

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Chesterfield County  
J. Michael Baxley, Circuit Court Judge  
2010-GS-13-0192, 2010-GS-13-0263

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Appellate Case No. 2015- \_\_\_\_\_  
Court of Appeals Appellate Case No. 2012-213655 **S.C. Supreme Court**  
Op. No. 5331  
Filed July 15, 2015, Rehearing Denied August 20, 2015

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THE STATE,

Petitioner,

v.

THOMAS STEWART,

Respondent

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**PETITION FOR WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS .....1**

**CERTIFICATE OF COUNSEL.....2**

**PETITIONER’S QUESTIONS PRESENTED.....2**

**STATEMENT OF THE CASE.....3**

**STATEMENT OF THE STATE’S VERSION OF FACTS.....4**

**HOW THE ISSUE WAS RAISED AT TRIAL.....5**

**ARGUMENTS WHY CERTIORARI SHOULD BE GRANTED.....10**

**The Court of Appeals erred in failing to adequately apply appropriate standards of deference and review in Batson v. Kentucky settings where under the totality of the circumstances the prosecution’s stated reasons for using each of the peremptory challenges were race-neutral and the defense failed to show purposeful discrimination or pretext where the alleged pretext jurors were not similarly situated when they revealed evident pro-prosecution leanings, were struck by the defense and factually distinguishable from the three African American potential jurors struck by the prosecution.**

**CONCLUSION .....25**

**CERTIFICATE OF SERVICE**

## **CERTIFICATE OF COUNSEL**

Counsel for Petitioner certifies that the Petition for Rehearing was made and  
Finally ruled on by the Court of Appeals on August 20, 2015 pursuant to SCACR Rule  
242(d)(1) .

### **PETITIONER'S QUESTIONS PRESENTED ON CERTIORARI**

- I.** When the totality of the circumstances support the trial court's conclusion that the prosecution's use of peremptory strikes against certain potential jurors was not pretext nor purposeful discrimination and not being treated distinctly and separately among the races, did the Court of Appeals err in failing to consider the totality of the circumstances and give appropriate deference to the trial court when it found pretext in the use of the peremptory strikes against three potential jurors?
  
- II.** When the State used a peremptory challenge to remove a potential juror's based upon prior arrest for possession of cocaine and the fact that same prosecution office involved in the juror's prosecution was prosecuting the Appellant and the trial court found a lack of pretext shown, did the Court of Appeal err in failing to consider the totality of the circumstances when it found pretext where there were evident reasons why two Caucasian jurors with evident leanings to the prosecution were not struck by the prosecution where neither were similarly situated to the challenged juror when one potential juror who had a nolle prossed assault charge when that potential juror's son-in-law was the area Highway Patrolman and it was not shown that the same prosecution office was involved with the nolle pros decision and another Caucasian female juror considered herself to be a "victim of a violent crime and hesitated on whether she could be fair and impartial although she had a prior charge of bad check and simple assault and the trial court found her to be (prior to the strikes) as "active law enforcement" leanings where the defense struck both jurors?
  
- III.** When the State used a peremptory challenge to remove a potential juror's based upon information from law enforcement about a tumultuous relationship with his girlfriend, did the Court of Appeals err in failing to consider the totality of the circumstances when it found pretext where there were evident reasons why the prosecution did not use a peremptory challenge against the juror through purposeful discrimination where the case involved a trial surrounding a violent domestic situation and pretext was not shown where it erroneously found jurors to be similarly situation who were dissimilar and had evident pro-prosecution leanings and struck by the defense?
  
- IV.** When the State used a peremptory challenge to remove a juror for the motivating reason that she was "unemployed," although she had gone to school with the victim, did the

Court of Appeals err in finding that the trial court should have further reviewed the juror when “unemployment” where purposeful discrimination was not shown under the totality of the circumstance when the prosecution’s stated reason was a race neutral reason and no seated jurors by the state were shown to be unemployed and similarly situated and the mere fact that that the unemployed juror had gone to school with the victim did not show pretext in the State’s failure to use a peremptory challenge to seat a potential juror who regularly met with the victim’s family in her employment and the defense struck that juror?

### STATEMENT OF THE CASE

The issue before this Court is whether the prosecution violated the mandates of Batson v. Kentucky, 476 U.S. 79 (1986) in the use of its peremptory challenges on three African-American potential jurors. The State of South Carolina makes a petition for writ of certiorari from the Court of Appeals of South Carolina pursuant to South Carolina Appellate Court Rules, Rule 221(a) and Rule 242 to the decision in State v. Thomas Stewart, Appellate Case No. 2012-213665, 775 S.E.2d 416 (S.C. Ct. App. July 15, 2015). The State made a petition for rehearing on July 28, 2015. The petition for rehearing was denied on August 20, 2015.

The State respectfully submits that the Court of Appeals misapprehended the facts by failing to consider the totality of the circumstances presented to the trial judge in its conclusion that the Stewart had failed to prove pretext concerning the State’s use of peremptory challenges against certain jurors. The State submits that the Court of Appeals’ conclusions as to the motivation by the Solicitor’s office for striking jurors 33 and 101 and conclusion that the stated reasons were pretextual as well as concern that the reasons for juror 117 117 should have been further reviewed by the trial court, in light of the entirety of the record were in error. The State respectfully submits that the prosecution’s stated reasons for the peremptory strikes were race-neutral and there was no pretext proven to the trial court. Certiorari should be granted.

