STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

On Petition for Writ of Certiorari to the Court of Appeals
Op. No. 5038 - Appellate Case No. 2008-111046
Howard P. King, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Petitioner,

v.

JEREMY McMILLAN,

Respondent

APPELLATE CASE No. 2012-213692

APPENDIX

NICOLE NICOLETTE MACE
THE MACE FIRM
1341 44th Avenue North, Suite 205
Myrtle Beach, S.C. 29577
843-839- 02900

ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
S.C. Bar No. 5758
Post Office Box 11549
Columbia, South Carolina 29211

(803) 734-6305

ERNEST FINNEY, III
Solicitor, Third Judicial Circuit

141 N. Main Street
Sumter, South Carolina 29140
(803) 436-2185
ATTORNEYS FOR PETITIONER

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In the Court of Appeals

APPEAL FROM LEE COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

Trial Court Case No.: 06-GS-31-00100

THE STATE.....Respondent

v.

JEREMY MCMILLIAN.....Appellant

BRIEF OF APPELLANT

Nicole Nicolette Mace
The Mace Firm
1341 44th Avenue North, Suite 205
Myrtle Beach, SC 29577
843.839.2900 Telephone
843.839.2913 Fax
nen@themacefirm.com

Attorney for Appellant

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QUESTIONS PRESENTED

McMillan raises three issues on appeal:

1) Whether the finding that the appellant's reason for striking certain jurors was pretextual constitutes reversible error when the court failed to require the state to prove purposeful discrimination as mandated under *Batson*.

2) Whether the circuit court's failure to hold a hearing on the appellant's motion to reconstruct the record prejudiced the appellant and is erroneous in light of this court's order which specifically instructed the trial court to hear the matter.

3) Whether the court's failure to make an evidentiary ruling regarding the state's introduction of prior bad acts that inflamed the jury prejudiced the appellant.

STATEMENT OF THE CASE

The appellant was the defendant in the circuit court and will be referred to by name or as the appellant. The respondent, the State of South Carolina, will be referred to as the state. Jeremy McMillian and Toby Fulmore were indicted in the State of South Carolina and were charged with two counts of murder and one count of possession of a weapon during the commission of a crime of violence on April 29, 2006. McMillian's trial commenced on December 8, 2008. McMillian was convicted on all counts on December 11, 2008. (R. 492, lines 20-25). He was sentenced to life without the possibility of parole. (R. 514, lines 23-25). He filed a notice of appeal on December 18, 2008 which was received by this Court on December 19, 2008.

The South Carolina Commission of Indigent Defense accepted the appellant's case on March 3, 2009. Undersigned counsel filed a motion to substitute counsel on July 24, 2009, which was granted by the court on August 5, 2009. Counsel ordered the transcript on July 24, 2009 and did not receive a complete set until March 21, 2010. Counsel challenged the accuracy of the transcripts pursuant to Rule 607(i) on April 12, 2010. On April 28, 2010, a reply was received from the court reporter with the portion of the transcripts in dispute. (R. 523). The appellant filed a motion to hold his appeal in abeyance on May 12, 2010 until a motion for remand in order to reconstruct the record could be filed.

This motion was granted on June 3, 2010. On August 13, the appellant filed a motion for remand to reconstruct the record in this court. This motion was granted on October 6, 2010; this court ordered the circuit court "to *hear* Appellant's challenge, and take whatever action it deems necessary to provide this Court with a correct transcription of the proceedings below." (R. 1). The circuit court failed to hold any type of hearing, and issued a written order on November 7, 2010, which was received by the Court of Appeals on November 22, 2010 denying the appellant's motion for remand to reconstruct the record. (R. 2). The appellant did not receive the circuit court's order until December 14, 2010. This initial brief and designation of matter follows.

STATEMENT OF FACTS

McMillan's trial commenced on December 8th, 2008. Once the first jury was selected, the state argued that the defense struck five white males from the jury, numbers 34, 27, 138, 72, and 174, and as a result, requested a *Batson* hearing. (R. 70, lines 4-5). Defense counsel pointed out that there were other white males on the first jury. (R. 76, lines 4-5). McMillan's attorney also argued that he struck juror number 34, Mr. Croft, because he was advised by other members of the Lee County Defense bar prior to drawing the jury that they attended church with Mr. Croft and that "he had displayed to them some views that they believed to be too controversial for this case." (R. 71, lines 4-10). Defense counsel explained to the

court that he was advised that juror number 34 had displayed attitudes that were inconsistent with being able to be unbiased and impartial during the trial. (R. 71, lines 24-25). The prosecution argued:

> Number 34, Your Honor, unless he can articulate some reason, other than somebody told me he wouldn't be a good juror. I don't see where that would be pretextual or an excuse. I mean somebody told me wouldn't be a good juror, well, a lot of people tell me if people will be a good juror, but I need to know something about that person. He should have said why he would be a good juror. What has he said about this case or what's he said about the defendant or whatever. (R. 74, lines 1-10).

The court determined, "I do find that the reason given for striking of juror number 34, that someone told me that he would not be a good juror is pretextual and I would think that is an improper right." (R. 77, lines 12-15). The appellant's attorney argued that he struck juror number 72 because he had previously indicated that his uncle was murdered which would make him impartial. (R. 72, lines 8-11). The state agreed and the court determined that the strike of juror 72 was not pretextual. (R. 77, lines 8-11). Defense counsel explained he struck juror number 174 because he was a member of the Lynchburg County Council and may have unfair knowledge of the case. (R. 72, lines 2-5). The court found that this reason was sufficient. Defense counsel argued that he struck juror number 138 because he was an employee of the South Carolina Department of Transportation and is often in contact with law enforcement agencies. (R. 72, lines 14-19). The state argued that juror number 98, who was seated on the jury, had a brother who was a deputy

sheriff. (R. 77, lines 1-2). Defense counsel stated that he had erred and believed it was juror number 97 who had a brother in law enforcement. (R. 75, lines 5-7). He explained that he would have struck number 98, and in fact, did strike juror number 98, a black male, during the second jury selection. (R. 79, lines 19-20). The court determined that the reason given for striking juror 138 was pretextual because of a similarly situated juror, number 98, who was seated on the first jury. (R. 76, lines 19-21).

Defense counsel explained that juror 27, Mr. Clark, was a contractor, a business owner. He argued that business owners "tend to be more conservative." (R. 72, lines 11-14). He explained that business owners are often "fiscally conservative with regard to taxes, they tend to have undue reverence for law enforcement and often times that in itself makes them conservative." (R. 76, lines 1-2). The state argued the defense's reasoning was insufficient, asserting, "As far as number 27 being a business owner, I don't know that makes, just because you own a business makes you more conservative or less conservative. To me, that is no reason whatsoever." (R. 73, lines 20-23). The trial court concluded, "and finally, with regard to juror number 27, simply that a business owner as being conservative is also pretextual and I will not allow that strike." (R. 77, lines 16-18). The court then ordered that the jury be "re-struck" and the defense would not be allowed to strike three jurors, number 34, 27, and 138 from the panel. Juror

number 34 was ultimately seated on the jury and number 27 was selected as an alternate. (R. 78, lines 12-13).

During pretrial motions, the state sought to include testimony regarding an incident in which McMillan allegedly got into a fight at a club with another person and subsequently obtained a gun and "shot up the house" of the individual. (R. 27, line 25). The state argued that the act was a "continuation or the beginning of this incident that occurred on April 29th." (R. 28, line 12). This incident allegedly occurred a month prior to the shootings and the state argued that "the testimony is going to show that this defendant packed the car with guns to go to the club, went to the club with the intent to get the St. John's boys." (R. 28, line 15). The appellant argued that this act did not show motive, identity, or common scheme, or plan or absence of mistake. He also explained that the act was not relevant to the case. (R. 30, lines 5-7). The court took the motion under advisement, but never made a ruling before the start of the trial. (R. 30, lines 19-20).

During the trial, Toby Fulmore testified he went to Mr. C's nightclub with the appellant a few times before the April 29 incident. (R. 118, lines 5-6). He testified that one month prior to the April 29th shooting, he witnesses an altercation between the appellant and Tyce Rhodes at the nightclub. (R. 121, lines 7-13). He testified that McMillan went to the parking lot to get his gun and then everyone left because the police showed up near the scene (R. 122, lines 20-25). Fulmore also

stated that McMillan later "shot Tyce Brown's house up." (R. 123, lines 21-22). The appellant objected, arguing the testimony was hearsay and was not relevant. The court determined the statement was admissible pursuant to 804(b)3, and constituted an exception to the hearsay rule. (R. 127, lines 20-25). The appellant also argued the testimony was not relevant to the case, but the court found, "that's the Lyle exception that I had previously ruled on." (R. 128, lines 2-5). However, the court had not made a previous ruling on the matter and had actually taken it under advisement. The court then determined "the ruling of the court has been made in that connection under 404 and under Lyle." (R. 129, lines 5-10). However, the ruling was never actually made by the court. The appellant was convicted and sentenced to life without the possibility of parole. (R. 514, lines 23-25).

McMillian initiated appellate proceedings, and a request for the transcript of the entire proceedings was provided to the Clerk of Court and all other parties involved in this action on July 24, 2009. Court Reporter Melissa R. Singletary informed counsel that she was experiencing technical difficulties on certain portions of the transcripts. A complete set of the trial transcripts was not received until March 20, 2010, nearly eight (8) months after the initial request. After reviewing said transcripts, counsel identified a portion of the proceedings that occurred during the polling of the jury, but had been omitted from the record. The

original transcripts received contain the following exchange between the court and juror Willie Price:

Clerk: Juror number 191, Willie Price, is this your verdict and still your verdict?

Juror 191: (Nods head affirmatively).

The court: All right, Mr. Price let me ask the question again or the clerk is going to ask you the question again and you either say yes or no. Ask the question.

Clerk: Willie Price, juror 191, is this your verdict and still your verdict?

Juror 191: Yes. (R. 503, line 1).

Upon discovering the inconsistency within the transcripts, counsel challenged the accuracy of the trial transcripts pursuant to Rule 607(i) on April 12, 2010. A reply from Court Reporter Melissa R. Singletary was received on April 28, 2010 with the portion of the transcripts in dispute. (R. 523).

The transcripts received from the court reporter in April indicate the following:

Clerk: Juror number 191, Willie Price, is this your verdict and still your verdict?

Juror 191: (Nods head affirmatively).

The Court: All right, Ms. Price let me ask the question again or the clerk is going to ask you the question again. We need to have a yes or no, so I'm going to have her ask the question again. When the question is asked we have to either have a yes or no. Ask the question. Thank you.

Clerk: Willie Price, Juror 191, was this your verdict and still your verdict?

Juror 191: Yes. (R. 503, lines 20-25)

However, several witness have indicated that Price stated she did not know if she agreed with the verdict and was forced to answer "yes" or "No." Willie Price herself stated that she was not sure whether the defendant was guilty. When asked if she agreed with the verdict, she stated in court and on the record, "I don't know." She also asserts that the trial judge stated, "Come on, we need an answer now" and that, "it's getting late." (R. 526). She was then told by the judge that she had to say yes or no. After some additional hesitation, she complied with the trial judge's order. This exchange is not present in the transcripts and the appellant argued the exchange was extremely important for his appeal in his motion to remand his case in order to reconstruct the record.

Counsel contacted numerous individuals present at the trial when drafting the motion for remand. Trial counsel stated that he remembered the exchange between Price and the court and that she was emotional. (R. 528). Trial counsel's former paralegal who was also present during the entire trial remembered that Price appeared very hesitant about the verdict and when asked if she agreed with the verdict, she shook her head in a no response and that Price stated she could not answer yes or no to the verdict at that time. (R. 531). The defendant's cousin, who also present throughout the trial stated that Price either informed the court that she "did not know" or "wasn't sure" about the verdict and that Price had tears in her

eyes. (R. 534).

The Court of Appeals issued an order on October 6th, 2010, granting the appellant's motion for Remand to Reconstruct the Record, instructing the circuit court "to hear Appellant's challenge, and take whatever action it deems necessary to provide this Court with a correct transcription of the proceedings below." (R. 1). However, the circuit court summarily denied the appellant's motion pursuant to a written order, finding that the record was complete. In fact, the circuit court failed to hold any type of hearing regarding this Court's Order dated October 6th, 2010, and issued a written order on November 7, 2010, which was received by the Court of Appeals on November 22, 2010. In this order, the circuit court determined that the affidavits submitted by McMillian were inconsistent. (R. 4, 5, 6).

The circuit court also stated in the order, "I did not shout 'in a noticeably forceful manner' for the juror to answer the question and that the juror did not appear to be intimidated." "I have never made that statement or used any language that would intimidate or impugn the integrity of this or any other juror." (R. 5, 6). The circuit court determined that many of the statements in the affidavits were "factually incorrect." (R. 6) This appeal follows.

ARGUMENT

I. THE CIRCUIT COURT'S FINDING THAT THE APPELLANT'S REASON FOR STRIKING JURORS WAS PRETEXTUAL WAS ERRONEOUS; THE STATE'S BATSON MOTION WAS IMPROPERLY GRANTED BY THE COURT.

In *Batson v. Kentucky*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the prosecution from striking potential jurors on the basis of race. 476 U.S. at 89, 106 S.Ct. 1712 (1986). The purpose of *Batson* is to " 'protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venire person's right not to be excluded from jury service for discriminatory reasons, and preserve confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process.' " *State v. Rayfield,* 357 S.C. 497, 501, 593 S.E.2d 486, 488 (Ct.App.2004) (quoting *State v. Haigler,* 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999)). The Supreme Court expanded *Batson* in *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), by holding "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges." Therefore, during jury selection, either the defendant or the prosecution may contest the peremptory challenge of a juror who is a member of a cognizable racial group. *State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294 (2006). Once there is an objection to a peremptory challenge the trial court must

conduct a *Batson* hearing and follow the requirements outlined in *Purkett v. Elem,* 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), which were subsequently adopted by the South Carolina Supreme Court in *State v. Adams,* 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996).

In *Purkett,* 514 U.S. at 767, 115 S.Ct. 1769, the Supreme Court held:

> Under our jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *See also Cochran*, 369 S.C. 314.

The Supreme Court explained that the second step of *Batson* "does not demand an explanation that is persuasive, or even plausible." *Id.* at 767-68, 115 S.Ct. 1769. Therefore, "[u]nless a discriminatory intent is inherent" in the reasoning given by the supporter of the strike, "the reason offered will be deemed race neutral" and the trial court then proceeds to the third step of *Batson*. *Cochran,* 369 S.C. at 314 *quoting Purkett,* 514 U.S. at 768, 115 S.Ct. 1769. At that point, the challenger of the strike must show the reason offered, though facially race-neutral, was actually a pretext to engage in purposeful racial discrimination in step three. *Adams,* 322 S.C. at 124, 470 S.E.2d at 372. The challenger of the strike has "the ultimate burden of showing purposeful discrimination" and must demonstrate the pretextual nature of the given reason for the strike. *Id.*; *Cochran*, 369 S.C at 315. "Pretext

generally will be established by showing that similarly situated members of another race were seated on the jury." *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999).

In *Cochran*, 269 S.C. at 315, the South Carolina Supreme Court held:

> As our case law illustrates, unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext. 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).

If a trial court erroneously grants a State's *Batson* motion, but none of the jurors who were found to have been improperly struck are seated on the jury, any error in quashing the juror is harmless. *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009). However, if a trial court improperly granted a *Batson* motion and a disputed juror is seated on the jury, then prejudice to the appellant is presumed and the proper remedy is a new trial. *Id.* On appeal, an appellate court will uphold a trial court's *Batson* ruling unless it is clearly erroneous. *Id.* at 509, 682 S.E.2d at 822. "This standard of review, however, is premised on the trial court following the mandated procedure for a *Batson* hearing." *Cochran*, 369 S.C at 312, 631

S.E.2d at 297. "Where the assignment of error is the failure to follow the *Batson* hearing procedure, the Court of Appeals must answer a question of law; when a question of law is presented, the standard of review is plenary." *Id.*

A. The trial court's conclusion that McMillian's strike of juror number 34 was racially motivated is clearly erroneous.

The state was not required to meet its burden of establishing purposeful discrimination because the trial court effectively placed the burden of disproving pretext on the appellant. The state argued that the defense struck five white males from the jury. (R. 70, lines 6-15). However, defense counsel pointed out that there were other white males on the first jury. Counsel also argued that he struck juror number 34, Mr. Croft, because he was advised by other members of the Lee County Defense bar prior to drawing the jury that they attended church with Mr. Croft and that "he had displayed to them some views that they believed to be too controversial for this case." (R. 71, lines 4-10). Defense counsel explained to the court that he was advised that juror number 34 had displayed attitudes that were inconsistent with being able to be unbiased and impartial during the trial. (R. 71, lines 22-25). The prosecution argued that this explanation was insufficient, stating:

> Number 34, Your Honor, unless he can articulate some reason, other than somebody told me he wouldn't be a good juror. I don't see where that would be pertextual or an excuse. I mean somebody told me wouldn't be a good juror, well, a lot of people tell me if people will be a good juror, but I need to know something about that person. He should have said why he would be a good juror. What has he said

about this case or what's he said about the defendant or whatever. (R. 74, lines 1-10).

The court determined, "I do find that the reason given for striking of juror number 34, that someone told me that he would not be a good juror is pretextual and I would think that is an improper right." (R. 77, lines 12-15). The court then ordered that the jury would be "re-struck" and that the defense would not be allowed to strike three jurors, including juror number 34. Juror number 34 was ultimately seated on the jury.

The court failed to follow the *Batson* requirements set out in *Puckett* and *Adams*. The state simply argued that the defendant had not met his burden of giving a racial neutral reason for the strike. However, the Supreme Court has held that the supporter of the strike's burden is relatively low. The Supreme Court explained that the second step of *Batson* "does not demand an explanation that is persuasive, or even plausible." *Id.* at 767-68, 115 S.Ct. 1769. Therefore, "[u]nless a discriminatory intent is inherent" in the reasoning given by the supporter of the strike, "the reason offered will be deemed race neutral" and the trial court then proceeds to the third step of *Batson*. *Cochran,* 369 S.C. at 314 *quoting Purkett,* 514 U.S. at 768, 115 S.Ct. 1769. "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Adams,* 322 S.C. at 124.

