

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2017-002447

Trial Case No.: 2014GS2601415

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THE STATE, ..... RESPONDENT,

v.

MITCHELL MONROE WEATHERALL, ..... APPELLANT.

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BRIEF OF APPELLANT

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**RECEIVED**  
JUN 17 2019  
SC Court of Appeals

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in denying the Appellant's Batson motion where state struck the only African American juror called?
- II. Did the trial court err in denying the Appellant's Batson motion where state struck gay juror?
- III. Did the trial court err in denying the Appellant's requested jury charge to show potential bias on the part of the state's key witness?
- IV. Does any of the court's errors, or a combination thereof, require a reversal of the Appellant's conviction and sentence?

## STATEMENT OF THE CASE

The Appellant, Mitchell Monroe Weatherall, was indicted by the Horry County Grand Jury on the charge of murder (2014-GS-26-01415). March 20-23, 2017, a jury trial was held, the Honorable Benjamin H. Culbertson presiding. Appellant was represented at trial by Johnny Gardner and Thomas Jarrett Bouchette. The State was represented by Nancy R. Livesay of the Horry County Solicitor's Office. Dixie C. Eubank was the court reporter in the case. The jury found the Appellant guilty as charged and the court imposed a sentence of life imprisonment. The Appellant was remanded to the South Carolina Department of Corrections where he remains currently incarcerated.

A timely notice of appeal was filed by Appellant's trial counsel. J. Falkner Wilkes was substituted as counsel for the Appellant for the appeal. The State is represented on appeal by Melody Jane Brown of the Office of the Attorney General.

## STATEMENT OF FACTS

The Appellant and several others were alleged to have been in a hotel room for days smoking crack cocaine. R. p. 272-278. While in the room one of the individuals was struck in the head with a bottle and died as a result. R. p. 96; 272-278. A video surveillance tape from the hotel showed two individuals carrying what appeared to be a body wrapped in a sheet and putting it into a car. R. p. 232. The victim's body was found some time later in a wooded area. 154. The Appellant's detention center cellmate, who was being held on unrelated charges, testified that during their stay together in jail the Appellant revealed that he had struck the deceased in the head with a bottle and later disposed of the victim's body. R. p. 272-273.

### Jury Selection

The Appellant is a gay African American. R. p. 36. During jury selection the State struck Juror 191, the only black juror called. R. p. 27-28; 34. The defense raised a motion pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In response to the motion the trial court began with a misstatement of the applicable law: "You know, there's a whole lot of leeway. I know that it -- if there had been more black females called and struck, you could address it, but since there was only one called..." R. p. 34, l. 25-35, l. 4. The court allowed the State to respond. R. p. 35. The State claimed that the juror was struck because "our records indicated that she has a prior conviction" and that "because under our records, it showed that she would have been disqualified as a juror." R. p. 35, 5-10. This claim however was apparently rebutted by the juror during qualifications when she presented her identification to prove that she did not have any prior criminal record. R. p. 35. The juror was subsequently qualified by the court. 8. Without any analysis or clarification of its earlier misstatement of the law, the trial court

found a “justifiable reason” for the strike. R. p. 37, l. 2-3.

The defense also raised a Batson objection to the State’s strike of Juror 397, who was gay. R. p. 31; 35-37. Without any consideration or analysis, and prior to any basis for the strike being given by the State the trial court denied the motion, holding that as a matter of law sexual orientation was not a protected class under Batson. R. p. 36. The court indicated that it would not require the solicitor to place a reason for the strike on the record. R. p. 36. Subsequent to the ruling the solicitor claimed that she was unaware of the juror’s sexual orientation and struck the juror because he appeared disinterested during the jury selection. R. p. 36. There was no indication that the court applied any particular analysis or actually revisited the issue on which it had already ruled. R. p. 36-37. The jury was empaneled over the defense’s objection. R. p. 37.

