STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Supreme Court Case No. 2015-001991
Court of Appeals Appellate Case No 2012-213655
Op.No 5331, 413 S.C. 308, 775 S.E.2d 416 (S.C. Ct. App. 2015)

THE STATE,

PETITIONER,

V.

THOMAS STEWART,

RESPONDENT

RETURN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JARRETT O. COCO

Nelson Mullins Riley & Scarborough LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

ROBERT M. DUDEK

South Carolina Commission on Indigent Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330

ATTORNEYS FOR RESPONDENT

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INTRODUCTION

The Petition for Writ of Certiorari ("Petition") in this matter should be denied. None of the factors in Rule 242(b) SCARC exist to justify the issuance of the writ. The Court of Appeals decision was unanimous, there is no constitutional issue, no federal question, no novel question of law, and no other "special and important" reason warranting certiorari. The opinion of the Court of Appeals regarding the *Batson* analysis is consistent with this Court's precedent. In its unanimous opinion, the Court of Appeals correctly reversed and remanded for a new trial, finding that the trial court improperly denied Respondent's *Batson* motion. The State's Petition fails to raise any error of law, case, or issue that the Court of Appeals misapprehended, misconstrued, or overlooked. Accordingly, Respondent respectfully requests this Court to deny the State's Petition.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals fail to defer to the factual findings of the trial court regarding similarly-situated jurors when the trial record does not contain such factual findings?

II. Did the Court of Appeals properly consider the totality of the circumstances when the Respondent offered similarly-situated Caucasian jurors who were not struck by the State and there were no findings by the trial court to distinguish those similarly-situated Caucasian jurors?

III. Did the Court of Appeals correctly hold that Respondent proved pretext where the Respondent offered both direct evidence of pretext by presenting similarly-situated Caucasian jurors, as well as circumstantial statistical evidence of pretext?

COUNTER-STATEMENT OF THE CASE

The issue before this Court is whether the Court of Appeals properly held that the trial court failed to grant Respondent's *Batson* motion. On appeal before the Court of Appeals, Respondent argued that the trial court erred in failing to grant his *Batson* motion because (1) the trail 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 explanations and make a deliberate decision as to whether purposeful discrimination occurred; and (2) Respondent carried his burden to prove that the State's proffered reasons were pretextual because they were not applied in a neutral manner. App. at 2.

During jury selection, the State used four of its five peremptory strikes to exclude African American jurors. App. at 8; R. at 80:13–15. Respondent is African American. The racial composition of the impaneled jury was two African Americans and ten Caucasians. App. at 8; *see* Jury Rollcall List for Panel at R. at 580–92. The two alternates were also Caucasian. The two African Americans in the impaneled jury, Juror 95 and Juror 59, were presented by the State only after the State had used four of its five peremptory strikes and the State had only one peremptory challenge remaining. App. 8; R. at 71: 10–13; R. at 72:2–6. The State used its final peremptory strike to strike an African American juror (Juror 33). App. at 8; R. at 72:19–25; Jury Rollcall List for Panel at R. 582. Respondent objected and the trial court held a *Batson* hearing. App. at 8; R. at 80:13–92:6. The four African American jurors struck by the State were Jurors 101, 33, 117, and 126. App. at 9; R. at 81:19–21. The State excused Juror 101 because he had a prior arrest: "possession of cocaine charge that was nolle prossed." App. at 9; R. at 82:4–9. The State excused Juror 33 because local law enforcement told the prosecutor that the juror had "prior incidents involving his . . . girlfriend who is now his wife." App. at 9; R. 83:23–84:12. The State excused Juror 117 because "the main reason, obviously, was the fact that he was unemployed . . ." but also because the juror knew the victim. App. at 9; R. at 83:6–19. The State excused Juror 126 because the State observed her disinterested demeanor and that the juror was late returning from a break. App. at 9; R. at 82:22–83:4.

