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S.C. SUPREME COURT

**STATE OF SOUTH CAROLINA
In The Supreme Court**

APPEAL FROM SPARTANBURG COUNTY

**Court of General Sessions
Hon. Grace G. Knie, Circuit Court Judge**

Appellate Case No. 2026-000456

THE STATE,

Respondent,

v.

DONALD KING POLLOCK,

Petitioner.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	3
ARGUMENT	4
This Court should affirm the trial court’s finding that Pollock’s explanation for his peremptory strike was a pretextual excuse for gender discrimination.....	4
A. The trial court employed the proper procedure.	4
B. This Court should defer to the trial court’s ruling that defense counsel’s explanation of the strike was a pretextual excuse for gender discrimination because it was a credibility- based finding dependent on personal observation.....	7
C. Pollock failed to give a race-neutral explanation for his peremptory strike	9
D. If the Court finds error, it should overrule <u>State v. Short</u> and hold that a trial court’s good-faith but erroneous grant of a State <u>Batson</u> motion should not result in automatic reversal absent a showing of prejudice.....	12
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<u>Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.</u> , 738 F.3d 960 (9th Cir. 2013)	14
<u>Batson v. Kentucky</u> , 476 U.S. 79 (1986)	2
<u>Bowden v. State</u> , 787 So. 2d 185 (Fla. Dist. Ct. App. 2001).....	7
<u>Hernandez v. New York</u> , 500 U.S. 352 (1991).....	8, 10
<u>Hernandez v. State of Tex.</u> , 347 U.S. 475 (1954).....	10
<u>Holland v. Illinois</u> , 493 U.S. 474 (1990).....	16
<u>People v. Bell</u> , 702 N.W.2d 128 (Mich. 2005).....	15
<u>People v. Hecker</u> , 942 N.E.2d 248 (N.Y. 2010)	14
<u>People v. Novotny</u> , 320 P.3d 1194 (Colo. 2014)	15
<u>Purkett v. Elem</u> , 514 U.S. 765 (1995)	5
<u>Riddle v. State</u> , 314 S.C. 1, 443 S.E.2d 557 (1994).....	9
<u>Rivera v. Illinois</u> , 556 U.S. 148 (2009)	13
<u>State v. Adams</u> , 322 S.C. 114, 470 S.E.2d 366 (1996)	15
<u>State v. Anderson</u> , 276 S.C. 578, 281 S.E.2d 111 (1981).....	15
<u>State v. Carr</u> , 331 P.3d 544, 641 (Kan. 2014).....	16
<u>State v. Cochran</u> , 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006).....	7
<u>State v. Dyar</u> , 317 S.C. 77, 452 S.E.2d 603 (1994)	3
<u>State v. Edwards</u> , 384 S.C. 504, 682 S.E.2d 820 (2009).....	3, 5
<u>State v. Evins</u> , 373 S.C. 404, 645 S.E.2d 904 (2007)	7
<u>State v. Frausto</u> , 463 S.W.3d 469 (Tenn. 2015).....	15

<u>State v. Guess</u> , 318 S.C. 269, 457 S.E.2d 6 (Ct. App. 1995).....	11
<u>State v. Inman</u> , 409 S.C. 19, 760 S.E.2d 105 (2014)	6
<u>State v. Johnson</u> , 363 S.C. 53, 609 S.E.2d 520 (2005).....	4
<u>State v. McMillan</u> , 400 S.C. 298, 734 S.E.2d 171 (Ct. App. 2012).....	6, 10
<u>State v. Rayfield</u> , 369 S.C. 106, 631 S.E.2d 244 (2006).....	16
<u>State v. Rogers</u> , 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013)	5
<u>State v. Short</u> , 333 S.C. 473, 511 S.E.2d 358 (1999)	12, 16
<u>State v. Stewart</u> , 413 S.C. 308, 775 S.E.2d 416 (Ct. App. 2015).....	3
<u>State v. Wright</u> , 354 S.C. 48, 579 S.E.2d 538 (Ct. App. 2003)	11
<u>Swain v. Alabama</u> , 380 U.S. 202 (1965)	13, 16
<u>United States v. Annigoni</u> , 96 F.3d 1132 (9th Cir.1996).....	14
<u>United States v. Bowman</u> , 106 F.4th 293 (4th Cir. 2024).....	14
<u>United States v. Campbell</u> , 544 F.3d 577 (5th Cir. 2008).....	12
<u>United States v. Canoy</u> , 38 F.3d 893 (7th Cir. 1994)	8
<u>United States v. Changco</u> , 1 F.3d 837 (9th Cir. 1993)	10, 12
<u>United States v. Lindsey</u> , 634 F.3d 541 (9th Cir. 2011).....	14
<u>United States v. Murillo</u> , 288 F.3d 1126 (9th Cir. 2002)	8
<u>United States v. Speer</u> , 30 F.3d 605 (5th Cir. 1994)	12

