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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to Charleston County
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge
Appellate Case No. 2023-000755

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CHRISTOPHER CAMPBELL,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF ISSUE ON CERTIORARI

"Whether the PCR court erred finding defense counsel was not ineffective for failure to challenge the composition of the jury where there were four black jurors used for jury selection and the state used two of their three peremptory strikes to strike black jurors?"

## COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge somehow err by determining Campbell failed to meet his burden of establishing defense counsel was constitutionally ineffective for failing to raise a Batson-based challenge to the selected jury when Campbell neither demonstrated defense counsel's performance was objectively unreasonable under the circumstances involved nor showed there was a reasonable likelihood the result of the trial would have been different but for defense counsel's performance?

## STATEMENT OF THE CASE

In May of 2011, Petitioner Christopher Campbell was arrested following an investigation into the armed robbery of a restaurant located in Charleston, South Carolina. In August of 2011, the Charleston County Grand Jury indicted Campbell for armed robbery and possession of a firearm during the commission of a violent crime. On October 22, 2014, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable W. Jeffrey Young, circuit court judge, presiding. At the conclusion of trial, the jury convicted Campbell as indicted. Following the verdict, the trial judge sentenced Campbell to concurrent terms of imprisonment of eighteen years for armed robbery and five years for possession of a firearm during the commission of a violent crime. Campbell then timely filed and perfected an appeal.

On appeal, the Court of Appeals—following briefing—issued an unpublished opinion unanimously affirming Campbell's convictions.[1] State v. Campbell, Op. No. 2016-UP-367 (S.C. Ct. App. filed July 20, 2016). Thereafter, Campbell petitioned the Court of Appeals for rehearing, and his petition was denied. Campbell then filed a petition for a writ of certiorari in the Supreme Court, and that petition was granted. However, following briefing and oral argument, the Supreme Court dismissed the writ of certiorari as improvidently granted.[2] State v. Campbell, Op. No. 2019-MO-029 (S.C. Sup. Ct. filed June 12, 2019). On June 12, 2019, remittitur was issued.

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[1] The records from the appellate proceedings in the Court of Appeals are presently available through the South Carolina Appellate Public Index. Appellate Records for State v. Christopher D. Campbell, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=58011.

[2] The records from the appellate proceedings in the Supreme Court are presently available through the South Carolina Appellate Public Index. Appellate Records for State v. Christopher D. Campbell, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=63350.

Subsequent to the issuance of the remittitur, Campbell timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing. Following that, Campbell—through counsel—filed several amendments to the PCR application raising additional grounds for relief. On April 8, 2022, an evidentiary hearing was commenced in the Charleston County Court of Common Pleas with the Honorable R. Ferrell Cothran, Jr., circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement. Thereafter, through an order filed on April 25, 2023, the PCR judge denied and dismissed Campbell's PCR application. Campbell then timely filed a notice of appeal.

## STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The PCR judge correctly determined Campbell failed to meet his burden of establishing defense counsel was constitutionally ineffective for failing to raise a Batson-based challenge to the selected jury because Campbell neither demonstrated defense counsel's performance was objectively unreasonable under the circumstances involved nor showed there was a reasonable likelihood the result of the trial would have been different but for defense counsel's performance.**

### Relevant Facts

On the morning of May 4, 2011, Christopher Riley, a shift leader at the Firehouse Subs restaurant located on King Street in Charleston arrived for work some time before 8:00 a.m. and began preparing the restaurant to open for business that day. (App'x pp. 126-127; pp. 129-130). Shortly thereafter, Leslie Green, a meat slicer at the restaurant, arrived for work at approximately 8:15 a.m. to 8:20 a.m. and began proceeding towards the back of the store to begin his shift.[3] (App'x pp. 132-133).

Seconds later, a man wearing a hoodie and sunglasses entered the restaurant and began walked towards Riley. (App'x p. 133; p. 136). In response, Riley tried to tell the man the restaurant was still closed, but the man ignored him, brushed past Green, pulled out a loaded .38-caliber revolver, pointed it at Riley's head, and ordered him to "let [him] get it." (App'x pp. 133-134; pp. 138-139; pp. 162-163). Frightened and in shock, Riley went to the back of the restaurant at gunpoint and began to access the safe to collect the restaurant's money for the robber. (App'x p. 134).