Thomas Stewart was indicted by the Chesterfield County Court of General Sessions for murder and possession of a weapon during the commission of a violent crime. He was represented by Casey Secor, S. Boyd Young and William McGuire of the South Carolina Office of Indigent Defense. The State of South Carolina, represented by Kernard E. Redmond, Adam Foard and Christopher Jones of the Fourth Circuit Solicitor's Office. The indictments were called to trial on December 3, 2012 before the Honorable J. Michael Baxley. On December 6, 2012, the jury returned a verdict of guilty as to the charges of murder and possession of a weapon during the commission of a violent crime. ROA 563, lines 7-15. A motion for a new trial was made and denied the same date. Judge Baxley sentenced Appellant to life in prison and five years to be served consecutively. ROA 577, lines 18-24.

The Appellant timely filed his notice of appeal. Among the issues presented in the Final Brief of Respondent, he raised the following question pertinent to the certiorari petition:

1. The trial court erred in finding no discrimination in the State's use of peremptory challenges because (a) the trial court failed to comply with the third step in the Batson analysis which requires a court to meaningfully evaluate the persuasiveness of the prosecutor's group neutral explanations and make a deliberate decision whether purposeful discrimination occurred; and (b) Appellant proved the State's proffered reasons were pretextual because they were not applied in a neutral manner.

Final Brief of Appellant, p.1. The Court of Appeals in State v. Thomas Stewart, Appellate Case No. 2012-213665, 2015 WL 4269714 (S.C. App. July 15, 2015). The State made a petition for rehearing on July 28, 2015. The petition for rehearing was denied on August 20, 2015.

#### **STATEMENT OF THE STATE'S VERSION OF FACTS**

"My daddy's stabbing my momma." Supp ROA 2-4. The Appellant declared: "I'm going to kill you." Supp ROA 7. The victim, Bellanie Clyburn was not seen stabbing back. Supp ROA

13-14. This case involves the death of Bellanie at the hands of the Appellant as the conclusion of a violent relationship. The victim was murdered on January 1, 2010 after suffering thirty-nine (39) stab wounds (ROA 303-04) after being confronted at her own apartment by a knife-wielding Appellant.

The record reflects that Stewart had been involved in an extra-marital affair with Ms. Clyburn for around eight (8) years. In April 2009, Bellanie Clyburn had assaulted Stewart's wife with a lug wrench. She pleaded guilty to the assault and served several weeks of jail time. Clyburn was released from jail in mid-December. Stewart spend several days with Clyburn upon her release.

The State's evidence revealed that the victim, who had made a restraining order against the Appellant on December 29, 2009 and arrest warrants concerning a trespassing and assault and battery within days before the January 1, 2010 incident ROA 289, 365-68.

In a statement to police, the Appellant admitted that he had arrived in the early morning hours. He confronted the victim with her two children as she left the apartment. She returned to the apartment where she attempted to defend herself and used mace on the Appellant. She ran out of the apartment, where she was chased down by the Appellant, resulting in 39 stab wounds. She died as a result of the attack. The Appellant was found away from the scene covered in blood. ROA 160-61, 163. He declared that he had "lost it in love." ROA 163-65. The Appellant further stated that he carried the knife into the apartment. ROA 164-65. See also, State Exhibit 7. He stated that the only reason why he stopped stabbing the victim because he felt threatened by others who had come to the scene. In his initial statements the Appellant made no claim about self-defense. ROA 165-66.

## HOW THE ISSUE WAS RAISED AT TRIAL

The record before the court reveals that the State used four (4) of its five (5) peremptory challenges against African American potential jurors. ROA 67-75, Roll call list for panel, ROA 580-592. The jury was made of ten Caucasian jurors and two African American jurors. The defense objected to the State's use of the preemptory challenges after an off-the-record discussion with the prosecution. ROA p. 80, ll. 11-19.

### *The State's Reasons*

The trial judge requested the Solicitor to explain his reasons for the strikes against the four potential African American jurors. In describing the manner he would use, Judge Baxley stated:

THE COURT: Let's do it this way. Mr. Young, you give me the four jurors whom you object. I first determine whether they are cognitive as a group, whether that be a racial group, gender group, whatever it and which I think that will determine if they're acceptable. Then I'll hear from the State as to what their purpose or reason in for striking and then hear from you as to why you believe that would be invalid reason. That fair enough reason?

ROA p. 81, ll. 10-17.

Solicitor Redmond stated earlier that his basis for striking **juror 101** was that he had been charged with "possession of cocaine" and that it was later *nolle prossed*. ROA p. 80, ll. 13-20. Solicitor Redmond stated that it was a prior arrest handled by the Solicitor's Office. Although he stated he did not know the particular reasons for the dismissal, "based on that interaction with law enforcement, especially with it being a drug charge, we feel that gives enough to [raise] concerns..." ROA p. 82, ll. 10-16. He stated this occurred in 2009. ROA p. 82, ll. 4-20.

As to **juror 126**, it was proffered that this juror was late in returning to court after a break

and there were additional concerns about her demeanor appearing disinterested. Solicitor Redmond stated that her lateness raised concerns about her ability to be [conscientious] in a serious murder trial. ROA p. 82, l. 22 – p. 83, l. 4.