Statutes

S.C. Code Ann. § 14-7-810.....	10
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STATEMENT OF THE ISSUE

A party may not strike a juror on the basis of race, national origin, or gender. After Pollock used eight strikes to eliminate women from the jury, the State challenged the strikes as gender discriminatory. In response, Pollock explained he struck Juror Seher Kul because “maybe English was not her first language,” but failed to cite any specific facts indicating Kul could not understand the proceedings. Was this a race-neutral explanation, and was the trial court’s finding that the explanation was pretextual clearly erroneous?

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Petitioner Donald Pollock for Criminal Sexual Conduct with a Minor (CSCM) in the first degree, CSCM in the second degree, and two counts of CSCM in the third degree. The State alleged a continuing course of sexual abuse by Pollock against his stepdaughter, including groping and repeated instances of digital penetration, beginning when she was in the fourth grade. (R.pp.139–64). Pollock proceeded to jury trial on April 4–6, 2022, before the Honorable Grace G. Knie, Circuit Court Judge. He was acquitted of CSCM in the first degree and convicted of the remaining charges. Pollock was sentenced to 15 years' incarceration for CSCM 2nd, to be served consecutively with the remainder of his sentence. For CSCM 3rd, he was sentenced to 15 years' incarceration on both counts, with the sentences suspended upon the completion of five years' probation, with these sentences to be served concurrently. On appeal, Pollock alleges the trial court improperly granted the State's motion to quash the initial petit jury based on a claim of discriminatory peremptory jury strikes in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny. The court of appeals affirmed Pollock's convictions in an unpublished decision.

STANDARD OF REVIEW

Whether the trial court employed the correct Batson hearing procedure is a question of law, which is reviewed de novo. State v. Stewart, 413 S.C. 308, 316, 775 S.E.2d 416, 420 (Ct. App. 2015). However, the trial court's determination whether a peremptory strike was exercised in a discriminatory manner is reviewed under a "clearly erroneous" standard. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). Under this standard, the appellate court gives the trial court's finding "great deference." State v. Dyar, 317 S.C. 77, 79, 452 S.E.2d 603, 604 (1994).

ARGUMENT

This Court should affirm the trial court's finding that Pollock's explanation for his peremptory strike was a pretextual excuse for gender discrimination.

The trial court properly quashed the original petit jury based on Pollock's gender-discriminatory strikes. The trial court followed the correct Batson procedure, requiring Pollock to provide a race- and gender-neutral explanation for his strike of Juror Kul and hearing the State's argument in response before ruling. This Court should defer to the trial court's credibility-based finding of discriminatory intent because it was based on the trial court's personal observations of defense counsel and Juror Kul.

As an additional sustaining ground, Pollock failed to provide a race-neutral justification for the strike, explaining that he assumed—without citing specific, objective facts—that Kul could not understand fluent English because it “seemed like maybe English wasn't her first language.” English as a second language is not a legitimate reason to exclude a United States citizen from jury service. Finally, if the Court finds error, it should overrule or decline to extend State v. Short and hold that a trial court's good-faith but erroneous grant of a State Batson motion does not result in automatic reversal without a showing of prejudice.

A. The trial court employed the correct Batson procedure.

Pollock claims the trial court did not follow the correct Batson procedure. This claim is not preserved for review because Pollock did not raise any objection to the procedure at trial. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (explaining an objection must be contemporaneous and “should be addressed to the

trial court in a sufficiently specific manner that brings attention to the exact error”). Regardless, the claim is meritless.