Therefore, the question here is whether or not the state met the ultimate

burden of persuasion regarding juror 34. The state neglected to demonstrate that the reason for striking juror number 34 was pretextual. In fact, the only argument made by the state was that the appellant's explanation was inadequate. Additionally, there was no showing by the prosecution that similarly situated members of another race were seated on the jury when discussing juror number 34. *See Adams, supra.* As in *Cochran*, the circuit committed reversible legal error in not adhering to the mandated *Batson* procedure, the court failed to require the prosecution to prove purposeful discrimination. *See Cochran*, 369 S.C. at 313. The first jury picked had white males on it, as noted by defense counsel. *See State v. Ford*, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999)("Although appellant exercised most of his challenges to strike white jurors, he did not strike every white juror...[T]he fact that appellant used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination.). Additionally, the reason for striking juror number 34 was race neutral, defense counsel argued that another attorney, who attended the same church as the juror and obviously knew him, would be biased and would not be a fair and impartial juror. This explanation is not pretextual.

For example, beyond a challenge for cause, the South Carolina Supreme Court has held that "[t]he principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice,

even where the juror is not challengeable for cause." *Cochran* 369 S.C. at 321, 631 S.E.2d at 301 *quoting State v. Short,* 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct.App. 1997), *aff'd,* 333 S.C. 473, 511 S.E.2d 358 (1999). This Court has held that "perceived prejudice may serve as a basis for exercising a peremptory challenge." *Cochran* 369 S.C. at 321. The *Cochran* Court noted, "Because a juror's perceived bias (for whatever reason), lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution." *Id.* Counsel's argument that he was informed by other attorneys who personally knew the juror and that he would not be impartial was race-neutral. Counsel believed juror number 34 was bias, which he expressed to the trial court; it was erroneous for the court to subsequently fail to require the state to establish purposeful discrimination.

As a result, the trial court committed reversible error by failing to follow the requirements of *Batson.* In *State v. Smalls,* 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct.App.1999) the defendant used nine of his ten peremptory challenges on white jurors. The State requested a hearing. At the *Batson* hearing, the defendant argued he struck the white jurors because they looked at him in a mean, stern, and accusatory manner. *Id.* The trial court determined these reasons were pretextual. However, it made this determination without requiring the State to prove the defendant engaged in purposeful racial discrimination. *Id.* This court reversed the

trial court's finding because it failed "to require the State to carry its burden to present evidence of pretext as prescribed by step three of the *Adams/Purkett* analysis." *Id.* at 309, 519 S.E.2d at 797. *See also Cochran*, 369 S.C. at 323 (concluding the trial court erred when it abandoned the process mandated by *Purkett* and *Adams* and effectively placed a burden of *disproving* pretext and purposeful discrimination on Appellants).

Since juror 34 was chosen for the second jury, the trial court committed reversible error when it found that juror 34 had been improperly struck by the appellant pursuant to *Batson.* South Carolina case law dictates that even if the trial court commits error in granting the State's Batson motion, the error is reversible only if the second jury is comprised of jurors whom the trial court erroneously prohibited the defendant from striking based on *Batson. Adams,* 322 S.C. at 126, 470 S.E.2d at 373; *State v. Rayfield,* 357 S.C. 497, 504, 593 S.E.2d 486,490 (Ct. App. 2004). Additionally, in *State v. Short,* 333 S.C. 473, 511 S.E.2d 358 (1999), our Supreme Court held that no actual prejudice need be shown to establish reversible error for the deprivation of a peremptory strike where properly struck jurors are seated on the second jury. *See also Ford,* 334 S.C. at 66, 512 S.E.2d at 504 (holding that reversal and granting of a new trial is a proper remedy). "If one of the disputed jurors is seated on the jury, the erroneous *Batson* ruling has tainted the jury and prejudice is presumed in such cases, because there is no way to

determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged." *Rayfield*, 369 S.C. at 114, 631S.E.2d at 248; *see also State v. Edwards*, 384 S.C. 504, 682 S.E.2d 820 (2009). The appellant's case should be reversed and remanded for a new trial due to the trial court's failure to adhere to the mandated *Batson* procedure, specifically the failure to require the state to prove purposeful discrimination.

B. The trial court also erred by granting the state's *Batson* challenge in regard to juror 27.

The trial court not only committed reversible error by seating juror number 34 on the second jury, but also erred by failing to comply with *Batson* in regard to juror number 27. Defense counsel explained that juror 27, Mr. Clark, was a contractor, a business owner. He argued that business owners "tend to be more conservative." (R. 77, lines 15-18). He explained that business owners are often "fiscally conservative with regard to taxes, they tend to have undue reverence for law enforcement and often times that in itself makes them conservative." (R. 75, lines 24-25). The state again argued the defense's reasoning was insufficient, asserting, "As far as number 27 being a business owner, I don't know that makes, just because you own a business makes you more conservative or less conservative. To me, that is no reason whatsoever." (R. 73, lines 20-23). The trial court concluded, "and finally, with regard to juror number 27, simply that a

business owner as being conservative is also pretextual and I will not allow that strike." (R. 77, lines 15-18).

The Supreme Court has consistently held that employment status of a prospective juror is a race-neutral reason for using a peremptory challenge. *State v. Haigler,* 334 S.C. 623, 632, 515 S.E.2d 59, 88, 512 S.E.2d 500 (1999) (lack of employment or place or type of employment is a race-neutral reason for strike); *State v. Ford,* 334 S.C. at 65, 512 S.E.2d at 504 (place of employment is a race-neutral reason for strike); *see Adams,* 322 S.C. at 125, 470 S.E.2d at 372 (type of employment is a race-neutral reason for strike); *State v. Flynn,* 368 S.C. 83, 85, 627 S.E.2d 763, 765 (Ct. App. 2006) (State's categorization of a Head Start director as "a very liberal job" was a race-neutral reason for striking the juror).

In *State v. Edwards*, 384 S.C. 504, 510, 682 S.E.2d 820, 823 (2009), the South Carolina Supreme Court held that the petitioners' stated concerns that juror number 50 was a journalist and that juror number 131worked at the Department of Motor vehicles were sufficient race-neutral reasons to survive a *Batson* challenge. The court in *Edwards* found that the State had the burden of demonstrating that the proffered explanations for the strikes were pretext for racial discrimination; the court ultimately held that there was no evidence that the prosecution met its burden, and remanded the case for a new trial. *Id.*

Here, as in *Edwards*, the trial court gave no explanation as to why it ruled

that jurors 34 and 27 strikes by the appellant violated *Batson*. The burden on the proponent of the challenge (the state) never rebutted the explanation given by the appellant for the strikes. The state simply argued that the defendant's explanation for the strike of juror 27 and 34 was not sufficient. However, in regard to juror number 27, "employment is a well-understood and recognized consideration in the exercise of peremptory challenges." *Edwards*, 384 S.C. at 511. Ultimately, the State, as opponent of the disputed strikes, carried the burden of persuading the court the appellant exercised the strikes in a discriminatory manner. The State's reasoning was, "As far as number 27 being a business owner, I don't know that makes, just because you own a business makes you more conservative or less conservative. To me, that is no reason whatsoever." (R. 73, lines 20-23). The State failed to carry its burden of showing that the Defendants strike was in violation of *Batson*. For that reason, the Defendants should have been allowed to exercise their strike when striking the second panel against number 34 and 27.

Juror number 27 was seated on the jury as an alternate. (R. 80, 24-25). If a trial court erroneously grants a State's *Batson* motion, but none of the jurors who were found to have been improperly struck are seated on the jury, any error in quashing the juror is harmless. *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009). However, if a trial court improperly granted a *Batson* motion and a disputed juror is seated on the jury, then prejudice to the appellant is presumed

and the proper remedy is a new trial. *Id.* The appellant's case should be reversed and remanded to the Circuit Court for a new trial.

II. THE CIRCUIT COURT FAILED TO FOLLOW THIS COURT'S ORDER REQUIRING IT TO HOLD A HEARING TO ADDRESS MCMILLIAN'S MOTION FOR REMAND TO RECONSTRUCT THE RECORD.

> As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy. *Smith v. State,* 291 Md. 124, 137, 433 Ad.2d 1143 (Md. 1981) *citing Ellis v. United States*, 356 U.S. 674, 675, 78 S.Ct. 974, 975, 2 L.Ed.2d 1060 (1958).

The appellant, Jeremy McMillian, has an important appellate issue that cannot be reviewed by the South Carolina Court of Appeals absent a full development of a critical portion of the record, the polling of juror Willie Price. In some cases, substitute statements or affidavits can be prepared to replace or to supplement the record, providing an appellant with adequate material for the court to review. *See Smith v. State*, 291 M.d. 124, 433 Ad.2d 1143. (internal citations omitted). *see Commonwealth* v. *Hughes*, 480 Pa. 311, 389 A.2d 1081 (1978); *State v. Goodbier*, 367 So.2d 356 (La.1979); *People v. Drew*, 26 Mich.App. 337, 182 N.W.2d 566 (1970); *State v. Neely*, 21 N.C.App. 439, 204 S.E.2d 531 (1974). In states that have some established procedure for correcting the record, most have required the appellant and the appellee to make diligent inquiry and effort to put together an

equivalent picture of the events at trial. *Smith v. State*, 291 M.d. 124, 433 Ad.2d 1143. *citing State v. Neely, supra; cf. Commonwealth v. Hughes, supra.*

In this State, in circumstances where a portion of the transcripts are lost or destroyed, the court has held that it can remand a case to the circuit court in order to have the record reconstructed. *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002). The Supreme Court has also determined that it is proper for a trial judge to consider affidavits from counsel and the court reporter during a hearing to reconstruct the record. *China v. Parrot*, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968). For example, in *State v. Ladson*, 373 S.C. 320, 644 S.E.2d 271 (S.C. App. 2007), Ladson moved the Court of Appeals to reverse his convictions and sentences and for a new trial after the court reporter revealed that there was no record of the trial court proceedings. *Id.* The circuit court attempted to reconstruct the record. However, the South Carolina Court of Appeals held that the reconstructed record was insufficient for meaningful review of the issues on appeal and remanded the case for a new trial, finding that the record was "largely conclusory" and that the recalled witness testimony during the reconstruction hearing in "summary fashion" was insufficient. *Id.*

Here, McMillian filed a Motion for Remand to Reconstruct the Record, arguing that crucial statements made during the polling of the jury were omitted from the trial transcripts. The appellant attached several affidavits to support this

contention. Additionally, the court reporter involved in this action admitted that she was experiencing technical difficulties in transcribing the record and further stated that two of the tapes in her possession were blank. In fact, it took approximately eight months for the court reporter to transcribe the trial. In the first set of transcripts received from the court reporter, juror number 191, Willie Price nodded affirmatively when asked if she accepted the verdict of guilty. (R. 503, line 1). The court stated, "All right, Mr. Price let me ask the question again or the clerk is going to ask you the question again and you either say yes or no. Ask the question." (R. 502, lines 20-23). In the second transcripts received from the court reporter in April 2010, the court stated, "All right, *Ms*. Price let me ask the question again or the clerk is going to ask you the question again. *We need to have a yes or no, so I'm going to have her ask the question again. When the question is asked we have to either have a yes or no.* Ask the question. *Thank you.* [emphasis added]. (R. 523).

According to section XI A.2 of the Court Reporter Manual for the State of South Carolina (2000), "Every proceeding of a criminal case must be recorded verbatim." It is clear that the appellant's transcripts are not verbatim based on the discrepancy in the portion of the transcripts when the court spoke to Willie Price. This calls into question the accuracy of the entire trial transcripts. The transcripts are required to be verbatim, meaning word for word. The transcripts received are

not verbatim, and as a result, do not permit meaningful appellate review of a murder trial in which the appellant received a life sentence without the possibility of parole.

The transcripts indicate that Willie Price, a member of the jury, nodded in the affirmative when questioned by the court and answered "yes" she agreed with the verdict during the polling of the jury. (R. 502, lines 20-23). However, several witness have indicated that Price stated she did not know if she agreed with the verdict and was forced to answer "yes" or "No." Willie Price herself stated that she was not sure whether the defendant was guilty. When asked if she agreed with the verdict, she stated in court and on the record, "I don't know." She also asserts that the trial judge stated, "Come on, we need an answer now" and that, "it's getting late." (R. 526). Trial counsel stated that he remembered the exchange between Price and the court and that she was emotional. (R. 528). Trial counsel's former paralegal who was also present during the entire trial remembered that Price appeared very hesitant about the verdict and when asked if she agreed with the verdict, she shook her head in a no response and that Price stated she could not answer yes or no to the verdict at that time. (R. 531). The defendant's cousin, who also present throughout the trial stated that Price either informed the court that she "did not know" or "wasn't sure" about the verdict and that Price had tears in her eyes. (R. 534).

The Court of Appeals issued an order on October 6th, 2010, granting the appellant's motion for Remand to Reconstruct the Record, instructing the circuit court "to *hear* Appellant's challenge, and take whatever action it deems necessary to provide this Court with a correct transcription of the proceedings below." [emphasis added]. (R. 1). However, the circuit court summarily denied the appellant's motion pursuant to a written order, finding that the record was complete without hearing the testimony of witnesses, the evidence, and arguments of counsel. In fact, the circuit court failed to hold any type of hearing, and issued a written order on November 7, 2010, which was received by the Court of Appeals on November 22, 2010. In this order, the circuit court determined that the affidavits submitted by McMillian were inconsistent. (R. 6).

The circuit court also stated in the order, "I did not shout 'in a noticeably forceful manner' for the juror to answer the question and that the juror did not appear to be intimidated." (R. 5, 6). The circuit court also asserted, "I have never made that statement or used any language that would intimidate or impugn the integrity of this or any other juror." (R. 6). The circuit court determined that many of the statements in the affidavits were "factually incorrect" without hearing the testimony of the actual witnesses. (R. 3). The circuit court noted that the appellant waived any objection to the accuracy of the record by failing to timely object at the end of the trial.

The trial court's order does not comply with the instructions of the South Carolina Court of Appeals. McMillian moved for "an order granting his Motion for Remand to Reconstruct the Record for the purpose of taking the testimony of a witness and/or witnesses with knowledge in this matter." (R. 517). This Court granted the appellant's motion and ordered the circuit court to "hear" his motion. A "hearing is defined as "an opportunity to be heard" and in law; a hearing is defined as "a session, as of an investigatory committee or a grand jury, at which testimony is taken from witnesses." *The American Heritage Dictionary of the English Language*, Fourth Edition, copyright 2000 by Houghton Mifflin Company, Updated in 2009. Published by Houghton Mifflin Company. The circuit court was required to conduct a hearing, yet failed to do so.

For example in *Ladson*, this Court remanded the matter to the trial court to reconstruct the record. Pursuant to the Order of the Court of Appeals, the trial judge held a hearing to reconstruct the record for the appeal. This court noted, "it is clear from the record before us that all parties made a diligent effort to reconstruct the record." *Id.* In the present case, the circuit court found the appellant's affidavits were inconsistent, yet failed to take any live testimony. The circuit court did not make a diligent effort to reconstruct the record, and simply noted that the affidavits were not credible when denying the appellant's motion. The best way to determine whether the affidavits were credible and accurate was to

actually hear live testimony in court. Willie Price herself could have testified to what she remembered during the polling of the jury. In *Whitehead*, 574 S.E.2d at 203, the Supreme Court of South Carolina recognized the importance of a reconstruction hearing and granted the defendant's motion to remand his case for a hearing to reconstruct a PCR record. It was also ordered that a reconstruction *hearing* be held promptly. *Id.* [emphasis added]

A. The failure to hold a hearing in this matter caused the appellant prejudice.

The transcripts show that Willie Price nodded her head affirmatively when asked if this was her verdict, the court then ordered her to say yes or no and that she responded "yes." Willie Price herself confirmed that she had informed the court she "didn't know" if she agreed with the verdict. This key admission is missing from the transcripts. It is well-settled that the trial court must be satisfied that the verdict is unanimous and must conduct a poll of the jury at the request of either party. *State v. Kelly*, 372 S.C. 167,170-71, 641 S.E.2d 468 (SC. Ct. App. 2007) *citing State v. Linder,* 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981).

> "Polling is a practice whereby the court determines from the jurors individually whether they assented [to] and still assent to the verdict." *Id.* at 308, 278 S.E.2d at 338. "If it is made known to the court when it is time to render the verdict that any juror does not assent to it, the verdict cannot be received and the jury should retire to their room until they have agreed." *Kelly*, 372 S.C. at 171 *quoting State v. Singleton,* 319 S.C. 312, 316, 460 S.E.2d 573, 576 (1995). A judge has

> a duty to urge the jury to reach a verdict, but he may not coerce them. *Id.* at 316, 460 S.E.2d at 575.

In *Lattisaw v. State*, 329 Md. 339, 619 A.2d 548 (Md. 1993), the court held that a juror's response to a jury poll "yes, with reluctance" was ambiguous and required the trial court to take corrective action. The juror was upset and was shaking her head at the time of her response. The court held that this action by the juror "cast doubt upon the unanimity of the verdict" and noted that the trial court should have sent the jury out for further deliberations. *Id* at 347. However, the court explained that a limited instruction for the purpose of clarifying a juror's ambiguous response is not inherently coercive, but warned, "for a trial court to demand a simple "yes" or "no" answer ordinarily is improper compulsion." *Id* at 348. *See also United States v. McCoy*, 429 F.2d 739 (D.C. Cir. 1970); *State v. Bell*, 13 Conn.App. 420, 537 A.2d 496 (1988); *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986); *People v. Kellogg*, 77 Ill.2d 524, 34 Ill.Dec. 163, 397 N.E.2d 835 (1979). As a result of the ambiguous and inconsistent verdict, the court in *Lattisaw* granted the defendant a new trial.

As indicated in the affidavits attached to the appellant's motion to reconstruct the record, there is evidence that juror Willie Price did not agree with the verdict and was clearly hesitant about the unanimity of the verdict. Due to the juror's apparent hesitation and disagreement with the verdict, a vital appellate issue would be that the trial judge erred in accepting the verdict at that time and should

have allowed the jury to deliberate further in order to reach a decision. McMillian views these findings as a non-frivolous issue that could be presented on appeal, requiring a new trial. He received a life sentence, yet, the circuit court failed to reconstruct the record by hearing any testimony from Willie Price or any other individuals that could corroborate her testimony. His conviction should be reversed because there is evidence that the juror disagreed with the verdict. Additionally, the trial court failed to comply with the order of this Court by denying the appellant a hearing on his motion.

