STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-000149
Opinion No. 2017-UP-426 (S.C. Ct. App. Filed November 15, 2017)

THE STATE, ...PETITIONER

v.

RAYMOND LEWIS YOUNG, ... Respondent

APPENDIX
VOLUME 3 OF 3

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S.C. SUPREME COURT

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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Columbia, South Carolina
December 16, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

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Edward W. Miller, Circuit Court Judge

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THE STATE, ...RESPONDENT,

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PROOF OF SERVICE

I, Angela Bennett, Administrative Coordinator, hereby certify that I have served the within *Final Brief of Respondent* dated December 16, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

J. Falkner Wilkes, Esquire
114 Whitsett Street
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I further certified that all parties required by Rule to be served have been served. This 16th day of December, 2016.

Angela Bennett
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Raymond Lewis Young, Appellant.

Appellate Case No. 2013-000149

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 2017-UP-426
Submitted September 7, 2017 – Filed November 15, 2017

REVERSED AND REMANDED

J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General J. Benjamin Aplin, both of Columbia, and Solicitor W. Walter Wilkins, III, of Greenville, for Respondent.

PER CURIAM: Raymond Lewis Young appeals his convictions and sentences of seven counts of attempted murder, one count of second degree assault and battery

by mob, and one count of conspiracy.[1] Young argues, among other issues, the trial court erred in denying his *Batson*[2] motion. We reverse and remand for a new trial.

FACTS/PROCEDURAL HISTORY

The codefendants were tried together for their involvement in a shootout at a Li'l Cricket gas station in Greenville. Prior to jury selection, the trial court agreed to permit counsel for Booker to "speak[] for the group." The State struck three black jurors: 281, 81, and alternate juror 215. Young challenged the strikes, noting of the State's six strikes, three were used on black jurors. The trial court noted three black jurors were seated. The State explained it excused Juror 281 because during voir dire, she "expressed some concerns regarding her ability to withstand the duration of the trial. She indicated she had a substantial number of health issues and wanted to be excused based on those issues." Regarding Juror 81, the State noted she lived on Prancer Avenue in Greenville County near some of the witnesses. Finally, the State explained it struck Juror 215 because he lived in the Piedmont area, possibly near many of the witnesses.

Young argued the State's explanations were not "satisfactory rac[e] neutral reasons," and the State did not strike Juror 106, a white, female juror who lived on Piedmont Avenue in Piedmont. The State argued it did not have any concern about that particular Piedmont address and it did not "know the geography of Greenville County with enough sophistication to appreciate the minor details of the community . . . ." The trial court noted Young made a valid point but denied the motion, relying on *State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1998), and *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998), and finding no discriminatory intent inherent in the State's explanation. After the presentation of the case, the jury convicted Young and the court denied all post trial motions. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* A

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[1] Kinjta Sadler (*State v. Sadler*, Op. No. 2015-UP-013 (S.C. Ct. App. filed Jan. 14, 2015)), Michael Antonio Williams, and Esaiveus Frantrez Booker were tried together as Young's codefendants.

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

trial court's decision constitutes an abuse of discretion when it is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

LAW/ANALYSIS

Young argues the trial court erred in denying his *Batson* motion. We agree.

In *Batson*, 476 U.S. at 89, the Supreme Court of the United States held the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States forbids a prosecutor from challenging "potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." In *Georgia v. McCollum*, 505 U.S. 42, 59 (1992), the Supreme Court held the Constitution also prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges. When one party strikes a member of a cognizable racial group, the trial court must hold a *Batson* hearing if the opposing party requests one. *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999).

In *State v. Giles*, our supreme court explained the proper procedure for a *Batson* hearing:

> First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination.

407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (citations omitted).

Merely denying a discriminatory motive is insufficient; however, the proponent of the strike need only present a race or gender neutral reason. *State v. Casey*, 325

S.C. 447, 451-52, 481 S.E.2d 169, 171-72 (Ct. App. 1997). "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett v. Elem*, 514 U.S. 765, 769 (1995). The explanation "need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with a bearing on it." *Giles*, 407 S.C. at 21-22, 754 S.E.2d at 265. "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

In denying Young's motion, the trial court relied on *Tucker* and *Payton*, neither of which we find instructive in this case. In *Tucker*, the State used all six of its preemptory strikes against black jurors. 334 S.C. at 8, 512 S.E.2d at 102. As its race-neutral explanations, the State proffered the first juror was argumentative and the second juror, among other things, lived in a high crime area, did not understand the court process, and stated she could not sign a death verdict form. *Id.* at 8-9, 512 S.E.2d at 102-03. As to the remaining four jurors, the State struck them based on their equivocality regarding the death penalty. *Id.* at 9, 512 S.E.2d at 103. Regarding the first two jurors, our supreme court determined the trial court did not err in finding the reasons for the strikes were race neutral *and noted no similarly situated jurors of a different race were struck.* *Id.* at 8-9, 512 S.E.2d at 102-03. As to the remaining four jurors, our supreme court referenced the deference it gives the solicitor when the solicitor "perceives a person will have difficulty imposing the death penalty." *Id.* at 9, 512 S.E.2d at 103.

In *Payton*, the plaintiff exercised all of his peremptory strikes to remove prospective white jurors. 329 S.C. at 54, 495 S.E.2d at 207. Counsel for the plaintiff stated he used a strike against Juror 18 because she was opinionated and "what we refer to as a *redneck variety*." *Id.* at 55, 495 S.E.2d at 208. Our supreme court found the term "redneck" was "a racially derogatory term applied exclusively to members of the white race" and it was "not a valid race-neutral reason to strike a potential juror." *Id.* at 55-56, 495 S.E.2d at 208. The court found the purported reason for the strike was not a valid race-neutral reason, prefacing its finding by stating it "need not go beyond the second step of the analysis." *Id.* at 55, 495 S.E.2d at 208. The court reminded that "the right to serve on a jury and not to be discriminated against because of race or gender belongs to the potential juror, not the party" and rejected the dual motivation analysis, finding "[o]nce a discriminatory reason has been uncovered . . . this reason taints the entire jury selection procedure." *Id.* at 56-59, 495 S.E.2d at 208-10; *see id.* at 59, 495 S.E.2d

at 210 (explaining other jurisdictions find "a discriminatory explanation will vitiate the entire selection process regardless of the genuineness of the other explanations for the strike").