The Equal Protection Clause of the Fourteenth Amendment prohibits the striking of a venireperson on the basis of race or gender. Edwards, 384 S.C. at 508–09, 682 S.E.2d at 822. “When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one.” Id. “Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, **the trial court must then decide** (step three) whether the opponent of the strike has proved purposeful racial discrimination.” State v. Rogers, 405 S.C. 520, 525, 748 S.E.2d 247, 250 (Ct. App. 2013) (quoting Purkett v. Elem, 514 U.S. 765 (1995)) (emphasis added).

That is exactly what occurred in this case. The State raised a Batson challenge based on Pollock using eight of ten strikes against women, and the trial court and attorneys addressed each juror one by one. (R.pp.116-128). Specifically regarding Juror 82, Seher Kul, whom the prosecutor described as a “white female,” Pollock asserted he struck Kul because “it seemed as if English wasn’t her first language.” (R.p.121). In response, the State argued Pollock’s strike of Juror Kul violated Batson because it was not race-neutral and noted that Juror Kul “did not appear to have any issues with understanding or answering questions.” (R.p.121). After a

recess, the trial court found Pollock's explanation for striking Juror Kul was pretextual, cited appropriate case law, and quashed the jury. (R.p.127–28).

The trial court employed the correct Batson procedure. Contrary to Pollock's assertion, the trial court did not absolve the State of its burden of persuasion. At the outset, the court established that the State was required to make a prima facie showing of discrimination, and Pollock in response was required to come forward with a race- and gender-neutral explanation. The State made a prima facie showing by pointing out Pollock used eight of his ten strikes against women. Pollock responded with neutral explanations for most of his strikes. But for Juror Kul, Pollock explained he struck her because: "I thought that it seemed as if maybe her English wasn't her first language, and I thought there might be a little discrepancy on what she could understand. I don't know that, but that was my only concern on that one, and that was my reason for the strike." (R.p.121).

The State responded to defense counsel's explanation of his strike by disputing its genuineness, arguing Juror Kul "did not appear to have any issues with understanding or answering questions." (R.p.121). Only then did the court rule that, under the "third part of Batson," that Pollock's explanation of his strike of Juror Kul was "pretext concerning gender." (R.p.127–28). The court did not place the burden on the defense to prove its strikes were not pretextual. Cf. State v. Inman, 409 S.C. 19, 24, 760 S.E.2d 105, 107 (2014) (explaining how "the circuit court—and not the State—challenged the sufficiency of Appellant's counsel's explanation" and quashed the jury without hearing why the State challenged the

strike). Rather, the court heard the State's prima facie case, the explanation offered by defense counsel, and rebuttal argument from the State. Only then did the court rule that defense counsel's explanation was pretextual. (R.p.127). This scenario is thus distinguishable from Cochran, where the trial court rejected the defendant's explanation "without hearing from the State." State v. Cochran, 369 S.C. 308, 319, 631 S.E.2d 294, 300 (Ct. App. 2006). The trial court was not required to use "magic words" in announcing its ruling. Bowden v. State, 787 So. 2d 185, 188 (Fla. Dist. Ct. App. 2001) (explaining "[t]here are no specific words that the trial court must state to satisfy the step 3 considerations"). The court employed the correct procedure.

B. This Court should defer to the trial court's ruling that defense counsel's explanation of the strike was a pretextual excuse for gender discrimination because it was a credibility-based finding dependent on personal observation.

When a Batson ruling is based on the trial court's observations of a juror or the believability of counsel's explanation for a peremptory strike, the appellate court reviews that ruling for "clear error." See State v. Evins, 373 S.C. 404, 415–16, 645 S.E.2d 904, 909–10 (2007) ("Typically, the decisive question becomes whether counsel's race-neutral explanation for a peremptory challenge should be believed... [T]here is seldom much evidence in the record bearing on that issue, and the trial court's findings regarding purposeful discrimination necessarily will rest largely on the evaluation of demeanor and credibility of counsel. Therefore, those findings are given great deference and will not be set aside unless clearly erroneous." (citing State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006))). The question

whether a party intended to discriminate is a “pure issue of fact.” Hernandez v. New York, 500 U.S. 352, 364 (1991). Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an “evaluation of the [attorney’s] mind lies peculiarly within a trial judge’s province.” Id. at 365.

Specifically in the context of language, the Ninth Circuit Court of Appeals explained:

The trial judge is in a unique position to determine whether a witness has difficulty communicating, and therefore we grant a high level of deference to the district court’s finding on this point. . . . How slowly she spoke, whether she hesitated, how thick her accent was, and what her body language revealed are not recorded in a transcript, yet these are aspects of communication that may be considered by the trial judge.