While Riley was doing so, the robber stood over him with the gun while leaving his back completely turned to Green for roughly fifteen to twenty seconds. (App'x p. 134). The robber then turned to Green and, with a smile on his face, asked Green to come over to where he was

[3] After arriving for work that morning, Riley had left the front door unlocked despite the fact the restaurant was not yet open for business so Green would be able to get into the restaurant when he arrived for his shift. (App'x pp. 131-132).

standing and get into the corner. (App'x pp. 134-135; p. 144; p. 163). After that, the robber had Riley place the restaurant's money into a book bag he had brought into the restaurant with him and then rapidly fled from the scene with approximately $1,400 in cash. (App'x pp. 135-136; p. 140).

Once the robber was gone, Riley immediately called 911 to report the crime, and officers from the Charleston Police Department quickly headed to the restaurant. (App'x p. 104; p. 106; p. 140). Upon arriving, the officers spoke with Riley, who appeared to be extremely shaken-up, and Green, who appeared to be calm and collected, and obtained a description of the suspect. (App'x pp. 107-108; pp. 112-113; pp. 136-138; p. 195). Furthermore, the officers reviewed the surveillance footage of the robbery, and several fingerprints were collected from the crime scene, including from the handles of the double-door entrance into the restaurant. (App'x pp. 97-98; p. 203; p. 248; pp. 253-257; p. 259). However, the officers were unable to track down the robber that day. (App'x pp. 106-107).

On the following day, Detective Richard Kennedy decided to speak with Green because he believed Green appeared to know the robber based on the suspicious manner in which the two interacted with one another during the robbery. (App'x p. 197; pp. 199-200; pp. 203-205). The detective then met with Green at the police department, and Green denied knowing who committed the robbery. (App'x p. 165; p. 197).

Unconvinced by Green's denial, Detective Kennedy went to the restaurant the next day to again speak with Green, and Green indicated he wanted to talk with the detective somewhere else because he was uncomfortable speaking at that location. (App'x p. 166; p. 198; p. 208). The two then returned to the police department, and Detective Kennedy again interviewed Green. (App'x p. 166; p. 198). During that interview, Green acknowledged knowing the

identity of the robber and initially claimed the robber was an individual called "L." (App'x p. 166; pp. 199-200). However, as the interview progressed, Green eventually admitted the robber was actually his cousin, Campbell. (App'x p. 158; p. 167; p. 189; p. 199; p. 201).

Based on Green's admissions, Detective Kennedy arrested Green and also obtained an arrest warrant for Campbell. (App'x p. 157; pp. 201-202). Later that day, officers arrested Campbell, who matched the physical description of the robber, at his home. (App'x p. 202). They then obtained a search warrant for Campbell's residence and, during the ensuing search, discovered a pair of sneakers consistent with the description of the sneakers worn by the robber. (App'x pp. 202-203; pp. 215-216; p. 230).

After that, Detective Lamar Williams of the Charleston Police Department advised Campbell of his rights and interviewed Campbell about the robbery. (App'x p. 213; pp. 216-218). At the outset of the interview, the detective asked Campbell if he was familiar with the Firehouse Subs restaurant located on King Street, and Campbell denied knowing anything about that particular restaurant. (App'x p. 218). Detective Williams then asked Campbell what he did on the morning of the robbery, and Campbell claimed he stayed home because it was his birthday. (App'x p. 220). As the interview continued, Detective Williams brought up the subject of Green, and Campbell quickly admitted he dropped Green off at the Firehouse Subs restaurant shortly before the robbery in direct contradiction of his earlier disavowal of having any knowledge regarding that restaurant. (App'x pp. 221-222; p. 227). However, Campbell insisted he returned home after dropping Green off and denied committing the robbery. (App'x p. 225).

As the investigation into the robbery continued, Anna Kerstein, a latent print examiner for the Charleston Police Department and an expert in fingerprint analysis, analyzed the

fingerprints that had been collected at the crime scene shortly after the incident. (App'x pp. 269-270; p. 272; p. 279). Through that analysis, Kerstein determined Campbell's left thumb print definitively matched the fingerprints collected from the right exterior door handle and left exterior door handle of the restaurant following the robbery. (App'x pp. 279-281).

