IN THE SOUTH CAROLINA COURT OF APPEALS

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

AKEVIUS DAYQUAN LINDSEY, SCDC#396525

Appellant.

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SC Court of Appeals

Appellate Case No. 2025-000317

(Greenville County Case No. 2023-GS-23-04555)

APPELLANT'S PRO SE SUPPLEMENTAL BRIEF

IN RESPONSE TO APPELLATE COUNSEL'S ANDERS BRIEF

INTRODUCTION

Appellant Akevius Lindsey, proceeding pro se, submits this supplemental brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and South Carolina Appellate Court Rule 203(b)(2), to accompany appellate counsel's *Anders* brief and to raise one additional issue apparent on the face of the record that was not addressed in that brief. The issue raised below, the seating of a juror the defense peremptorily struck and whom the Clerk of Court confirmed on the record as excused, independently warrants full merits briefing and reversal under controlling South Carolina authority. It is not merely arguable. It is an error that, under South Carolina law, requires reversal without any showing of prejudice.

STATEMENT OF THE ADDITIONAL ISSUE

Whether the trial court committed reversible error, without any showing of prejudice required, by seating Juror No. 277, Lori A. Palmieri, on Appellant's jury after defense counsel exercised a peremptory strike to excuse her, the excusal was confirmed on the record by the Clerk of Court, and the official Jury Strike Sheet reflects both the defense strike and her seating as the fifth juror.

STATEMENT OF FACTS RELEVANT TO THIS ISSUE

During jury selection in this matter, before the Honorable G. D. Morgan, Jr., the following exchange occurred on the record as to prospective Juror No. 277, Lori A. Palmieri:

> *"277, Lori Palmieri. What says the State? SOLICITOR SCOTT: Please seat the juror. CLERK OF COURT: What says defense? ATTORNEY MESSER: Please excuse the juror. CLERK OF COURT: Have a seat. You've been excused." (Tr. pp. 118-119, 2-6.)*

The Clerk of Court confirmed on the record, in open court, that Juror Palmieri had been struck by the defense and excused. The Clerk's statement, "You've been excused", is unambiguous. It is the standard confirmation used to inform a prospective juror that a peremptory strike has been honored. Nothing in the transcript that follows suggests this confirmation was corrected, reversed, or superseded by any ruling. No party made a *Batson* or *J.E.B.* challenge to the strike. The trial court made no ruling overruling or

reconsidering the strike. The record is silent on any basis for Palmieri's seating.

Notwithstanding this unambiguous record, the contemporaneous Jury Strike Sheet prepared during the same proceeding lists Juror No. 12 on that sheet – Lori A. Palmieri – as struck by the defense (the "DFT" column is marked) and simultaneously marks her as "SEATED #5." The same official document therefore reflects that the defense exercised its strike and that the struck juror was nonetheless empaneled as the fifth member of the jury that heard and determined Appellant's guilt (Tr. P.2, number 12. Lori A. Palmieri, Seated #5).

This discrepancy, a juror confirmed excused on the transcript who nonetheless appears as a seated juror on the official strike sheet, is visible only by cross-referencing the two documents. Trial counsel had no apparent opportunity to observe this error in real time and lodge a contemporaneous objection. No explanation for Palmieri's presence on the jury appears anywhere in the record.

ARGUMENT

I. UNDER CONTROLLING SOUTH CAROLINA AUTHORITY, NO SHOWING OF PREJUDICE IS REQUIRED WHERE THE RECORD DEMONSTRATES DENIAL OR IMPAIRMENT OF THE RIGHT TO A PEREMPTORY CHALLENGE.

The South Carolina Supreme Court has held without qualification: "no showing of actual prejudice is required to find reversible error for the denial or impairment of

the right to a peremptory challenge." *State v. Short*, 333 S.C. 473, 511 S.E.2d 358, ~~358~~ (1999).

The Court of Appeals applied *Short* directly on materially indistinguishable facts in *State v. Cochran*, ~~371~~ S.C. ~~168~~, ~~638~~ S.E.2d ~~41~~ (Ct. App. 2006). In *Cochran*, the court held that "because jurors properly struck were seated on the second jury, which found Appellants guilty, the error is reversible." *Id.* The Court of Appeals did not require any showing of how those jurors' presence affected the verdict. The fact of seating a struck juror was itself the reversible error.