Concerning **juror 117**, Solicitor Redmond stated that she was unemployed, which he noted had been upheld as a race neutral reason. However, he further stated that in their discussions that it was pointed out that she knew the victim. ROA p. 83, ll. 5-10. See ROA 14-15 (“I went to school with her,” but that she had not seen her in some time). He also stated that knowing the victim sometimes works both ways stating there was another juror that the defense struck.<sup>1</sup> Because juror 117 knew the victim, but not in what context she knew her raised concerns, but Solicitor Redmond unequivocally declared the reason for the use of the strike was the fact that juror 117 was unemployed. ROA p. 83, ll. 6-19.

As to **Juror 33**, Solicitor Redmond stated they had no information about him, but law enforcement were present and they had one strike left at the time. Solicitor Redmond stated law enforcement made them aware that juror 33 had prior incidents involving his girlfriend who is now his wife. Although they did not result in criminal charges, the reported incidents revealed the juror and his wife engaged in a “tumultuous” relationship. He stated that given the nature of the case before them (a girlfriend being killed by her boyfriend after violence toward the boyfriend’s wife) it raised concerns. Solicitor Redmond stated this information about the incidents was given to him by the Chief of Police of Pageland. ROA p. 83, l. 23 – p. 84, l. 12.

*The Defense Claims that the Reasons for the Strikes Were Pretextual*

Judge Baxley then inquired of the defense why they thought these reasons were

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<sup>1</sup> The defense struck Juror 128 who stated that she knew the victim’s family because “they come to where I work all the time.” ROA p. 15, l. 15 – p. 16, l. 6.

pretextual. Concerning the strike of **juror 101** on the basis of the nolle prossed possession of cocaine charge, he stated he had no way of knowing if other jurors had “some other nolle prossed charges in some other clerk’s office.” ROA p. 84, ll. 17-23. However, he stated that juror 131 was struck by the defense because he had a son in law enforcement, but had on his rap sheet a nolle prossed assault and battery with intent to kill charge. ROA 84-85. The defense opined that they were similarly situated and his charge was for a violent crime, as opposed to a drug charge.

As to **juror 117**, who the prosecution stated was unemployed and went to school with the victim, the defense noted the first juror called was juror 128 but who was struck by the defense because the victim’s family comes in and out of the store all the time. ROA p. 85, ll. 10-14. The defense stated juror 128 was not struck for knowing the victim’s family. He opined this was similarly situated and therefore the reason for juror 117 was not race neutral. ROA p. 85, l. 16-18.

As to **juror 33**, the defense argued the basis was that someone told them this person would not be a good juror. ROA 85. The defense said “I don’t know. I mean I’ll leave that up to the Court.” He said he did not have law enforcement assistance but noted that the court asked the juror about criminal domestic violence charges and he did not answer. ROA 86.

Judge Baxley inquired of the defense concerning **juror 126** who the State asserted was late and “had something of an attitude.” ROA p. 86, ll. 7-10. Counsel Young responded that he did not recall the court admonishing any juror for being late and claimed he viewed the jury and did not know what they were talking about (concerning the attitude). ROA p. 86, ll. 11-17.

*The Trial Court’s Findings and Conclusions*

Judge Baxley however noted whether it is a valid issue was a separate question, but confirmed that there were two jurors who were 10 minutes late after a break, noting that he was a few minutes late himself. He stated at that time to make sure other jurors were not outside. He confirmed that **juror 126** was one of the two jurors. ROA p. 86, l. 18 – p. 87, l. 4.<sup>2</sup>

The trial judge then ruled on the defense Batson motion. In particular, Judge Baxley stated:

THE COURT: All right. Just a moment. All right. The Court is prepared to rule at this time, and what I have before me is four jurors that the Defense complains about. They are Juror 101, 126, 117 and 33.

With regards to 101 the reason given for the strike is that this juror had a *nolle prossed* cocaine charge; that there had been previous, obviously, from that negative relationship with law enforcement, that that has been found by our Court in the case of the State v. Johnson at 302 SC 243, to be a permissible reasons for a strike.

This same reason will apply to Juror 33. With regards to the juror who may have been late or who may have a demeanor that is - - seems to be disinterested, the Court finds that has been previously permitted by our Supreme Court in the case of the State v. Casey, 325 SC 447. Specifically on the issue of being late, in the case of State v. Wilder, 306 SC 535 our Supreme Court has permitted a strike and found that to be a valid reasons.

In regard to Juror 117, the Court finds that the State [main] reason that this witness had known the victim and had been to school with the victim is a valid and non-racial reason for the strike. Court does not accept the fact that the juror may be “unemployed” particularly in this environment. That is not, in this Court’s opinion, and in this [locale] a valid reason to impose a strike.

And I do find that reason that the victim was known to the juror. **Also, I do not find that there is a pattern here of jurors being treated distinctly and separately among the races, one decision for one and another decision for the other. That would be opposite or inappropriate.**

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<sup>2</sup> At that time of the proceedings, the State withdrew its Batson motion. ROA 87-88.

And the Court finds that the Batson motion should be denied for these reasons.

ROA p. 88, l. 9 – p. 89, l. 16.

