witness during closing argument was harmless.

Cumulative error denied Jenkins a fair trial. Jenkins argues that even if no individual error required reversal, the cumulative effect of the errors required reversal. Jenkins submits this issue for this Court's review should this Court grant review on his other issues. "Cumulative trial errors, when considered collectively, may be so great as to require reversal of the defendant's conviction. The test is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial." *State v. Lumbra*, 252 Kan. 54, 57, 845 P.2d 609 (1992). Taken collectively, they show that Jenkins was not provided a fair trial as guaranteed by the Fourteenth Amendment.

Jenkins raises the issue of Jurisdiction before this Court. Jenkins challenges the jurisdiction over this matter. Jurisdiction over the count of aggravated robbery was not legal ab initio. Jurisdiction was fabricated the morning of trial, but this violated Jenkins right to Timely Notice to prepare for his defense, violating Jenkins right to Due Process. In Kansas, all crimes are statutory and the elements necessary to constitute a crime must be gathered wholly from the statute. An information which omits one or more of the essential elements of the crime it attempts to charge is jurisdictionally and fatally defective, and a conviction based on such an information must be reversed. Jenkins complaint, warrant, and amended complaint omitted did inflict bodily harm from the count of aggravated robbery. The basis of any criminal conviction begins with the Court having jurisdiction over the subject matter. Jurisdiction cannot be made up, faked, or fabricated. Jurisdiction cannot be obtained illegally. The first appearance, preliminary hearing, & several plea arrangements were all held without jurisdiction. The pre-trial hearing was held without jurisdiction. Jenkins was not aware that the did inflict bodily harm language was added to a second-amended complaint the morning of trial. Jenkins filed a motion to arrest judgment (continued)

(continued) with the amended complaint attached. No one mentioned a second-amended complaint at the hearing. The Judge said he reviewed the complaints and they were proper. The Court erred in it's ruling. After recently reviewing an obtained transcript, Jenkins pieces together the events for this court. Based on the facts of this case, it seem that the State sandbagged the defense indicating that it had planned to amend the complaint to drop a cocaine charge from the amended complaint. Nevertheless, the record would seem to indicate that the State never told the defense that it also planned to amend the aggravated robbery charge to add the "did inflict bodily harm" language to the second-amended complaint. The State is charged with seeing justice is done, yet it's duty is not to convict. The adversarial system is disserved when the State's attorney uses these kind of tactics. Substantial rights of the defendant was prejudiced. K.S.A. 22-4503 Entitlement of defendant to counsel (section D) to inform defendant fully of the crime charged. The sixth Amendment to the United States Constitution provides, in part: "...in all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation." In this case, the alleged victim received no medical treatment. With timely notice, the defense could have produced evidence that bodily harm was not inflicted. The state deprived Jenkins of Timely Notice to prepare for his defense. The state allowed Jenkins to post a 5,000\$ bail on a count of aggravated robbery that it held no jurisdiction over. Wherefore Jenkins asks this Court to reverse the trial courts decision and reverse his conviction or arrest the judgment.

REASONS FOR GRANTING THE PETITION

This Court should now grant review of this issue, and ultimately reverse the decision of the lower courts for several reasons, I give three reasons pertaining to the Batson issues; 1) To provide clarity to the lower courts on how to resolve Batson challenges, as the record in this case shows is needed; 2) To clarify that when the record is insufficiently established, as the opinion found here, remand to perform a full Batson analysis is the proper remedy; and 3) To reverse Jenkins conviction and remand for a fair trial as the record in this case at a minimum sufficient to show purposeful discrimination.