Subsequently, Campbell was indicted for armed robbery and possession of a firearm during the commission of a violent crime, and he elected to proceed forward to trial. (App'x pp. 9-10; pp. 521-524). At the outset of his trial, a jury of eleven white jurors and one black juror was selected from the available jury pool.[4] (App'x pp. 22-30; p. 409). Notably, during the selection process, the solicitor exercised two peremptory strikes on black prospective jurors—Juror # 393 and Juror # 139—and defense counsel exercised five peremptory strikes on white prospective jurors along with one on a black prospective juror—Juror # 83. (App'x pp. 22-29; p. 409). Additionally, two alternate jurors—both white—were selected after the solicitor exercised one peremptory strike on a white prospective juror and defense counsel exercised no peremptory strikes. (App'x pp. 29-30; p. 409). Once that jury had been selected, the trial judge promptly afforded the parties an opportunity to raise any objections they may have had concerning the selection process, and none were raised by either party. (App'x p. 30). The trial then continued on, and, at its conclusion, the selected jury unanimously convicted Campbell of both indicted offenses. (App'x p. 397).

Subsequent to that and following an unsuccessful appeal, Campbell sought relief through the filing of a PCR application. (App'x pp. 415-426; pp. 433-435). Amongst the allegations raised, Campbell—through an amendment submitted by PCR counsel—alleged defense counsel

[4] Regarding the make-up of that jury pool, it included fifty prospective jurors in total, and forty were white and ten were black. (App'x pp. 409-411).

was constitutionally ineffective for failing to object to the selected jury based on a belief the State exercised its peremptory strikes in a racially-discriminatory manner. (App'x p. 433).

During the ensuing evidentiary hearing conducted on the matter, Campbell's defense counsel, who had approximately two decades of experience handling criminal cases, testified about his representation of Campbell. (App'x p. 465). As part of his testimony, defense counsel recounted the solicitor exercised two peremptory strikes on black prospective jurors, and he indicated he did not personally know why the solicitor exercised either of those strikes. (App'x p. 444; p. 447). However, he explained he exercised a strike on one black prospective juror—Juror # 83—for multiple reasons, including based on her employment and donation history. (App'x p. 445). Moreover, defense counsel indicated he likely would have exercised a peremptory strike on another black prospective juror—Juror # 393—had the solicitor not first exercised a strike on him because: (1) that juror had served on a jury in a trial conducted earlier that same week that had ended in conviction; (2) he intended to strike all the jurors that had served on the earlier jury; and (3) he potentially would have had his own Batson[5] problem if he did not strike Juror # 393 since he had already struck similarly-situated white prospective jurors for the same reason. (App'x pp. 446-447). Likewise, defense counsel noted Juror # 393 was a cook just like the victim in Campbell's case, which he asserted was another compelling reason to strike him. (App'x p. 447). Beyond that, defense counsel confirmed he was aware of the Batson decision and—although he could no longer remember specifically—assumed he did not raise a challenge pursuant to that decision in Campbell's case because he was sufficiently satisfied with the jury selected, which was not an "all-white" one, such that he did not want to risk potentially leading to a "reshuffling" of it by objecting. (App'x p. 448; pp. 470-471; pp. 483-484).

[5] Batson v. Kentucky, 476 U.S. 79 (1986).

In addition to that, Campbell—the only other witness to testify during the evidentiary hearing—offered testimony on his own behalf. (App'x p. 479). Through it, Campbell claimed he would have personally tried to get another "jury panel" if he could. (App'x p. 479). Additionally, he noted only one black juror was seated on the jury that decided his case, and he lamented that juror was "not of [his] social or economical background." (App'x p. 479). Furthermore, he asserted he believed Juror # 393, the first black juror struck by the solicitor, "would have shown [him] fairness" if seated on the jury, and he conceded he did not remember much about Juror # 139, the second black juror struck by the solicitor. (App'x p. 480).