The Court in *Ladson* noted, "the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." *Id* at 324. *Smith v. State*, 433 A.2d 1143, 1148 (Md. 1981) *(internal citations omitted).* Reversible error is established when the petitioning party demonstrates that the missing evidence within the transcript resulted in prejudice to the appellant. *Ladson* 373 S.C. at 324; *citing State v. Quick,* 634 S.E.2d 915, 918 (N. C. Ct. App. 2006); *Lewis v. State*, 123 S.W. 3d 891, 893 (Ark. 2003). Further, the party must demonstrate prejudice by showing that the reconstructed record "does not allow for meaningful appellate review." *Ladson* 373 S.C. at 324.

Here, the circuit court's order is insufficient and is not adequate for meaningful appellate review. The circuit court noted that the affidavit of William Beam contained the hearsay statements of Willie Price that are inadmissible, yet

refused to conduct a hearing so that Willie Price herself could be subpoenaed to testify. Additionally, the circuit court concluded that the affidavits of Ms. Page, Mr. McKnight, and Ms. McCrea were "not credible" without holding a hearing in order to consider their live testimony. The disputed portion of the transcripts is critical to McMillian's appeal. The verdict is not credible, and the transcript of the polling of the jury has been called into doubt. A hearing should have been held by the circuit court in order to adequately address this discrepancy in the transcripts and to reconstruct the record during the polling of the juror Willie Price. The State of South Carolina requires that criminal jury verdicts be unanimous, McMillian's conviction should be reversed.

B. McMillian's motion for remand to reconstruct the record should be heard by a different judge in the Circuit Court.

It is well-established in this State that judges should recuse themselves where questions of impartiality or impropriety are raised. In *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), *cert. granted*:

> The Code of Judicial Conduct requires a judge to "disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned. *State v. Cheatham* 349 S.C. 101, 561 S.E.2d 618, 624 (Ct. App. 2002) *citing Christy v. Christy,* 317 S.C. 145, 452 S.E.2d 1 (Ct.App.1994). Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Ellis v. Procter & Gamble Dist. Co.,* 315 S.C. 283, 433 S.E.2d 856 (1993). It is not enough for a

> party seeking disqualification to simply allege bias. The party must show some evidence of bias. *Christensen v. Mikell,* 324 S.C. 70, 476 S.E.2d 692 (1996); *Mallett v. Mallett,* 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996). Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature. *Id.* at 497, 531 S.E.2d at 566.

In the present case, the circuit court judge stated in his order that "I did not in this case, nor have I ever, intimidated a juror" and as a result, determined that several of the affidavits were not credible and subsequently denied the appellant's motion without conducting a hearing. (R. 3). It is presently unknown whether the juror, Willie Price, agreed with the verdict because the court failed to hear her testimony at a reconstruction hearing. In the appellant's motion for remand to reconstruct the record, it was alleged that this juror felt pressured by the judge to give an answer. In the Order, the trial judge states, "I spoke in a normal tone of voice. The transcript of record accurately reflects the entire colloquy with the juror." (R. 6). The judge essentially had a conflict in the matter and was a potential witness, and as a result, he should have been recused from hearing the motion. This is evidenced throughout the Order. Appellate counsel can not effectively advocate for McMillian without the circuit court holding a hearing in order to adequately resolve this issue.

III. THE COURT'S FAILURE TO MAKE AN EVIDENTIARY RULING REGARDING THE STATE'S INTRODUCTION OF PRIOR BAD ACTS THAT INFLAMMED THE JURY PREJUDICED THE APPELLANT.

The South Carolina Supreme Court has held evidence of prior crimes or bad acts is not admissible to prove the crime for which the defendant is charged. *State v. Lyle,* 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). However, such evidence is admissible when it tends to show (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime on trial. *Id.* The evidence of prior crimes or bad acts must be relevant to prove the alleged crime. *State v. Campbell,* 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct.App.1994). When the prior bad acts are "strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." *State v. Gore,* 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). "[E]ven if [the] prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Gillian,* 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007). This balancing process is reflected in Rule 403 of the South Carolina Rules of Evidence. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Dickerson,* 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000).

In the present case, during pretrial motions, the state sought to include testimony regarding an incident in which McMillian allegedly got into a fight at a club with another person and subsequently obtained a gun and "shot up the house" of the individual. (R. 27, line 25). The state argued that the act was a "continuation or the beginning of this incident that occurred on April 29th." (R. 28, lines 11-12). This incident allegedly occurred a month prior to the shootings and the state argued that "the testimony is going to show that this defendant packed the car with guns to go to the club, went to the club with the intent to get the St. John's boys." (R. 28, lines 12-15). The appellant argued that this act did not show motive, identity, or common scheme, or plan or absence of mistake. He also explained that the act was not relevant to the case. (R. 30, lines 8-10). The court took the motion under advisement, but never made a ruling before the start of the trial. (R. 30, lines 19-20).

During the trial, Toby Fulmore testified he went to Mr. C's nightclub with the appellant a few times before the April 29 incident. (R. 118, lines 5-6). He testified that one month prior to the April 29th shooting, he witnesses an altercation between the appellant and Tyce Rhodes at the nightclub. (R. 121, lines 7-13). He testified that McMillian went to the parking lot to get his gun and then everyone left because the police showed up near the scene (R. 122, lines 20-25). Fulmore also stated that McMillan later "shot Tyce Brown's house up." (R. 123, lines 21-

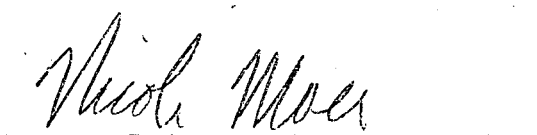
22). The appellant objected, arguing the testimony was hearsay and was not relevant. The court determined the statement was admissible pursuant to 804(b)3, and constituted an exception to the hearsay rule. (R. 127, lines 20-25). The appellant also argued the testimony was not relevant to the case, but the court found, "that's the Lyle exception that I had previously ruled on." (R. 128, lines 2-5). However, the court had not made a previous ruling on the matter and had actually taken it under advisement. The court then simply stated, "the ruling of the court has been made in that connection under 404 and under Lyle." (R. 129, lines 5-10). However, the ruling was never actually made by the court.

This testimony regarding the defendant did not provide any evidentiary value to the state's case, and was only used to tarnish the defendant in front of the jury. The argument and shooting involving Tyce Brown was introduced to enrage the jury. Additionally, the judges' role as gate keeper of inflammatory irrelevant evidence was sullied by the fact that this judge made no ruling and then refers to his prior ruling to allow the evidence to be admitted. The admission of this testimony insured that this defendant would not receive a fair trial based on the true evidence, but rather on the absolute tarnishment of his character. His conviction should be reversed.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Appellant, Jeremy McMillian, should be afforded relief from the prison sentence of life without the possibility of parole imposed against him. The Appellant's convictions should be reversed and this case should be remanded for a new trial.

Respectfully Submitted,



Nicole Nicolette Mace, Esquire
The Mace Firm
1341 44th Avenue North, Suite 205
Myrtle Beach, SC 29577
843.839.2900 Telephone
843.839.2913 Fax
nen@themacefirm.com

August 29, 2011

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM LEE COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

Trial Court Case No.: 06-GS-31-00100

THE STATE.....RESPONDENT

V.

JEREMY MCMILLIAN .....APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the Final Brief of Appellant complies with 211(b) of SCACR and a true copy has been served upon Donald J. Zelenka, Esq. at Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, this 30th day if August, 2011.

Nicole N. Mace, Esq.
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of August, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 6, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lee County
Howard P. King, Circuit Court Judge

Case No. 06-GS-31-100

STATE OF SOUTH CAROLINA,

Respondent,

v.

JEREMY McMILLAN,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ERNEST FINNEY, III
Solicitor, Third Judicial Circuit

141 N. Main Street
Sumter, SC 29150
(803) 436-2185

ATTORNEYS FOR RESPONDENT

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APPELLANT'S QUESTIONS PRESENTED

McMillan raises three issues on appeal:

1. Whether the finding that the appellant's reason for striking certain jurors was pretextual constitutes reversible error when the court failed to require the state to prove purposeful discrimination as mandated under *Batson*.

2. Whether the circuit court's failure to hold a hearing on the appellant's motion to reconstruct the record prejudiced the appellant and is erroneous in light of this court's order which specifically instructed the trial court to hear the matter.

3. Whether the court's failure to make an evidentiary ruling regarding the state's introduction of prior bad acts that inflamed the jury prejudiced the appellant.

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Jeremy McMillan, was indicted at the term of the Court of General Sessions for Lee County for murder (two counts), assault and battery with intent to kill (9 counts) and the possession of a weapon during an offense. Indictment 2006-GS-31-100. The crimes concerned an incident on April 26, 2006 that resulted in the deaths of Patrick Hood and Joshua Lee. Toby Fulmore was jointly indicted. The Appellant was represented by Mr. Cezar McKnight.

On December 8, 2008, the indictment was called to trial before the Honorable Howard P. King. At the outset, Assistant Solicitor Paul Fata announced that they were proceeding on count one (murder of Patrick Hood), count two (murder of Joshua Lee) and count twelve (possession of a weapon during the commission of a violent crime. R. 21-22, 48-51, Tr. p. 3-4, 31-34. The Appellant was present and represented by counsel McKnight. The prosecution was represented by Assistant Solicitor Fata. On December 11, 2008, the jury found the Appellant guilty of each count. R. 500-04, Tr. p. 629-633.

After the verdict, counsel McKnight made a motion to set aside the verdict because "we believe that there was not ample evidence in which the jury could reach a verdict." R. 507, Tr. 636, ll. 6-9. Judge King denied the new trial motion, concluding that it was a jury issue concerning the credibility of the witnesses. R. 507, Tr. p. 636, ll. 10-18.

During the sentencing, Appellant's prior record of criminal domestic violence (CDV) in 2003 and disturbing school and malicious injury to property (2004) was presented. Also, victim impact evidence was presented by Stephanie McGill (victim of

ABWIK and cousin of victim Joshua Lee) [R. 508-09, Tr. p. 637-38] and Mr. McEwan (victim of ABWIK) [R. 510-11, Tr. p. 639-640]. The defense made a plea in mitigation. R. 512-14, Tr. 641-43. Counsel McKnight requested a minimum 30 year sentence concurrent on the murder convictions. R. 513, Tr. p. 642, ll. 3-14. he indicated his client expresses remorse to the victims, but still maintains his innocence. R. 513, Tr. p. 642, ll. 14-18. The Appellant's niece, Ms. Gamble, also made a plea in mitigation. R. 513-14, Tr. 642-43. The Appellant, through counsel, waived his right of allocution "based upon any legal ramifications of [his] talking." R. 513, Tr. p. 642, ll. 8-10. Judge King sentence McMillan to life imprisonment without parole on each murder charge (2) and five (5) years for possession of a weapon during the commission of a violent crime. R. 512-13, Tr. 641-42.

The Appellant, through counsel McKnight, made a timely notice of appeal on December 18, 2008.

On August 13, 2010, the Appellant through new appellate counsel, Nicole N. Mace, made a "motion for remand to reconstruct the record." The Respondent made a Return to the Motion on September 14, 2010. On October 6, 2010, the South Carolina Court of Appeals entered an order granting Appellant's motion and remanded the matter to the circuit court with directions "to hear Appellant's challenge, and take whatever action it deems necessary to provide the court with a correct transcription of the proceedings below." State v. McMillan, Order (S.C.Ct.App. Oct. 6, 2010).

On November 17, 2010, the Honorable Howard P. King entered a five (5) page Order, concluding "The transcript prepared by the Court Reporter is confirmed as the

Transcript of Record in this matter, and the motion to reconstruct or correct the record is denied." Id. Order, p. 5. On November 19, 2010, Judge King entered an Amended Order, amending a reference in the Order. State v. McMillan Order, November 19, 2010. The Orders of Judge King were provided to both counsel through the Clerk of Court for the South Carolina Court of Appeals on December 10, 2010.

This briefing follows.

RESPONDENT'S STATEMENT OF THE FACTS.

The relevant facts will be included within the argument.

ARGUMENT

I. The trial court properly concluded that the mandates of Batson v. Kentucky were violated when the defense gave pretextual reasons of reliance upon another person's assessment of one juror as "not a good juror" based upon the assessment of another person and a second juror based upon a factor of "business owner." The re-striking was proper and the conviction should be affirmed.

In his initial argument, Appellant contends the trial court erred in requiring the re-striking of the jury after the judge concluded that reasons given for striking the jurors were pretextual due to their breadth. The trial court correctly assessed the asserted reasoning and concluded that discrimination had been shown in the striking of the venireman. The claim must be rejected.

How the Issue Was Raised

The Appellant, Jeremy McMillan, is an African American. during the trial, he was represented by counsel Cezar McKnight. The potential jurors were voir dired by the trial judge prior to jury selection. R. 51-65, Tr. 34-48. At striking of the petit jury, the parties were advised that the prosecution would have use of five (5) peremptory challenges and the defense would have access to ten (10) peremptory challenges. R. 65, Tr. p. 48, ll. 19-15. Counsel McKnight used his strikes in the following pattern:

#34 - James Croft - White Male. R. 66, Tr. p. 49, ll. 2-3.
#174 - Bruce Hunnicutt - White Male. R. 66, Tr. p. 49, ll. 4-7.
#72 - Charles McCutcheon-White Male. R. 68, Tr. p. 51, ll. 16-18.

As to potential alternates, counsel McKnight used the strikes in the following manner:

#27 - Donald Clark - White Male - R. 68-69, Tr. p. 51, ll.

25 - p. 52, l. 2.
#138 - Shawn Arrants - White Male - R. 69, Tr. p. 52, ll. 7-9.

After the initial selection was completed, Assistant Solicitor Fata made a motion pursuant to Batson v. Kentucky, 476 U.S. 89 (1986) and its progeny. He contended that there were 23 jurors presented and the Appellant struck five (5) white males from the jury. R. 70, Tr. p. 53, ll. 1-3.

Judge King concluded that in the Batson motion, the State had identified a racially cognizable group and confined that the struck jurors were all white males. "Under our law when the State has identified the racial cognizant group, the burden shifts to the striking party to show that the reasons for striking the jury were not racially motivated or non-discriminatory so in that connection Mr. [McKnight] the burden shifts back to you to give reasons for striking the jurors." R. 70, Tr. p. 53, ll. 15-21.

Counsel McKnight's Reasons for the Peremptory Strikes

Counsel McKnight initially declared his strikes were racially neutral and in complete accord with Batson. R. 71, Tr. p. 54, ll. 1-2. His stated reasons for his strikes as to each juror was as follows:

#34 - James Croft

McKnight declared he had consulted with other members of the Lee County Defense Bar and Mr. Severance, another attorney, had indicated to him "that Mr. James Croft, Jr. would not be a good pick for this jury, in that he had some interactions with him and he displayed attitudes that he [Severance] believed to be not consistent with being a good and fair and unbiased juror in this matter." R. 71-72, Tr. p. 54, l. 4 - p. 55, l. 1.

#174 - James Hunnicutt

Counsel McKnight stated he had received information that Hunnicutt was a member of the Lynchburg County [City] Council and had the potential to have unfair knowledge about the case. Counsel McKnight stated that he might have some matter that he did not disclose to them and would be biased. R. 72, Tr. p. 55, ll. 2-7. [During the voir dire, Mr. Hunnicutt did not respond to having any "close personal friend" of any witnesses (R. 54-55, Tr. p. 37, l. 22 - p. 38, l. 3), had not formed or expressed an opinion as to guilt or innocence (R. 56, Tr. p. 39, ll. 20-24), and did not know interest, bias, or prejudice for or against the State, the local law enforcement, the Defendant, or their representatives. (R. 61, Tr. p. 44, ll. 1-9)].

#72 - Charles McCutcheon

Counsel McKnight stated McCutcheon indicated at sidebar that his uncle was murdered as a child. Counsel stated he believed that would make him "slightly impartial." R. 72, Tr. p. 55, ll. 8-11.

[The record reveals that Mr. McCutcheon stated that he had an uncle murdered in Lee County in 1993. R. 60, Tr. p. 43, ll. 2-5. However, he declared it would not prevent him from giving the State and defense a fair and impartial trial and would base his decision on the evidence. R. 60, Tr. p. 43, ll. 6-13].

#27 - Donald Clark

Counsel McKnight stated that Clark is a contractor, a business owner. R. 72, Tr. p. 55, ll. 11-15. He stated that "makes him tend to be more conservative." R. 72, Tr. p. 55, ll. 11-14,

#138 - Shawn Arrants

McKnight stated that juror 138 is an employee at the South Carolina Department of Transportation "which puts him often times in contact with law enforcement agencies throughout the State and we believe that would lead him to be someone who would be more favorable toward law enforcement." R. 72, Tr. p. 55, ll. 14-19.

The State's Response

Judge King stated that the striking party having enumerated "race-neutral" reasons, the burden shifted to the State to show that the reasons were "pretextual." R. 72, Tr. p. 55, ll. 20-24.

Assistant Solicitor Fata stated that #138 (Arrants) concerning his potential connection (contact) with law enforcement was pretextual because the defense put juror 98 (Terry Scarborough), a black male who is Lee County Deputy Sheriff Lyn Blackney's brother. R. 73, Tr. p. 56, ll. 1-14. See also R. 58-59, Tr. p. 41, l. 6 - p. 42, l. 5 (voir dire of #98 Terry Scarborough concerning impact of his relationship with brother Deputy Sheriff Lyn Blackney). The prosecution confirmed that this showed the reason stated was pretext because he had seated a black male with obvious connection to law enforcement whereas the white jurors' connection to law enforcement were speculative. R. 73, Tr. p. 56, ll. 11-15.

Concerning #27 (Donald Clark), the prosecution stated that he did not think "because you own a business makes you more conservative. To me, that is no reason whatsoever." R. 73, Tr. p. 56, ll. 20-23.

The prosecution continued that the reason the defense gave for juror #72 (Charles

McCutcheon) was true. R. 73, Tr. p. 56, ll. 24-25.

Concerning #174 (Bruce Hunnicutt), the prosecution stated that he was a councilman, but had not been a councilman for two years. R. 73-74, Tr. 56-57.

Finally, as to #34 (James Croft), the State responded to the reason as follows:

> Number 34, Your Honor, unless he can articulate some reason, other than somebody told me he wouldn't be a good juror. I don't see where that would be pretextual or an excuse. I mean somebody told me wouldn't be a good juror, well a lot of people tell me if people will be a good juror, but I need to know something about that person. He should have said why would he be a good juror. what has he said about this case or what's he said about the defendant or whatever.