At that point, defense counsel Young sought to clarify Judge Baxley's ruling. He stated he was provided with a rap sheet which included the juror 131 was passed over and had a *nolle prossed* assault and battery with intent to kill charge. ROA p. 90, ll. 12-19. However, counsel Young also added that juror 105 (a white female that the defense struck) had something listed on the rap sheets as either arrest or conviction on bad check and simple assault. ROA p. 90, ll. 20-23.

Judge Baxley stated the Solicitor states this case arises from a criminal domestic violence situation and the Court found the *nolle pros* was a valid reason of juror 101. ROA 90-91.

#### **ARGUMENT ON WHY CERTIORARI SHOULD BE GRANTED**

- I. **The Court of Appeals erred in failing to adequately apply appropriate standards of deference and review in Batson v. Kentucky settings where under the totality of the circumstances the prosecution's stated reasons for using each of the peremptory challenges were race-neutral and the defense failed to show purposeful discrimination or pretext where the alleged pretext jurors were not similarly situated when they revealed evident pro-prosecution leanings, were struck by the defense and factually distinguishable from the three African American potential jurors struck by the prosecution.**

The Court of Appeals failed to give proper deference to the factual conclusions of the trial court after the Appellant's argument concerning pretext was presented and rejected. After concluding that the reasons were race-neutral, Judge Baxley concluded:

**Also, I do not find that there is a pattern here of jurors being treated distinctly and separately among the races, one decision for one and another decision for the other. That would be opposite or inappropriate.**

And the Court finds that the Batson motion should be denied for these reasons.

ROA p. 88, l. 9 – p. 89, l. 16.

At the outset, the Court of Appeals found pretext, contrary to the trial court's conclusions, in the prosecution's failure to strike prosecution-desired jurors who were **struck by the defense including:**

- a juror whose son-in-law was a local highway patrolman (juror 131),
- a female juror who considered herself a victim of a violent crime who had testified for the prosecution previously and the trial court had indicated was "active law-enforcement" as a result of her responses (juror 105);
- a female juror who saw the grieving victim's family at her work "all the time" (juror 128).

This reveals a failure to consider the totality of the circumstances by rejecting the trial court's assessment and limited its review to the one-sided characterizations of the defense, rather than the prosecution's stated reasons which the trial court generally accepted.

A court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 6, 545 S.E.2d at 829; see also State v. Edwards, 384 S.C. 504, 508, 509, 682 S.E.2d 820, 822, 823 (2009); State v. Haigler, 334 S.C. 623, 630, 515 S.E.2d 88, 91 (1999) ("The trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous."). See Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) ("deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike."); Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) ("As with the state of mind of

a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within the trial judge's province.' ") (citations omitted). Here, the trial court finding rejecting purposeful discrimination is not clearly erroneous because there is support in the record. The Court of Appeals erred in its failure to consider the totality of the circumstances in the record, rather than the defense characterizations.

B.

The Court of Appeals further failed to consider the totality of the circumstances presented to the trial judge by a consideration of the entire record. Step three of the Batson v. Kentucky analysis requires the court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. State v. Green, 655 So.2d 272, 290 (La.1995); see also Batson, 476 U.S. at 93–94, 106 S.Ct. 1712 (stating that the court must consider “the totality of the relevant facts,” including both direct and circumstantial evidence). During step three, the party asserting the Batson challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Edwards, 384 S.C. at 508–09, 682 S.E.2d at 822; see also Haigler, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party is attempting to show that the “originally neutral reason was ... a pretext because it was not applied in a neutral manner.” State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989). However, “If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence *tending to prove purposeful discrimination* to be considered at Batson's third step.” Miller–El v. Dretke, 545 U.S. 231, 241 (2005). Contrary to

the Stewart's position, it does not automatically prove purposeful discrimination.<sup>3</sup>

Under Batson, the assessment was still based upon a totality of the circumstances test. “[T]he trial court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination.” United States v. McAllister, 693 F.3d 572, 580 (6th Cir.2012). The answer to the decisive question about whether the race-neutral explanation for a peremptory challenge should be believed will largely turn on an evaluation of credibility and usually will involve an evaluation of the demeanor of the jurors and the attorney who exercises the challenge. See Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). “The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the [defense attorney’s] credibility to such an extent that a court should sustain a Batson challenge.” Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir.2003). “[T]he critical question in determining whether [the State ] has proved purposeful discrimination at step three is the persuasiveness of the [defense counsel’s] justification for [its] peremptory strike.” See Miller-El v. Cockrell, 537 U.S. 322, 338–39, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003). And the persuasiveness of the State’s justification depends heavily on credibility. See *id.* at 339 (“At [step three], ‘implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.’ In that instance the issue comes down to whether the trial court finds the [defense counsel’s] race-neutral explanations to be credible.” (quoting Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam))).

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<sup>3</sup> See People v. Hudson, 157 Ill.2d 401, 431 (1993) (“[A] venireperson possessing an unfavorable trait may be accepted as a juror while another venireperson possessing that same negative trait, but also possessing other negative traits, may be challenged.”). The fact that a prosecutor accepts other jurors of the same race as the challenged juror on the jury is indicative, albeit not dispositive, of a nondiscriminatory motive. Turner v. Marshall, 121 F.3d 1248, 1254 (9th Cir.1997), cert. denied, 522 U.S. 1153 (1998). The court need not make specific findings on all the evidence, beyond ruling on the objection to the challenge. United States v. Gillam, 167 F.3d 1273, 1278 (9th Cir.), cert. denied, 528 U.S. 900 (1999).