#### **Failure to Give Requested Jury Charge**

The State offered testimony of Marcus Bell, the Appellant’s former detention center cellmate. R. p. 270. In February of 2015 Bell wrote the solicitor a letter, which he described at trial as “giving a brief description of what was told to me as far as what we’re here today discussing as far as this murder trial.” R. p. 272, l. 8-11; 276. Bell claimed that the Appellant had told him about his charges. R. p. 270. Bell claimed that Appellant told him “bits and pieces”. 271, l. 23. Bell couldn’t recall details but said that “I can give you a pretty much overview summary.” R. p. 272.

According to Bell “a misunderstanding about the victim having some money to purchase more drugs, this, that, and the third because they were all in the room, Mr. Weatherall and a couple of other people were having, you know, just sitting down, getting high, enjoying themselves, and the drugs were running out, the money was getting low, and the victim

supposedly claimed he had more money to get more drugs. Come to find out, that wasn't the case. Mr. Weatherall said, hey, you know, kind of got angry and something ensued to the point to where a bottle was grabbed and hit the victim across the head, and come to find out, like they didn't even notice that the victim was, was deceased until some days later..." R. p. 272, l. 17-273, l. 3. When asked if the Appellant had shown him how he struck the victim Bell said: " Not exactly like in a whole bunch of different moves, but he just was like I smacked him across the head with the bottle." R. p. 275, l. 3-7. Bell's testimony was clearly critical to the State's case as there was no other evidence to show the identity of the victim's assailant.

Despite having testified that the Appellant had confessed to hitting the victim, Bell contradicted himself and admitted that the Appellant never actually told him that he had hit the victim. R. p. 274. Bell admitted that the Appellant had told him repeatedly that "Chicken" [Marvin McElveen, R. p. 308] had hit the victim with the bottle. R. p. 274. Bell then contradicted his own testimony further and claimed that the Appellant had implied that he had hit the victim in the head with a bottle. R. p. 274, l. 8-275, l. 2.

The defense questioned Bell to show that the alleged confession was simply fabricated using information that Bell obtained from reading the Appellant's discovery material, rather than any actual admissions by the Appellant. R. p. 287-288. Bell admitted "that discovery, that's a commodity at the jail; people trade it, people use it, and things like that." R. p. 285, l. 18-22. On cross-examination Bell first denied having seen Appellant's discovery material while in the jail, but then later admitted that the Appellant, "like every other inmate out there, has a copy of his [discovery material] that stays in the cell". R. p. 287-288. On cross Bell also admitted that inmates don't stay in their cells all the time, leaving to go to eat, go out on the yard, and things

like that. R. p. 288.

On re-direct the solicitor attempted to rehabilitate Bell's testimony asking if he ever saw the Appellant's discovery. R. p. 288. Bell responded that he had not. R. p. 288. Despite having just admitted on cross-examination that Appellant had his discovery in the cell like every other inmate, on re-direct Bell was suddenly able to "specifically remember Mr. Weatherall saying that he didn't even have discovery at the time when I was in his room. R. p. 288, l. 20-22. Despite Bell's answer that the Appellant didn't even have discovery while they were cellmates, the solicitor's next question was: "Okay, And did he ever just leave it sitting out for anybody to look at?" R. p. 288, l. 23-24. To which Bell responded: "No, because he rarely came out the room." 288, l. 25. The solicitor continued: "Okay, And so, he was basically in there holding his stuff, making sure weren't nobody looking at it?" R. p. 289, 1-2. To which Bell responded: "Pretty much." R. p. 289, l. 3. This continued with the solicitor asking: "Okay. Now let me ask you this, would you have messed with his discovery?" R. p. 289, l. 4-5. Bell: "Definitely not." R. p. 289, l. 6. Despite the obvious incongruity of the whole line of questions, and the importance of the testimony to the case, the court denied the defense's request to follow up on the solicitor's attempt to rehabilitate Bell. R. p. 289, l. 22-23.