United States v. Murillo, 288 F.3d 1126, 1136 (9th Cir. 2002). See also United States v. Canoy, 38 F.3d 893, 900 (7th Cir. 1994) (explaining “it is up to the district court, which has had the opportunity to view the challenged juror and to hear the government’s explanation, to assess whether the government is legitimately concerned about language skills or is instead utilizing that concern as a shield for prohibited discrimination”).

Here, the trial court was present for “roll call” and therefore would have had an opportunity to observe Juror Kul.¹ (R.pp.22–24). Likewise, the trial court was in a

¹ The “roll call” was not transcribed, but likely would have included each prospective juror sharing their name, occupation, marital status, and spouse’s marital status. During arguments on the Batson motion, the solicitor recounted that Juror Kul answered the “initial questions. She’s a procurement manager and her husband is in the auto industry.” (R.pp.120–21). The solicitor argued Juror Kul “did not appear to having any difficulties with understanding or answering questions.” (R.p.121).

unique position to observe counsel's demeanor and assess his credibility when he explained the reason for his peremptory strike. Although the court could have been more explicit about its observation of Juror Kul's language abilities, this was the only excuse defense counsel offered and the trial court found the explanation pretextual. This a quintessential factual question.

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. Riddle v. State, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994). The other circumstances support an inference of discriminatory intent. Pollock used 8 of 10 strikes to exclude female jurors. It is no secret that female jurors are typically not seen as favorable to defendants in child sex abuse cases. These circumstances, along with the standard of review considerations discussed above, support the trial court's ruling. Pollock has not shown "clear error."

C. Pollock failed to provide a race-neutral explanation for his peremptory strike.

Pollock failed the Batson test for a second reason: he failed to offer a race-neutral reason for the strike. Although the State's motion was premised on gender discrimination, Pollock was required to state both a gender- **and** race-neutral basis for his strike. He did not do so, and thus failed to satisfy the second step of the Batson analysis.²

When a Batson challenge is raised, "the burden of production shifts to the proponent of the strike to come forward with a race-neutral **explanation** (step

² The State presents this argument as an alternate sustaining ground. See Rule 220(c), SCACR.

two), and if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial [or gender] discrimination (step three).” State v. McMillan, 400 S.C. 298, 306, 734 S.E.2d 171, 176 (Ct. App. 2012) (emphasis added). A race-neutral explanation is “an explanation based on something other than the race of the juror.” Hernandez, 500 U.S. at 360.

“The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.” Hernandez v. Texas, 347 U.S. 475, 479 (1954). Defense counsel admitted he had no information that Kul could not understand fluent English. If defense counsel truly believed Kul could not understand English, he could have challenged her for cause. See S.C. Code Ann. § 14-7-810 (providing a juror is disqualified if he “is unable to read, write, speak, or understand the English language The trial judge must make the final determination of the qualifications of a juror as set out in this section and his decision must not be disturbed on appeal.”). When asked the reason for the strike, his immediate response was that “it seemed as if maybe English wasn’t her first language.” (R.p.121). English as a second language is not a legitimate reason to exclude a United States citizen from jury service.

Pollock was required to articulate specific, objective facts bearing on Kul’s ability to understand the proceedings. As the Ninth Circuit Court of Appeals explained in United States v. Changco, 1 F.3d 837, 840 (9th Cir. 1993):

So long as [a party] can convince the district court that the potential juror who is being struck in fact has difficulty with English, the justification is race-neutral. It would be much different, of course, if the prosecutor were to strike a potential juror based on her last name alone, and then justified the strike by arguing that people with a particular last name often have trouble understanding English. The latter would be the type of sweeping generalization about the language abilities of racial groups that would make the explanation race non-neutral.