However, the totality of the circumstances supports the trial court's ruling that the prosecutor's explanations were based on the desire for a race-neutral decision based on the evidence, and not on racial animus. In order to properly evaluate the prosecutor's reasoning, this Court failed to conduct a complete comparative juror analysis which includes side-by-side comparisons of minority venire members who were struck and non-minority venire members allowed to serve. See e.g., Jameson v. Runnels, 713 F.3d 1218, 1224 (9th Cir.2013) (federal court must conduct comparative analysis in the first instance if the state court declined to perform it) (citing Briggs v. Grounds, 682 F.3d 1165, 1170 (9th Cir.2012)). "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller–El v. Dretke (Miller–El II), 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

**Pretext and Purposeful Discrimination was not Proven to the Trial Judge Concerning the Use of the Strikes Under the Totality of the Circumstances**

**JURORS 101 and 33**

In the decision below, the Court of Appeals concluded that the trial court erred in not finding pretext concerning the strike of juror 101.

As to Jurors 33 and 101, Stewart asserted the State did not strike Juror 131, who had a charge for assault and battery with intent to kill that was nolle prossed, or Juror 105, who had a conviction or an arrest for bad checks and simple assault. Although Stewart showed the State did not strike similarly-situated Caucasian jurors, the court found the State's reasons for striking Jurors 33 and 101 were permissible because case law supports dismissing a juror who had a previous negative relationship with law enforcement. The court seemed to find it relevant that Juror 33 had past domestic issues involving law enforcement. However, even though the State offered a racially-neutral explanation for striking the African American jurors, the State negated the reason by seating similarly-situated

Caucasian jurors. See Miller–El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (“If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson 's third step.”); State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated); *id.* (“In this case, an examination of the circumstances shows that the solicitor's originally neutral reason was proven to be a pretext because it was not applied in a neutral manner.”). Therefore, we find the State's strikes of Jurors 33 and 101 were not permissible.

#### State v. Stewart.

However, the Court of Appeals overlooked that there was support in the record for the trial court's conclusion that the prosecutor's stated reason for the strike was not pretextual and that there was a record basis to support the race-neutral reasons as being valid. For this reason, certiorari is appropriate.

#### **A. JUROR 101**

As to juror 101, the prosecutor stated that he was struck because of the prior arrest for possession of cocaine and the fact that the Solicitor's Office that was prosecuting the Stewart's case had been involved in the earlier prosecution of juror 101. ROA 80-82. The panel adopted and the Stewart asserted he had shown pretext at the trial by the fact that juror 131, a white male had a rap sheet that included a dismissed charge of assault and battery with intent to kill, although the defense admitted that the same juror had been struck by the defense and he had a son in law enforcement. ROA 84-85, 90. Subsequent to the rejection of the claim, the Appellant added that juror 105, a white female, had a record of either unknown as to arrest or conviction on bad check or simple assault. However, he also acknowledged that juror 105 was the sixth strike by the defense. In denying the Batson claim, the Court found the reason that there had been

previous, obviously, from that negative relationship with law enforcement and was a permissible reason for the strike, citing State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)

**1. Jurors 131 and 105 Were not Similarly Situated to Juror 33 and 101**

The Court of Appeals found the stated reason for the strike of juror 101 is a race neutral reason, but rejected its validity as being pretext where the State was never asked to explain why potential jurors 131 and 105 were not struck by the State. Under Batson, the assessment was still based upon a totality of the circumstances test. “[T]he trial court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination.” Here, the jurors that the Court of Appeals concluded were similarly situated were clearly not similarly situated to juror 101. Simply put, under the totality of the circumstances “purposeful discrimination” was not shown.

**2. Unlike Juror 101, the State Had Clear Reasons to Seek to Seat Juror 131 by the fact that his son-in-law was a locally assigned Highway Patrol trooper and his assault and battery charge had been nolle prossed who was struck by the Defense.**

The Court of Appeals overlooked that alleged pretext juror 131 had a son-in-law in law enforcement - Trooper Stacy Griggs - particularly the local Highway Patrol assignment<sup>4</sup> - is an obvious reason why juror 131 was not shown to be similar to juror 101. ROA. p. 39, ll. 10-23. [Further, although he had an apparent *nolle pros* of an assault and battery charge, it was not shown that in this record that he had been prosecuted by this Solicitor’s office]. Nevertheless,

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<sup>4</sup> Juror 131 indicated that he had a son-in-law in law enforcement with the Highway Patrol who was assigned to Chesterfield County which is where this crime occurred. ROA. p. 39.

the breadth of the difference was additionally shown by the fact that the defense struck juror 131. This factor was not addressed by the Court of Appeals in its opinion.