The solicitor asked Bell if what he put in the letter, and what he told the jury, was the truth. R. p. 276. Bell replied that it was. R. p. 276. To bolster Bell's credibility further the solicitor asked Bell: "Okay. Now, are you expecting anything in exchange for writing that letter or coming up here and telling them what Mitch told you?" R. p. 276, l. 200-22. To which Bell responded: "Not at all." R. p. 276, l. 23. When asked why he wrote the letter to the solicitor Bell responded:

1 Well, at first I'm gonna be totally honest w1th you, I,  
2 I, I felt that it was -- I felt that possibly it could help me  
3 when I was facing time, but then I later on found out that it  
4 didn't help me. And, as the time went on down the road,  
5 figured out that it was pretty much the right thing to do  
6 because of the simple fact that it could've been my dad, it  
7 could've been my brother, it could've been my, you know, it  
8 could've been a family member on mine and, you know, I'd want  
9 somebody to do it for me -- you know what I'm saying, to do it  
10 for a family member of mine, but this me being here today  
11 don't help me none, so -- at all, not one bit.

R. p. 277, l. 1-11.

In an effort to show the potential for bias in Bell's ability to qualify for a sentence reduction the defense requested the court charge the content of S.C. Code § 17-25-65. Despite the critical nature of Bell's testimony the court denied the defense request to charge. R. p. 358-359.

## ARGUMENT

### I. THE COURT ERRED IN EMPANELING JURY OVER THE APPELLANT'S BATSON V. KENTUCKY MOTIONS.

#### *Standard of Review*

"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 court failed to apply the proper law given the facts. Plenary review is therefore appropriate.

#### *Discussion of the Issues*

The defense raised two challenges pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The first was to the State's strike of the only African American juror called. The second was in response to the State's strike of a gay juror. In considering the Batson issue the court misstated the law in both instances.

In response to the defense challenge of the State's strike of the African American juror the trial court stated: "You know, there's a whole lot of leeway. I know that it -- if there had

been more black females called and struck, you could address it, but since there was only one called..." This was an error of law: "The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)" Foster v. Chatman, 136 S. Ct. 1737, 1747, 195 L. Ed. 2d 1 (2016). While the solicitor put on the record that the strike was based on some belief that the juror might have had a disqualifying prior drug conviction, such was clearly contrary to the court's prior qualification of the juror. 8. The court made no analysis on the record and never corrected its earlier misstatement of the law. The court, apparently only as an afterthought, stated: "I find that there is a justifiable reason for striking Juror Number 191." R. p. 37, l. 2-3. Having failed to place any analysis on the record after misstating Batson's application, the court's finding cannot be assumed valid. The court's misapprehension as to Batson's application where the strike involved only a single African American juror therefore constitutes an error of law.

As to the State's strike of a gay juror the court again misstated the law: "I'm gonna go ahead and deny your motion because I agree, there's no protected class based upon sexual orientation." R. p. 36. The trial court's subsequent comments show that it's ruling was final and that it did not intend to conduct any meaningful analysis of the issue: "And I'm not gonna require you to give the reason that you struck him unless you just want to put that on the record. You want to put that on the record?" R. p. 36. It was only subsequent to the court's ruling that the solicitor added that she was unaware of the juror's sexual orientation and had struck the juror because he appeared "disinterested" during the jury selection process. R. p. 36. There was no indication that the court actually revisited the issue on which it had already ruled, or even if it did, that it applied the proper analysis required under Batson. R. p. 36-37.

### ***The Batson Analysis***

In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prevents the prosecution from striking potential jurors on the basis of race. McCrea v. Gheraibeh, 380 S.C. 183, 186, 669 S.E.2d 333, 334 (2008) (citing State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)); see also Batson v. Kentucky, 476 U.S. at 89. The 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. See Purkett v. Elem, 514 U.S. 765, 767-68 (1995); State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014).