We find neither of these cases was controlling on the trial court, which failed to exercise its discretion in stating the cases "required [it] to find the reason offered to be deemed race neutral." In this case, the State's stated reason for striking these jurors was a concern that they lived in the same area as some of the witnesses. Regarding Juror 215, the State "was concerned that he may be familiar with some of the witnesses." We agree the State's explanation for striking Jurors 81 and 215–they lived in an area near many of the witnesses–is a race-neutral explanation. Accordingly, the burden shifted to Young to show pretext because a similarly situated juror of another race was seated.

Thus, we look to step three, in which the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination. *See Haigler*, 334 S.C. at 629, 515 S.E.2d at 91 ("[T]he opponent of the strike must show that the race- or gender-neutral explanation given was mere pretext."). The opponent of the strike has the burden of proving the pretextual nature of the stated reason for the strike. *State v. Cochran*, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006). "This burden is generally established by showing similarly-situated members of another race were seated on the jury." *Id.* In this case, the State struck two black jurors on the basis they lived in the same area as some of the State's witnesses, yet seated at least one similarly situated white juror. Thus, Young has shown the pretextual nature of the stated reason for the strike.

However, this inconsistent application of a neutral reason does not automatically result in a finding of discrimination if the strike's proponent provides a race-neutral explanation for the inconsistency. *See State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995) (finding the solicitor provided a racially neutral explanation for why it did not strike a juror with similar characteristics to one previously striken when she stated she was "saving her last strike to use on other potential jurors" who had criminal records). However, the record in this case does not reflect any race-neutral explanation for the solicitor's strikes. Rather, the solicitor stated the following:

> I've offered race neutral reasons. If the Court wants a more specific inquiry. I didn't make that address on [the white juror who lived on Piedmont], it is something that I

> had no concern. I had concerns about the Piedmont address but not this one. I don't know the geography of Greenville County with enough sophistication to appreciate the minor details of the community the basis of my strike, Judge.

The trial court recognized Young made "a very valid point." However, the court stated, "I don't see a discriminatory intent inherent in the proponent's explanation and so I believe those cases require me to find the reason offered to be deemed race neutral."

We find the trial court erred in failing to conduct a proper analysis under the third step of a *Batson* review. Rather than considering the State's failure to articulate a race neutral reason for its disparate treatment of the jurors, the court seemingly found only that the reason given in the first place was race neutral. *See State v. Oglesby*, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason for striking three black jurors when he failed to strike a white juror who was similarly situated); *id.* (finding the solicitor's stated neutral reason "was proven to be a pretext because it was not applied in a neutral manner"). "Furthermore, no showing of actual prejudice is required to find reversible error for the denial or impairment of the right to a peremptory challenge." *State v. Smalls*, 336 S.C. 301, 309, 519 S.E.2d 793, 797 (Ct. App. 1999). Thus, we reverse Young's conviction and remand for a new trial.[3]

CONCLUSION

Based on the foregoing, the trial court is

REVERSED AND REMANDED.[4]

SHORT, KONDUROS, and GEATHERS, JJ., concur.

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[3] Based on our disposition of the *Batson* issue, we decline to address Young's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues because its resolution of a prior issue was dispositive).

[4] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Edward W. Miller, Circuit Court Judge

Opinion No. 2017-UP-426 (S.C. Ct. App. filed November 15, 2017)

Appellate Case No. 2013-000149

THE STATE, ...RESPONDENT

v.

RAYMOND LEWIS YOUNG, ...APPELLANT.

PETITION FOR REHEARING

On November 15, 2017, this Court issued an unpublished opinion that reversed Appellant Young's convictions for seven counts of attempted murder, one count of second degree assault and battery by mob, and one count of conspiracy, and remanded for a new trial. *State v. Young*, Op. No. 2017-UP-426 (S.C. Ct. App. filed November 15, 2017). Respondent (the State) respectfully petitions the Court for rehearing pursuant to Rule 221(a), SCACR.

The State seeks rehearing on the grounds that this Court may have misapprehended, overlooked, or failed to properly apply the controlling standard of review in reaching its ultimate conclusions that: (1) "the trial court erred in failing to conduct a proper analysis under the third

step of a *Batson* review"; and (2) "Rather than considering the State's failure to articulate a race neutral reason for its disparate treatment of the jurors, the court seemingly found only that the reason given in the first place was race neutral." Specifically, this Court appears to have abandoned the "any evidence" standard by failing to recognize the trial court's proper examination of ALL of the circumstances under which the challenged strikes were exercised, including an examination of the explanations offered for those strikes, before concluding during the third stage of the *Batson* analysis that it "[did not] see any discriminatory intent." Indeed, this Court seems to have failed in this regard as a result of compounding several other analytical errors which are set out in its opinion.

First, this Court may have misapprehended the trial court's reliance on two cases referenced in support of its decision to deny the *Batson* motion where those cases were, contrary to this Court's findings, "instructive" to the trial court's analysis, and should not have been discounted out of hand. Second, and more critically, this Court may have improperly conflated the solicitor's reason for striking Juror 81 [Prancer Avenue] with her reason for striking Juror 215 [Piedmont], thereby confusing its review of the trial court's ultimate decision. Although the solicitor explained she struck the two jurors because they lived in particular geographic locations and was concerned they would know witnesses from those locations, the two geographic locations were NOT the same. Each strike should have been considered on its own merits rather than treated together. Third, and also critically, this Court appears to have completely failed to address the fact that the ONLY strike challenged after the race-neutral explanations were given by the solicitor, and the ONLY strike for which the defendants presented ANY evidence supporting their claim of purposeful discrimination, was the strike of an alternate juror where no alternate was called upon to serve as a member of the jury during deliberations. These three

analytical mistakes appear to have combined to lead this Court to misapply the standard of review by failing to properly analyze the trial court's determination that no *Batson* violation was proven by Young and the evidence supporting that determination.

For these reasons, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Young's convictions and sentence. Additionally, if Young's convictions are affirmed, the State respectfully requests that this Court address Young's remaining issues because the *Batson* issue will no longer be dispositive.