R. 74, Tr. p. 57, ll. 1-10.

Counsel McKnight's Rebuttal

Counsel McKnight, concerning his sitting of black juror Terry Scarborough stated his notes were that juror 98 - James Scarborough - was a brother of the deputy - and that's why he picked Terry Scarborough. R. 74, Tr. p. 57, ll. 15-25. Judge King stated his notes reflected juror 98 (Terry Scarborough) was the juror who came forward and explained his brother was a deputy. R. 75, Tr. p. 58, ll. 1-2. The prosecution noted that James Scarborough had not shown up for jury duty. R. 75, Tr. p. 58, ll. 3-4. Counsel McKnight faulted it on a scrivener's error. R. 75, Tr. p. 58, ll. 8-17. He said it was his intent to strike Scarborough after he had learned "Mr. Scarborough was a deputy." R. 75, Tr. p. 58, ll. 14-17.

Concerning the "business owner" strike, counsel McKnight stated "often times it

is, well isn't a business owner conservative, Your Honor. They are definitely conservative with regard to taxes, they tend to have undue reverence for law enforcement and often times that in itself makes them conservative." R. 75-76, Tr. p. 58, l. 22 - p. 59, l. 2. Counsel McKnight also noted that there was one white male - Steven Ciotti - on the selected jury. R. 76, Tr. p. 59, ll. 4-5.

Court Order

In his oral order concerning the Batson issue from the initial jury selection, Judge King concluded that the reasons given by the defense concerning juror 138 (Arrants), Juror 34 (Croft), and juror 27 (Clark) were pretextual. R. 76-77, Tr. p. 59-60. The court further found the reasons given for jurors 174 (Hunnicutt) and 72 (McCutcheon) were not pretextual. More specifically, Judge King held:

> THE COURT: I understand. All right. When a Motion is made by the Batson case, the striking of a jury that has been made in this case. The party making the motion must show that the jurors are of a cognizable racial group. This has been done by the State. It must also how that the pre-emptory challenge used to exclude the juror on the grounds of race. The striking party then has the burden of showing racially neutral explanation for striking the juror then the burden shifts back to the opposing party who must show that the race neutral explanation was pretext.
>
> Pretext generally will be established by showing that similarly situated members of another race were seated on the jury, I do find that juror number 138, the reasons given for striking the juror were pretextual. The reason given was that the juror was employed by the South Carolina Department of Transportation, therefore having relation or ties to law enforcement, when in fact, juror number 98, a black male disclosed in voir dire that he had a relative who was related to law enforcement which would be a closer tie then the one that Mr. Arrants, the juror who was seated, I mean who was struck had. So I would therefore find that the Defendant's explanation which reportedly was racially neutral was not in fact mutual but is

> pretextural [sic] because of a similarly situated juror was seated.
>
> In addition to that, the Court would find that jurors number 174 and 72, for reasons given striking those jurors was racially neutral in that it was not pretextural [sic] so there was no problem with either one of those two jurors.
>
> However I do find that the reason given for the striking of juror number 34, that someone told me that he would not be a good juror is pretextural [sic] and I would think that is an improper strike [sic]. And finally in regard to juror number 27, simply that a business owner as being conservative is also prefectural and I will not allow that strike.
>
> The jury will therefore be re-struck and defense will not be allowed to strike jurors 34, 27 and 31. . .

R. 76-77, Tr. p. 59, l. 7 - p. 60, l. 21.

Re-Striking the Jury

The petit jury was re-struck. Included in the petit jury as the third juror selected was juror 34 (James Croft). R. 78, Tr. p. 61, ll. 12-13. The second alternated selected was juror 27 (Donald Clark). R. 80-81, Tr. p. 63, l. 24 - p. 64, l. 2.

No further motions were pursued in this matter. Alternate juror Donald Clark, juror number 27 did not deliberate on the verdict. R. 501-04, Tr. p. 630-633.

Standard of Review

In criminal cases, the appellate court will review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). On review, it is limited to determining whether the trial court abused its discretion. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). 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. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). State v. Edwards 384 S.C. 504, 508, 682 S.E.2d 820, 822 (S.C.,2009).

Batson v. Kentucky Analysis

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender. State v. Hicks, 330 S.C. 207, 211, 499 S.E.2d 209, 211 (1998). 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 State v. Haigler, 334 S.C. 623, 629-30, 515 S.E.2d 88, 90-91 (1999) (explaining the proper procedure for a Batson hearing). The proponent of the strike must offer a race or gender neutral explanation. Id. The opponent must show the race or gender neutral explanation was mere pretext, which is generally established by showing the party did not strike a similarly situated member of another race or gender. Id. Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment. Id.

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. Riddle v. State, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994). The opponent of the strike carries the ultimate burden of persuading the trial court that the challenged party exercised strikes in a discriminatory manner. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). Appellate courts give the trial judge's finding great deference on appeal and review the trial judge's ruling with a clearly erroneous standard. State v. Dyar, 317 S.C. 77, 79, 452 S.E.2d 603, 604 (1994).

The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility. Sumpter v. State, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994). Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an "evaluation of the [attorney's] mind lies peculiarly within a trial judge's province." Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). Furthermore, 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. State v. Oglesby, 298 S.C. 279, 280, 379 S.E.2d 891, 892 (1989).

If a trial court improperly grants the State's Batson motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to the jury of her choice. State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006). However, if one of the disputed jurors is seated on the jury, then the erroneous Batson ruling has tainted the jury and prejudice is presumed in such cases "because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged." Id. at 114, 631 S.E.2d at 248. The proper remedy in such cases is the granting of a new trial. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 - 823 (S.C.,2009).

ANALYSIS

In this appeal, the *Batson* issue is limited to two persons - one juror who actually sat - juror #34 -James Croft, Jr. and an alternate - juror #27 - Donald Clark. However, as more fully set forth below, since the alternate never sat in the deliberations, any alleged

error concerning his quashing should be deemed harmless. See State v. Rayfield, supra.

This appellate issue should be focused upon juror #34 James Croft. Judge King concluded the stated reasons for the peremptory challenge of this juror was pretext. The judge found that the stated reason: "someone told me that he would not be a good juror" was an improper strike and pretextual. R. 77, Tr. p. 60, ll. 13-15.

In his brief, Appellant claims that the trial court erred under Purkett v. Elem, 514 U.S. 765 (1995) and State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) because the second step of Batson "does not demand an explanation that is persuasive, or even plausible." 514 U.S. at 767-68. Therefore, unless discriminatory intent is inherent in the reasoning given by the supporter of the strike, the reason will be deemed race-neutral.

The Appellant asserts the prosecution argument that the reason was inadequate was itself inadequate and complains that the State had to show that the defense seated "similarly situated" members of another race when discussing juror 34.

The fallacy with the Appellant's assessment is that he fails to take into account the stated reason found by the trial judge - that someone told me he would not a good juror - was in fact no reason at all in a Batson assessment. Under Appellant's theory, to show pretext, the State would have to show that Appellant allowed a member of another race to be seated when the defense was told by "someone that he would not be a good juror." This logic would and could only enhance the risks of juror discrimination, not prevent it. By merely adopting another person's suggestion that a person should be struck does not provide any race neutral reason at all nor provide sanctuary for that person's discriminatory intent.

Further, an attorney's discriminatory intent to strike jurors of a certain race is not shielded by merely asserting someone else's suggestion to strike the juror. Here, counsel McKnight ultimately asserted that Mr. Severance, another Lee County attorney, had indicated to him that the he would not be a good pick for this jury, in that Severance had some interactions with him [in church] and he displayed attitudes that he [Severance] believed to be not consistent with being a good and fair and unbiased juror in this matter." R. 71-72, Tr. p. 54, l. 4 - p. 55, l. 1. This general feeling about a third party contact should not be adequate as a "neutral reason" under Batson where the trial judge - assessing the demeanor of the attorney found pretext.

The added problem with the approach by Appellant at trial was that it put counsel's credibility, as well as the real proponent - Mr. Severance as well as the potential juror's credibility at issue. If the reason was not Mr. Severance's assessment, but the juror's "displayed attitudes" to Severance, there is nothing in the record to suggest what those "displayed attitudes" were [or further why those "attitudes" would suggest impartiality. While Batson "does not demand an explanation that is persuasive, or even plausible," it does demand "a reason." cf, State v. Edwards,682 S.E.2d 820 (S.C. 2009) (defendants' proffered reasons for striking prospective jurors, one because he was newspaper editor who may have knowledge of or have written story about case, and second because she was employee of Department of Motor Vehicles and interacted with law enforcement on regular basis, were sufficiently race-neutral to survive Batson challenge, in trial for murder); State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999) (An attorney's personal knowledge of and relationship with a prospective juror is a

race-neutral reason for exercising a peremptory strike; a potential juror's relationship with a law enforcement official, or a potential juror's pro-law enforcement attitude, is a race-neutral reason for exercising a peremptory strike).

The trial court properly concluded that the reason given was pretext. Contrary to the claim, Judge King followed the procedures established for Batson matters. The Appellant attempts o equate this with the court's decision in State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (S.C. Ct. App. 1999). In Smalls, after the defendant had struck 9 of 10 white jurors and claimed they had looked at him "in a mean, stern and accusatory manner," the trial court found as a matter of fact this was a pretextual reason. In Smalls the Court cited to Purkett noting that:

> In Purkett, the Court stated as follows:
>
> The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the [proponent's] explanation.'
>
> * * *
>
> It is not until the third step that the persuasiveness of the justification becomes relevant-the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
>
> Purkett, 514 U.S. at 767-768, 115 S.Ct. at 1771 (emphasis added) (citations omitted).
>
> We discern no discriminatory intent inherent in the defendant's explanation. We therefore find the reason asserted by Smalls for his peremptory strikes, that the jurors were either refusing to look or looking

> in a "mean," "stern" or "accusatory" manner, was facially race-neutral, even if perhaps suspect. See State v. Tucker, supra; State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991) (counsel may strike venire persons based on their demeanor and disposition).

State v. Smalls, 336 S.C. 301, 308-309, 519 S.E.2d 793, 797 (S.C.App.,1999). The court reversed concluding that the State was never required to carry its burden to present evidence of pretext.

However, unlike Smalls, which supplied a demonstrated race neutral reason of demeanor, the Appellant herein presented no reason other than someone else suggested he was not a good juror for him. As the appellate courts have stated - "*[u]nder some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment.*" State v. Adams, supra. 322 S.C. at 124, 470 S.E.2d at 372. See, Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (implausible or fantastic justifications for prosecutor's peremptory strikes of racial minorities may be found to be pretexts for purposeful discrimination under Batson; in that instance, issue comes down to whether trial court finds prosecutor's race-neutral explanations to be credible). Judge King did not abandon the process mandated by Adams and Purkett, but followed it rejecting the existence of the reason as a race-neutral reason concluding the comment was a pretext.[1] The claim otherwise is without merit.

Alternate Juror Number 27 - Donald Clark.

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[1] See also Annotation, *Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury - post-Batson cases*, 47 A.L.R. 5th 259 (1997).

The Appellant alternately argues that the trial court erred in concluding that the reasons for the strike of juror number 27 Donald Clark was a pretext. Counsel McKnight had declared that Clark was business owner and that "makes him tend to be more conservative" and "often times it is, well isn't a business owner conservative, Your Honor. They are definitely conservative with regard to taxes, they tend to have undue reverence for law enforcement and often times that in itself makes them conservative." R. 72, 75-76, Tr. p. 55, ll. 11-14, p. 58, l. 22 - p. 59, l. 2. Judge King found simply that a business owner as being conservative was pretextural. R. 76-77, Tr. p. 59, l. 7 - p. 60, l. 21.

At the outset, any concerns about the qualification of the strike and the ultimate prohibition about the striking of alternate juror Clark need not be addressed because he was never involved in the deliberation of Mr. McMillan. If a trial court improperly grants the State's Batson motion, but none of the disputed jurors thereafter serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to a particular jury. State v. Williams, 379 S.C. 399, 402, 665 S.E.2d 228, 230 (S.C.App.,2008); State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006). Since the alternate did not serve on the jury, he is not entitled to a new trial - even if there was error in the conclusion of pretext.

Nevertheless, the trial court did not violate the mandate of Batson wherein the stated reason was that he was a "business owner" and therefore " conservative" and "they tend to have undue reverence for law enforcement and often times that in itself makes them conservative." The State had argued this was no reason whatsoever.

The trial judge found the reason of "business owner" as a pretext based upon the argument that it was no reason at all. The Appellant seeks to equate the broad and general reason of "business owner" with the series of specific employment cases found to be race-neutral reasons. However, and obviously, the mere factor of "employment" is not a supportable race neutral reason, but the more particularized employment of an individual. The state appellate court have found race-neutral reasons in the striking of a journalist, a worker at the Department of Motor Vehicles with contact with law enforcement [State v. Edwards, supra.], and "Head Start Director" [State v. Flynn, 368 S.C. 83, 627 S,E<2d 763 (S.C. Ct. App. 2006). Employment is a well-understood and recognized consideration in the exercise of peremptory challenges. State v. Williams, 379 S.C. 399, 402–03, 665 S.E.2d 228, 230 (Ct.App.2008); State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (holding **place** of employment is a race-neutral reason for a strike); State v. Adams, 322 S.C. 114, 125, 470 S.E.2d 366, 372 (1996) (finding **type** of employment is a race-neutral reason for a strike). Here, the reason was neither to a particular type of employment or particular place of employment.

To rebut a prima facie case of discrimination in the use of peremptory strikes, the explanation need not rise to the level justifying exercise of a challenge for cause, but it must be neutral, related to the case to be tried, and a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges. Importantly, however, a "rubber stamp" approval of all nonracial explanations, no matter how whimsical or fanciful, would cripple Batson's commitment to ensure that no citizen is disqualified from jury service because of his race.

While these explanations were facially neutral, they were neither reasonably specific nor related to the case to be tried. Appellant did not show that being a "business owner" had any bearing on a prosecution for murder. Moreover, these characteristics are so general as to be common to many members of the jury pool. Significantly, the trial court did allow other peremptory strikes by Appellant when his counsel articulated a reason that was both specific and related to the case to be tried. These strikes were accepted by the State and the trial court.

The trial court's finding of pretext and purposeful discrimination is a finding of fact which ordinarily must be given great deference by an appellate court, since it largely will turn on evaluation of credibility. Moreover, the trial court can visually and auditorially observe the demeanor of both prospective jurors and counsel. The Court should only reverse the trial judge's determination that appellant's peremptory challenge was motivated by intentional discrimination if that determination is clearly erroneous. [2] Here, it was not.

For the reasons set forth above, the Appellant's argument is without merit.

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[2] See, Shelton v. State, 572 S.E.2d 401 (Ga. Ct. App. 2002) (trial court's finding that defendant's peremptory strikes of three white male veniremen were motivated by intentional discrimination was not clearly erroneous, although defendant's explanations that one worked for county, second served in the military and worked as corporate executive, and third was involved in collection case, were facially neutral, where explanations were not reasonably specific or related to prosecution for selling cocaine, challenged characteristics were so general as to be common to many members of jury pool, and court allowed other strikes for specific case–related reasons).

II. The Circuit Court Did Not Err In Following the Court's Remand To Reconstruct And Settle the Record Concerning the Entry of the Jury Verdict and the Polling of the Jury. The Trial Judge Received The Pleadings of The Appellant In The Motion To Remand, Reviewed The Portion Of the Court Reporter's Transcript and Resolved The Record.

In the second argument, the Appellant asserts that the trial court did not properly follow the Court's remand order of October 6, 2010, the South Carolina Court of Appeals entered an order granting Appellant's motion and remanded the matter to the circuit court with directions "to hear Appellant's challenge, and take whatever action it deems necessary to provide the court with a correct transcription of the proceedings below." State v. McMillan, Order (S.C.Ct.App. Oct. 6, 2010). Rather than holding an evidentiary hearing, Judge King reviewed the motion of Appellant with its attachments relating to the responses of Juror # 191 Willie Price and the transcribed record. On November 17, 2010, the Honorable Howard P. King entered a five (5) page Order, concluding "The transcript prepared by the Court Reporter is confirmed as the Transcript of Record in this matter, and the motion to reconstruct or correct the record is denied." Id. November 17, 2010 Order, p. 5. On November 19, 2010, Judge King entered an Amended Order, amending a reference in the Order. State v. McMillan Order, November 19, 2010. The Orders of Judge King were provided to both counsel through the Clerk of Court for the South Carolina Court of Appeals on December 10, 2010.

Respondent submits that the entry of the reconstruction order was in compliance with the mandate of this Court "to hear Appellant's challenge, and take whatever action it deems necessary to provide the court with a correct transcription of the proceedings below." In the original Motion before the Court , Appellant, though current retained

appellate counsel Nicole N. Mace,[not trial counsel] asserted that the record that Appellant received from Court Reporter Melissa Singletary was inaccurate and requested this Court to remand to resolve the alleged discrepancy. In particular, he contended that during the polling of the jury, one juror - Willie Price - stated that she did not know if she agreed with the verdict and stated "I don't know" and an exchange that she had with the judge was not reported in the provided transcript. Motion, p. 2-3.[3]

However, in the motion, the Appellant attached a review letter by Court Reporter Singletary dated April 27, 2010 consistent with SCACR Rule 607(I). (Exhibit A). In the letter, Court Reporter Singletary confirmed the accuracy of her transcription as revealed in the page attached to the letter. In particular, the Court Reporter concluded the

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[3]In her motion, McMillan included a hearsay affidavit from William Beam an investigator who interviewed juror 191, Willie Price. Included in the were hearsay statements from juror Price concerning her deliberations. Beam Affidavit, ¶ 9, 10, 11. ROA p. 526-27. These averments are inadmissable and inappropriate under S.C. R.E., Rule 606(b). Rule 606(b) of the South Carolina Rules of Evidence alters this common law rule by allowing a juror to offer testimony as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The rule additionally provides:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, ... [n]or may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. Rule 606 thus draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter. See, *Shumpert v. State*, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (S.C.,2008)

following as the accurate record:

Clerk : Juror 191, Willie Price, is this your verdict and still your verdict?

Juror 191: (Nods head affirmatively).

The Court: All right, Ms. Price let me ask you the question again or the clerk is going to ask you the question again. We need to have a yes or no, so I'm going to have her ask the question again. When the question is asked we have to either have a yes or no. Ask the question, thank you.

Clerk: Ms. Price, Juror 191, was this your verdict and still your verdict?

Juror 191: Yes.