Respondent argued that State's strikes of Jurors 101 and 33 were pretextual because there were other similarly situated Caucasian jurors with prior arrests that were not stricken by the State. App. at 9; R. at 85:1–8; R. at 90:13–23). Respondent offered Jurors 105 and 131, both Caucasian and similarly situated with prior arrest records, App. at 9; R. at 90:13–23, that the State did not strike, App. at 9; R. at 69:19–22; R. at 70:11–14. Respondent argued that the State's strike of Juror 117 was also improper because there was another similarly-situated Caucasian juror who knew the family of the victim. Respondent offered Juror 128, as a similarly situated Caucasian juror who knew the victim's family because they came to her workplace "all the time." App at 9; R. at 15:15–24. Juror 128 was the first juror called and the State did not strike her. App. at 9; R. at 67:16–19. With regard to Juror 126, counsel for Respondent noted that he did not notice any jurors come back late from a break. App. at 9; R. at 86:11–17.

Regarding Jurors 101 and 33, the trial court found that there had been a previous, "negative relationship with law enforcement, and that has been found by our Court in the case of [*State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990)], to be a permissible reason for a strike." App. at 9; R. at 88:13–19. Regarding Juror 117, the trial court found the State's reason that the juror knew the victim was a valid reason; however, the trial court did not accept the fact that the juror may be unemployed "as a valid reason to impose a strike." App. at 10; R. at 89:2–9. Regarding Juror 126, the trial court found that disinterested demeanor "has been previously permitted by our Supreme Court in the case of [*State v. Casey*, 325 S.C. 447, 481 S.E.2d 167 (1997)] and "[s]pecifically on the issue of being late, in the case of [*State v. Wilder*, 306 S.C. 535, 413 S.E.2d 323 (1991)] our Supreme Court has permitted a strike and found that to be a valid reason." App. at 10; R. at 88:19–89:1. The trial court then denied Respondent's *Batson* motion because these reasons proffered by the State were previously found to be "permissible" in

other cases. The trial court did not address the similarly-situated Caucasian jurors offered by the Respondent.

Respondent timely appealed to the Court of Appeals on the *Batson* issue and two others that were not reached by the Court of Appeals. The Court of Appeals found that although "the State offered racially-neutral explanations for striking [Jurors 101 and 33], the State negated the reason by seating similarly-situated Caucasian jurors." *State v. Stewart*, 413 S.C. 308, 317, 775 S.E.2d 416, 421 (S.C. Ct. App. 2105). The Court of Appeals also found that, although there was a difference between Juror 117 and the similarly-situated Caucasian juror, "we note they are similar enough to have warranted further review by the court." *Id.* at 318, 775 S.E.2d at 421. The Court of Appeals reversed and remanded for a new trial, finding that the trial court improperly denied Respondent's *Batson* motion. *Id.*

In its Petition, the State argues that the Court of Appeals erred by failing to (1) defer to the factual findings of the trial court; (2) consider the totality of the circumstances; and (3) recognize that pretext was not proven to the trial judge. The Court of Appeals did not err. There were no factual findings placed in the record by the trial court to defer to; the Court of Appeals clearly considered the entire record; and the Court of Appeals properly concluded that trial court improperly denied Respondent's Batson motion. Therefore, Respondent respectfully requests this Court to deny the State's Petition.

ARGUMENT

The South Carolina Appellate Court Rules provide that a "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b) SCACR; *see also State v. Lyles*, 381 S.C. 442, 443, 673 S.E.2d 811, 812 (2009) ("The Court has held it will grant certiorari to the Court of Appeals only

where special reasons justify the exercise of that power."). Typically, certiorari is limited to cases:

> (1) Where there are novel questions of law.
> (2) Where there is a dissent in the decision of the Court of Appeals.
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
> (4) Where substantial constitutional issues are directly involved.
> (5) Where a federal question in included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR; *see also Lyles*, 381 S.C. at 444 n.2, 673 S.E.2d at 812 n.2.