The purposes of Batson v. Kentucky and its progeny are to protect the defendant's right to a fair trial by a jury of his peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of the justice system by seeking to eradicate discrimination in the jury selection process. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999); State v. Flynn, 368 S.C. 83, 627 S.E.2d 763 (Ct.App.2006). It is unconstitutional to strike a juror on the basis of race or gender. See J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venireperson on the basis of race. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Haigler, 334 S.C. at 628, 515 S.E.2d at 90. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson, 476 U.S. at 86, 106 S.Ct. 1712. A criminal defendant may object to race-based peremptory challenges on equal protection grounds regardless of whether the defendant and

potential juror share the same race. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Payton v. Kearsse, 329 S.C. 51, 495 S.E.2d 205 (1998). Batson has also been held to apply to strikes based on sexual orientation. Smithkline Beecham Corporation, v. Abbott Laboratories, 740 F.3d 471 (2014); Morgan v. State, 416 P.3d 212 (2018).

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, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), and adopted by our supreme court in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006).

### ***Batson's Three Step Analysis***

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) (*internal citations omitted*).

State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014).

### ***The First Step Of The Analysis***

First, the [party asserting the Batson] challenge must make a prima facie showing that the challenge was based on race. State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014). When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one. *See generally* State v. Haigler, 334 S.C. 623, 515

S.E.2d 88 (1999). The same would apply when a party strikes a juror based on sexual orientation. Smithkline Beecham Corporation, v. Abbott Laboratories, 740 F.3d 471 (2014); Morgan v. State, 416 P.3d 212 (2018). In this case the defense objected to the State's strike of the only African American juror called, as well as to the strike of a gay juror. This satisfies the first step of the Batson analysis.

***The Second Step Of The Analysis***

Once a prima facie showing has been 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. State v. Giles, 407 S.C. 14, ---, 754 S.E.2d 261, 263 (2014). (*internal citations omitted*); *see also* Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008) (*quoting Miller-El v. Dretke*, 545 U.S. 231, 277 (2005)); State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014). The same type of analysis should apply to strikes based on sexual orientation. Beecham Corporation, v. Abbott Laboratories, 740 F.3d 471 (2014); Morgan v. State, 416 P.3d 212 (2018).

***Reversal Required Based on the Failure to Reach the Second Step of the Analysis as to Gay Juror***

Here the court ruled as a matter of law that Batson does not apply to strikes based on sexual orientation. Although the State later stated that the strike was based on the juror appearing disinterested in the process, that was only done subsequent to the trial court ruling that Batson does not apply as a matter of law. Having ruled prior to reaching Batson's second step, the court failed to conduct a proper Batson analysis. The failure of the court to apply Batson to the State's strike of a gay juror as a matter of law constitutes reversible error. *See* Smithkline Beecham Corporation, v. Abbott Laboratories, 740 F.3d 471 (2014); Morgan v. State, 416 P.3d 212 (2018).

### ***The Second Step of the Analysis***

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; Randall v. State, 716 So. 2d 584, 588 (Miss. 1998). 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 ---, 754 S.E.2d at 265; *see., e.g., id. at ---*, 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"). *See also* State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014).

The Supreme Court observed "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett v. Elem, 514 U.S. 765, at 767-68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). At step two, therefore, the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations for the strikes." State v. Adams, 322 S.C. at 123, 470 S.E.2d at 371. Therefore, "[u]nless a discriminatory intent is inherent" in the explanation provided by the proponent of the strike, "the reason offered will be deemed race neutral" and the trial court must proceed to the third step of the Batson process. Purkett, 514 U.S. at 768, 115 S.Ct. 1769.