This case is stronger than *Cochran* on every relevant fact. In *Cochran*, the defendant had to establish that the court improperly honored a *Batson* challenge to the strike, meaning there was at least a dispute on the record about whether the strike was valid. Here, there is no dispute. Defense counsel made the strike, the State did not challenge it, the trial court made no ruling overruling it, and the Clerk of Court confirmed the excusal in open court. Palmieri's presence on the jury cannot be explained by any ruling in the record. There is nothing to evaluate, weigh, or balance. The record shows a struck juror was seated. Under *Short* and *Cochran*, that is reversible error.

The applicable standard is equally clear from *State v. Franklin*, 318 S.C. 47, 52-53, 456 S.E.2d 357, 359-360 (1995), which recognized that seating an improperly struck juror impairs the striking party's rights and constitutes reversible error. Appellant need not show that Palmieri's participation in deliberations affected the verdict. The denial of his right to have the strike honored is the harm.

II. THE TRANSCRIPT CONFIRMS THE EXCUSAL. THE STRIKE SHEET CONFIRMS THE ERROR.

The State may contend that the Clerk's statement, "Have a seat. You've been excused", is ambiguous, and that "Have a seat" could mean "take your seat on the jury." This reading is untenable for three independent reasons.

First, the plain meaning of the Clerk's words resolves any ambiguity against the State. "Have a seat" in the context of a peremptory challenge response means "sit down while we continue", the standard direction to a prospective juror waiting in the gallery while the selection process proceeds. "You've been excused" is the operative legal statement. That phrase is not ambiguous. In South Carolina practice, it is the standard words of dismissal from the venire panel. It does not mean "take your seat on the jury." It means the strike has been accepted and the juror is released from service.

Second, even if the transcript alone were considered ambiguous, the official Jury Strike Sheet resolves the ambiguity. That document is not oral courtroom colloquy subject to transcription error or speaker misidentification. It is a written official record prepared contemporaneously with jury selection. It marks Lori A. Palmieri in the "DFT" column, she was struck by the defense. It also marks her as "SEATED #5." There is no innocent explanation for how both entries appear on the same line of the same official document. The only conclusion that fits both entries is that the struck juror was improperly retained.

Third, the State bears the burden of establishing a valid waiver of the defendant's rights. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (waiver of fundamental rights cannot be presumed from a silent record). If the record is ambiguous, that ambiguity resolves in Appellant's favor — not the State's. The State cannot rely on an unclear transcript to sustain a jury panel that includes a juror the defense struck and was told had been excused.

III. THE ERROR IS STRUCTURAL AND NOT SUBJECT TO HARMLESS-ERROR REVIEW.

Even apart from South Carolina's no-prejudice rule, this error independently defies harmless-error analysis. A structural error is one that affects "the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). The composition of the jury is that framework. When the jury includes someone the defendant had the right to exclude and was told had been excluded, the trial proceeds before a tribunal the defendant was never given the opportunity to accept.

In *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993), the Supreme Court held that structural errors are not amenable to harmless-error measurement because their effect on the verdict is, by its nature, unknowable. No court can reconstruct what a differently-composed jury, the jury Appellant was entitled to, would have concluded in deliberations that no one observed.

In *Weaver v. Massachusetts*, 582 U.S. 286 (2017), the Supreme Court further refined this framework, holding that where a structural error is neither preserved nor raised on direct review, but is instead raised later through an ineffective-assistance-of-counsel claim, the defendant must ordinarily demonstrate *Strickland* prejudice to obtain relief — except where the error is of a kind that "always results in fundamental unfairness," in which case prejudice may be presumed. *Id.* at 295-300. This case does not present the posture *Weaver* addressed: Appellant raises this issue directly, in a pro se filing responding to appellate counsel's *Anders* brief on direct appeal, not through a later, collateral ineffective-assistance claim. But even measured against *Weaver*'s more demanding framework, the seating of a struck juror falls within the category of error that "always results in fundamental unfairness," because its effect on the verdict is, by its nature, unknowable in the same sense *Sullivan* and *Fulminante* describe. That irreducible uncertainty is precisely what justifies the automatic-reversal rule South Carolina has already adopted, without any *Weaver*-style prejudice showing, in *Short* and *Cochran*.

IV. THE ISSUE IS PROPERLY BEFORE THIS COURT, AND ITS PRESENCE DEFEATS ANY FINDING THAT THE APPEAL IS WHOLLY FRIVOLOUS.

A. No Contemporaneous Objection Was Possible Because the Error Is Only Visible by Cross-Referencing the Transcript Against the Strike Sheet.