The unanimous Court of Appeals ruling in this case presents none of these factors and is consistent with longstanding precedent regarding *Batson* issues, and the State's Petition does not assert otherwise. Specifically, the State does not raise any novel issue to be considered by the Court. Nor does the State identify any prior Supreme Court decision that conflicts with the Court of Appeals decision. Nor does the State assert that constitutional or federal question issues demand Supreme Court review. Moreover, as shown below, the issues raised in the State's Petition, which were considered and correctly decided by the Court of Appeals, fail. Certiorari is unwarranted.

I. THE COURT OF APPEALS DID NOT FAIL TO DEFER TO THE FACTUAL FINDINGS OF THE TRIAL COURT BECAUSE THERE WERE NO FINDINGS IN THE RECORD TO DEFER TO

The State argues that this Court failed to give deference to the "factual conclusion" of the trial court. Pet. at 10. Significantly, the State does not point to any "factual finding" to which this Court should defer other than the trial court's conclusory ruling that it did not find racial bias. The State's citations to case law are unavailing because those cases support the Respondent's position: a reviewing court owes deference to a trial court's factual findings *contained in the record.* As the Court of Appeals notes, a trial court's *findings* are given great

deference and will not be set aside unless clearly erroneous. *Stewart*, 413 S.C. at 316, 775 S.E.2d at 420 (citing *State v. Evins*, 373 S.C. 404, 416, 645 S.E.2d 904, 909-10 (2007)) (emphasis added). The Court also notes that "[t]his standard of review, however, is premised on the trial court following the mandated procedure for a *Batson* hearing." *Id.* (quoting *State v. Cochran*, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006)). Therefore, there was no misapprehension or omission by the Court of Appeals. Clearly, the Court of Appeals was aware that deference should be afforded to factual findings of a trial court, provided that the trial court followed the procedure required for a *Batson* hearing and those findings can be found in the record.

The State cites to *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008), for the proposition that an appellate court should defer to the trial court "where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike." Respondent agrees. *See* Appellant's Reply Br. at 9-10, App. at 41–42 (quoting *Snyder* for the same proposition). The problem for the State (and that which animates Respondent's argument), is that the trial court in this case made no such finding, or any factual findings for an appellate court to rely upon. In *Snyder*, the United States Supreme Court declined to defer to the trial court because the trial court failed to make specific findings on the record. *Snyder*, 552 U.S. at 479. Therefore, the Court of Appeals should not defer to the trial court in this case because there are no factual findings in the record for which the Court to defer. *See id.*; *United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011) ("[I]f there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer. That is why the third step under *Batson* '*requires* the court to weigh the evidence and determine whether the prosecution's nondiscriminatory reason for the strike is credible or if the defense has shown purposeful discrimination.'" (citing

Snyder, 552 U.S. at 479 and quoting *Coulter v. McCann,* 484 F.3d 459, 465 (7th Cir. 2007) (emphasis in original)). The State's argument that a court should defer to the factual findings of the trial court actually underscores the importance of the third step in *Batson*, and the absence of factual findings in the record in this case undermines the State's position that the trial court fully complied with the strictures of *Batson*.

In addition, Respondent argues that the trial court did not comply with the third step in *Batson*; therefore, the Court of Appeals is answering a "question of law," so the "standard of review is plenary." *Stewart*, 413 S.C. at 316, 775 S.E.2d at 420 (quoting *Cochran*, 369 S.C. at 312, 631 S.E.2d at 297).

Therefore, the State's argument that the Court of Appeals failed to defer to the trial court fails. Certiorari is inappropriate.

II. THE COURT OF APPEALS DID NOT FAIL TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES.

The State argues that this Court failed to consider the "totality of the circumstances" presented to the trial judge. Again, this argument was made by the Parties in their briefing and is noted in the Opinion of the Court of Appeals. App. at 12, 39, 68, 75-76; *Stewart*, 314 S.C. at 316, 775 S.C.2d at 420. Therefore, there is no misapprehension or omission by the Court of Appeals. Contrary to the State's position, "totality of the circumstances" does not mean that an appeal court should read into the trial record findings that do not exist. Nor does "totality of the circumstances" mean that the record should be scoured to conjure possible ways to distinguish similarly-situated Caucasian jurors from the struck African American jurors. *See Miller-El v. Dretke*, 545 U.S. 231, 247, n.6 (2005) ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . A per se rule that a defendant cannot win a Batson claim unless

there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters."). *See also State v. Scott*, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct. App. 2013), reh'g denied (June 16, 2014) (quoting *Miller-El*, and noting that potential jurors are not required to be "identical in all respects.").