This case is distinguishable from State v. Wright, 354 S.C. 48, 579 S.E.2d 538 (Ct. App. 2003), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In that case, a defendant alleged the State improperly struck a juror based on her race. The State justified the strike by noting the juror's "heavy accent." Id., 354 S.C. at 55, 579 S.E.2d at 542. The court of appeals held the trial court's ruling denying the Batson motion was not "clearly erroneous." By contrast, in this case Pollock did not cite Juror Kul's thick accent, difficulty communicating, or any other information supporting his suspicion that she could not understand the English language. Counsel admitted he believed Juror Kul could speak English and cited no specific facts objectively drawing into question Juror Kul's ability to understand the proceedings such that it would affect her ability to serve. (R.p.121, 125). Cf. State v. Guess, 318 S.C. 269, 271, 457 S.E.2d 6, 7 (Ct. App. 1995) (holding solicitor gave valid race-neutral reason for strike when he explained in detail that prospective juror was "a little slow. Didn't really seem to know kinda what was going on. Very hesitant in his answers to your questions. I think he stood up once or twice in response either to your education question or something. There was some particular reason that he stood up, and my initial impression of him was that he really didn't have a good grasp of what was going on.").

Pollock was required to articulate **some** objective facts justifying a legitimate concern about Juror Kul's ability to understand the proceedings such that it would affect her ability to serve. See Changco, 1 F.3d at 840. There is no such evidence in this record. Cf. United States v. Speer, 30 F.3d 605, 611 (5th Cir. 1994) (affirming excusal of juror based on juror's statement that she had trouble understanding English and other objective facts showing her "inability to understand or communicate effectively in English"); United States v. Campbell, 544 F.3d 577, 582 (5th Cir. 2008) (finding juror's language difficulties were race-neutral justification for strike where the juror "asked to speak to the judge again to explain that he was 'not able to participate [in deliberations] because of [his] limited English'" and there were "numerous notes from the jury stating that they were unable to effectively communicate with" the juror). Absent such facts, Pollock's explanation cannot be considered race-neutral in light of his initial response that his strike was based on his impression that English was not Juror Kul's "first language."

D. If the Court finds error, it should overrule or decline to extend State v. Short and hold that a trial court's good-faith but erroneous grant of a State Batson motion should not result in automatic reversal absent a showing of prejudice.

Even if this Court finds error, it should affirm because Pollock was not prejudiced by Juror Kul's presence on the jury. This Court should overrule or decline to extend State v. Short, which held that the erroneous grant of a State Batson motion will result in automatic reversal on appeal. State v. Short, 333 S.C. 473, 477, 511 S.E.2d 358, 360 (1999) (holding "no showing of actual prejudice is required to find reversible error for the denial or impairment of the right to a

peremptory challenge”). The Short rule merits reexamination in light of recent United States Supreme Court precedent and the ensuing national trend against automatic reversal in “reverse” Batson cases. Regardless of developments in the law, automatic reversal would not serve the purpose of peremptory challenges in this case because there has never been any allegation that Juror Kul was biased, or even unfavorable, to Pollock.

In Rivera v. Illinois, 556 U.S. 148 (2009), the Supreme Court held there is no constitutional error when a trial court erroneously but in good faith grants a State Batson challenge. In so doing, the Court rejected dicta from Swain v. Alabama, 380 U.S. 202 (1965), suggesting automatic reversal is mandated when a party is wrongfully denied a peremptory challenge. The Court explained that erroneous denial of a peremptory challenge is not the type of error for which automatic reversal is typically reserved: “structural” errors which “necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Rivera, 556 U.S. at 160.

The Rivera court explained that automatic reversal for the erroneous but good-faith denial of a State Batson motion undermines the Fourteenth Amendment. If a trial court genuinely believes a defense strike is discriminatory, it should be able to redraw the jury without the fear that its good-faith ruling could result in automatic reversal. Otherwise, courts may feel pressured to tolerate the discriminatory exercise of strikes. See Rivera, 556 U.S. at 160 (“To hold that a one-time, good-faith misapplication of Batson violates due process would likely discourage trial courts

and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges."). And because of the State's limited ability to appeal, a defendant's unchecked discriminatory exercise of strikes typically will not be reviewed. See People v. Hecker, 942 N.E.2d 248, 276 (N.Y. 2010) (Smith, J., concurring in part) ("A defendant, who need not fear an appeal by the People, can and generally will vigorously contest any prosecution use of a peremptory challenge that might raise Batson problems. But the People will be reluctant to do the same thing, lest they lead the trial judge into an error that would upset a conviction.").