Statement of the Case

Appellant, **Raymond Lewis Young (Young) (a/k/a "Lil Ray" & "Randy")**,[1] was indicted at the May 2012 term of the grand jury for Greenville County for one (1) count of second-degree assault and battery by mob (2012-GS-23-3841A), one (1) count of possession of a weapon during the commission of a violent crime, one (1) count of conspiracy, and seven (7) counts of attempted murder (2012-GS-23-7941 to -7947).[2] He was represented by John Abdalla, Esquire, of the Greenville County Bar. The State was represented by Assistant Solicitor Katrina Salisbury of the Thirteenth Circuit Solicitor's Office. On January 7-11, 2013, Young and three of his eight codefendants, **Michael A. Williams (Williams) (a/k/a "Mikey")**, **Esaiveus Frantrez Booker (Booker) (a/k/a "Trez")** and **Kinjta K. Sadler (Sadler) (a/k/a "Ken")**, proceeded to a joint trial by jury pursuant to which all four were found guilty of the seven counts

[1] Nearly all of the codefendants, victims, and other fact witnesses have nicknames that were used throughout the trial. To the extent possible, the State has noted those nicknames in parentheticals when each individual's name is first used.

[2] Five codefendants, Raymond Lewis Young, Michael Antonio Williams, Kinjta Kadeem Sadler, Daquan Bruster, and Tavarus Holmes, were similarly indicted, and two codefendants, Shaquille Hogan and Larry Johnson, were indicted for only second-degree assault and battery by a mob and conspiracy.

of attempted murder and the single count of second-degree assault and battery by mob. Young was also found guilty of conspiracy but was found not guilty of possession of a weapon during the commission of a violent crime. The other four codefendants who were not tried entered pleas to various charges prior to trial. Young was sentenced by the Honorable Edward W. Miller to thirty (30) years' concurrent imprisonment for each count of attempted murder (2011-GS-23-8012 to -8018), five (5) years' concurrent imprisonment for conspiracy (2011-GS-23-8011), and ten (10) years' consecutive imprisonment suspended upon the service of five (5) years' probation for second-degree assault and battery by a mob (2012-GS-23-3838A). (R.p.837-p.865). He timely filed a notice of intent to appeal his convictions and sentences and the parties submitted briefs addressing the five issue raised by Appellant on appeal. On November 15, 2017, this Court issued an unpublished opinion that reversed Appellant's convictions. *State v. Young*, Op. No. 2017-UP-426 (S.C. Ct. App. filed November 15, 2017). This Petition for rehearing follows.

Statement of Facts

As explained in the solicitor's opening statement, in the early morning hours of July 17, 2011, a group of friends were hanging out in the parking lot of the Lil' Cricket (LC) gas station on Whitehorse Road in Greenville County. They gathered at the LC after a trip to the hospital where they had visited a friend who was shot earlier that night during a fight at the nearby Red Planet (RP) nightclub. Unbeknownst to the friends, eight young men had devised a plan to retaliate for the fight at the RP. Booker, his three codefendants at trial and four other codefendants parked behind the LC, approached the gas station on foot, and opened fire. Seven people were hit as the victims ducked and ran for cover during the attack. (R.p.105-p.112).

Before the commencement of the trial, four of the eight original codefendants entered guilty pleas to charges associated with the shooting. (R.p.5-p.34). The State asked for deferred sentencing on the four codefendants who pled guilty until after the trial of the four remaining codefendants.

After accepting the pleas, the trial began and the judge conducted jury qualification and selection proceedings. (R.p.35-p.63). As part of jury qualification, the trial court asked if any member of the jury panel was related by blood or marriage, or if they had a business, personal, or social relationship with any of the four co-defendants, the seven shooting victims, or the more than 75 potential witnesses. None of the potential jurors responded in the affirmative. Similarly, there was no response when the judge asked if any juror knew of any reason they should not serve or could not be fair and impartial. (R.p.48-p.52). The trial court then proceeded with jury selection, with the State and counsel for Booker, who was acting on behalf of all four co-defendants, exercising peremptory strikes until twelve jurors and two alternates were seated. (R.p.53-p.62). Juror 106, Cynthia Foxx, a white female, was seated fourth. (R.p.55, line 22-p.56, line 3). Juror 281, Valisa Smith, a black female, was struck by the State after the ninth juror was seated. (R.p.59, lines 3-6). Juror 81, Anatolya Dodd, a black female, was struck by the State after the eleventh juror was seated. (R.p.60, lines 3-6). Juror 215, Lee Montgomery, a black male, was struck by the State after the twelfth juror was seated, during the selection of the two alternates. (R.p.61, lines 15-18). At the conclusion of jury selection, the defendants advised the trial judge they had a matter regarding jury selection they would like to take up outside the presence of the jury. (R.p.62, lines 17-23).

After the jury was excused, the defendants made an objection to the jury selection pursuant to *Batson v. Kentucky*,[3] pointing out that out of its six challenges the State struck three black individuals. The trial court noted three black jurors had been seated on the jury but acknowledged Juror 281 was an African-American struck by the State with its 4th challenge, Juror 81 was an African-American struck by the State with its 5th challenge, and Juror 215 was an African-American struck by the State when selecting the first alternate. The defendants said they were challenging all three strikes in their *Batson* motion. (R.p.63). The solicitor proceeded to give the following explanation for her strikes:

> With respect to Juror 281, Ms. Smith, I noted during jury qualifications that Ms. Smith expressed some concerns regarding her ability to withstand the duration of the trial. She indicated she had a substantial number of health issues and wanted to be excused based on those issues. That's my basis for striking Ms. Smith.
>
> Ms. Dodd, is Juror 81, and my notes indicate that Ms. Dodd lives on Prancer Avenue in Greenville County. It's my understanding that some of the witnesses in this case live in the area of Prancer Avenue and I was quite simply concerned that juror may become family with the witnesses even though she may not recognize their names off hand. That's my basis for striking her. And then Mr. Montgomery lives at Piedmont and I have the same reservations. There are many of these witnesses that live in the Piedmont area and have residences in Piedmont and again just out of an abundance of caution, I was concerned that he may be familiar with some of the witnesses in this case and decided that another alternate may be a better choice.

(R.p.63, line 23-p.64, line 19). The defendants responded that they did not believe these to be satisfactory racially neutral reasons because during voir dire the court had named all potential witnesses and gave the jurors the opportunity to identify any they knew. (R.p.64, line 21-p.65, line 6).

The trial judge disagreed, said the solicitor had given race neutral reasons for her strikes, and said the defendants were going to have to show something more to prove purposeful discrimination. (R.p.65, lines 7-11). Counsel for Sadler then stated: "One thing I would point

[3] 476 U.S. 79 (1986).

out to the Court is Juror 106, No 12 on the list, Ms. Fox. So *the extent that they are striking the jurors in Piedmont*, Juror No. 106, Cynthia Fox, it was a white female and it provides her address as 13 Piedmont Avenue in Piedmont, no less, and yet she was not struck by the State." (R.p.65, line 12-18) (emphasis added). The solicitor replied:

> Your Honor, I just didn't indicate on my list that that was an address that I had some concern about. So[me] I do and some I don't, but that doesn't make it the –
> . . . .
>
> Judge, I'm not sure where I left off. I've offered race neutral reasons. If the Court wants a more specific inquiry. I didn't make that address on Ms. Fox, it is something that I had no concern. I had concerns about the Piedmont address but not this one. I don't know the geography of Greenville County with enough sophistication to appreciate the minor details of the community the basis of my strike, Judge.