Instead, "totality of the circumstances" means that a court should look to direct and circumstantial evidence of discrimination, as the State recognizes in its Brief. *See* State's Br. at 9; App. at 68; Pet. for Reh'g at 2; App at 123 (citing *Batson* for the proposition that "the court must consider 'the totality of the relevant facts,' including both direct and circumstantial evidence"). Respondent showed both direct evidence of discrimination by presenting similarly-situated Caucasian jurors, as well as circumstantial statistical evidence of discrimination. *State v. Inman*, 409 S.C. 19, 27, 760 S.E.2d 105, 109 n.6 (2014) ("[T]he statistical evidence must be paired with some other evidence of discrimination, such as direct evidence of other jurors being struck for pretextual reasons."); App. at 39–41 (presenting statistical evidence showing that the State used 80% of its strikes against African Americans who comprised only 31% of the jury pool, and seated the only two African American jurors after using 4 of its 5 strikes). Therefore, the Court of Appeals did not fail to consider the "totality of the circumstances." Certiorari is inappropriate.

III. THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT IMPROPERLY DENIED RESPONDENT'S BATSON MOTION

The State again speculates as to possible characteristics that the State believes distinguish the struck African American jurors from the similarly-situated Caucasian jurors, arguing that these characteristics certainly must have been in the contemplation of the solicitor and the judge (the absence of any findings in the record notwithstanding), and therefore, the State argues, the Caucasian jurors must not be sufficiently "similar." Pet. at14–23. This argument is essentially a

species of the State's "totality of the circumstances" argument in which the State urges the Court to adopt the State's version of findings and read them into the trial record. As Respondent has previously argued, a reviewing court is not at liberty to do so. *Miller-El*, 545 U.S. at 252 ("A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."). Notably, the State still does not cite to any case law to support its argument that a reviewing court should permit such speculation, but instead attempts to shoehorn its argument into the general rule that a court should consider the "totality of the circumstances."

To even reach to the State's argument, one must set aside the fact that the trial court failed to comply with the analysis required in the third step of Batson and the record does not contain any findings by the trial court to substantiate the State's speculative reasons. For the State to succeed, one would have to believe that (1) the solicitor recognized these Caucasian jurors as different for the reasons offered by the State, (2) the trial court recognized the same, (3) the trial court also recognized that solicitor recognized the same, and (4) the trial court still decided to decline to engage in any dialogue or questioning to explore or confirm as much, provide any findings, or point to any other evidence demonstrating as much.

For example, the State argues that Juror 101, a black juror who was struck because of a prior arrest, is not similar to Juror 131, a Caucasian juror who was not struck but also had a prior arrest, because Juror 131 had a son in law in law enforcement. Yet nothing in the record supports the State's supposition that the occupation of Juror 131's son-in-law was in the contemplation of the trial court and the solicitor. The State is forced to engage in this type of tortured speculation over and over because the trial court failed to comply with the third step of

the *Batson* analysis. This is exactly the type of information that would have be been reviewed and weighed by the trial court and borne out on the record had the third step of the *Batson* analysis been properly conducted. The State, after enjoying the benefit of time to comb the record, research, and reflect, cannot be allowed to "think up" years after the *Batson* motion took place in an attempt to distinguish the similarly-situated Caucasian jurors. *See Miller-El*, 545 U.S. at 247 n.6, 252 (noting that similarly-situated jurors need not be identical and a *Batson* challenge is not an exercise in "thinking up any rational basis"). As argued more fully in briefing and at oral argument, it remains that the trial court did not conduct a proper analysis in the third step of *Batson*, and instead summarily concluded that the race-neutral reasons offered by the solicitor had been found to be permissible in previous cases in South Carolina. Doing so fulfilled the second step in the Batson analysis, but fell short of the analysis required in the third step of *Batson* which *requires* the court to undertake a careful analysis to evaluate whether the facially-neutral reasons were actually applied neutrally. *Inman*, 409 S.C. at 27, 709 S.E.2d at 109; *Rutledge*, 648 F.3d at 559. In other words, it is not enough that South Carolina courts have previously found these reasons to be race-neutral; the court must address whether these reasons were applied neutrally in this case. The trial court never did so, nor did the court address the similarly-situated jurors presented by the defense.