Exhibit A, p. 3. { R. 4, Tr. p. 4.}. See also, R. 502-03, Tr. p. 631, l. 17 - p. 632, l. 1. Judge King concluded that this was accurate in denying the motion for revision or correction. Order, p. 2

The Appellant appears to assert that the initial non-verbal response was a no rather than a yes response (McKnight Affidavit ¶4, [ROA 528-529]. McCrea Affidavit ¶4, [ROA 531-32] but concurs that the oral response was a "yes." (McKnight Affidavit, ¶ 5, [ROA 529] McCrea Affidavit ,¶ 5, [ROA 532] [4].

In entering his order on remand, the trial court's consideration of the pleadings is

[4] Respondent submitted that the affidavit of Nyredia Page was consistent that the an unnamed juror nodded in an up and down fashion which is consistent with a yes rather than a negative response. However, unlike the Court Reporter conclusions or the McKnight and McCrea recollections she stated one of the jurors had stated "I don't know" or "I'm not sure" prior to the affirmative non-verbal response. She further asserted it was the trial judge and not the clerk of court who inquired of the juror. However, also unlike the Court Reporter record or the affidavits of McCrea and McKnight, Ms. Page's attestation did not include anything about a verbal "yes" response.

documented. Judge King made the following pertinent conclusions[5]:

2. The letter of the Court Reporter Melissa R. Singletary to Appellant Counsel dated April 27, 2010 confirms the accuracy of the transcript and is in accord with this Court's specific recollection of the event.

3. This Court specifically remembers this event because of an unusual occurrence. After the publication of the verdict and the polling of the jury had begun, a spectator became overcome with emotion and had to be assisted from the courtroom. The jury was sent to the jury room while the Court dealt with the problem and returned to the courtroom after the matter had been resolved. This occurred after the polling of the first juror (#57) and during the polling of the second juror (#124). Thereafter jury polling resumed from the beginning. Four jurors (#57, #124, #34, & #61) before the polling of #191, Ms. Price.

4. McMillian apparently contends that the initial non-verbal response was a no rather that a yes response (McKnight Affidavit Paragraph 4, McCrea Affidavit Paragraph 4) but concurs that the oral response was a "yes" (McKnight Affidavit Paragraph 5, McCrea Affidavit Paragraph 5).

5. There is no affidavit from the juror whose response has been questioned (#191 Willie Price), although McMillian's representative has interviewed her. (Affidavit of William Beam).

6. The affidavit of William Beam contains hearsay and the averments are inadmissible under SCRE Rule 801[6] and 606 (b). The latter, Rule 606(b) alters the common law by allowing a juror to offer testimony as to "whether any outside influence was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror." The rule draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter. See Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (S.C. 2008).

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[5]Judge King initially concluded that the the motion was not timely because SCACR Rule 607(I) provides that the Court Reporter is only required to retain the primary and backup tapoes for 30 days after a transcript is sent to the (initial) requesting party. As noted within the Order, the transcript was initially furnished to McMillian on March 20, 2010.

[6]Correction made in November 19, 2010 Amended Order. ROA, p. _ .

7. The affidavits submitted on behalf of McMillian are inconsistent. For example, the affidavit of Nyredia Page (an "immediate relative" of McMillian) was consistent that an unnamed juror nodded in an up and down fashion which is consistent with a yes rather than a negative response. However, unlike the Court Reporter's conclusions and transcript, or the McKnight or McCrea affidavits, she stated one of the jurors had stated "I don't know" or "I'm not sure" prior to the affirmative non-verbal response. She further asserted it was the trial judge and not the clerk of court who inquired of the juror. However, also unlike the Court Reporter record or the affidavits of McCrea and McKnight, Ms. Page attestation did not include anything about a verbal "yes" response. Her affidavit is not credible.

8. The factual averments of Cezar McKnight are incorrect. The Court disagrees that she " nodded her head in a non-verbal "No" response as stated in Paragraph 4. At no time did she state " I don't know" or "I'm not sure." The McCrea affidavit (McKnight's paralegal who was present during the entire trial including the polling) does not include this alleged statement. I did not shout "in a noticeably forceful manner" for the juror to answer the question and the juror did not appear to be intimidated. I spoke in a normal tone of voice. The transcript of record accurately reflects the entire colloquy with the juror. The assertions of the affiant ("practically shouted", "noticeably forceful manner," " visibly fearful", " apprehensively answered") are not factual but are subjective impressions not supported by the record. I did not in this case, nor have I ever, intimidated a juror. The affidavit is not credible.

9. The McKnight averment in Paragraph 6 is correct but inaccurate. The transcript , p. 636, shows that the Court called on Mr. McKnight for post-trial motions. His response was: "Your Honor, the Defendant respectfully move (sic) that you set aside the verdict of the jury. We believe that there was not ample evidence in which the jury could reach the verdict they did." the motion was based on lack of evidence and was denied because the Court would be substituting its judgment for that of the jury. Nothing was said about the polling of the jury or the juror's response.

10. The affidavit of McCrea is factually incorrect and contains subjective but incorrect assertions. The Court did not conduct the polling as asserted (Paragraph 3). She never verbally stated that she could not answer yes or no. (Paragraph 5). It was not five to ten minutes that the juror was addressed by the Court. (Paragraph 7). The subjective impressions ("shutter cowardessly" (sic), "shook her head nervously", "forcefully and aggressively",) are not factual or accurate. The affidavit is not credible.

11. The Beam affidavit contains the statement that "the judge told her, "Come on, it's getting late" and "we need an answer now"." Aside from hearsay, the statements are factually incorrect. I never made that statement or used any language that would intimidate or impugn the integrity of this or any other juror. This was about 3:40 PM on a Thursday afternoon. It was not "getting late" and I never made the statement. Notably the McKnight, McCrea or Page affidavits contain no reference to this alleged statement.

12. Most importantly, McMillian never raised any issue regarding the polling of the jury before the jury was excuse (sic) even though he was given an opportunity to do so. At the conclusion of the polling the transcript (p 632, lines 23-25) reveals the following colloquy:

The Court:	All right, thank you very much. Anything before the jury is excused Mr. McKnight?
Mr. McKnight:	No.

Had defense counsel had any problems with the polling of the jury, or any concerns over the responses of any juror, or any objection to the procedure or conduct of the Court, he could have raised them at that time. The Court would then have been able to address those concerns and take remedial action. By his failure to make a timely objection or bring the matter to the attention of the Court he has waived any objection he may now have to the accuracy of the record.

November 17, 2010 Order, as amended November 19, 2010. ROA 4-7, 8 .

The Appellant complains that the trial court erred when it summarily denied holding an evidentiary hearing and concluding the challenge portion of the record concerning the polling of juror Price was accurate. He asserts that this procedure did not comply with the remand order from the Court of Appeals. He contends that he was given a right to be personally heard before Judge King in open court, yet Judge King failed to hold a hearing - instead issuing his order with findings based upon his recollection, the transcript and consideration of Appellant's proffered affidavits. He contrasts this procedure with what occurred in State v. Ladson 373 S.C. 320, 324-325, 644 S.E.2d 271, 273 (S.C.App.,2007), when a hearing was held to reconstruct a record. However, in

Ladson there was a complete loss of a transcript of the trial. Here, it was limited to whether the record concerning the polling of juror Willie Price was accurate.

South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal. In China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968), our supreme court held that where a portion of the court reporter's notes were lost, the trial judge properly considered affidavits from counsel and the court reporter in reconstructing the record. See also Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (recognizing a court's power to remand for a reconstruction hearing); Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (finding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct.App.1992) (holding trial court did not err in granting property owner's request to reconstruct the record of zoning proceeding where portions of original tape of hearing were incapable of being transcribed).

The authority of the trial court in South Carolina to reconstruct the record for appellate purposes aligns our state with the majority of jurisdictions that hold "the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." State v. Ladson, supra. (Cases cited therein).

In Ladson, the Court found the supreme court would follow a rule requiring the party challenging a reconstructed record on appeal to demonstrate prejudice flowing from an inadequate record. However, the issue of prejudice is not at play here because the trial court concluded the record concerning Juror Price was accurate and rejected the claim

that it was not accurate. The "prejudice" issues in Ladson and Whitehead concern whether there is an ability to reconstruct the record and the prejudice arising from the failure to do so. Here, it is the Appellant's disagreement with the record after the trial court has concluded that it is accurate.

The Appellant attempt to show that "prejudice" existed because Appellant continues to assert that juror Price actions showed that this was not a unanimous verdict. However, the record created and confirmed by the trial judge shows that Appellant's claim lacks a basis in fact. It need go no further.

The Appellant also claims, essentially because the trial judge found as a fact that the record was accurate that there should be a new reconstruction of the record because the judge's impartiality must be questioned. Appellant contends because there was disagreement between the judge, the court reporter and the affiants, that another judge must resolve the record. The Appellant's claim must be rejected.

Respondent submits that the Court of Appeals - aware of the affidavits and dispute with the Court Reporters conclusion remanded the matter to Judge King with the expectation that the judge would "take whatever action it deems necessary to provide the court with a correct transcription of the proceedings below." Judge King complied with this direction in issuing his order settling the record related to juror Price. The Appellant's dissatisfaction the "accurate record" did not create an appellate issue concerning a unanimous jury related to juror Price notwithstanding, Judge King complied with the mandate. The matter must be denied.

III. The trial court did not err in admitting evidence about an earlier incident where Appellant had acted violently in admitting to shooting up a house when the evidence was relevant to show the context and reason why he armed himself when he returned to a nightclub and provided a basis to show identity motive and absence of mistake in identifying him. Further any error in the admission is harmless in light of the probative evidence of Appellant's presence at the crime scene.

The Appellant claims that the trial court erred in failing to make an evidentiary ruling concerning the admissibility of evidence of a prior bad act by the Appellant which occurred one month before the shooting deaths of Patrick Hood and Joshua Lee at Mr. C's Club on April 29, 2006. He claims the trial court failed to provide a ruling on his motion to exclude evidence that McMillan had gotten into a fight at the club one month before and shot up a house. He claims that because the trial court's failure to make a ruling on his motion to exclude the evidence requires a new trial because the evidence was admitted at trial. This same claim - that the trial court failed to rule on his motion to exclude evidence - was never raised at trial nor was it raised in any post-verdict motion. Alternately, the limited evidence concerning the earlier event - although it showed context to the charged crimes - had slight prejudicial value assessed against the entire case and is error was harmless. For these reasons the appeal must be dismissed.

HOW THE ISSUE WAS RAISED AT TRIAL

At the outset of the trial on December 8, 2006, the Appellant, through counsel McKnight made a motion in limine to exclude evidence that Appellant was involved in prior bad acts. R. 26-27, Tr. p. 8-9. Solicitor Fata asserted that he intended to introduce evidence that Appellant about a month earlier was involved in another incident at Mr. C's Club where one of the St. John's boys had been talking with Appellant's girlfriend. He

asserted that the state untended to show that McMillan got mad, went to the parking lot and got his gun claiming he was going to kill this person. This lead to a fight and Appellant was later heard stating that "he took care of it." The prosecutor stated that he shot up a house. R. 27-28, Tr. p. 9-10. The State claimed that this act was admissible because he claims it was the beginning of a series of incidents that concluded with the death's at Mr. C's Club. He stated that it would show that Appellant packed the car with guns to go to the club, that he went to the club with the intent to get the St. John's boys, and the next day he declares that " I took care of it on the OG." R. 28, Tr.p. 10, l. 9- 17. He stated that he asked a witness to hide the guns for him and then he retrieves the guns later on. R. 28, Tr. p. 10, l. 17-22. The prosecutor asserts that it was admissible under SCRE Rule 404 (b) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Counsel McKnight asserted that it was not admissible first because the fact that Appellant prepared to commit the crime (on April 29) by packing his car with weapons and traveling to the scene (Mr. C's) can be shown by direct testimony without the use of the earlier act of the fight and lacks probative value. R. 29, Tr. p. 11, l. 10-19. He stated it did not show conformity with this crime. He asserted that it was not relevant to the April 29 incident that he had gotten into an altercation with someone a month before and did not show motive, identity , common scheme or plan or absence of accident or mistake or intent. R. 30, Tr. p. 12, l. 1-11. Solicitor Fata asserted that it especially showed motive as well as common scheme or plan. R. 30, Tr. p. 12, l. 14-18. Judge King declared that he would take the motion under advisement. R. 30, Tr. p. 12, l. 19-20.

The trial involved the incident at Mr. C's Club after midnight on April 29, 2006,

in Lynchburg. The club had a DJ working that night at the club and the bouncers escorted people out of the club. R. 91-95, Tr. p. 122-126. Under the State's theory, the Appellant went to his car and got a long gun (rifle) and he starts shooting back at the club and Patrick Hood, a bouncer is shot and falls to the ground and then Lee is shot. R. 96-99, Tr. p. 127-130.

During the trial, co-defendant Toby Fulmore testifies for the state. R. 113-15, Tr. p. 144-146. Fulmore admits being a dealer in drugs around Lake City. R. 115-17, Tr. p. 146-148. Fulmore stated that he had been a friend of the Appellant for a long time. He stated that they had been to Mr. C's Club twice. R. 118, Tr. p. 149. He stated that there were groups of people from St. John's there and Lake City people who generally do not associated with each other. R. 119, Tr. p. 150.

Fulmore testified that about one month before the April 29 incident, he was at Mr. C's with the Appellant. R. 120, Tr. p. 151, l. 1-8. He stated - without objection - that Appellant got into a fight with Tyce Rhodes from St, John's. R. 120, Tr. p. 151, l. 9-12. He stated that Appellant never told him what the fight was about. He stated that when he was getting ready to leave, he saw people coming outside of the club in a rage, probably over a girl. He stated that Rhodes and Appellant got into the altercation in the parking lot. Fulmore testified that McMillan grabbed a gun from the truck and did not respond when asked what was going on. R. 121, Tr. p. 152, l. 15-24.

At that point, counsel McKnight made an objection to relevance which was overruled. R. 122, Tr. p. 153, l. 7-12.

Fulmore restated that Appellant was in the truck turning his hat around backwards

looking in the mirror and then grabbed his gun. R. 122, Tr. p. 153, l. 15-21. At that point, Fulmore stated that he could solve this because he knew people in the area. The police then were seen after Rhodes went between the cars and got the security guards and everyone then left. R. 123, Tr. p. 154.

Fulmore stated that he left with Appellant who dropped him off and "he came back." R. 123, Tr. p. 154, l. 7-23. Fulmore stated that "Jeremy McMillan came back and shot Tyce Rhodes house up." R. 123, Tr. p. 154, l. 21-22. the defense objected on "hearsay, relevánce, the whole thing." R. 123, Tr. p. 154, l. 24- 25. The court rejected the hearsay objection because it was a statement by the defendant to Fulmore and it was admissible under SCRE Rule 804(b). R. 124-27, Tr. p. 155-158.

Counsel McKnight claimed that the other objection was to relevancy in that the prior shooting was not relevant to the April 26 shooting because there were "no facts to indicate that the alleged victims or the intended persons to be murdered were this person." R. 128, Tr. p. 159, l. 2-9. At that point, the following occurred:

The Court :	Well, that the Lyle exception that I had previously ruled on is it not?
Mr. Fata::	Yes sir. Yes sir, your Honor. We talked about that yesterday ...
The Court:	And 404 and 404(b) and Lyle that I rule upon in connection with your motion in limine?
Mr. McKnight:	So it is, is it the Court's contention that this is being offered to be admissible. And it's admissible to show the motive,

liability and intent? I'm sorry.

The Court: We're not going to argue that motion again. My question to you is, isn't this the same objection that you made yesterday to exclude the testimony in your Motion in Limine?

Mr. McKnight: No, your honor. My motion in limine was to gang affiliation and also prior bad acts. Your honor, this offers no probative value.

The Court: I'm not going to hear it again. My question is , it's the same objection you made yesterday in limine, isn't it?

Mr. McKnight: Yes it is.

The Court: All right that ruling has been made and the ruling of the Court stands. . . .

The Court: I'm going to allow the testimony as I say 804(b) (3), also we're not going to rehash my ruling of yesterday. The ruling of the court has been made in that connection under 404 and under Lyle. ..

R. 128-29, Tr. p. 159-160, l. 18.

At that point, Fulmore returned to testify about the earlier incident. He stated that after the argument was over between McMillan and Rhodes he got into the truck and McMillan took him home. He stated that he saw McMillan the next day and McMillan told him: " he shot Tyce's home up." R. 134, Tr. p. 165, l. 12-16.

The testimony continued that Fulmore still associated with McMillan. Concerning

April 28, he stated he left his house around 11 PM after he called McMillan to pick him up. He stated that they went to a store and bought beer, drank a little and then decided to go to Mr. C's. R. 138, Tr. p. 169. After they agreed to go, they went by McMillan's house where McMillan got a rifle (which Fulmore thought was a shotgun) out of the house and put it in the back of the truck. R. 139-40, Tr. p. 170-171. McMillan also had two guns on him. R. 139-40, Tr. p. 170-171. He stated that he was during the ride, McMillan stated he "wasn't playing when I shot the n___ 's house up. I'm gonna get the n ----, I'm gonna get the n___" R. 141, Tr. p. 172, l. 2-8. However, he never said to McMillan why he wanted to get him." Id. [7]

Fulmore stated that the got to Mr. C's around 1:30 AM. He went into the club with "Buggalou" who they had picked up and were drinking. He saw his brother there. He noticed an altercation break out and the security guards starting grabbing people and he saw his brother push Adrian and Fulmore's brother then got stabbed. R. 143, Tr. p. 174. After they were pushed out by security, Fulmore stated his brother and Adrien started fighting each other again and his brother got stabbed again. R. 145, Tr. p. 176. He stated that he needed to be taken to the hospital. Fulmore and his uncle were taking his brother out and Fulmore saw McMillan that through him his car keys. R. 146-47, Tr. p. 177-178. Fulmore stated that he though McMillan was going to follow them when his uncle and Fulmore had gotten in his uncle's car to go to the hospital, but Fulmore saw McMillan

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[7] Officer Dellinger testified that Fulmore gave a statement during the interview on June 13, 2006. In the statement, he described that McMillan talked to him about the earlier incident when he shot up the house. R. 376-77, Tr.p. 423, l. 17- p. 424, l. 7.

reach into the back of the truck and get the long gun out and went toward the club and shot one time. R. 147, Tr. p. 178, l. 18-25. Fulmore stated that he saw two more shots. R. 148, Tr. p. 179. He stated he saw the first shot go into the ground. And described where he saw the second shot. R. 149-50, Tr. p. 180-181. He stated that he saw McMillan the next morning to get his keys back around 11 AM. McMillan told him that " I handled that, OG call,[8] I handled that." R. 151-52, Tr. p. 182-183. McMillan stated that he told him to get rid of the guns. He stated that he took the guns and put them into his girlfriends car and out them later in his Corolla at his grandmother's house. R. 152-53, Tr. p. 183-184. The next day, though McMillan initially claimed he wanted drugs, he came to get the guns back. R. 154-55, Tr. p. 185-186. He got his two pistols from the trunk of the call and left the long gun. R. 155, Tr. p. 186. After he was arrested, Fulmore stated that he told them where the gun was, but when the police got there, he was gone from the unlocked trunk. R. 156-57, Tr. p. 187-188.