(R.p.65, line 19-p.66, line 9). Ultimately, the trial court ruled:

> Okay. Well, Mr. Quinn makes a very valid point. I'm going to rely on State versus Tucker and Peyton versus Kirk Kearse (ph) that I don't see a discriminatory intent inherent in the proponent's explanation and so I believe those cases require me to find the reason offered to be deemed race neutral. So I'm going to deny your motion.

(R.p.66, lines 10-16) (emphasis added).

After addressing other pretrial matters, the jury was sworn and the case proceeded to trial. The State presented testimony from more than twenty-five witnesses including the seven shooting victims, several additional fact witnesses, numerous police investigators and forensic experts, and three of Young's co-defendants. (R.p.80-p.661). A specific summary of this testimony appears in the "Statement of Facts" in the Final Brief of Respondent, which is hereby incorporated by reference. After the State rested, Young and his codefendants all moved for directed verdicts and those motions were denied. Each defendant then advised the trial court that he did not want to testify. Following a brief charge conference, the State and the defendants gave closing arguments. (R.p.661-p.783). Finally, the trial court instructed the jurors on their

roles as the sole judges of the credibility of witnesses, the burden of proof, the presumption of innocence, reasonable doubt, direct and circumstantial evidence, and the elements of the crimes. (R.p.784-p.796). Young was found guilty of the seven counts of attempted murder and the single count of second-degree assault and battery by mob. Young was also found guilty of conspiracy but was found not guilty of possession of a weapon during the commission of a violent crime. He was sentenced to thirty (30) years' concurrent imprisonment for each count of attempted murder (2011-GS-23-8012 to -8018), five (5) years' concurrent imprisonment for conspiracy (2011-GS-23-8011), and ten (10) years' consecutive imprisonment suspended upon the service of five (5) years' probation for second-degree assault and battery by a mob (2012-GS-23-3838A). (R. p.837-865).

Argument

In its unpublished opinion, this Court reversed Young's convictions and remanded for a new trial. *State v. Young*, Op. No. 2017-UP-426 (S.C. Ct. App. filed November 15, 2017). For the reasons noted above and argued in more detail below, the State respectfully requests this Court grant its petition for rehearing, reconsider and rehear this matter, and issue an order affirming Young's convictions and sentence.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Inman*, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014); *State v. Palmer*, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016). A court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.* Thus, on review, this Court is limited to determining whether the trial

court abused its discretion. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *Palmer* at 511, 783 S.E.2d at 827. "Because the trial court's findings regarding purposeful discrimination rest largely upon his evaluation of the solicitor's credibility, we will give those findings great deference." *State v. Tucker*, 334 S.C. 1, 9, 512 S.E.2d 99, 103 (1998); *see also Palmer*, 415 S.C. at 513, 783 S.E.2d at 829 ("The trial [court's] findings of purposeful discrimination rest largely on [its] evaluation of demeanor and credibility. Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] mind [based on demeanor and credibility] lies peculiarly within a trial [court's] province.'") (internal citations omitted).

Batson Framework

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a juror on the basis of race. *Batson,* 476 U.S. at 89; *State v. Inman*, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014); *State v. Cochran*, 369 S.C. 308, 313, 631 S.E.2d 294, 297 (Ct. App. 2006). "Once a peremptory challenge is opposed, the trial court must, upon request, conduct a Batson hearing and adhere to the procedures set forth in *Purkett v. Elem,* 514 U.S. 765, 767 (1995), and adopted by our Supreme Court in *State v. Adams,* 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996)." *Cochran*, 369 S.C. at 314, 631 S.E.2d at 297-98. The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. *Inman* at 26, 760 S.E.2d at 108; *See Purkett,* 514 U.S. at 767-68. (1995).

First, the [party asserting the *Batson*] challenge must make a prima facie showing that the challenge was based on race. *Inman* at 26, 760 S.E.2d at 108. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the *Batson*] challenge to provide a race neutral explanation for the challenge. *Id.* If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination. *Id.* The ultimate burden always rests with the [party asserting the *Batson* challenge] to prove purposeful discrimination. *Id.*

Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible. *Purkett,* 514 U.S. at 768; *Inman* at 26, 760 S.E.2d at 108. The explanation must only be "clear and reasonably specific such that the [party asserting the *Batson* challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it. *Inman* at 26, 760 S.E.2d at 108. In contrast, step three of the above 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. *Id.* (emphasis added); *see also* Batson, 476 U.S. at 93-94 (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. *Inman* at 26, 760 S.E.2d at 108-09. When the opponent of the strike *proves the proponent of the strike practiced purposeful racial discrimination*, the

trial court must quash the entire jury panel and initiate another jury selection de novo. *Cochran* at 315, 631 S.E.2d at 298 (emphasis added).

Discussion / Analysis

Here, in compliance with *Purkett*, the trial court conducted a *Batson* hearing and adhered to the mandatory three-step procedure for evaluating whether the State executed its peremptory challenges in a manner which violated the Equal Protection Clause. After the defendants made a prima facie showing that the challenges were based on race, the trial judge asked the solicitor to provide race neutral explanations for the three strikes, and the solicitor did so. Juror 281 was struck because she "had a substantial number of health issues and wanted to be excused." Juror 81 was struck because she "lives on **Prancer Avenue**" and "some of the witnesses in this case live in the area of Prancer Avenue and I was quite simply concerned that juror may become family [sic] with the witnesses even though she may not recognize their names off hand." Juror 215 was struck because he "lives at **Piedmont** and I have the same reservations. There are many of these witnesses that live in the Piedmont area." (R.p.63, line 23-p.64, line 19) (emphasis added).

The defendants' response was that they did not believe these to be satisfactory racially neutral reasons because during voir dire the court had named all potential witnesses and gave the jurors the opportunity to identify any they knew. (R.p.64, line 21-p.65, line 6). Consequently, the only question truly before this Court was whether the trial court abused its discretion in regard to step three of the *Purkett* procedure as to the three African-American jurors struck by the State.