Equally unavailing is the argument that Respondent's strike of a similarly-situated Caucasian juror somehow validates the prosecution's decision to not strike the same juror. Observers cannot ascribe the same meaning for adverse parties' respective decisions to strike or seat jurors because adverse parties do not necessarily strike or seat the same juror for the same reason. In other words, just because one party strikes a juror and the other party does not, does not mean that they do so for the same reason; therefore, it does not demonstrate, affirm, or

validate the State's speculation that the similarly-situated Caucasian jurors were not sufficiently similar.

In its Petition, the State also improperly argues that Respondent's showing of pretext for Juror 117 must fail because the trial judge incorrectly held that unemployment was an invalid reason to strike, and the Court of Appeals and the defense at trial failed to show a similarly-situated Caucasian juror who was unemployed. Pet. for Cert. at 21-22. First, this argument is untimely because the State never asserted in its briefing that Respondent's argument with regard to Juror 117 must fail because Respondent failed to present a similarly-situated Caucasian juror who was also unemployed.[1] The State simply added a footnote asserting that unemployment is a valid reason in South Carolina and noted that Respondent did not present an unemployed Caucasian juror who was not struck by the State. App. 77-78. Second, the State argues that knowing the victim "was not the initially claimed motivating reason by the State for its strike." Pet. for Cert. at 21. If that were true and the trial court should have only considered unemployment as a reason as the State asserts, then the trial court would have ruled, correctly or not, that unemployment was not a race-neutral reason and Respondent would have prevailed on his Batson motion. This issue would have never been brought up on appeal. It is unclear how that is helpful for the State. Third, the trial court ruled that unemployment was not a race-neutral reason and the Parties accepted that ruling. There was no objection from the Solicitor that unemployment was in fact a race-neutral reason in South Carolina. Fourth, the State's argument ignores the fact that the solicitor gave two reasons for the strike of Juror 117: unemployment and knowing the victim. Each reason must be independently race-neutral. Respondent presented a similarly-situated Caucasian juror with regards to knowing the victim; therefore, his argument does not fail simply because a similarly-situated Caucasian juror was not presented for both

[1] The State made this argument for the first time in its Petition for Rehearing at 9; App. at 130.

reasons. In addition, Respondent recognizes that it would be improper to go back now to scour the record in an attempt to identify similarly-situated Caucasian jurors who were unemployed, just as it is improper for the State to scour the record now to speculate as to possible reasons why the solicitor might have presented the similarly-situated Caucasian jurors but struck the African American jurors.

Therefore, the Court of Appeals correctly determined that the trial court inappropriately denied Respondent's *Batson* motion. Thus, certiorari is unwarranted.

CONCLUSION

Consistent with the foregoing, Respondent respectfully requests the Court to deny the State's Petition for Certiorari.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Jarrett O. Coco
SC Bar No. 100577
E-Mail: jarrett.coco@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE
Robert M. Dudek
E-Mail: RDudek@sccid.sc.gov
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330

Attorneys for Respondent Thomas Stewart

This 20th day of October, 2015.

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Appellate Case No. 2012-213655

CERTIFICATE OF SERVICE

The undersigned attorney hereby certified that a true copy of the Return in Opposition to the Petition for a Writ of Certiorari in the above referenced case have been served upon Donald J. Zelenka, Esquire, State of South Carolina, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201, this 20th day of October, 2015.

By: _____
Jarrett O. Coco
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 20th day of October, 2015.

_____ (L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.