Keith Rose testified that he saw McMillan and Toby Fulmore at Mr. C's on April 29. He stated that he saw Toby and McMillan go to the truck and McMillan came out with an assault rifle and Fulmore had a handgun. R. 185, Tr.p. 223. He stated he saw McMillan fire the rifle once and then two more times firing at the door of Mr. C's. R. 185-86, Tr. p. 223-224. He described the rifle as an "AK." R. 186, Tr. p. 224. He stated that he did not see Toby Fulmore shoot anything. R. 186-87, Tr. p. 224-225. He stated he saw the bouncer get hit with the second shot. Tr.p. 225. He stated that he saw two people get hit. R. 187, 195, Tr. p. 225, 233 .

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[8] "OG" was described as standing for "original gangster." R. 380, Tr. p. 427.

Demetrius Hamm testified he was the Disc Jockey at Mr. C's on April 29. He described Fulmore and McMillan getting slammed by the security guards. He stated that he heard McMillan arguing that he was going to shoot the place up. R. 215, Tr. p. 253. He stated he later saw McMillan pull out an assault rifle from the car and Fulmore get a gun. He stated that he saw the Appellant start shooting the assault rifle. R. 216-17, Tr. p. 254 -255. He then saw Patrick Hood get hit. R. 217-18, Tr. p. 255-256. However, he did not see Fulmore ever shoot.

Nathaniel McEwin testified similarly that he saw Hood and Tremaine Lee get shot, as well as others. R. 341-42, Tr. p. 384-385. He stated he saw the Appellant with the long gun. R. 346-47, Tr. p. 389-390.

The pathologist testified that Hood died of a single gunshot wound to the head. R. R. 230, 233, Tr. p. 268, 271. Tremaine Lee had a fatal wound to his chest. R. 237-38, Tr. p. 275-276. Testimony was that the bullets retrieved would have been from a gun that fired 762 bullets like an assault rifle and that they came from the same weapon. R. 327-28, Tr. p. 327-328.

ANALYSIS

1. The Issue Concerning A Failure To Rule Is Not Preserved.

The allegation raised in this appeal is that the trial judge never gave a ruling on the motion in limine concerning the admission of the evidence concerning the month earlier. This issue was not raised at trial or in a motion for new trial. In fact, when Judge King stated that he had already ruled the day before on the same objection, defense counsel remained silent. R. 128-29, Tr, p. 159-160. In order for an issue to be preserved

for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005); In the Interest of Michael H., 360 S.C. 540, 602 S.E.2d 729 (2004)(trial court must be given an adequate opportunity to resolve the issue).

To the extent he asserts as a free-standing claim that the trial judge erred in asserting that he had ruled when Appellant now asserts he had not, the claim is not preserved. Further, at trial, defense counsel confirmed that it was the same issue that had been argued the day before, but never claimed it had not been ruled upon. R. 129, Tr. p. 160.

The Appellant is correct that the record does not include the particular ruling that the trial judge refers to on Tr.p. However, it is clear that the judge ruled that the evidence was admissible under Rule 404(b) and under Lyle. R. 128-29, Tr. p. 159-160, l. 18. No one at trial disputed that fact. In fact the judge ruled that he had done so. Id. The claim that "the judge's role as the gate keeper of inflammatory evidence was sullied by the fact that this judge made no ruling and then refers to his prior ruling to allow the evidence to be admitted," *Initial Brief of Appellant*, p. 41, flys in the face of reason when the defense , as well as the State did not challenge or correct the judge's claim. To the contrary their silence confirmed it. The claim that the trial court was misleading both the state and the defense that there was a ruling must be error. See State v. Nelson, 380 S.C. 226, 231, 669 S.E.2d 595, 598 (S.C.App.,2008); State v. Serrette, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct.App.2007) (stating the burden is on the appellant to provide an appellate court

with an adequate record for review); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000) (appellant has the burden to provide an adequate record for review). see Rule 210(h), SCACR (stating an appellate court need not consider any fact which does not appear in the record). The assertion must be rejected.

The Evidence Is Admissible Under Rule 404(b)

The evidence of the earlier altercation at Club C, the arming of the Appellant and "shooting up the house" is admissible under Rule 404(b) to show Appellant's intent to continue his revenge at Club C on April 29, that he - not Fulmore - had armed the vehicle that night, and that he went to Club C on April 29 intending to continue the fight he had started the month before. The prior act evidence shows motive, intent and absence of mistake and explains the April 29,2006 crime. The link to Appellant on April 29 returning home to gather weapons to arm himself with the stated intent to stated he "wasn't playing when I shot the n___ 's house up. I'm gonna get the n ----, I'm gonna get the n___" [R. 141, Tr.p. 172, l. 2-8] is explained by the incident the month before. Although there is no claim the deceased victims were the predetermined target, it is evident that McMillan returned to Mr. C's on April 29 with the intent to do damage and identified Tyce Rhodes as a probable target. This explains the control of the weapon by Appellant as opposed to Fulmore and others.

The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).

As a threshold matter, the trial judge must initially determine whether the

proffered evidence is relevant as required under Rule 401 of the South Carolina Rules of Evidence. Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence fits within an exception of Rule 404(b). According to Rule 404(b), evidence of prior crimes or misconduct is inadmissible to prove the specific crime charged unless the evidence *tends* to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime. Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); Lyle, 125 S.C. at 416, 118 S.E. at 807.

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id. When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The determination of a witness's credibility is left to the trial

judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity. Id. (analyzing prior bad act evidence and finding the appellate court committed error by basing its ruling on its own view of the witness's credibility). If the trial judge concludes there is clear and convincing evidence that the defendant committed the uncharged acts, he or she must determine whether the prior acts fall within the common scheme or plan exception to Lyle.

Here, the prior act evidence was logically relevant and tended to establish motive, identity of the perpetrator and absence of mistake on whether Appellant was the triggerman at the scene. His reasons for acquiring the weapons that night were placed into context by reference to the earlier incident and explained his malicious motive for violence described on his way to Mr. C's that evening. Simply put, the evidence was relevant and described why Appellant was locked on his path of destruction that night.

4. Any Error in the Admission Was Harmless.

Even if the evidence of the prior act was deemed inadmissible, any error in its admission was harmless. There is substantial other evidence pointing to the Appellant's involvement in the April 29 shootings. As noted above, a plethora of eyewitnesses identified Appellant as the perpetrator who held the long rifle which was deemed to be the murder weapon as compared to Toby Fulmore (or anyone else). State v. Liverman, 386 S.C. 223, 244, 687 S.E.2d 70, 81 (S.C.App.,2009) See State v. Page, 378 S.C. 476, 483–84, 663 S.E.2d 357, 360 (Ct.App.2008) (holding error is harmless where it could not reasonably have affected the trial's outcome; no definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error

must be determined from its relationship to the entire case; in considering whether error is harmless, a case's particular facts must be considered along with various factors including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case).

The reference to the evidence of the month before did not unduly prejudice the defense case because, as defense counsel admitted, there was evidence from witnesses to describe Appellant gather weapons on that date. Although the prior act evidence explained to motivation to be armed and headed for Mr. C's, evidence at the scene that night identify Appellant's involvement in being forcefully removed from Mr. C's by the security guards at the time when Appellant was already emotionally keyed up, as reflected in his comments to Fulmore. The prior act evidence also was not a primary focus of the state's case when compared with the emphasis placed on other evidence in the record at trial and his the prosecution argument. The admission does not require a new trial.

CONCLUSION

For all the foregoing reasons, the judgement of convictions must be affirmed.

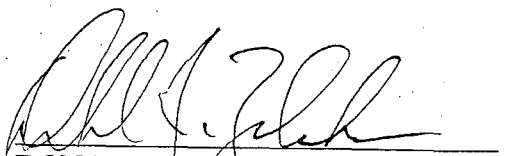
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA

Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 
DONALD J. ZELENKA
ATTORNEYS FOR RESPONDENT

September 19, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lee County
Howard P. King, Circuit Court Judge

Case No. 06-GS-31-100

STATE OF SOUTH CAROLINA,

Respondent,

v.

JEREMY McMILLAN,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

DONALD J. ZELENKA
Assistant Deputy Attorney General

September 19, 2011

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the United States mail, postage prepaid to the following:

Nicole Nicolette Mace, Esquire
The Mace Firm
1341 44th Avenue North, Suite 205
Myrtle Beach, SC 29577

This 19th day of September, 2011.

DONALD J. ZELENKA
Assistant Deputy Attorney General

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

Trial Court Case No.: 06-GS-31-00100

THE STATE.....Respondent

v.

JEREMY MCMILLIAN.....Appellant

REPLY BRIEF OF APPELLANT

Nicole Nicolette Mace
The Mace Firm
1341 44th Avenue North, Suite 205
Myrtle Beach, SC 29577
843.839.2900 Telephone
843.839.2913 Fax
nen@themacefirm.com

Attorney for Appellant

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ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING THE STATE'S *BATSON* CHALLENGE WHERE THE APPELLANT'S REASONS FOR EXERCISING THE PEREMPTORY STRIKES WERE FACIALLY RACE NEUTRAL AND THE STATE WAS NOT REQUIRED TO MEET ITS BURDEN OF ESTABLISHING PURPOSEFUL DISCRIMINATION.

The respondent argues in its brief that this Court should reverse the trial judge's *Batson* ruling only if it finds that the judge's determination that the appellant's peremptory challenge was motivated by discrimination is clearly erroneous. *Initial Brief of the Respondent pg. 19.* However, the clearly erroneous standard of review "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 (2006). "Where the assignment of error is the failure to follow the *Batson* hearing procedure, the Court of Appeals must answer a question of law; when a question of law is presented, the standard of review is plenary." *Id.* In the present case, the trial court did not follow proper *Batson* hearing procedure. The state was not required to meet its burden of establishing purposeful discrimination because the trial court effectively placed the burden of disproving pretext on the appellant. Therefore, the standard of review is *de novo*.

The state raised a *Batson* challenge, and defense counsel argued that he struck juror number 34, Mr. Croft, because he was advised by other members of

the Lee County Defense bar prior to drawing the jury that they attended church with Mr. Croft and that "he had displayed to them some views that they believed to be too controversial for this case." (R. 71, lines 4-10). Defense counsel explained to the court that he was advised that juror number 34 had displayed attitudes that were inconsistent with being able to be unbiased and impartial during the trial. (R. 71, lines 24-25). The respondent asserts that the appellant failed to provide a sufficient reason for striking juror number 34, and that the fact that the defense was told by "someone that he would not be a good juror" does not provide any race neutral reason at all. *Initial brief of the Respondent pg. 13.* The respondent does not cite to any authority to support this position and simply concludes that defense counsel's explanation was not an adequate "neutral reason" under *Batson. Initial brief of the Respondent pg. 14.*

Contrary to the state's assertions, the explanation for striking juror number 34 was race neutral and constitutes a "reason." For example, in *State v. Ford,* 334 S.C. 59, 512 S.E.2d 500 (1999), the Court noted that "an attorney's personal knowledge of and relationship with a prospective juror is a race-neutral reason." The Supreme Court has held that the supporter of the strike's burden is relatively low. The second step of *Batson* "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem,* 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). Therefore, "[u]nless a discriminatory intent is

inherent" in the reasoning given by the supporter of the strike, "the reason offered will be deemed race neutral" and the trial court then proceeds to the third step of *Batson*. *Cochran,* 369 S.C. at 314; *quoting Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *State v. Adams,* 322 S.C. 114, 124, 470 S.E.2d 366 (1996).

Defense counsel did not simply argue that someone else suggested that juror number 34 was not a good juror for him as stated by the respondent. *Initial Brief of Respondent pg. 16.* Defense counsel argued that an attorney, who attended the same church as the juror and obviously knew him, informed him juror number 34 would be biased and would not be a fair and impartial juror. (R. 72, lines 8-11). This explanation is not pretextual and constitutes a "reason" as required by *State v. Edwards*, 682 S.E.2d 820 (S.C. 2009). Counsel's argument that he was informed by other attorneys who personally knew the juror and that he would not be impartial was race-neutral. Counsel believed juror number 34 was bias, which he expressed to the trial court; it was erroneous for the court to subsequently fail to require the state to establish purposeful discrimination.

The South Carolina Supreme Court has held that "[t]he principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not

challengeable for cause." *Cochran* 369 S.C. at 321, 631 S.E.2d at 301 *quoting State v. Short,* 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct.App. 1997), *aff'd,* 333 S.C. 473, 511 S.E.2d 358 (1999). This Court has held that "perceived prejudice may serve as a basis for exercising a peremptory challenge." *Cochran* 369 S.C. at 321. The *Cochran* Court noted, "Because a juror's perceived bias (for whatever reason), lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution." *Id.* As a result, the trial court committed reversible error by failing to follow the requirements of *Batson.*

The appellant relies on the arguments made in his initial brief in regard to juror number 27.

II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO HOLD AN EVIDENTIARY HEARING REGARDING THE APPELLANT'S MOTION TO RECONSTRUCT THE RECORD.

The respondent argues that the record "created and confirmed by the trial judge shows that the appellant lacks a basis of fact." *Initial Brief of the Respondent pg. 27.* However, this Court issued an order on October 6th, 2010, granting the appellant's motion for Remand to Reconstruct the Record, instructing the circuit court "to *hear* Appellant's challenge, and take whatever action it deems necessary to provide this Court with a correct transcription of the proceedings below." [emphasis added]. (R. 1). The circuit court summarily denied the appellant's

motion pursuant to a written order, finding that the record was complete without hearing the testimony of witnesses, the evidence, and arguments of counsel. This court directed the circuit court to conduct an evidentiary hearing in this matter. The circuit court did not conduct this hearing, but rather made a ruling on the credibility of the affidavits submitted by witnesses to this trial. The circuit court ruled that discrepancies in the affidavits prevented any need for a hearing and the "accurate" court reporter transcript was in contradiction with the affidavits. If all the affidavits had been identical, the circuit court would have undoubtedly ruled that there must have been joint fabrication at some level. This prevents any just assessment of what actually occurred during this trial and a young man is now in prison for Life. The trial court was directed to have a hearing, not make a ruling based on affidavits.

The circuit court did not make a diligent effort to reconstruct the record, and simply noted that the affidavits were not credible when denying the appellant's motion. The circuit court's order is insufficient and is not adequate for meaningful appellate review. For example, the order states that the affidavit of William Beam contained hearsay statements of Willie Price that were inadmissible, yet failed to conduct a hearing so that Willie Price herself could be subpoenaed to testify. She is the key witness regarding this issue and as a result, the appellant should have been afforded the opportunity to question her at a hearing. Her testimony would

have been preserved for potential review by this Court. Additionally, the circuit court concluded that the affidavits of Ms. Page, Mr. McKnight, and Ms. McCrea were "not credible" without holding a hearing in order to clarify their recollection of the events and to consider their live testimony. McMillian was prejudiced by this error.

Lastly, the appellant's transcripts and the transcripts provided to the state have different page numbers.[1] As noted in the initial brief, the transcripts are to be verbatim. It is unknown at this time why the court reporter changed the pagination of the transcripts, making it nearly impossible to prepare an accurate record on appeal. The appellant was sentenced to life without the possibility of parole; he is entitled to a complete and accurate transcript of his trial.

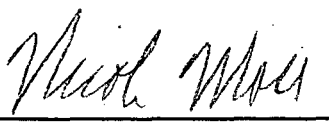
The appellant relies on the arguments made in his initial brief in regard to the remaining issues.

[1] Appellate counsel only recently learned that the pagination of the transcripts were different in the state's set of transcripts on July 11, 2011.

CONCLUSION

The Appellant, Jeremy McMillian, should be afforded relief from the prison sentence of life without the possibility of parole imposed against him. The Appellant's convictions should be reversed and this case should be remanded for a new trial.

Respectfully Submitted,



Nicole Nicolette Mace, Esquire
The Mace Firm
1341 44th Avenue North, Suite 205
Myrtle Beach, SC 29577
843.839.2900 Telephone
843.839.2913 Fax
nen@themacefirm.com

August 29, 2011

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM LEE COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

Trial Court Case No.: 06-GS-31-00100

THE STATE.....RESPONDENT

V.

JEREMY MCMILLIAN .....APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the Final Reply Brief of Appellant complies with 211(b) of SCACR and a true copy has been served upon Donald J. Zelenka, Esq. at Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, this 30th day if August, 2011.

Nicole N. Mace, Esq.
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 30th day of August, 2011.
_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 6, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jeremy McMillan, Appellant.

Appellate Case No. 2008-111046

Appeal From Lee County
Howard P. King, Circuit Court Judge

Opinion No. 5038
Heard September 10, 2012 – Filed October 17, 2012

REVERSED AND REMANDED

Nicole Nicolette Mace, of The Mace Law Firm, of Myrtle Beach, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Ernest J. Finney, III, of Sumter, for Respondent.

SHORT, J.: Jeremy McMillan appeals his convictions for two counts of murder and possession of a weapon during the commission of a violent crime, arguing the court erred in (1) finding his reason for striking jurors was pretextual; (2) not following this court's order requiring it to hold a hearing to address his motion for remand to reconstruct the record; and (3) not making an evidentiary ruling regarding the State's introduction of prior bad acts because it inflamed the jury. We reverse and remand for a new trial.

FACTS

In the early morning of April 29, 2006, McMillan and Toby Fulmore, III, went to a club in Lee County named Mr. C's.[1] Before arriving at the club, Fulmore drove McMillan to his house, where McMillan retrieved a rifle and put it in Fulmore's truck. Fulmore later testified McMillan also had two pistols with him at the time. After the two arrived at the club, a fight broke out, and McMillan shot Patrick Hood and Joshua Lee, killing them both.[2] During the shooting, McMillan also shot and injured nine others. McMillan was indicted for two counts of murder, nine counts of assault and battery with intent to kill, and possession of a weapon during crimes of violence.