Upon considering the matter, the PCR judge issued an order denying relief. (App'x pp. 488-520). In doing so, the PCR judge concluded Campbell failed to meet his burden of showing defense counsel's failure to raise an objection to the jury was deficient and likewise failed to show he was prejudiced by defense counsel's actions. (App'x p. 500; pp. 504-506).

**Law Applicable to Ineffective Assistance of Trial Counsel Claims**

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). Pursuant to that right, the defendant is entitled to effective assistance of trial counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). However, that does not mean entitlement to perfect or mistake-free representation. Burt v. Titlow, 571 U.S. 12, 24 (2013). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Meanwhile, trial counsel's assistance is considered constitutionally ineffective only when it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of trial counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant must establish: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for trial counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether trial counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Harrington v. Richter, 562 U.S. 86, 110 (2011) (instructing the proper analysis "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). To establish deficiency, the applicant must demonstrate trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Thus, trial counsel's performance will be considered deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105.

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. For that

burden to be met, trial counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the trial would have been different but for trial counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). Moreover, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

**Law Applicable to Claims of Discrimination in the Jury Selection Process**

The constitutional guarantee of equal protection precludes the striking of a prospective juror for a discriminatory reason, such as race. State v. Inman, 409 S.C. 19, 25, 760 S.E.2d 105 (2014). By doing so, the equal protection guarantee protects a defendant's right to a fair trial, ensures prospective jurors will not be excluded from jury service for improper discriminatory reasons, and preserves public confidence in the fairness of the justice system. State v. Weatherall, 431 S.C. 485, 494, 848 S.E.2d 338, 343 (Ct. App. 2020); see also Powers v. Ohio, 499 U.S. 400, 410-411 (1991) ("Race cannot be a proxy for determining juror bias or competence.").

When racial discrimination in the exercise of a peremptory strike is alleged, the trial judge must employ a three-step analysis to evaluate the claim. Snyder v. Louisiana, 552 U.S. 472, 476-477 (2008). First, pursuant to the applicable analysis, the opponent of the strike must make out a prima facie case of racial discrimination by showing "the totality of the relevant facts give rise to an inference of discriminatory purpose" for the exercise of a peremptory strike. Batson v. Kentucky, 476 U.S. 79, 93-94 (1986). Second, if such a showing is made, the proponent of the strike must be afforded an opportunity to offer a race-neutral reason for it. Snyder, 552 U.S. at 476-477; see Purkett v. Elem, 514 U.S. 765, 767-768 (1995) ("The second

step of this process does not demand an explanation that is persuasive, or even plausible. . . . What it means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."). Third and finally, if a race-neutral reason is tendered, the trial judge must determine from the totality of the circumstances whether the opponent of the strike *proved* purposeful discrimination occurred. Snyder, 552 U.S. at 476-477.

Significantly, "[t]he burden of persuading the court that a Batson violation has occurred remains at all times on *the opponent of the strike*." State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007) (emphasis added); see Davis v. Ayala, 576 U.S. 257 (2015) (instructing "[t]he opponent of the strike bears the burden of persuasion regarding racial motivation"). Moreover, "[d]iscrimination in the selection of a jury must be proved and it *cannot be presumed*." State v. Stallings, 253 S.C. 451, 454, 171 S.E.2d 588, 590 (1969) (emphasis added).

**Application of the Relevant Law to Campbell's Case**

Through his petition for a writ of certiorari, Campbell contends the PCR judge erred by refusing to grant relief based on defense counsel's failure to raise a specific Batson-based challenge to the two peremptory strikes the solicitor exercised on black prospective jurors. In raising such a contention, Campbell readily concedes the record in his case—including the record from the PCR evidentiary hearing—is entirely devoid of any evidence concerning the solicitor's actual reasons for striking the two black prospective jurors he struck. Nevertheless, based purely on the fact two of the three peremptory strikes exercised by the solicitor were exercised on black jurors, Campbell maintains the solicitor's peremptory strikes purportedly "appear, on their face, to have been racially motivated" and, therefore, argues defense counsel was deficient for failing to raise a Batson-based challenge to those two strikes. Beyond that, Campbell maintains he was prejudiced as a result of defense counsel's deficient performance in

that regard, and he points to the fact the jury that decided his case contained no members of the "racial and gender group" to which he belonged as the apparent support for that claim. Significantly, contrary to Campbell's current contention, the PCR judge correctly declined to grant relief in Campbell's case because Campbell failed to meet his burden of establishing both defense counsel's performance was deficient and there was a reasonable likelihood the result of the proceedings would have been different but for defense counsel's alleged deficiency.