### ***The Third Step Of The Analysis - The Fundamentally Implausible Explanation***

In light of the totality of the facts the State's explanation for the strike of the only black

juror presented in the Appellant's case is fundamentally implausible and therefore fails the third step of the Batson analysis. "Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment." 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. Kears, 495 S.E.2d 205, 329 S.C. 51 (S.C., 1996). Payton v. Kears, 329 S.C. 51, 495 S.E.2d 205 (1998). Here the implausibility of the State's explanation is clear. The solicitor struck the African American juror because she believed the juror might have a disqualifying prior conviction, which is clearly contrary to the court's qualifying the juror during the venire process. During qualification the juror raised the issue which was resolved by the trial court qualifying her for the jury pool. The State's claim that the strike was "out of abundance of caution" that there could be a prior disqualifying conviction is therefore clearly unfounded and completely contrary to the court's ruling. The stated basis for the State's strike is therefore fundamentally implausible. Therefore the trial court erred in empaneling the jury over the Appellant's Batson motion.

[Continued on following page]

**II. THE COURT ERRED IN REFUSING TO CHARGE THE JURY ON S.C. CODE § 17-25-65 WHERE THE STATE'S KEY WITNESS DENIED THAT HE COULD RECEIVE ANY BENEFIT FROM HIS TESTIMONY AT TRIAL.**

Here the State's key witness Marcus Bell provided the only evidence identifying the Appellant as the person that hit the deceased in the head with a bottle. Bell was not a witness to the events, but rather the Appellant's cell mate at the detention center while both were pending trial on unrelated charges. The defense attempted to show Bell's access to the Appellant's discovery material as the source of his knowledge of the Appellant's case. To bolster Bell's credibility the solicitor asked Bell if he was expecting anything in exchange for writing that letter or testifying at trial. Bell initially claimed that he expected nothing, but later when on to admit that he was when he originally wrote the letter to the solicitor, but that it couldn't help him now. Essentially Bell claimed that he was testifying simply because it was the right thing to do. To contradict Bell's testimony and expose possible bias the defense requested a jury charge on S.C. Code § 17-25-65 which specifically provides for the reduction of sentences where an inmate cooperates with the State in a situation such as Bell's. The court denied the charge and in doing so foreclosed the defense's only effective means of showing Bell's potential bias.

Showing witness bias is an essential right guaranteed under the Sixth Amendment. The analysis here should therefore be similar to cases involving a witness facing sentencing on pending charges. "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists "a substantial possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to [a] future [court]" how the witness cooperated in the instant case. *See State v. Sims*, 348 S.C. 16 at 25, 558

S.E.2d at 523; *see also* State v. Mizzell, 349 S.C. 326 at 332–33, 563 S.E.2d 315 at 318. (2002); State v. Gillian, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004), *aff'd as modified*, 373 S.C. 601, 646 S.E.2d 872 (2007). Here the only way to show the bias in Bell's testimony was to show that, contrary to his testimony, his cooperation would qualify him for a sentence reduction, if of course the State was so inclined.

The potential for biased testimony in the hope of reducing a sentence already imposed is no different than the potential for biased testimony in hopes of a reduced sentence on pending charges. In addressing the right to show potential bias where a witness has sentencing pending on outstanding charges the court has said: "We found Brown was unfairly prejudiced because the witness "was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy [was] critical evidence of potential bias that appellant should have been permitted to present to the jury." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). Moreover, the witness provided the only evidence to link Brown to the cocaine trafficking. *Id.*, 303 S.C. at 171-72, 399 S.E.2d at 594." State v. Mizzell, 349 S.C. 326, 332, 563 S.E.2d 315, 318 (2002). Here, Bell's testimony opened the door for future gain no different than where a witness testifies in hopes of having that cooperation affect future sentencing. The potential for bias is exactly the same.

It is not necessary that there be evidence of an existing agreement or offer by the State to have Bell's sentence reduced in exchange for Bell's testimony. It is merely the hope of one that creates the potential for bias:

"Petitioners argue Steele would reasonably have felt the quality of his cooperation would determine the degree of benefit he would later receive. *See* Boone v. Paderick, 541 F.2d 447, 451 (4th Cir.1976) ("[A] promise to recommend leniency

(without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced; the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.”). We agree.”