A trial was held December 8-11, 2008. At the beginning of trial, the State announced it was only proceeding on two counts of murder (counts one and two) and possession of a weapon during a violent crime (count twelve). At the close of the State's case, McMillan made a motion for directed verdict, which the court denied. A jury found McMillan guilty, and the court sentenced him to life without parole for murder and five years' imprisonment for possession of a weapon during the commission of a violent crime. McMillan's motion to set aside the verdict was denied by the court. This appeal followed.

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[1] Fulmore was also indicted for two counts of murder, nine counts of assault and battery with intent to kill, and possession of a weapon during crimes of violence. However, he was tried separately from McMillan, and he testified against McMillan at McMillan's trial.

[2] The indictment lists the second victim as Joshua Lee; however, the forensic pathologist who did the autopsy testified his name was Tremaine Lee.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus, on review, the appellate court is limited to determining whether the trial judge abused his discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

LAW/ANALYSIS

McMillan argues the trial court erred in finding his reason for striking juror 34 was pretextual. We agree.

In *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), 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. Additionally, the Equal Protection Clause prohibits the striking of a venire person on the basis of gender. *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). 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. *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999).

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

> After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so

> fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment.

373 S.C. at 415, 645 S.E.2d at 909. The proponent's reason for striking a juror does not have to be clear, reasonably specific, or legitimate – the reason need only be race neutral. *State v. Adams*, 322 S.C. 114, 123, 470 S.E.2d 366, 371 (1996). "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *Evins*, 373 S.C. at 415, 645 S.E.2d at 909. The opponent of the strike must show the race or gender-neutral explanation was mere pretext, which generally is established by showing the party did not strike a similarly-situated member of another race or gender. *Adams*, 322 S.C. at 124, 470 S.E.2d at 372.

"Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge can find the explanation was mere pretext, even without a showing of disparate treatment. *Haigler*, 334 S.C. at 629, 515 S.E.2d at 91. "The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility." *Edwards*, 384 S.C. at 509, 682 S.E.2d at 822. "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). 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.

During jury selection, McMillan struck five jurors: 27, 34, 72, 138, and 174. The State requested a *Batson* hearing, asserting "[t]here were twenty[-]three jurors drawn and the Defendant struck five white . . . males from the jury." Although the court ultimately found McMillan's reasons for striking jurors 27, 34, and 138 were pretextual, McMillan only appeals as to jurors 27 and 34. During the second jury

selection, juror 34 was seated on the jury, and juror 27 was seated as an alternate. We find we need not discuss juror 27 because he was never required to serve as a juror; therefore, we only discuss the *Batson* issue as it relates to juror 34.

In response to the State's *Batson* motion, McMillan explained he struck juror 34 because someone told him juror 34 "displayed attitudes that he believed to be not consistent with being a good and unfair and unbiased juror in this matter."[3] McMillan also asserted he seated one white male on the jury in response to the State's challenge that he struck five white males from the jury. Responding to McMillan's explanation, the State questioned McMillan's stated reason for dismissing juror 34, arguing:

> [U]nless he can articulate some reason, other than somebody told me he wouldn't be a good juror. I don't see where that would be per-textual [sic] or an excuse. I mean somebody told me [he] wouldn't be a good juror, well a lot of people tell me if people will be a good juror, but I need to know something about that person. He should have said why would he [sic] be a good juror. What has he said about this case or what's he said about the Defendant or whatever.

Judge Howard King found McMillan's reason for striking juror 34 was pretextual, and therefore, his strike was improper. Following the trial court's quashing of the first jury, McMillan was not allowed to strike juror 34 from the second jury, and juror 34 was impaneled for McMillan's trial.

On appeal, McMillan argues "the [S]tate was not required to meet its burden of establishing purposeful discrimination because the trial court effectively placed the

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[3] McMillan's counsel explained that "[i]n consulting with members of the Lee County Defense bar prior to drawing the jury advise [sic] me that they attended church with [juror 34] and that he had displayed to them some views that they believed to be controversial for this case." He further explained, "We were reviewing the juror list and it was indicated to me by members of the Lee County Local Bar, in particular Mr. Severance indicated that [juror 34] would not be a good pick for this jury, in that he has had some interactions with him and he displayed attitudes that he believed to be not consistent with being a good and unfair and unbiased juror in this matter."

burden of disproving pretext on the appellant." He maintains the court failed to follow the *Batson* requirements set out in *Purkett v. Elm*, 514 U.S. 765 (1995), and *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996), and the "[S]tate simply argued that the defendant had not met his burden of giving a racial[ly] neutral reason for the strike."

In *Purkett*, the Supreme Court stated the opponent of a peremptory challenge must first make out a *prima facie* case of racial discrimination (step one). 514 U.S. at 767; *see also Adams*, 322 S.C. at 124, 470 S.E.2d at 372 (adopting the standard delineated in *Purkett*). Then, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two), and if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination (step three). *Purkett*, 514 U.S. at 767. "'[U]nless a discriminatory intent is inherent' in the explanation provided by the proponent of the strike [in step two], 'the reason offered will be deemed race neutral' and the trial court must proceed to the third step of the *Batson* process." *State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006) (quoting *Purkett*, 514 U.S. at 768). The *Purkett* court found the Eighth Circuit Court of Appeals had "erred by combining *Batson's* second and third steps into one, requiring that the justification tendered at the second step [by the proponent] be not just neutral but also at least minimally persuasive, i.e., a 'plausible' basis for believing that 'the person's ability to perform his or her duties as a juror' will be affected." 514 U.S. at 768. The court explained the persuasiveness of the justification does not become relevant until the third step when the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Id.* "At that [third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* The court found the prosecutor's proffered explanation – that he struck the juror because he had long, unkempt hair, a mustache, and a beard – was race-neutral and satisfied the prosecution's step two burden of articulating a nondiscriminatory reason for the strike because the wearing of beards and the growing of long, unkempt hair, are not characteristics peculiar to any race. *Id.* at 769. Also, in *Adams*, our supreme court found the explanations given by defense counsel – that one juror was a court reporter and looked "too intelligent," and that another juror knew the judge – were racially-neutral, legitimate reasons for exercising peremptory strikes. 322 S.C. at 125, 470 S.E.2d at 372.

Here, McMillan's stated reason for striking juror 34 was that he had reason to believe the juror would not be unbiased based on his counsel's conversation with members of the Lee County Bar. We find this reason, although questionable, is race neutral. *See id.* at 123, 470 S.E.2d at 371 (stating the defendant's reasons for striking a juror do not have to be reasonably specific or legitimate – the reason need only be race neutral); *Cochran*, 369 S.C. at 321, 631 S.E.2d at 301 ("Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution."); *State v. Short*, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct. App. 1997) ("The principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause."). We also find the State, as the opponent of the strike, failed to prove McMillan's strike was purposeful racial discrimination. Furthermore, the fact that McMillan "used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination." *State v. Ford*, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999). Therefore, we find the trial court erred in ruling McMillan's stated reason for striking juror 34 was not race neutral and in granting the State's *Batson* motion.

Further, because juror 34 was seated on the second jury, we remand the case for a new trial. *See Edwards*, 384 S.C. at 509, 682 S.E.2d at 823 (holding if a trial court improperly grants the State's *Batson* motion and one of the disputed jurors is seated on the jury, then the erroneous *Batson* ruling has tainted the jury and prejudice is presumed because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged, and the proper remedy in such a case is a new trial); *see also Ford*, 334 S.C. at 66, 512 S.E.2d at 504 (determining that no showing of actual prejudice is required and reversing appellant's conviction because he established he was wrongfully denied the right to exercise a peremptory challenge).

Because we reverse and remand the case for a new trial based on this issue, we need not address the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when its determination of another issue is dispositive of the appeal).

REVERSED AND REMANDED.

KONDUROS and LOCKEMY, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lee County
Howard P. King, Circuit Court Judge
Appellate Case No. 2008-111046
Opinion No. 5038

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

JEREMY McMILLAN,

Appellant.

PETITION FOR REHEARING

The Respondent State of South Carolina hereby makes a Petition for Rehearing pursuant to SCACR Rule 221 in the above-captioned matter from the decision of the panel of the South Carolina Court of Appeals on October 17, 2012 in State v. Jeremy McMillan, Appellate Case No. 2008-111046 which reversed and remanded the murder conviction for a new trial rejecting a conclusion by the trial judge that found defense counsel's striking of one juror as pretextual in an initial jury selection. Respondents respectfully submit that the panel decision overlooked and misapprehended certain facts and positions in concluding that a new trial was warranted.

I.

In vacating the conviction and remanding for a new trial, the Court of Appeals panel

concluded, in pertinent part:

> Here, McMillan's stated reason for striking juror 34 was that he had reason to believe the juror would not be unbiased based on his counsel's conversation with members of the Lee County Bar. **We find this reason, although questionable, is race neutral.** See id. [State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)] at 123, 470 S.E.2d at 371 (stating the defendant's reasons for striking a juror do not have to be reasonably specific or legitimate -the reason need only be race neutral); Cochran, 369 S.C. at 321, 631 S.E.2d at 301 ("Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution."); State v. Short, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct.App.1997) ("The principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause."). **We also find the State, as the opponent of the strike, failed to prove McMillan's strike was purposeful racial discrimination. Furthermore, the fact that McMillan "used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination."** State v. Ford, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999). **Therefore, we find the trial court erred in ruling McMillan's stated reason for striking juror 34 was not race neutral and in granting the State's Batson motion.**

State v. McMillan, supra., p. 7 (emphasis added).

II.
How This Issue Was Decided Below.

The Appellant, Jeremy McMillan, is an African American. during the trial, he was represented by counsel Cezar McKnight. The potential jurors were voir dired by the trial judge prior to jury selection. R. 51-65, Tr. 34-48. At striking of the petit jury, the parties were advised that the prosecution would have use of five (5) peremptory challenges and the defense would have access to ten (10) peremptory challenges. R. 65, Tr. p. 48, ll. 19-15. Counsel McKnight used his strikes in the following pattern:

> #34 - James Croft - White Male. R. 66, Tr. p. 49, ll. 2-3.
> #174 - Bruce Hunnicutt - White Male. R. 66, Tr. p. 49, ll. 4-7.
> #72 - Charles McCutcheon-White Male. R. 68, Tr. p. 51, ll. 16-

18.

As to potential alternates, counsel McKnight used the strikes in the following manner:

#27 - Donald Clark - White Male - R. 68-69, Tr. p. 51, ll. 25 - p. 52, l. 2.
#138 - Shawn Arrants - White Male - R. 69, Tr. p. 52, ll. 7-9.

After the initial selection was completed, Assistant Solicitor Fata made a motion pursuant to Batson v. Kentucky, 476 U.S. 89 (1986) and its progeny. He contended that there were 23 jurors presented and the Appellant struck five (5) white males from the jury. R. 70, Tr. p. 53, ll. 1-3.

Judge King concluded that in the Batson motion, the State had identified a racially cognizable group and confined that the struck jurors were all white males. "Under our law when the State has identified the racial cognizant group, the burden shifts to the striking party to show that the reasons for striking the jury were not racially motivated or non-discriminatory so in that connection Mr. [McKnight] the burden shifts back to you to give reasons for striking the jurors." R. 70, Tr. p. 53, ll. 15-21.

Counsel McKnight's Reason for the Peremptory Strikes

Counsel McKnight initially declared his strikes were racially neutral and in complete accord with Batson. R. 71, Tr. p. 54, ll. 1-2. His stated reasons for his pertinent strike of juror #34 was as follows:

#34 - James Croft

McKnight declared he had consulted with members of the Lee County Defense Bar and had indicated to him that they had attended church with Mr. Croft and "that he had displayed some views that they believed to be controversial for this case" and particularly Mr. Severance,

another attorney, "that Mr. James Croft, Jr. would not be a good pick for this jury, in that he had some interactions with him and he displayed attitudes that he [Severance] believed to be not consistent with being a good and fair and unbiased juror in this matter." R. 71-72, Tr. p. 54, l. 4 - p. 55, l. 1.

The State's Response

Judge King stated that the striking party having enumerated "race-neutral" reasons, the burden shifted to the State to show that the reasons were "pretextual." R. 72, Tr. p. 55, ll. 20-24. In particular, as to juror 34, Assistant Solicitor Fata stated that:

> Number 34, Your Honor, unless he can articulate some reason, other than somebody told me he wouldn't be a good juror. I don't see where that would be pretextual or an excuse. I mean somebody told me wouldn't be a good juror, well a lot of people tell me if people will be a good juror, but I need to know something about that person. He should have said why would he be a good juror. what has he said about this case or what's he said about the defendant or whatever.

R. 74, Tr. p. 57, ll. 1-10.

Counsel McKnight's Rebuttal

Counsel McKnight did not make any argument in rebuttal concerning juror #34. R. 75., concerning his striking

Court Order

In his oral order concerning the Batson issue from the initial jury selection, Judge King concluded that the reasons given by the defense concerning juror 138 (Arrants), Juror 34 (Croft), and juror 27 (Clark) were pretextual. R. 76-77, Tr. p. 59-60. The court further found the reasons given for jurors 174 (Hunnicutt) and 72 (McCutcheon) were not pretextual. More specifically,

Judge King held:

> THE COURT: I understand. All right. When a Motion is made by the Batson case, the striking of a jury that has been made in this case. The party making the motion must show that the jurors are of a cognizable racial group. This has been done by the State. It must also how that the pre-emptory challenge used to exclude the juror on the grounds of race. The striking party then has the burden of showing racially neutral explanation for striking the juror then the burden shifts back to the opposing party who must show that the race neutral explanation was pretext.
>
> Pretext generally will be established by showing that similarly situated members of another race were seated on the jury, I do find that juror number 138, the reasons given for striking the juror were pretextual. The reason given was that the juror was employed by the South Carolina Department of Transportation, therefore having relation or ties to law enforcement, when in fact, juror number 98, a black male disclosed in voir dire that he had a relative who was related to law enforcement which would be a closer tie then the one that Mr. Arrants, the juror who was seated, I mean who was struck had. So I would therefore find that the Defendant's explanation which reportedly was racially neutral was not in fact mutual but is pretextual [sic] because of a similarly situated juror was seated.
>
> In addition to that, the Court would find that jurors number 174 and 72, for reasons given striking those jurors was racially neutral in that it was not pretextual [sic] so there was no problem with either one of those two jurors.
>
> **However I do find that the reason given for the striking of juror number 34, that someone told me that he would not be a good juror is pretextual [sic] and I would think that is an improper strike [sic].** And finally in regard to juror number 27, simply that a business owner as being conservative is also prefectural and I will not allow that strike.
>
> The jury will therefore be re-struck and defense will not be allowed to strike jurors 34, 27 and [138]. . .

R. 76-77, Tr. p. 59, l. 7 - p. 60, l. 21. (emphasis added).

III.

THE PANEL DECISION FAILED TO GIVE PROPER DEFERENCE TO THE TRIAL COURT'S FACTUAL CONCLUSION THAT PRETEXT WAS FOUND.

The panel rejected Judge King's conclusion that the stated reason for the striking of juror 34 was pretextual. Judge King found: " I do find that the reason given for the striking of juror number 34, that someone told me that he would not be a good juror is pretextual [sic] and I would think that is an improper strike." The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility. Sumpter v. State, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994). This was a credibility based finding by the trial court. The Court of Appeals misapprehended the decision in Batson as removing fact finding and credibility determinations by the trial judge to one of de novo review. To the contrary, the Supreme Court has stated at the conclusion of the Batson procedure, "the trial court must determine if the party challenging the strike has proven purposeful racial discrimination, **and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge**." Purkett v. Elem , 514 U.S. 765, at 768, 115 S.Ct. at 1771 (1995). The persuasiveness of the justification for the peremptory strike is critical. E.g., Purkett, 514 U.S. at 768, 115 S.Ct. at 1771. "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." Purkett, 514 U.S. at 768, 115 S.Ct. at 1771. However, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Id. Throughout the Batson process, including any appeal, the party exercising the strike must rely on the explanation originally proffered in response to the prima facie case. As explained by the Supreme Court:

> A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El v. Dredke, 545 U.S. at 252, 125 S.Ct. at 2332.

> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding 'largely will turn on evaluation of credibility.' 476 U.S., at 98, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' Wainwright v. Witt, 469 U.S. 412, 428 (1985), citing Patton v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)."

Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Plausibility is reviewed *but not reweighed* in light of the entire record. Miller-El v. Dretke, supra, 545 U.S. at pp. 265–266. We review the trial court's finding for substantial evidence, giving " 'great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. '" See Snyder v. Louisiana, 552 U.S. 472, 477 (2008). In assessing credibility, the trial court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. " 'As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) Absent " 'exceptional circumstances,' " we defer to the credibility findings of the trial court." Snyder, supra, 552 U.S. at p. 477.

In Snyder, the Supreme Court again emphasized that the plausibility of the prosecutor's explanation for a peremptory strike is to be carefully scrutinized by the trial judge under the third step of the Batson inquiry, and noted that implausible reasons will fail a Batson challenge. The

Supreme Court further noted that "[t]he trial court has a pivotal role in evaluating Batson claims," and that, "in the absence of exceptional circumstances, we would defer to [the trial court]." Snyder, 552 U.S. at 477, 128 S.Ct. at 1208 (citing Hernandez, 500 U.S. at 366, 111 S.Ct. at 1859). Pursuant to Snyder, step three of the Batson inquiry involves an evaluation of the prosecutor's credibility to determine "not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." Snyder, 552 U.S. at 477, 128 S.Ct. at 1208).

Citing Miller-El, the Snyder court reiterated that, in considering a Batson objection, "all of the circumstances that bear upon the issue of racial animosity must be consulted." Snyder, 552 U.S. at 478, 128 S.Ct. at 1208. If the record does not support the prosecutor's proffered explanation or if it evidences that the proffered explanation is implausible, "there is an inference of discriminatory intent that sufficiently demonstrates a Batson violation." Snyder, 552 U.S. at 485, 128 S.Ct. at 1212.

The Court of Appeals conflated the analysis under Purkett and Snyder and ignored the fact that the trial court found as a fact that the reason given - albeit race neutral on its face - was pretext. R. 77. Under the panel's assessment, when the trial court believes that the particular alleged reason given was false - based upon trial counsel's demeanor and actions - it reject the Batson challenge - even when there is evidence that he used his strikes to remove members of the class. This conclusion flies in the face of the Court prior decision regarding its rejection of dual motivation in Batson cases, because it is actually the same, albeit unspoken. The Supreme Court of South Carolina's rejected the "dual motivation doctrine in the Batson context." See Payton v.