3. **Unlike Juror 101, the State had an obvious reason to seek to seat juror 105 who had been a victim of a violent in two prior incidents and assisted in the prosecutions which was evident to the defense who struck her.**

As with juror 131, the dissimilarity between juror 101 and juror 105 (a white female) were readily apparent to any neutral observer of the record. Juror 105 was reported to have a rap sheet showing a bad check and simple assault, but the dispositions were not clear. Nevertheless, juror 105 was also the same juror who indicated that she had been involved as a victim in two separate accidents 18 and 20 years before and was involved in the prosecution of those matters. ROA p. 40, l. 11 – p. 41, l. 16. She considered herself to be a “victim of a violent crime” and her response to the trial court as to whether she anything would prevent her from being fair and impartial gave a response “I don’t think” which caused the trial judge to asked an additional follow-up question as to whether she was certain of it. ROA p. 40-41. See also ROA p. 57, ll. 5-12 (trial court discusses the questioning of juror 105 on her being a victim “as a courtesy to the defense” because he found her to be “**active law enforcement** and somewhat hesitant in her responses” and that “she had a hesitancy about being fair and impartial”). Again, the evident pro-law enforcement leaning and dissimilarity was shown to the trial judge-as well as the defense, The defense used a peremptory challenge, #6, to have her removed.

Under the totality of the circumstances, the Appellant failed to prove pretext by the fact that the prosecutor did not strike juror 105 and 131 before they were struck by the defense. ROA 70-72.

**B. JUROR 33 - Information about tumultuous relationship with girlfriend/wife through Pageland police information.**

- 1. This trial was about a tumultuous relationship in a domestic situation between the Appellant and his girlfriend and the potential jurors own domestic troubles could impact upon the assessment of this case arising from a violent domestic situation and history.**

As to juror 33, an African American male who was the prosecution's 5<sup>th</sup> strike, the prosecutor asserted that he was struck based upon the advice from the Chief of Police of Pageland that the potential juror had been involved in a tumultuous relationship with his girlfriend/wife. The Court of Appeals overlooked that since this case involved alleged domestic violence between Stewart, his girlfriend, and his wife, the basis of the strike was due to this information about similar activity as the current prosecution. The defense urged that the claim that someone told the prosecutor that the person would not be a good juror was insufficient and left it up to the court – although he noted that juror 33 had not indicated that he had any criminal domestic violence charges which the venire was questioned. ROA 86. The trial judge rejected the claim of pretext for the same reasons as juror 101.

- 2. Under the totality of the circumstances, pretext was not shown in the prosecution not striking juror 105 in a trial concerning a violent domestic situation where juror 131 was dissimilar because he had evident pro-prosecution leanings with a son-in-law in law enforcement and no evidence that his nolle prossed charges arose from a violent or tumultuous domestic situation as juror 33 and juror 105 had considered herself a victim of a violent crime and that she was evidently pro-prosecution and hesitant in her responses as to being fair and impartial according to the trial court's assessment of her demeanor.**

The failing to show the pretext jurors 105 and 131 were similarly situated are weaker here where the dissimilarity between the jurors is even stronger. Juror 33 was struck based upon law enforcement information which revealed a potential bias in the actual prosecution based

upon the potential juror's own life experience in his own domestic relationship. Although juror 33 had not been charged with a crime, the information would suggest to any reasonable prosecutor that it could impact upon the juror's treatment of a similar domestic situation. There was no similarity to either juror 131 who had a son-in-law enforcement or juror 105 who considered herself to be a victim of a violent crime and prosecution witness, as stated earlier.

As Judge Baxley recounted, this incident on trial arose from a criminal domestic violence situation which is similar to the contentious situation concerning juror 33. The trial court plainly saw the evident difference and credible basis for the prosecutor's use of the strike of juror 33. ROA 91-92. These matters were overlooked in the assessment of the totality of the circumstances. Certiorari is appropriate.

### **C. JUROR 117 – unemployed potential juror.**

The Prosecutor stated that he struck potential juror 117, an African American female primarily as being unemployed, but noted that she had also gone to school with the victim. ROA 83, citing ROA 14-15. [There is no evidence that this juror was a "friend" of the victim in any of this record nor that she thought favorably or unfavorably of the victim.] Solicitor Redmond declared that unemployment had been found to be a race-neutral reason by the courts. ROA 83. Rollcall List for Panel, p. 10.<sup>5</sup> The prosecutor also noted that while knowing the victim may

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<sup>5</sup> As the Court of Appeals concluded, Solicitor Redmond made a correct statement of law in support of his use of the strike. See State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991) (unemployment is a race-neutral reason). In State v. Williams, 379 S.C. 399, 403, 665 S.E.2d 228 (S.C. App. 2008), the Court of Appeals unequivocally stated "employment, or lack of it, is a well-understood and recognized consideration in the exercise of peremptory challenges. State v. Haigler, 334 S.C. 623, 632, 515 S.E.2d 88, 92 (1999) (stating unemployment is a race-neutral reason for a strike); State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (holding place of employment is a race-neutral reason for a strike); see State v. Adams, 322 S.C. 114, 125, 470 S.E.2d 366, 372 (1996) (finding type of employment is a race-neutral reason for a strike." In Williams, the Court found pretext was not shown where "Jurors

work both ways, it had been shown that the defense had struck juror 128 who asserted she also knew the victim's family as seeing them "all the time" where she currently works. Although he saw that the struck juror had known the victim in school as a matter that raised concerns (although he did not say whether it was favorable or unfavorable), Solicitor Redmond stated the main reason for the strike was the unemployment. ROA 83. It was not contested that the potential juror 117 was unemployed. **Solicitor Redmond unequivocally declared: "but the main reason, obviously, was the fact that [she] was unemployed, and actually, that was in our discussions. That's the first thing that was brought to our attention that fact that [she] was unemployed."** ROA p. 83, ll. 14-19.