State v. Mizzell, 349 S.C. 326, 332–33, 563 S.E.2d 315, 318 (2002). Here Bell testified that his cooperation with the State, and testimony in the Appellant's case, could not help him "not one bit". This testimony was offered by the State to bolster Bell's credibility and was especially egregious as it was not at all true. S.C. Code § 17-25-65 provides that upon the State's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved information provided by the defendant to the State within one year of sentencing, but which did not become useful to the State until more than one year after sentencing. Clearly, Bell's testimony makes him eligible for a sentence reduction. Whether or not offered by the State, Bell could have hope that testimony favorable to the State would result in some benefit to him. That potential for future benefit gives rise to a corresponding potential for bias that the defense was entitled to show. The defense sought to do this by having the court charge the relevant portion of S.C. Code § 17-25-65.

The jury's ability to judge credibility turns on it's having all of the relevant information, including that which might create bias. In analyzing the right of a defendant to establish bias that can be created by the potential for a sentence reduction the federal court has said:

As in many trials, the jury's task boiled down to deciding which of the two most important witnesses was lying to them. The defendant had an obvious motive to lie, because his direct freedom was at stake, but so did the government's star witness. His motive was more subtle, as it arose from a plea agreement that left open the possibility that he might walk out the door a free man if the government was satisfied that his testimony was the truth.

United States v. Schoneberg, 396 F.3d 1036, 1041 (9th Cir. 2005).

Here the State elicited testimony that Bell's cooperation could do nothing for him. This evidence was clearly presented to bolster Bell's credibility by removing any impression of bias. It misrepresented to the jury that Bell's testimony could not benefit him in any way, which is clearly not case. Whether or not the solicitor had made an offer or intended to move to reduce Bell's sentence if pleased with his testimony, the potential for bias lies in fact that she could. Bell's role as the State's star witness made him eligible for a sentence reduction under S.C. Code § 17-25-65. 'The law to be charged to the jury is determined by the evidence presented at trial.' "State v. Sams, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) (*quoting State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). The defense requested the court charge the statute so the jury could see the potential for bias. As the request arose from the facts and was based on the applicable law, it was error for the court to refuse it: "It is error to refuse a requested charge on an issue raised by the indictment and the evidence presented at trial." State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987); State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct. App. 1995).

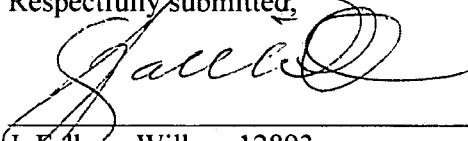
Federal courts apply a similar analysis: "We review for abuse of discretion the district court's denial of Sonmez's proposed jury instructions. United States v. Bartko, 728 F.3d 327, 343 (4th Cir.2013). To establish an abuse of discretion in this regard, a defendant must demonstrate that his proposed instructions (1) were "correct," (2) were "not substantially covered by the charge that the district court actually gave to the jury," and (3) "involved some point so important that the failure to give the instruction[s] seriously impaired the defendant's defense." *Id.*; *see also* United States v. McFadden, 753 F.3d 432, 443-44 (4th Cir.2014) (same)." United States v. Sonmez, 777 F.3d 684, 688 (4th Cir. 2015). Here, the failure to charge Code § 17-25-65 limited the defense's ability to show the potential for bias in Bell's testimony. As Bell's testimony

constituted the only evidence that the Appellant struck the victim, the court's refusal to charge seriously impaired Weatherall's defense.

### CONCLUSION

For the reasons set forth herein, Appellant Mitchell Monroe Weatherall respectfully requests this Court to reverse his convictions and remand for new trial.

Respectfully submitted,



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July 10, 2019.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2017-002447  
Trial Case No.: 2014GS2601415

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THE STATE, ..... RESPONDENT,

v.

.....  
MITCHELL MONROE WEATHERALL, ..... APPELLANT.

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CERTIFICATE OF COUNSEL

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I certify that the Final Brief of the Appellant is in compliance with Rule 211(b), SCACR.

Respectfully submitted,



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JUN 17 2019  
SC Court of Appeals

June 12, 2019