Kearse, 329 S.C. 51, 59, 495 S.E.2d 205, 210 (1998) (noting that South Carolina follows the "tainted" approach whereby a discriminatory explanation for the exercise of a peremptory challenge will vitiate other nondiscriminatory explanations for the strike). [1]

Here, the panel determined on step three of the analysis that Judge King's finding that "*that the reason given for the striking of juror number 34, that someone told me that he would not be a good juror is pretextual and I would think that is an improper strike*" was without any value. Pretext is a step three determination - not a step two determination under Batson. Pretext is defined as a "made-up excuse: a misleading or untrue reason given for doing something in an attempt to conceal the real reason." *Encarta World English Dictionary* (2009). Under the panel's assessment, the trial judge can only find pretext if similarly situated individuals are seated. Under this assessment, the prosecution would have to show that there were African American jurors seated that Mr. Severance opined to defense counsel that "had views controversial to the defense" and/or attended church with members of the Bar. Thus, it is clear that the finding by Judge King was one of non-belief that it was the real reason based upon the demeanor of the

[1]Court have not limited the showing of pretext to simimilarly sitiated jurors. For example it has been held to meet this standard, the party challenging the strike "must present evidence or specific analysis" showing that the proffered reason was pretextual. State v. Johnson, 930 S.W.2d 456, 460 (Mo.App.1996). The party "cannot simply rely on conclusory allegations that the real motivation for the strike was racial in nature." Id. Factors that may be relevant to the determination of pretext include: (1) "the presence of 'similarly situated white jurors who were not struck,' " State v. Strong, 142 S.W.3d 702, 712 (Mo. banc 2004) (citation omitted); (2) "the degree of logical relevance between the explanation and the case to be tried in terms of the nature of the case and the types of evidence adduced," State v. Kesler-Ferguson, 271 S.W.3d at 559; (3) "the striking attorney's demeanor or statements during voir dire, " id.; and (4) the circuit court's past experience with the striking attorney. Id. Because the circuit court is in a better position to observe trial counsel's sincerity and credibility and to observe the racial makeup of the jury panel, we rely on the circuit court "to consider the plausibility of the striking party's explanations in light of the totality of the facts and circumstances surrounding the case." Id.

proponent of the strike - here the defense counsel.

In State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009), the Court held the a defense counsel stated reasons on a reverse-Batson challenge were sufficiently race-neutral to survive a Batson challenge. As Edwards stated however,. Often the demeanor of the challenged attorney on a Batson motion will be the best and only evidence of race or gender discrimination. Therein, the court rejected the finding that the reasons given by the defense lawyer were not race neutral. Here, however, the trial judge did not reject the reason because it was not race neutral, but because it was pretextual - not the true reason. This conclusion recognizes the unique credibility assessment that the judge must make.

In demanding more, the Court of Appeals has created a situation where the truth of the basis of a strike has no function in a Batson assessment. While the conclusion was harsh as any finding of pretext would be, Judge King's conclusions taken to its terms was just that - he did not believe the proponent had expressed his true reasons. This is all the more confusing when the panel acknowledged in the step two assessment that : " We find this reason, although questionable, is race neutral." State v. McMillan, supra. What appeared questionable to this Court in the step two assessment was resolved by the Circuit Court in step three after questioning the proponent. The Court of Appeals in its panel misapprehended this finding and its effect in the step three Batson assessment. Respondents note that the conclusion by the Judge King was supported by the defense counsel's actions in striking two other jurors - jurors 74 and 138 were also pretextual. R. 77.

The Court is reminded that in the reverse Batson scenario, the assessments are turned on their head because there is a finding of discriminatory intent by the factual determination of

pretext. While Respondent agrees that the fact that McMillan used its challenges to strike white jurors is not sufficient in and of itself to establish racial discrimination, the fact that he did is a factor in the trial judge's reasoned determination of whether the reason given was the truth or pretext for juror 34. The Court of Appeals misapprehended the law in failing to give deference to the trial court's assessment of pretext.

IV.

In State v. Adams, 307 S.C. 368, 415 S.E.2d 402 (1992), the Court stated that the State may not meet its burden under Batson by merely asserting that a third person made the decision to strike and communicated this to the Solicitor. Accord, State v. Marble, 311 S.C. 23, 24, 426 S.E.2d 744, 745 (1992) Adams says that the clear and reasonably specific explanation offered by the third person must be provided. Id. 415 S.E.2d at 403. Without this requirement, there would be no assurance that the third person did not make the decision based on the juror's race. Id. Here, the Appellant asserted that he was not selecting juror 34 because a member of the Bar had told him he was not going to be a good juror and had explained that the reason was because he had controversial views - without explaining what those views were. For an alternative reason, Respondent submits that this reason was insufficient to satisfy the requirements of analysis under Batson because it did not explain what the controversial view was that the juror allegedly possessed in order to make an adequate assessment. The reason given was no reason at all, as argued by the prosecutor at trial.

The Court of Appeals erred in its assessment because it concluded that the neutral reason was because he had communicated with a member of the Bar - not based upon what the jurors views were. This misdirects the assessment and fails under Adams and Marble. Under Adams,

the mere fact that the proponent relied upon a third party is insufficient -the clear and reasonably specific explanation offered by the third person must be provided and this must withstand analysis as a neutral reason. Id. 415 S.E.2d at 403. Here, the reasons was inadequate to support a race-neutral reason because the particular view was not presented. The Court of Appeals misapprehended Adams in its assessment.

V.

Wherefore having made a petition for rehearing, Respondents request the opinion be vacated and the conviction upheld.

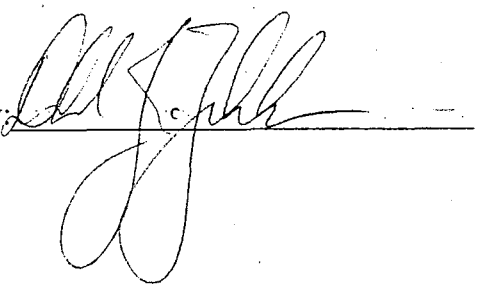
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Columbia, South Carolina
November 1, 2012

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Petition for Rehearing*** in the foregoing matter on opposing counsel by depositing in the United States mail, postage prepaid, on the following:

Ms. Nicole Nicolette Mace
The Mace Law Firm
1341 44th Avenue, North, Suite 205
Myrtle Beach, South Carolina 29577-5710

This 1st day of November, 2012.

DONALD J. ZELENKA

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

Case No. 2008-111046
Opinion No. 5038

The State of South Carolina, Respondent,

v.

Jeremy McMillan Appellant.

APPELLANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING

COMES NOW the Appellant, Jeremy McMillan, by and through undersigned counsel, and respectfully files his response to the State's Petition for Rehearing in the above-captioned matter. On October 17, 2012, the South Carolina Court of Appeals reversed and remanded this case for a new trial concluding that the trial judge erred in granted the State's *Batson* motion. The State now moves for a rehearing alleging that this Court overlooked and

misapprehended certain facts and positions in its decision. In support of his response, Appellant respectfully states as follows:

ARGUMENT

I. The South Carolina Court of Appeals correctly applied a *de novo* standard in concluding that the trial court's *Batson* ruling was in error.

The Fourth Amendment to the United States Constitution prohibits the prosecutor or criminal defendant from exercising peremptory challenges to strike potential jurors solely on the basis of race or gender. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). A trial judge must hold a *Batson* hearing when members of a cognizable racial group or gender are struck and the opposing party requests a hearing. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). The Supreme Court has provided the necessary steps in conducting a proper *Batson* hearing, which was subsequently adopted by the South Carolina Supreme Court in *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). The Supreme Court held:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995). "At this third step, the burden returns to the party challenging the strike to establish that the explanation is mere pretext." *State v. Smalls*, 336 S.C. 301, 308, 519 S.E.2d 793, 797 (Ct. App. 1999).

In this case, the Court of Appeals found that the trial court did not follow proper *Batson* procedures. During the *Batson* hearing, defense counsel argued that he struck Juror #34, Mr. Croft, because other members of the Lee County Defense bar advised him that they attended church with Mr. Croft and that "he displayed to them some views that they believed to be too controversial for this case." (R. 71, Lines 4-9). Defense counsel explained to the trial court that Juror #34 had displayed attitudes that were inconsistent with being able to be unbiased and impartial during the trial. (R. 71, Lines 20-25, R. 72, Line 1). This reasoning, as the panel found, was race neutral. *State v. McMillan*, No. 5038, 2012 WL 4900862, at *4 (S.C. Ct. App. Oct. 17, 2012). At this point, the State was required to show that the reason offered, though facially race neutral, was actually pretext to engage in purposeful racial discrimination. *See Adams*, 322 S.C. at 124, 470 S.E.2d 372. Pretext can be established, "either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment." *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). The prosecution argued that this explanation was insufficient, stating:

> Number 34, Your Honor, unless he can articulate some reason, other than somebody told me he wouldn't be a good juror. I don't see where that would be pertextual [sic] or an excuse. I mean somebody told me wouldn't be a good juror, well, a lot of people tell me if people will be a good juror, but I need to know something about that person. He should have said why he would be a good juror. What has he said about this case or what's he said about the defendant or whatever. (R. 74, 1-10)

The only argument made by the State was that the Appellant's explanation was inadequate. There was no showing by the State that similarly situated members of another race were seated on the jury when discussing Juror #34 or that defense counsel's stated reason was implausible. As such, the State failed to demonstrate that the reason for striking Juror #34 was pretextual. Nonetheless, the trial court found that the strike of Juror #34 was pretextual and improper. In so ruling, the trial court effectively placed the burden on the Appellant to prove the reason was not pretext without requiring the State to meet its burden of persuasion. "The opponent of the strike carries the ultimate burden of persuading the trial court that the challenged party exercised strikes in a discriminatory manner." *Edwards*, 384 S.C. at 509, 682 S.E.2d at 822. As stated in *State v. Cochran*, "[w]here the assignment of error is the failure to follow the *Batson* hearing procedure, the Court of Appeals must answer a question of law; when a question of law is presented, the standard of review is plenary." 369 S.C. 308, 312, 631 S.E.2d 294, 297 (2006). In applying this standard, the panel ruled that McMillan's strike was race neutral, and

"the State, as the opponent of the strike, failed to prove McMillan's strike was purposeful racial discrimination." *McMillan*, 2012 WL 4900862, at *4.

However, the State argues that greater deference was owed to the trial court's *Batson* decision because it was a judgment as to the credibility and demeanor of defense counsel. Specifically, the State contends that the "Court of Appeals misapprehended the decision in *Batson* as removing fact finding and credibility determinations by the trial judge to one of *de novo* review." (Resp't Pet. for Reh'g 6.) However, this argument is without merit, as the Court of Appeals repeatedly emphasizes the great deference provided to a trial judge's findings when the trial court *follows* the mandated procedure under *Batson*:

> The trial judge's findings of purposeful discrimination rest largely on his 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] state of mind based on demeanor and credibility lies peculiarly within a trial judge's province. The judge's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous. This standard of review, however, is premised on the trial court following the mandated procedure for a *Batson* hearing.

McMillan, 2012 WL 4900862, at *2 (internal quotation marks omitted) (internal citations omitted). As the Court of Appeals explains, it reviewed the decision *de novo* because the trial court did not follow proper *Batson* hearing procedures. Specifically, in this case, the State was not required to meet its burden of

establishing purposeful discrimination because the trial court effectively placed the burden of disproving pretext on the Appellant.

The decision in *Smalls* makes the panel's decision in this case particularly compelling. In *Smalls*, the defendant used nine of his ten peremptory challenges on white jurors. 336 S.C. at 304, 519 S.E.2d at 794. A *Batson* hearing was held at the State's request and the defendant argued that he struck the white jurors because they looked at him in a mean, stern, and accusatory manner. *Id.* The trial court determined these reasons were pretextual. *Id.* However, it made this determination without requiring the State to prove the defendant engaged in purposeful racial discrimination. *See id.* This Court reversed the trial court's finding because it failed "to require the State to carry its burden to present evidence of pretext as prescribed by step three of the *Adams/Purkett* analysis." *Id.* at 309, 519 S.E.2d at 797; *see also Cochran*, 369 S.C. at 323, 631 S.E.2d at 303 (concluding the trial court erred when it abandoned the process mandated by *Purkett* and *Adams* and effectively placed the burden of disproving pretext and purposeful discrimination on Appellants). Here, similar to *Smalls* and *Cochran*, the trial court failed to follow proper *Batson* procedure, and the Court of Appeals correctly reviewed the trial court's *Batson* ruling under a *de novo* standard.

On the other hand, the State suggests, in so ruling, "the Court of Appeals has created a situation where the truth of the basis of a strike has no function in a

Batson assessment." (Resp't Pet. for Reh'g 10.) Despite the State's contention, the panel never limited the *Batson* assessment in this manner, but simply ruled that the State had failed to meet its burden of persuasion in this case. In other words, the Court reaffirmed the prevalent rule in *Batson*, that the "ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768. While the State argues that the trial court made a credibility determination, the record never indicates that the trial court found defense counsel's demeanor or credibility to be questionable. Instead, when the State failed to meet its burden of persuasion, it attempted to rely on the previous strikes used by defense counsel. However, this Court held in its decision that "the fact that McMillan 'used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination.'" *McMillan*, 2012 WL 4900862, at *4 (quoting *State v. Ford*, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999)). In fact, the first jury selected in this case had white males seated. *See Ford*, 334 S.C. at 66, 512 S.E.2d at 504 ("Although appellant exercised most of his challenges to strike white jurors, he did not strike every white juror.") Therefore, the Court of Appeals was not obligated to give weight to the trial court's findings on this issue and correctly ruled that the trial court erred in concluding that defense counsel's strike of Juror #34 was pretextual.

II. The explanation given for striking Juror #34 by defense counsel was sufficient and is not challengeable by the State.

The State next argues that defense counsel's explanation was insufficient because it was offered by a third party, which requires the explanation be clear and reasonably specific. This argument is without merit as the State failed to preserve this argument on appeal. Furthermore, even if the State had preserved this argument, defense counsel's explanation was sufficient under *Batson*.

A. The State failed to make this argument on appeal.

The State never argued in its initial brief that defense counsel was required by law to provide greater specificity in his explanation pursuant to *State v. Adams*, 307 S.C. 368, 415 S.E.2d 402 (1992) and *State v. Marble*, 311 S.C. 23, 426 S.E.2d 744 (1992). In fact, contrary to the argument in its petition, the State argues in its brief that even though "*Batson* 'does not demand an explanation that is *persuasive, or even plausible*,' it does demand 'a reason.'" (Resp't Initial Br. 14. (emphasis added)) The State merely alleged that defense counsel never provided a reason as to why Juror #34 was struck, not that defense counsel was required to provide a specific explanation as to information received from a third party. An issue not raised by the State in its appellate brief to the Court of Appeals, and instead raised for the first time in a petition for rehearing to the Court of Appeals is deemed abandoned. *See State v. Primus*, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002), *overruled on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); and *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996). The State should not

be allowed to address this issue in its petition for rehearing as it was not properly addressed in its initial brief.

However, even if it can be found that the State raised this issue in its initial brief, the State never provided any authority for its position. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). The State never discussed *Adams* or *Marble* in its initial brief regarding this issue. Therefore, based on the foregoing, the State should not be permitted to address this argument in its petition for rehearing.

B. Even if the State had properly preserved this argument, defense counsel's explanation was sufficient under *Batson*.

It is well settled that once the proponent offers a race neutral reason for a strike, there is no requirement that it be clear, reasonably specific, or legitimate. *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999). While *Adams* held that an explanation is insufficient when it is "merely asserting [that] a third person made the decision to strike and communicated this decision to [counsel]," this rule does not apply to the facts of this case. 307 S.C. at 370, 415 S.E.2d at 403. For example, in *Marble*, the Court relied on *Adams* in holding that striking a juror because an investigator insisted counsel do so was an insufficient explanation. 311 S.C. at 24, 426 S.E.2d at 745. The court in *Marble* held "*Adams* says that the clear and reasonably specific explanation offered by the third person must be provided.

Without this requirement, there would be no assurance that the third person did not make the decision based on the juror's race." *Id.* Here, defense counsel's reason for striking Juror #34 was that he believed the juror would not be unbiased or impartial based on defense counsel's conversations with members of the Lee County Bar. He also informed the court that Juror #34 had displayed views that were "too controversial for this case." (R. 71, lines 20-25). This provided defense counsel with the ability to make his *own* assessment in deciding whether to strike Juror #34. Unlike *Marble*, defense counsel did not rely solely on the Lee County Bar member's suggestion that he strike Juror #34. Additionally, he gave a race neutral reason for the strike, that the juror would not be impartial because he had views that were "too controversial" for McMillian's case. This is a racial neutral reason for a strike. The strike was based on personal knowledge that defense counsel acquired as a result of speaking to members of the Lee County Bar that personally knew of this particular juror. *See Ford*, 334 S.C. at 65, 512 S.E.2d at 504 ("[A]n attorney's personal knowledge of . . . a prospective juror is a race-neutral reason for exercising a peremptory strike."). Contrary to *Marble* and *Adams*, Defense counsel's reasons for striking Juror #34 were clearly race neutral, and he had no obligation to provide any greater specificity to his explanation. Furthermore, there was no inherent discriminatory intent in defense counsel's explanation nor were there any similarly situated seated jurors of another race.

The State simply did not meet its burden in establishing that defense counsel struck Juror #34 in a discriminatory manner. Therefore, the Court of Appeals properly found that the trial court erred in ruling that the strike of Juror #34 violated *Batson*.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Appellant, Jeremy McMillan, respectfully requests that this Court deny the Respondent's petition for rehearing.

Respectfully Submitted,

By: Nicole Mace
Attorney for Appellant

Nicole N. Mace
The Mace Firm
1341 44th Ave. N., Ste. 205
Myrtle Beach, SC 29577
(843) 839-2900

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

Appellate Case No. 2008-111046
Opinion No. 5038

The State of South Carolina, Respondent,

v.

Jeremy McMillan Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's Response in Opposition to Respondent's Petition for Rehearing in the above-referenced case has been served upon Donald J. Zelenka, Esq. at the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, this 20th day of November, 2012.

Nicole Mace
Nicole N. Mace
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 20th day of November, 2012.

Notary Public for South Carolina
My Commission Expires: 8/6/2019

04-3583

The South Carolina Court of Appeals

The State, Respondent,

v.

Jeremy McMillan, Appellant.

Appellate Case No. 2008-111046

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

FILED
30 Nov 2012

cc:
Nicole Nicolette Mace
Donald J. Zelenka