The Court should now grant review of the petition pertaining to the closing argument for three reasons; 1) An error in closing argument was established, and the State did not meet its burden to meet the constitutional harmless test. The lower court did not take up any of Jenkins' issues that were not met, so it should not have tipped the scales of justice. In this case, the burden could not be met by the State, and, in fact, the State's brief did not even assert an argument that the Doyle violation was harmless. Even further, the errors in this case went directly to the jury's ultimate determination, repeatedly telling the jurors to make credibility determinations based upon impermissible reasons. Because the prosecutor improperly commented upon Jenkins' post-arrest silence and injected his personal opinion of the State's evidence into the trial, errors that were not harmless, this Court should now grant review of this issue, reverse the decisions of the lower courts and reverse conviction and remand for new trial. 2) The lower courts found that during closing argument the prosecutor erroneously committed a free standing violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) by arguing Jenkins' testimony lacked credibility because it only occurred at trial "10 months later" when that pre-trial silence was the result of exercising his constitutional right to remain silent pursuant to *Miranda*. Likewise, the Court of Appeals also found the prosecutor impermissibly expressed his personal opinion on the veracity of the witness Dekow Omar. Because the lower courts ultimately erred in determining those errors were harmless, and did not properly hold the State to the burden of showing harmless-ness, this Court should grant review of this issue, reverse Jenkins' conviction, and remand for a fair trial. 3) The burden of proof was shifted in the closing argument when the prosecutor attacked Jenkins' credibility for exercising his right to remain silent. The prosecutor used the silence when there was no other opportunity to testify, but at trial. The court has held that after government agents advise suspects or witnesses of their right against self-incrimination, the prosecution cannot use their silence in declining to answer questions to undermine their testimony as a recent fabrication by arguing they had not disclosed their account earlier. Doing so is commonly called a *Doyle* violation in recognition of the United States Supreme Court case holding the tactic to be a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Since the lower courts erred in not granting Equal Protection of the Law, I ask this Court to reverse, and remand for a new trial.

The statutory changes to the mental culpability requirements enacted during the 2012 recodification require revisiting the lower courts' holding in *State v. Frierson*, 298 Kan. 1005, 1018, 319 P.3d 515 (2014). On appeal, Jenkins also argued the district court committed clear error in failing to instruct the jury on simple battery as a lesser-included crime of an aggravated robbery in which the defendant inflicted bodily harm. The lower courts rejected the argument. This Court should now grant review of the issue because, as discussed above, K.S.A. 21-5202 requires reevaluation of the pre-recodification decision in *Frierson*, and compels a new conclusion. Jenkins questions the district court's jurisdiction over the proceedings. Jurisdiction cannot be faked, fabricated, or made up. Since jurisdiction can be challenged at any time, Jenkins asks this Court to review this issue, since appointed counsel refused to raise the issue. (continued →)

(continued →) Jenkins filed a pro se Motion to Arrest Judgment because the complaint provided to him (upon request) by the district court clerk omitted the aggravated factor "did inflict bodily harm." In Kansas, all crimes are statutory and the elements necessary to constitute a crime must be gathered wholly from the statute. An information which omits one or more of the essential elements of the crime it attempts to charge is jurisdictionally and fatally defective, and a conviction based on such an information must be reversed. *State v. Sanford*, 250 Kan. 592. The trial court said the complaint was proper and denied the motion. After receiving the trial transcripts, Jenkins realized that the state sandbagged the defense, indicating that it planned to amend the amended complaint to drop the cocaine charge. Nevertheless, the record indicates that the state never told the defense that it also intended to amend the aggravated robbery charge to add 'did inflict bodily harm' language to the second amended complaint. This was done the morning of trial. Our adversarial system is disserved when the state's attorney uses these kind of tactics. Jenkins was not afforded 'Timely Notice' to prepare for a defense to did inflict bodily harm, violating his right to Due Process. The state can amend a verdict anytime as long as no new crime is charged & substantial rights of the defendant were not prejudiced. In this case, the alleged victim received no medical treatment. If Jenkins had notice to prepare against the element of did inflict bodily harm, that evidence could have been provided to the jury. Did the state fabricate its jurisdiction seeing that the complaint was jurisdictionally defective ab initio, Jenkins argues it is and ask this Court to reverse and void conviction.

Cumulative error denied Jenkins a fair trial. Jenkins argues that even if no individual error required reversal, the cumulative effects of the errors required reversal. Jenkins submits this issue for this Court's review should this Court not grant review on his other issues standing alone. Cumulative trial errors, when considered collectively, may be so great as to require reversal of the defendant's conviction. Taken collectively, they show that Jenkins was not provided a fair trial as guaranteed by the Fourteenth Amendment. Please reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, Jenkins respectfully requests this Court grant review of his case and reverse the opinion of the lower courts. Jenkins prays for review. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert T. Jenkins #109454
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Date: 5-20-19