In addressing this juror strike, the Court of Appeals did not conclude that it was pretextual, instead finding that "the trial court should have further reviewed the State's strike of Juror 117. It expressly found:

Likewise, as to Juror 117, Stewart asserted the State struck Juror 117, but did not strike Juror 128 even though Clyburn's family frequented her workplace. The trial court found the State's reason that the juror had gone to school with Clyburn was a valid reason for the strike.<sup>5</sup> Although we find a difference between a juror having attended school with Clyburn and Clyburn's family frequenting a juror's workplace, we note they are similar enough to have warranted further review by the court. *See State v. Scott*, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct.App.2013) ("For the purpose of demonstrating potential jurors are similarly situated under *Batson*, potential jurors are not required to be 'identical in all respects.' " (quoting *Miller-El*, 545 U.S. at 247 n. 6, 125 S.Ct. 2317)); *id.* ("[I]n determining whether potential jurors are similarly situated, our courts have focused their inquiry on whether there are meaningful distinctions between the

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78 and 81 are both white and they are not "similarly situated," as Juror 81 is unemployed and the spouse of Juror 78 is unemployed." In *State v. Martinez*, 294 S.C. 72, 362 S.E.2d 641 (1987), and *State v. Howard*, 295 S.C. 462, 369 S.E.2d 132 (1988). In *Martinez* the court found racially neutral reasons stated for strikes against black jurors of the same age and sex as the defendant who had possible criminal records and against a black juror who was unemployed. *Martinez*, 294 S.C. at 73, 362 S.E.2d at 642.

individuals compared.”). Therefore, we find the trial court should have further reviewed the State's strike of Juror 117.

State v. Stewart, 775 S.E.2d 416, 421 (S.C. Ct. App. 2015).

The Court of Appeals recognized that the trial court erred in concluding that the prosecution’s stated motivating reason for the strike of unemployment was not a race-neutral reason. Opinion, ft. 5.

n. 5 The State's reason for striking Juror 117 was two-fold: she was unemployed and she knew Clyburn. The trial court ruled that the fact that Juror 117 was unemployed was not a valid reason to strike her. We find this was error because our courts have held unemployment is a race-neutral reason for striking a juror. *See Haigler*, 334 S.C. at 632, 515 S.E.2d at 92 (finding unemployment is a race-neutral reason for a strike).

State v. Stewart, 775 S.E.2d 416, 421, n.5 (S.C. Ct. App. 2015), reh'g denied (Aug. 20, 2015).

However, the Court of Appeals refused to recognized that this should have removed the issue from its Batson analysis because pretext had not been shown by any similarly situated unemployed members of the Caucasian race. This should have ended the assessment as a matter of law because it was a proper race-neutral reason and no “pretext” jurors that the state seated possessed a similar characteristic.

In suggesting that the trial court “should have further reviewed the strike of Juror 117”, the Appellant and Court of Appeals ignored in its analysis that the prosecution’s actual stated reason of unemployment and focused upon the collateral fact that the struck juror acknowledged on voir dire going to school with the victim but had not seen “for some time” and could not recall when she last saw the victim. ROA 14-15. However, this was not the initially claimed motivating reason by the State for its strike. At no point did the Court of Appeals or the

defense at trial show a similarly situated person was “unemployed.” Absent any showing of pretext to that stated reason, the assertion of pretext must fail.

**1. Juror 128 is not similarly situated because she was not unemployed and in fact was employed and met the victim’s family regularly at her place of employment.**

However, the defense asserted that he had shown pretext with juror 128 because she knew the victim’s family, but did not address the stated reason of unemployment and made no showing that any unemployed white potential jurors were not struck by the state. The trial court, however, found the reason the State struck the juror was because she knew the victim and had gone to school with her and concluded that it was “valid and non-racial reason for the strike.” ROA p. 89, ll. 2-9.

Assuming arguendo that the main reason for the strike was knowing the victim and having gone to school with her, the situation with juror 128 is dissimilar. Juror 117 stated that she had gone to school with the victim, but had not seen her for some time and did not recall when she last saw her. However, the motivating reason stated by the prosecution was the juror’s unemployment.

In contrast, the alleged pretext juror #128 was not only employed, but stated that she “knows the victim’s family” [but did not state that she knew the victim] and that “they come into where I work all the time.” ROA 15, l. 21-24. Again, she stated she knew Bellanie’s family – not that she knew Bellanie.<sup>6</sup> This reflected present and ongoing contact with the grieving family

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<sup>6</sup> AS the prosecution implicitly noted, knowing the victim could work both ways. This case involves a situation where Bellanie’s earlier violence against the Stewart’s wife had resulted in Bellanie’s incarceration. This stands in stark contrast to knowing the victim’s family – which could suggest empathy to them by the continued and ongoing relationship with juror 128 employment.

members, but did not include a response about actually knowing the victim, unlike struck juror 117.

The Appellant contended that juror 128 was the first juror addressed and the State did not strike her. However, he ignores the evident differences between knowing the victim in school and that she had not seen her for some time,<sup>7</sup> in contrast to seeing the members of victim's family where she works "all the time" including the present time after the death. There was no information that juror 128 actually knew the victim, only the victim's family, unlike 117. In addition, juror 117 did not state that she was friends with the victim, a concept that underlies their present argument.