Although the trial court invited Young and his codefendants to attempt to make a showing of purposeful discrimination as to each of the three strikes, they chose to focus **solely** on the State's strike of Juror 215, Mr. Montgomery. Counsel for Sadler stated: "One thing I would point out to the Court is Juror 106, No 12 on the list, Ms. Fox. *So the extent that they are striking the jurors in Piedmont*, Juror No. 106, Cynthia Fox, it was a white female and it provides her address as 13 Piedmont Avenue in Piedmont, no less, and yet she was not struck by the State." (R.p.65, line 12-18) (emphasis added). By failing to offer any further showing in regard to Juror 281 or Juror 81, Young failed to carry his burden of proof in the trial court as to those two strikes. He similarly has also waived any right he may have had to challenge those two strikes on appeal. Furthermore, to the extent Young argues his challenge to Juror 215 encompassed a challenge to Juror 81 because the solicitor's race neutral reasons were both based on their home addresses, his argument fails because he never argued to the trial judge that Prancer Avenue is in Piedmont. This is likely because Prancer Avenue is not in Piedmont, and instead is located **ten miles** north, near the Greenville Country Club.

Specifically, as to Juror 215, the solicitor's explanation initially appeared to be pretext because Ms. Foxx, a white woman from Piedmont, was seated on the jury. *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298 ("This burden is generally established by showing similarly situated members of another race were seated on a jury."). The inquiry at Young's trial, however, continued when the trial judge asked the solicitor for further explanation. She replied:

> Your Honor, I just didn't indicate on my list that that was an address that I had some concern about. So[me] I do and some I don't . . . I didn't make that address on Ms. Fox, it is something that I had no concern. **I had concerns about the Piedmont address but not this one.** I don't know the geography of Greenville County with enough sophistication to appreciate the minor details of the community.

(R.p.65, line 19-p.66, line 9) (emphasis added). Upon observing the solicitor's demeanor while she gave this explanation, the trial court found it did not "see a discriminatory intent" in the explanation. (R.p.66, lines 10-16). This credibility finding was the basis upon which the trial court grounded its conclusion that the State's reason given for striking Juror 215 was not pretext. The credibility finding must be given great deference and may not be set aside unless clearly erroneous. *State v. Tucker*, 334 S.C. 1, 9, 512 S.E.2d 99, 103 (1998) ("Because the trial court's findings regarding purposeful discrimination rest largely upon his evaluation of the solicitor's credibility, we will give those findings great deference."). Because the trial court was in the best position to evaluate demeanor and credibility, its finding should control and the denial of Young's *Batson* motion was not error.

This Court should grant Rehearing

In its unpublished opinion, this Court found the trial court erred in denying his *Batson* motion. Specifically, this Court found: "The trial court erred in failing to conduct a proper analysis under the third step of a *Batson* review." Specifically it found: "Rather than considering the State's failure to articulate a race neutral reason for its disparate treatment of the jurors, the court seemingly found only that the reason given in the first place was race neutral." The State hereby seeks rehearing on the grounds that the Court may have misapprehended, overlooked, or failed to properly apply the standard of review in reaching these conclusions. Specifically, this Court appears to have abandoned the "any evidence" standard by failing to recognize the trial court's examination of ALL of the circumstances under which the challenged strikes were exercised, including an examination of the explanations offered for other strikes, before concluding during the third stage of the *Batson* analysis that it "[did not] see any discriminatory

intent." Indeed, this Court seems to have failed in this regard as a result of several other analytical errors which are set out in its opinion.

First, this Court may have misapprehended the trial court's reliance on two cases referenced in support of its decision to deny the *Batson* motion where those cases were, contrary to this Court's findings, nevertheless "instructive" to the trial court's analysis, and should not have been discounted out of hand. In denying Young's motion, the trial court relied on *State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1998) and *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998). In *Tucker*, our supreme court held no *Batson* violation occurred despite the State using all six of its peremptory strikes against black jurors. In so holding, the *Tucker* Court noted: "Because the trial judge's findings regarding purposeful discrimination rest largely upon his evaluation of the solicitor's credibility, we will give those findings great deference." *Tucker*, 334 S.C. at 9, 512 S.E.2d at 103. Here, the trial court listened to the solicitor's explanations in the context of ALL of the circumstances of the case and concluded: "I don't see a discriminatory intent." Those circumstances included: (1) the solicitor only exercised six of her ten peremptory strikes; (2) out of the six strikes exercised by the solicitor, only three were of African-Americans; and (3) the solicitor chose not strike three African-Americans who were then seated on the jury. As apparently recognized by the trial judge, *Tucker* required that he evaluate the solicitor's credibility as part of step three of his analysis, and he appropriately did so in the context of ALL of the circumstances before concluding there was no purposeful discrimination. In *Payton*, our supreme court rejected the dual motivation analysis, finding that "[o]nce a discriminatory reason has been uncovered . . . this reason taints the entire jury selection procedure." *Payton*, 329 S.C. at 59, 495 S.E.2d at 210. Here, there was no racially derogatory term used in the reasons given for the strikes and therefore no discriminatory intent was uncovered in the second step of the

Batson analysis. As apparently recognized by the trial judge, *Payton* required that he move to the third step of the *Batson* analysis to determine if Young could prove purposeful discrimination. He could not. For these reasons, the trial court's reliance on *Tucker* and *Payton* was entirely appropriate and should have been considered by this Court to be "instructive" to Young's case on appeal.

Second, and more critically, this Court may have improperly conflated the solicitor's reason for striking Juror 81 with her reason for striking Juror 215, thereby confusing its appellate review of the trial court's decision that there was no *Batson* violation. Although the solicitor explained she struck the two jurors in question because they lived in a particular geographic location and was concerned they would know witnesses from that location, the two locations were NOT the same. Counsel for Sadler merely identified a juror of a different race who was seated and who was from one of the two geographic locations named by the solicitor.[4] This information has no relevance to the second geographic location which was given as a reason for the other strike, and did nothing to support or carry the opponent's burden to prove purposeful discrimination as to that second juror. An example illustrates the fallacy of this Court's logic in this regard. Consider a *Batson* challenge where the proponent of the strikes explained it struck one juror because she was from a particular neighborhood in Chicago and might know some witnesses who were also from that neighborhood in Chicago, and it struck a second juror because she was from a particular neighborhood in Los Angeles and might know some witnesses who were also from that neighborhood in Los Angeles. If the opponent of the strike then presents evidence that the striking party seated a juror from the Los Angeles neighborhood in question, it would carry significant weight in the trial court's determination of whether there had been a

[4] Arguably, Young's *Batson* issue is not preserved for Appellate review because the defendants all agreed that counsel for Booker would speak on their behalf, not counsel for Sadler, and then counsel for Young failed to specifically join in the argument advanced by counsel for Sadler at step three of the *Batson* analysis.