Turning to the deficiency prong of the analysis, Campbell wholly failed to demonstrate defense counsel's failure to raise a Batson-based challenge to the jury constituted deficient performance. Demonstrating that fact, "jury selection is a process that inherently falls within the expertise and experience of trial counsel." Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). With that in mind, Campbell's highly-experienced defense counsel—who was unquestionably aware of the Batson decision based on his own concerns about whether *his* peremptory strikes could withstand a challenge from the solicitor—made an apparent judgment-based decision not to challenge the selected jury pursuant to Batson due to his satisfaction with the jury as selected coupled with his understanding a new selection process might not necessarily yield a more favorable group of jurors for the defense. See Flanagan v. State, 712 N.W.2d 602, 609 (N.D. 2006) (recognizing "counsel may have been satisfied that the selected jury was a fair cross section of the community and the defendant's chances for a favorable outcome would not improve with any changes and may instead lessen"). And, in making that apparent judgment-based decision, defense counsel was guided in part by the fact he intended to strike one of the two prospective black jurors the solicitor struck in the event the solicitor had not done so. Cf. State v. Alarcon-Chavez, 893 N.W.2d 706, 715 (Neb. 2017) (concluding defense counsel's decision not to raise a Batson challenge was reasonable when defense counsel intended to strike

the juror if the prosecutor had not first done so). Under such circumstances, the PCR judge correctly concluded defense counsel's performance regarding the selection of the jury was not shown to be deficient, and Campbell—who appears to have based his claim to the contrary on nothing more than the fact the solicitor exercised two of the three peremptory strikes he used on black prospective jurors—has not even attempted to identify anything that would or could warrant a differing conclusion. See Wilcher v. State, 863 So. 2d 719, 756 (Miss. 2003) ("[T]he decision to make a Batson challenge falls within counsel's trial strategy and the wide latitude given to him."); see also Cullen v. Pinholster, 563 U.S. 170, 195-196 (2011) (explaining trial counsel is entitled to constitutionally-protected independence and wide latitude in making tactical decisions and instructing there will rarely be just one technique or approach that would be considered constitutionally reasonable for trial counsel to undertake in representing a defendant); Strickland, 466 U.S. at 688-689 (recognizing there typically exists a "range of legitimate decisions regarding how best to represent a criminal defendant" and instructing defense counsel must have "wide latitude" in making tactical decisions); cf. State v. Blakeney, 531 S.E.2d 799, 815 (N.C. 2000) ("In short, defendant has not demonstrated that his counsel was ineffective by failing to make a Batson objection. Rather, defendant has shown only that he is black and that the State peremptorily struck one black prospective juror. This is insufficient to establish a prima facie case of racial discrimination." (citation, internal quotations, and brackets omitted)); Commonwealth v. Reid, 99 A.3d 470, 487 (Pa. 2014) ("The fact that the prosecutor struck more African Americans than Caucasians, in and of itself, is insufficient to demonstrate purposeful discrimination when considering the totality of the circumstances."); State v. Waitus, 224 S.C. 12, 20, 77 S.E.2d 256, 259 (1953) (explaining the mere absence of black jurors from a

particular petit jury "is insufficient, in and of itself, to show discrimination against the defendant in the selection of the jury").