South Carolina generally requires a contemporaneous objection to preserve an issue for appellate review. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). That requirement cannot sensibly apply here. The discrepancy at issue, a juror confirmed excused on the transcript who appears seated on the Jury Strike Sheet, is not visible from the courtroom colloquy alone. Trial counsel heard the Clerk say "You've been excused." Counsel had no basis to object to an error that, in that moment, appeared not to have occurred. The discrepancy only becomes apparent by comparing the trial transcript against the official Jury Strike Sheet, a reconciliation the record does not reflect was undertaken during the selection proceeding.

South Carolina has not adopted a general plain-error rule of the kind found in the federal rules; its courts have "consistently refused to apply the plain error rule." *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). But the Supreme Court has recognized narrow exceptions permitting review of issues raised for the first time on appeal where a contemporaneous objection was not realistically available. *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994); *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994) (excusing the absence of a contemporaneous objection where the circumstances made any objection futile). The same logic applies here: trial counsel heard the Clerk confirm the strike had been honored and had no basis, in that moment, to suspect the confirmation was inaccurate. An error invisible until compared against a second document, created

contemporaneously but reconciled only afterward, is not the kind of unpreserved error *Dunbar*'s preservation rule was designed to bar.

B. This Issue Independently Defeats Any Finding That the Appeal Is Wholly Frivolous.

Under *Anders v. California*, 386 U.S. 738, 744 (1967), before appellate counsel may withdraw, this Court must conduct "a full examination of all the proceedings, to decide whether the case is wholly frivolous." This examination is not limited to issues counsel preserved below; it exists precisely to catch record-based errors like this one that are apparent from the face of the record without any further factual development. *See McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 438 (1988) (explaining that *Anders* review requires identification of "anything in the record that might arguably support the appeal," independent of what was preserved for ordinary appellate review).

The issue raised here is not borderline arguable. It is an error that under controlling South Carolina authority, *Short* and *Cochran*, requires automatic reversal without any showing of prejudice, based on a discrepancy that is visible on the face of the official record. An appeal is not "wholly frivolous" when it contains an issue that, if credited, compels reversal under the standard the reviewing court is required to apply. This issue compels reversal. This appeal is not wholly frivolous. Counsel's motion to withdraw should be denied and the Court should direct full merits briefing on the issue presented.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that:

The record on its face discloses that Juror No. 277, Lori A. Palmieri, was peremptorily struck by the defense, the Clerk of Court confirmed the excusal in open court, and no ruling, Batson challenge, or other explanation appears in the record for her presence on the jury;

Under *State v. Short*, 333 S.C. 473, 511 S.E.2d 358 (1999), and *State v. Cochran*, ~~371~~ 369 S.C. 168, ~~638~~ 308 S.E.2d ~~41~~ 631 (Ct. App. 2006), this error is reversible without any showing of actual prejudice; 294

The error is structural, defies harmless-error measurement, and independently warrants reversal;

The issue is properly before this Court because a contemporaneous objection was not realistically available; and

The presence of this non-frivolous issue, an issue requiring automatic reversal under controlling authority, defeats any finding that this appeal is wholly frivolous.

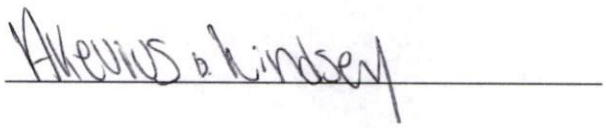
Appellant respectfully requests that this Court:

(1) **REJECT** appellate counsel's *Anders* brief and DENY counsel's motion to withdraw;

(2) **ORDER** full merits briefing on the issue of whether the trial court committed reversible error by seating a peremptorily-struck juror; and

(3) in the alternative, **REVERSE** Appellant's conviction and **REMAND** for a new trial.

Respectfully submitted,



Akevius Lindsey, Pro Se

SCDC#396525

Tyger River CI

200 Prison Road

Enoree, SC 29335

CERTIFICATE OF SERVICE

I, Akevius Lindsey, hereby certify that I am the Appellant in the above-captioned matter, proceeding pro se, and that on this 8th day of JULY, 2026, I served a true and correct copy of *Appellant's Pro Se Supplemental Brief in Response to Appellate Counsel's Anders Brief* upon the following parties by placing same in the United States Mail, first-class postage prepaid, addressed as follows, via the institutional mail system at Tyger River Correctional Institution:

Counsel for Respondent:

Office of the Attorney General
South Carolina Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

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Appellate Counsel:

David Alexander
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211

I certify under penalty of perjury that the foregoing is true and correct.

AKEVIUS D. LINDSEY

Akevius Lindsey, Pro Se

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Akevius D. Lindsey #396525
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