Other courts have followed suit. Indeed, the primary case relied on in the court of appeals opinion in Short, cited with approval by this Court—United States v. Annigoni, 96 F.3d 1132 (9th Cir.1996)—has since been overruled by the Ninth Circuit. See United States v. Lindsey, 634 F.3d 541, 550 (9th Cir. 2011) (explaining Annigoni's "reasoning has been fatally undercut by the Supreme Court"). See also Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 967 (9th Cir. 2013) ("The 1st and 8th circuits have also concluded that Rivera effectively overruled previous cases that had adopted an automatic reversal rule when a trial court's error impaired the right to exercise peremptory challenges."); United States v. Bowman, 106 F.4th 293, 305 (4th Cir. 2024) (holding automatic reversal rule for impairment of peremptory strike cannot withstand Rivera).

Rivera made clear that states are free to establish their own remedies for the erroneous denial of peremptory challenges. The Short court adopted the automatic reversal rule because it was the "majority rule," but that may no longer be the case.

See, e.g. People v. Bell, 702 N.W.2d 128 (Mich. 2005); State v. Frausto, 463 S.W.3d 469, 486 (Tenn. 2015); People v. Novotny, 320 P.3d 1194, 1202 (Colo. 2014).

Further, Short did not discuss the fact that only two years earlier, this Court refused to reverse a conviction based on an improvidently granted State Batson motion. In Adams, this Court recognized that an improvidently granted Batson motion is “fundamentally different from one in which the trial judge improperly upholds racially discriminatory peremptory challenges. . . . An appellate determination that a judge erred in finding a Batson violation means the obvious: **No Batson violation occurred**, and there was, therefore, no denial of anyone’s equal protection rights.” State v. Adams, 322 S.C. 114, 126–27, 470 S.E.2d 366, 373 (1996) (emphasis added), overruled by State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014).

The Adams court noted that the two stricken jurors in that case were not ultimately seated on the jury, which may have affected its decision. Id. at n.2. And there are other cases where this Court has reversed based on the erroneous denial of peremptory strikes without a showing of actual juror bias. Cf. State v. Anderson, 276 S.C. 578, 579, 281 S.E.2d 111, 112 (1981) (“This Court has reversed when prejudicial error in the allotment of peremptory challenges has appeared.”). But, as in Short, those cases typically involve jurors whom a defendant attempted to strike because they were perceived as unfavorable to the defense. Stating the automatic reversal rule in State v. Rayfield, this Court explained “[p]rejudice is presumed in such cases because there is no way to determine with any degree of certainty

whether a defendant's right to a fair trial by an impartial jury was abridged." State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006). This case is distinguishable on that basis.

There has never been any suggestion that Juror Kul was biased against—or even unfavorable to—Pollock. The automatic reversal cases are premised on the value of peremptory strikes as a safeguard against partial jurors. For example, in Short, a stricken juror's husband was a manager at a business which had been a frequent target of crime, an association which defense counsel perceived as carrying the danger of bias against criminal defendants. Short, 333 S.C. at 476, 511 S.E.2d at 359. Juror Kul's only alleged shortcoming was her linguistic abilities, which the trial court rejected as pretextual. Thus the rationale of peremptory challenges—to allow parties the opportunity to reject jurors based on "real or imagined **partiality**"—is not present in this case. Swain v. Alabama, 380 U.S. 202, 220 (1965) (emphasis added), overruled by Batson v. Kentucky, 476 U.S. 79 (1986); see also Holland v. Illinois, 493 U.S. 474, 484 (1990) (recognizing purpose of peremptory challenges is "to exclude those jurors [a party] believes will be most partial toward the other side").

There is no question that the trial court acted in good faith. See State v. Carr, 331 P.3d 544, 641 (Kan. 2014) (discussing "good faith" requirement), rev'd and remanded on other grounds, 577 U.S. 108 (2016). If the trial court erred, it was not a Batson error. On the contrary, the trial court's decision to strike the original petit

jury was intended to **prevent** structural error—the unconstitutional exclusion of a U.S. citizen from jury service based on gender.

The trial court's good-faith Batson ruling had absolutely no impact on the fairness of Pollock's trial. This Court should overrule Short, or decline to extend it to the facts of this case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of the lower court should be affirmed.

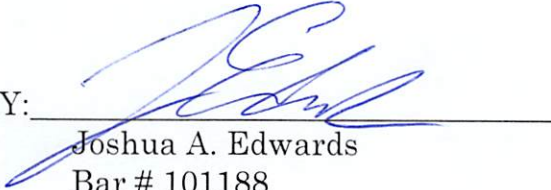
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