The Appellant speculates in their Initial Brief of Appellant that: "it would be difficult to imagine a better juror for the State than one that had known the victim and been to school with the victim."<sup>8</sup> *Initial Brief of Appellant*, p. 13. To the contrary, where the victim had a history of violent conduct against others and the Appellant's theory was that he feared for his own life and that she assaulted him the night of her death, juror 117 could be the worst juror for the prosecution if similar violent tendencies had been evident while in school or the juror had knowledge of the other assaultive behavior! ROA 489-497. Further, the defense used its first peremptory strike against juror 128, reflecting their concern about that jurors potential leanings in the State's favor. Plainly, these jurors situations are dissimilar.

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<sup>7</sup> According to the Rollcall, p. 10, ROA 589, juror 117 was born in 1983. The crime occurred on January 1, 2010. The juror was 27 years old at the time of the crime. The victim was 25 when she died, two years younger than juror 117. ROA 501. It was not presented when the last time juror 117 she saw the victim other than it being some time. It should be noted that the victim had been convicted previously of a violent crime against the Appellant's wife in 2009. ROA 447-49. As the prosecution feared, the prior knowledge about the victim was potentially dangerous to the state's case where the defense was claiming the victim was the aggressor.

<sup>8</sup> This speculation was never raised to the trial judge by the defense.

## SUMMARY

The Court of Appeals relies upon State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891(1989) to suggest that merely showing a non-struck white juror with a similar characteristic is sufficient to prove always pretext, without regard to dissimilarities that motivated the use of a strike. However, the Court of Appeals misapprehended the case as applied to the circumstances presented here and the strength of his statement fails when it is shown that the non-struck jurors are not “similar” under a review of the totality of the circumstances as required to show purposeful discrimination.

The Court of Appeals overlooked that these stark differences between the struck and non-struck jurors revealed exactly why those particular non-struck jurors would be a qualified but favorable juror to the prosecution theory of the case against Appellant. These prosecution-desired jurors **and struck by the defense were:**

- a juror whose son-in-law was a local highway patrolman (juror 131),
- a female juror who considered herself a victim of a violent crime who had testified for the prosecution previously and the trial court had indicated was “active law-enforcement” as a result of her responses (juror 105);
- a female juror who saw the grieving victim’s family at her work “all the time” (juror 128).

The basis for the prosecution to seek to have these jurors on their panel was self-evident to the prosecution, the defense (who were each struck by the defense) and the trial court, yet overlooked by the Court of Appeals. Similar pro-prosecution traits were not shared with the

prosecution struck jurors. This was not a question of a pattern of disparate treatment by the Solicitor, but reasoned decision-making. The defense recognized the soundness of the prosecution decision in striking each of the jurors themselves. The trial court reasonably found no pattern of discrimination in the strikes. The Court of Appeals erred in concluding otherwise and failing to assess the entire record.

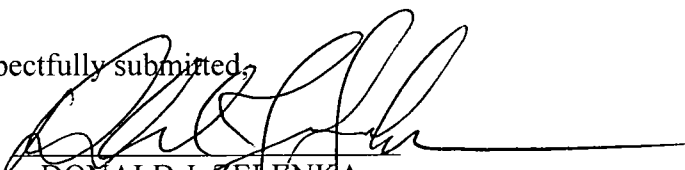
The issue was whether purposeful discrimination was proven in the use of any of the strikes by the totality of the circumstances – not just whether there may be some shared characteristics as defined by the defense. The trial judge concluded that it was not and that a pattern was not proven. ROA 86-91. This assessment was based upon the totality of the circumstances, including the demeanor of the prosecutor contrasted against the record of information provided for each of the jurors and that type of case being tried. His claim otherwise is without merit. Rehearing should be granted.

### CONCLUSION

For all the foregoing reasons, the State submits that petition for writ of certiorari should be granted and the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

BY:

  
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September 21, 2015

ATTORNEYS FOR PETITIONER

**CERTIFICATE OF SERVICE**

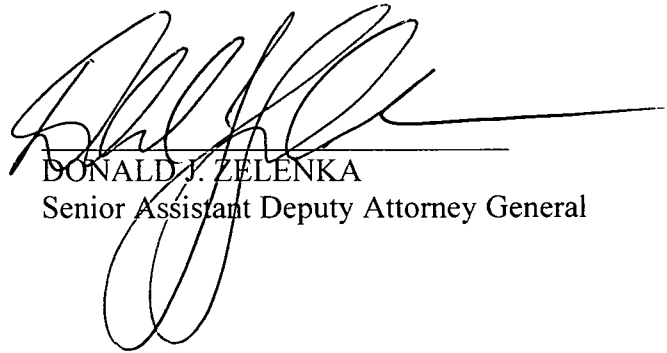
**I, Donald J. Zelenka**, hereby certify that I have served the Petition for Writ of Certiorari in the foregoing action by depositing copies in the United States mail, postage prepaid to:

Jarrett O. Coco, Esquire  
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and by InterAgency Mail to

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This 21<sup>st</sup> day of Sseptember, 2015.



DONALD J. ZELENA  
Senior Assistant Deputy Attorney General