STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

DONNELL MCFADDEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002667

PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUE

Did the PCR judge err in finding appellate counsel was not ineffective for failing to raise error on direct appeal in the denial of Petitioner's *Batson* motion?

STATEMENT

On October 2, 2008, the Florence County Grand Jury indicted Petitioner Donnell McFadden for distributing crack cocaine. App. 244-245. The State alleged that on April 2, 2008, Petitioner sold crack cocaine to a confidential police informant in Lake City. App. 47, line 25—App. 49, line 20. On April 14, 2009 Petitioner proceeded to trial before The Honorable Thomas A. Russo and a jury. Scott Floyd represented Petitioner and John Jepertinger represented the State. App. 1.

In jury voir dire, the trial judge asked the jury panel whether any member had a "close, personal or business relationship" with trial counsel. Juror Taylor responded that he knew trial counsel from being members of the same church. Nevertheless, he told the trial judge the relationship would not affect his ability to be fair and impartial. Juror Braxton then responded that he "[j]ust [knew] [trial counsel] from around Lake City area." He also told the trial judge the relationship would not affect his ability to be fair and impartial. No other members spoke up. App. 7, lin2 15—App. 8, line 23. The trial judge then asked whether any member had a close business or personal relationship with Petitioner. No members responded. App. 8, line 24—App. 9, line 4.

In jury selection, Solicitor Jeptertinger struck juror Alexander, a black female; juror Williams, a black male; juror Simmons, a black female; juror Taylor, a white male; juror McKenzie, a black female; and alternate juror Braxton, a white male. App. 11, line 22–App. 20, line 3. Afterward, trial counsel made a motion pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). App. 22, lines 3-15.

Solicitor Jepertinger stated he struck juror Alexander because she appeared particularly reluctant to serve on a jury and juror Williams based on his criminal record. App. 22, line 20—App. 24, line 25. For juror Simmons, Solictor Jepertinger stated, "I took this strike for the very reason that she was from Lake City. The defendant has a Lake City address, Your Honor." App.

25, lines 3-5. He then explained he struck Juror Taylor because of his relationship with trial counsel; juror McKenzie because his office had a pending charge against her; and Mr. Braxton because of his relationship with trial counsel. App. 25, lines 3-20; App. 27, lines 6-18.

With regard to juror Simmons, trial counsel challenged Solicitor Jepertinger's purported rationale:

> [T]his juror did not indicate that she even knew who I was. And you ask her questions, I don't think she indicated she even knew who I was. I certainly don't know her. And, I mean, just because she's from Lake City seems tenuous especially after he just admitted that he put another juror on from Lake City after that.

App. 25, line 22—App. 26, line 3.

The trial judge concluded that Solicitor Jepertinger provided a sufficient, race-neutral reason for striking juror Simmons and denied the *Batson* challenge. App. 27, line 24—App. 28, line 12. At the conclusion of the trial on April 15, 2009, the jury found Petitioner guilty, and the trial judge imposed a twenty-two year sentence. App. 158, line 20—App. 159, line 2; App. 172, lines 11-21. Petitioner filed a notice of appeal, and his appellate counsel, Tricia A. Blanchette, argued two grounds other than the *Batson* issue. The Court of Appeals denied the appeal in an unpublished opinion on January 25, 2012. App. 234; *State v. McFadden*, 2012-UP-28 (S.C. Ct. App. filed Jan 25, 2012).

On July 10, 2012, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel. App. 174-187. On December 19, 2012, the State filed its return. App. 188-192. On October 10, 2013, Petitioner appeared at an evidentiary hearing before The Honorable William H. Seals, Jr. Josh Thomas represented Petitioner and Daryl Corbin represented Petitioner. App. 194. Petitioner testified and confirmed that appellate counsel did not raise the *Batson* issue on appeal, and he did not know why not. App. 210, lines 3-11. Trial counsel also

testified that he raised and preserved the *Batson* issue and that the issue provided grounds for an appeal. App. 221, line 21—App. 226, line 8.