Batson violation as to the Los Angeles juror who was struck. However, it would have absolutely no relevance and should be given no weight in regard to the Chicago juror who was struck. It cannot be the rule that simply because both strikes were based on geographic location that both strikes constitute *Batson* violations, unless they were based on the **same** geographic location. Here, the only strike that could have been impacted by the evidence submitted during step three of the analysis was that of Juror 215, and as explained below, even that evidence did not compel a finding of a *Batson* violation.

Third, this Court completely failed to address the fact that the ONLY strike challenged after the race-neutral explanations were given by the solicitor, and the ONLY strike for which the defendants presented ANY evidence supporting their claim of purposeful discrimination was the strike of Juror 215, an alternate juror, where no alternate was called upon to serve as a member of the jury during deliberations. Although the trial court invited Young and his codefendants to attempt to make a showing of purposeful discrimination as to each of the three strikes, they chose to focus **solely** on the State's strike of Juror 215 [Piedmont] by pointing out that Juror 106 was a white female with an address in Piedmont who was seated. (R.p.65, line 12-18). By failing to offer any further showing in regard to Juror 281 or Juror 81 [Prancer Avenue], Young failed to carry his burden of proof in the trial court as to those two strikes. He similarly has also waived any right he may have had to challenge those two strikes on appeal. This limitation is crucial to any analysis on appeal because any error by the trial court in regard to Juror 215 was entirely harmless where the State struck Juror 215 as a potential alternate juror. *See State v. Ford*, 334 S.C. 444, 449, 513 S.E.2d 385, 387 (1999) ("Any *Batson* violation in regards to an alternate is harmless where an alternate was not needed for deliberations."); *see also United States v. Lane*, 866 F.2d 103, 106 n.3 (4th Cir. 1989) (noting a defendant would not

have been prejudiced by the peremptory challenge of an alternate juror regardless of the stated reason where an alternate juror was not called upon to serve as a member of the petit jury).

While each of these errors alone supports rehearing and reconsideration, it is in combination that they demonstrate how this Court may have misapplied the proper standard of review. Even in regard to the strike of Juror 215, this Court seems to have overlooked the proper scope of the analysis on appeal by failing to consider ALL of the relevant circumstances in Young's case, including the actual explanation given by the solicitor for each strike. Relying on our supreme court's opinion in *State v. Oglesby*, 298 S.C. 279, 379 S.E.2d 891 (1989), this Court found the trial court had no choice but to find purposeful discrimination because a white juror from Piedmont was seated on the jury while an African-American juror from Piedmont was struck. However, the decision in *Oglesby* does not appear to be quite so narrow. In *Oglesby*, our supreme court held: "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." However, those circumstances included the following explanation from the solicitor: "[a]ll knew or had been patients of . . . [the doctor] . . . . This is a very important witness. We feel that any doctor patient relationship to this witness would affect the case. He will be coming as a doctor, and we feel that we are better served to not have *anyone on the jury that knows any of the eyewitnesses, especially one that's so important*;" as well as the solicitor seating a white female juror who was also a patient of the doctor. *Id.* at 281, 379 S.E.2d at 892 (emphasis added). Given the language used in the solicitor's explanation in *Oglesby*, there is no way the seated juror could be distinguished from the struck jurors, except by her race. Here however, at step three of the *Batson* analysis, the solicitor explained the particular Piedmont address for Juror 215 gave her pause, while the particular Piedmont address for Juror 106 did not, even though they

were both in Piedmont. This distinction alone distinguishes the two jurors and provides an evidentiary basis for the trial court's decision. Under the "any evidence" standard of review, this Court should have affirmed.

Furthermore, *Oglesby* stands for the proposition that: "A solicitor's strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes." Id. at 280, 379 S.E.2d at 892. This requires an examination of ALL circumstances to determine whether there has been purposeful racial discrimination, not only a bare showing that the striking party failed to strike another juror who appears to be similarly situated. In Young's case, those circumstances included: (1) the solicitor only exercised six of her ten peremptory strikes; (2) out of the six strikes exercised by the solicitor, only three were of African-Americans; and (3) the solicitor chose not strike three African-Americans who were then seated on the jury. When these circumstances are combined with the solicitor's specific explanation for the strikes, there is ample evidence to support the trial court's conclusion that Young failed to prove purposeful racial discrimination as to any strikes.

In conclusion, this Court appears to have abandoned the "any evidence" standard by failing to recognize the trial court's examination of ALL of the circumstances under which the challenged strikes were exercised, including an examination of the explanations offered for other strikes, before concluding during the third stage of the *Batson* analysis that it "[did not] see any discriminatory intent." This Court should grant this petition for rehearing.

The trial court clearly followed the required three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. During that inquiry, the solicitor provided racially neutral explanations for striking each of the

three African American jurors in question. Even though the explanation in regard to Juror 215 initially appeared to be pretext because a similarly situated juror of another race, Ms. Foxx, was seated on the jury, the trial judge observed the solicitor's demeanor during her explanation for the strike, made a credibility finding that there was no discriminatory intent in the her explanation, and thereby concluded the reason given was in fact not pretext. That credibility finding must be given great deference and should not have been set aside by this Court unless clearly erroneous. Also, upon close analysis, the solicitor's explanation did distinguish between the two Piedmont jurors based on their particular addresses. There is evidence in the record to support the trial court's determination that Young, as the opponent of the strike, failed to show the reason offered by the officer was actually mere pretext to engage in purposeful racial discrimination. Under this Court's standard of review, that determination should have been affirmed.

Furthermore, even if this Court concluded the State's strike of Juror 215 was improperly exercised on the basis of race, any error was necessarily harmless because Juror 215 could only have been seated as an alternate, and no alternate was called upon to participate in jury deliberations in this case.

Conclusion

WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Young's convictions and sentence. Additionally, if Young's convictions are affirmed, the State respectfully requests

that this Court address Young's remaining issues because the *Batson* issue will no longer be dispositive.

Respectfully submitted,

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Columbia, South Carolina
November 30, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Edward W. Miller, Circuit Court Judge

Opinion No. 2017-UP-426 (S.C. Ct. App. filed November 15, 2017)

Appellate Case No. 2013-000149

THE STATE, ...RESPONDENT

v.