Meanwhile, turning to prejudice prong, Campbell likewise wholly failed to establish there was a reasonable likelihood of a different outcome in his case as was necessary to warrant a grant of relief. Supporting such a conclusion, Campbell did not present any testimony from the solicitor or other similar evidence to demonstrate a Batson-based challenge would have been successful if one had been raised in his case despite bearing the burden to do so. Cf. Pierce v. State, 686 S.E.2d 656, 662 (Ga. 2009) ("[I]n the context of an ineffective assistance of counsel claim, it was Pierce's burden, not the State's, to ensure that the trial court had sufficient information to determine the merit of a Batson challenge."). Instead, Campbell simply pointed to the fact the solicitor—who did *not* strike an equal number of black prospective jurors—exercised two of his three peremptory strikes on black prospective jurors for some unknown reasons and, based on that, speculates the unknown reasons for those strikes must have been discriminatory in nature in the absence of anything to the contrary. But the mere fact the solicitor exercised peremptory strikes on black prospective jurors was not proof of discrimination. See Moorer v. State, 244 S.C. 102, 110, 135 S.E.2d 713, 716 (1964) ("Discrimination in the selection of a jury must be proved; it cannot be presumed."); cf. State v. Quick, 462 S.E.2d 186, 189 (N.C. 1995) ("[T]he prosecutor used only two of his peremptory challenges. The mere fact that he used them against two black venirepersons in this case does not establish a pattern of strikes or show a disproportionate number of peremptory challenges against black jurors. Further, the State's acceptance rate of blacks was fifty percent because the prosecutor accepted two of the four blacks from the original panel of twelve."). And, without any other evidence, the PCR judge was left with no way of knowing whether the solicitor

could—like defense counsel did for the strike he used on a black prospective juror—provide race-neutral reasons for his strikes and with no way to determine whether the totality of the circumstances demonstrated purposeful discrimination despite the reasons offered. See Turner v. State, 953 So. 2d 1063, 1069 (Miss. 2007) ("To overcome the presumption of competence, [the defendant] is required to produce more than mere speculation of a Batson violation."); cf. Pierce, 686 S.E.2d at 662-663 ("Pierce did not call the prosecutors in her case to testify at the motion for new trial hearing, nor did she seek their notes or other evidence from voir dire. The trial court could have requested such evidence on its own, but it was not required to do so. Absent this evidence, or at least the State's response to Pierce's attempts to gather this evidence, the trial court had no way of knowing whether the State could produce race-neutral explanations for whatever strikes it made and, if so, of evaluating their credibility so that it could decide, at step three of the Batson analysis, whether there was purposeful racial discrimination in the selection of Pierce's jury. Pierce's mere speculation that the State had no such explanations, or that the trial court would have found the State's race-neutral explanations to be pretextual, is insufficient to establish a meritorious Batson claim. Accordingly, the trial court did not err in rejecting Pierce's ineffective assistance of counsel claims and denying her motion for new trial." (citations omitted)). Under such circumstances, Campbell's rank speculation was simply not sufficient to establish a Batson-based challenge would have been meritorious in his case, and, thus, he failed to meet his burden of demonstrating a reasonable likelihood of a different outcome as was necessary to demonstrate the requisite prejudice for a grant of relief. See Grant v. State, 757 S.E.2d 831, 836-837 (Ga. 2014) ("The burden of ensuring that the trial court had sufficient information before it to rule on a Batson challenge rested on [the] appellant because the challenge is being raised in the context of a claim of ineffectiveness."); see also Stokes v. State,

715 S.E.2d 81, 84 (Ga. 2011) (instructing more than a defendant's own speculation is necessary to support a claim trial counsel was constitutionally ineffective for failing to make a Batson motion); cf. Magazine v. State, 361 S.C. 610, 618606 S.E.2d 761, 765 (concluding the PCR judge erred by granting relief because Magazine failed to show defense counsel's deficient performance during the jury selection process "resulted in a violation of [Magazine]'s right to a trial by a competent and impartial jury"), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Accordingly, since Campbell wholly failed to meet his burden of establishing both deficiency and prejudice, Campbell's PCR application was properly rejected, and the PCR judge's decision to do so was neither unsupported by the record nor legally erroneous. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (instructing a PCR judge's factual finding will be upheld if supported by any evidence and a post-conviction relief's judge's decisions will only be reversed where controlled by an error of law); cf. Grant, 757 S.E.2d at 837 (concluding Grant could not establish trial counsel was constitutionally ineffective for failing to raise a Batson challenge because Grant "failed to present to the trial court evidence of any kind pertaining to the State's use of its peremptory strikes" and further explaining "[Grant]'s conjecture, based solely on the ultimate composition of the jury, is, by itself, insufficient evidence of purposeful discriminatory intent"). Campbell's petition for a writ of certiorari should be denied.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 8, 2024