On December 11, 2013, the PCR court issued its order of dismissal, concluding Petitioner failed to show ineffective assistance of counsel. App. 233-242. Specifically, the order stated that Petitioner did not prove he would have been successful in appealing the *Batson* issue because the trial judge committed no error in accepting Solicitor Jepertinger's race-neutral explanation for striking juror Simmons. App. 240-241.

ARGUMENT

The PCR judge erred in concluding that Petitioner would not have succeeded on appeal because Solicitor Jepertinger did not offer a race-neutral explanation for striking juror Simmons in the *Batson* hearing.

The PCR judge erred in concluding that Petitioner would not have succeeded on appeal because Solicitor Jepertinger did not offer a race-neutral explanation for striking juror Simmons in the *Batson* hearing. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

A criminal defendant has the right to a fair trial by an impartial jury under the federal and state constitutions. *See* U.S. Const. Amend. VI; *see also* S.C. Const. art. I, § 14; *State v. Salters*, 273 S.C. 501, 257 S.E.2d 502 (1979. This guarantee includes the right to a selection process that is unbiased and fair to the defendant and the jurors. *See Powers v. Ohio*, 499 U.S. 400, 410-16 (1991). The United States Supreme Court has held that the Equal Protection Clause of the

Fourteenth Amendment prohibits the prosecution from striking potential jurors on the basis of race. *Batson v. Kentucky*, 476 U.S. 79 (1986). Consequently, a trial court must hold a *Batson* hearing when members of a cognizable racial group are struck and the opposing party requests a *Batson* hearing. *See State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999).

"Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). In *Purkett v. Elem*, 514 U.S. 765, 767 (1995), the United States Supreme Court set forth the procedures for a trial court to follow when a party challenges a peremptory strike. The South Carolina Supreme Court adopted that procedure in *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). Specifically, *Batson* challenges follow a three step process: (1) the opponent of the strike requests a hearing and asserts a *prima facie* case of racial or gender discrimination; (2) the proponent of the strike must offer a race or gender neutral explanation; and then (3) the opponent must show the race or gender neutral explanation was mere pretext. *See State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006).

During the third step, the moving party "must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298 (citing *Adams*, 322 S.C. at 124, 470 S.E.2d at 372). "This burden is generally established by showing similarly situated members of another race were seated on the jury." *Id.* "Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext." *Id.* Thus, "[u]nder some circumstances, the explanation given by the proponent may be so

fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment." *Edwards*, 384 S.C. at 508-09, 682 S.E.2d at 822.

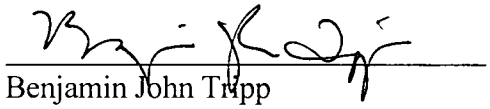
If the trial judge determines the race and gender neutral explanations were mere pretext, then the trial court must quash the jury panel and select a new jury. *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298; *See Riddle v. State*, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994) (finding courts will examine the totality of the facts and circumstances in the record to determine if a *Batson* violation has occurred); *see also State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990) (finding the composition of the jury panel is also a factor that may be considered when determining whether a party engaged in purposeful discrimination).

In this case, Solicitor Jepertinger did not offer a sufficiently race-neutral explanation for striking juror Simmons. He stated that he struck her because both she and Petitioner were from Lake City. The only ostensible concern was that based on knowledge or acquaintanceship with Petitioner, juror Simmons would be unduly sympathetic to him. However, in voir dire the trial judge specifically asked whether any member had a close business or personal relationship with Petitioner, and juror Simmons did not respond. Thus, the explanation was fundamentally implausible and insufficient to dispel pretext under the prescribed *Batson* analysis. Accordingly, the trial judge's denial of trial counsel's *Batson* motion constituted reversible error, and appellate counsel was deficient for failing to raise the issue on direct appeal.

CONCLUSION

For the foregoing reasons, Petitioner Donnell McFadden respectfully requests reversal of his conviction and remand for a new trial.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
William H. Seals, Jr., Circuit Court Judge

DONNELL MCFADDEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of December, 2014.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day of December, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.