RAYMOND LEWIS YOUNG, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Petition for Rehearing*, dated November 30, 2017, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

J. Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, SC 29601

I further certified that all parties required by Rule to be served have been served. This 30th day of November, 2017.

Angela Bennett
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY

Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2013-000207

THE STATE, ... RESPONDENT,

v.

RAYMOND YOUNG, ... APPELLANT.

RETURN

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The Respondent's argument misperceives this Court's ruling. The Respondent's petition rests on "any evidence" and "deference" arguments. In doing so the Respondent overlooks the fact that "any evidence" is not the standard of review, and deference is not required or even appropriate where the trial court failed to apply the proper law. "Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). The judge's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous. Evins, 373 S.C. at 416, 645 S.E.2d at 909-10. "This standard of review, however, is premised on the trial court following the mandated procedure for a Batson hearing." State v. Cochran, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct.App.2006). "[W]here the assignment of error is the failure to follow the Batson hearing procedure, we must answer a question of law. When a question of law is presented, our standard of review is plenary." Id. at 312-13, 631 S.E.2d at 297. State v. McMillan, 400 S.C. 298, 734 S.E.2d 171 (S.C. App., 2012). In this case, the issue is whether or not the trial court properly applied the law as to the third stage of its Batson analysis. This is a question of law. Plenary review is therefore appropriate.

This case involves all three steps of the Batson analysis. The trial court erred in the third step. Upon reaching the third step of the analysis the trial court stated: "I'm going to rely on State versus Tucker and Peyton versus Kirk Kearse (ph) that I don't see a discriminatory intent inherent in the proponent's explanation and so I believe those cases *require me to find the reason offered to be deemed race neutral.*" *empahsis added.* As this Court's opinion recognized, the trial court failed to properly apply the law in the third step of its Batson analysis.

Step three of the Batson analysis requires the court to carefully evaluate whether the party asserting the Batson challenge [the defense in this case] 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 (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 must 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 proves 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). State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014); State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). Pretext generally will be established by showing that similarly situated members of another race were seated on the jury. Purkett, *supra*; Adams, 322 S.C. at 124, at 123, 470 S.E.2d at 372. State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006); Payton v. Kearse, 495 S.E.2d 205, 329 S.C. 51 (S.C., 1996); State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999). In the present case the solicitor struck three black jurors, two on the stated basis that they lived in an area where some of the witnesses lived. The defense then showed that the solicitor has seated at least one white juror that also resided in an area where some of the witnesses lived. The defense therefore established an uneven application of the reason stated for the strike of two black jurors.

Although the record shows an uneven application of the state's stated reason for the

strikes, the uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race-neutral explanation for the inconsistency. *See* State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995). The explanation must only be "clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with a bearing on it." Giles, 407 S.C. at 21-22, 754 S.E.2d at 265; see., e.g., id. at 17, 23, 754 S.E.2d at 262, 265-66 (finding that a defendant's explanation that he "did not feel the [struck] jurors were right for the jury," while "technically, semantically and intellectually racially neutral," would not allow the circuit court to "assess the plausibility of the proffered reason for striking the potential jurors")." State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (S.C., 2014). In this case the solicitor failed to clearly articulate a basis for the uneven treatment of similarly situated black and white jurors.[1] This prevented the defense from having a full and fair opportunity to demonstrate pretext. It also prevented the trial judge from fully assessing the plausibility of the solicitor's statements.

Unfortunately, the trial court did not attempt to fully assess the plausibility of the solicitor's stated reasons, and in failing to do so it deviated from the *Purkett-Adams* procedure in the third step of the Batson analysis. The third step in the Batson analysis required the trial court to conduct an assessment of the state's reason for distinguishing between the addresses of the white juror seated and those of black jurors struck. Rather than considering the state's failure to

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[1]Black jurors 81 and 215 were both struck for the reason that each lived in an area near witnesses. White juror 106 was also lived in an area near witnesses and was seated. While the State argues about distances and location of neighborhoods on appeal, none of those 'facts' were stated by the solicitor during the hearing, nor are they in the record on appeal.

clearly articulate a race neutral distinction between the addresses of the jurors, the court instead held that it was bound to find the reason offered "to be deemed race neutral" under Tucker and Payton unless discrimination was inherent in the explanation. Although this would be correct for the initial inquiry under step two of the Batson analysis, this was a misstatement of the law as to the analysis required under step three.

Once a neutral reason is shown to have been applied in an uneven manner the third step in the Batson analysis requires that the proponent of the strike articulate a valid reason for the uneven treatment and, that the trial judge assess that reason in light of all of the relevant evidence. In the third step of the analysis, the scrutiny of the trial judge and review of all evidence is critical. Here the "persuasiveness of the justification becomes relevant." Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); State v. Edwards, 649 S.E.2d 112, 374 S.C. 543 (S.C. App., 2007). If the trial judge's analysis is merely to look for discrimination inherent in the solicitor's explanation rather than to assess the explanation in light of all of the evidence, then the law has been misapplied. As this Court correctly points out, the trial court failed to properly conduct the third step of the Batson analysis.

Had the trial court properly applied the proper analysis it would have held that the state failed to provide a valid reason for the uneven treatment between similarly situated white and black jurors. The solicitor failed to articulate why she had a problem seating African American jurors that might live near some of the witnesses, but not with a white juror that lived in an area near witnesses. Although claiming that she had concerns about some addresses but not others, the solicitor specifically stated that she was unfamiliar with the area: "I don't know the geography of Greenville County with enough sophistication to appreciate the minor details of the community

the basis of my strike, Judge." R. 66, ll, 7-9. The solicitor's response clearly failed to explain why one address of two black jurors which were near witnesses, the purported basis of the strikes, was any more or less problematical than the white juror's address which was also near witnesses. Having shown unequal treatment of similarly-situated jurors in this case, the state was required to articulate an explanation that would allow the court to make a determination in light of all evidence bearing on the issue. The state's failure to adequately explain with sufficient clarity to allow judicial review of its reasons negates any otherwise race neutral basis given for the strikes. *See* State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (S.C. App., 1996) (where defense counsel cited demeanor, an otherwise valid basis for a strike, but failed to point out any specific examples of why he disliked the juror's demeanor.)

It is most important to note that the Solicitor's failure to articulate any difference between the addresses prevented the defense from further demonstrating that the Solicitor's explanation was pretextual.[2] "The explanation must only be "clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it." Giles, 407 S.C. at 21-22, 754 S.E.2d at 265; *see., e.g., id.* at 17, 23, 754 S.E.2d at 262, 265-66 (finding that a defendant's explanation that he "did not feel the [struck] jurors were right for the jury," while "technically, semantically and intellectually racially neutral," would not allow the circuit court to " assess the plausibility of

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[2]The State's argument now on appeal for the first time as to the difference in distances any of the jurors lived from the Defendant or witnesses is improper as it purports to make statements of fact that are not in the record. The failure of the trial court to conduct a through factual inquiry, combined with the vague nature of the solicitor's statements prevented the defense from dispelling the arguments the State now asserts on appeal.

the proffered reason for striking the potential jurors")." State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (S.C., 2014). In this case the solicitor simply failed to articulate any coherent reason for differentiating between addresses of the jurors at issue.

In State v. Oblesby the court stated: "The reason given for striking the black male was sufficiently neutral to withstand the Batson inquiry. The reason given for striking the black females was also neutral. The solicitor negated his reason, however, when he seated a white female juror who was also a patient of the doctor." State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989). Even if the stated basis for the strikes of the African American jurors in the present case appeared otherwise neutral, any validity is negated by the unexplained disparate treatment of at least one similarly situated white juror.

Similarly, in State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986), although the State offered a racially-neutral explanation for striking African American jurors, the court held that it negated the reason by seating similarly-situated Caucasian jurors. *See* Miller-El v. Dretke, 545 U.S. 231, 241 (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."). Based on the disparate treatment of white jurors, the strikes in Stewart were held impermissible. Here of course, the trial court never reached an analysis of all of the evidence to determine whether there was purposeful

discrimination.

The determination of whether the minimum quantum of evidence has been produced under this prong is flexible, for the trial court's ruling turns on an examination of the totality of the facts and circumstances in the record, including the credibility and demeanor of the strike's proponent, and the plausibility of a neutral, but otherwise unpersuasive, reason. Casey, 325 S.C. at 452, 481 S.E.2d at 172. In deciding whether the opponent of a strike has carried the burden of persuasion, a court must undertake a sensitive inquiry into the circumstantial and direct evidence of intent. Haigler, 334 S.C. at 629, 515 S.E.2d at 91. A strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. *Id*; State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006). Here the trial court failed to conduct the proper totality analysis or consider all of the relevant facts in record, looking instead only for any discrimination inherent in the solicitor's explanation.

An examination of the facts and circumstances in the present case shows that the solicitor's stated basis, even if originally appearing neutral was proven to be a pretext because it was not applied in a neutral manner. *See* State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989); Garrett v. Morris, 815 F.2d 509 (8th Cir.1987) *cert. denied*, --- U.S. ----, 108 S.Ct. 233, 98 L.Ed.2d 191 (1987) (prosecutor's asserted reason for excluding black prospective jurors was a pretext for racial discrimination in light of prosecutor's decision not to strike white jurors who differed in no significant way from black jurors who were excused). The same was true in Oglesby where the solicitor was adamant in his articulation of his reason for striking the black females, yet he did not strike a white female with the same characteristic. There the court said: "If the State were allowed to prevail despite the application of such blatantly inconsistent

standards, Batson would be left without substance. Accordingly, appellant's conviction is reversed and this case is remanded for a new trial." State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989).

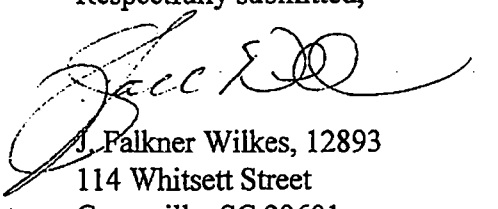
Here the court failed to consider the solicitor's failure to articulate any basis for distinguishing between the addresses of jurors, the purported basis of the strikes. Step three of the analysis requires the trial court to carefully evaluate all of the evidence to determine whether the party asserting 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 proves 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). State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (S.C., 2014). Here the defense established the pretextual nature of the state's strikes by showing uneven treatment between similarly situated jurors.

The state was provided the opportunity yet failed to provide a race neutral reason for the uneven treatment of similarly situated jurors. The solicitor stated that the black jurors were struck because each lived near witnesses, yet a white juror that lived near witnesses was seated. When challenged, the solicitor could not articulate any meaningful difference between the three jurors.

The only difference discernable from the record between the jurors was that the two jurors that were struck were black and the one that was seated was white. While the state argues that one of the black jurors was an alternate, that fact does not affect the outcome of the case. "Once it is found that the exercise of even one peremptory challenge is racially motivated, this in and of itself gives rise to an inference of discriminatory purpose and violates the mandates of Batson, which explicitly prohibits the State from exercising strikes in a racially discriminatory manner. To hold otherwise, I believe, completely guts the notion of pretext, and offends the policies underlying Batson. *Id.* at 299-300, 460 S.E.2d at 421." Payton v. Kearse, 495 S.E.2d 205, 329 S.C. 51 (S.C. 1996).

The state gave no basis, much less a racially neutral one, for the disparate treatment between races. The record shows that the strikes were discriminatory, and therefore in violation of Batson v. Kentucky and its progeny. Based on the record, the trial court erred in denying the defense's Batson motion. "When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection *de novo*. *See* State v. Jones, 293 S.C. 54, 58, 358 S.E.2d 701, 704 (1987), *abrogated on other grounds by* State v. Chapman, 317 S.C. 302, 306, 454 S.E.2d 317, 320 (1995); *see also* State v. Heyward, 357 S.C. 577, 580, 594 S.E.2d 168, 169 (Ct.App.2004)." State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006). The trial court therefore committed reversible error in denying the defense's Batson motion. This Court's decision was well reasoned and therefore, the petition of the State should be denied.

Respectfully submitted,



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December 18, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-000207

THE STATE, ... RESPONDENT,

v.

RAYMOND YOUNG ..... APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Return of Appellant in the above referenced case has, on the 18th day of December, 2017, been served upon the Respondent by placing a copy of same in the U.S. Mail, first class postage affixed addressed as follows:

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Counsel for Raymond Young

December 18, 2017.

The South Carolina Court of Appeals

The State, Respondent,

v.

Raymond Lewis Young, Appellant.

Appellate Case No. 2013-000149

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
J. Falkner Wilkes, Esquire
John Benjamin Aplin, Esquire
William Walter Wilkins, III, Esquire
The Honorable Edward W. Miller

FILED
January 18, 2018