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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
The Honorable Doyet A. Early, Circuit Court Judge
Appellate Case No. 2018-000065

DAVID LEE MEGGETT,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

PETITIONER'S STATEMENT OF ISSUE ON APPEAL

I. Whether the lower court erred in finding that counsel was not deficient nor was there resulting prejudice when counsel failed enter a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).

COUNTER-STATEMENT OF ISSUE PRESENTED

Whether this Court must either dismiss certiorari as improvidently granted or affirm the PCR judge's denial of Petitioner ineffective assistance of counsel claim because the record supports the PCR judge's finding that Petitioner failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), from counsel's failure to argue a *Batson* motion. Also, Petitioner's argument that the PCR judge's "findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors that were struck and sat on the jury" is not properly before this Court because Petitioner did not present it to the PCR judge, it was not argued in his proposed order, and he did not include this argument in his Rule 59(e), SCRCP, motion?

STATEMENT OF THE CASE

Respondent accepts Petitioner's "Statement of the Case," Brief of Petitioner, at 2-5.

STATEMENT OF FACTS

Respondent accepts the PCR judge's discussion of the facts for purposes of this Return. ***App. 773-78***. Yet, Respondent would add that, unlike other PCR cases where the South Carolina Supreme Court has criticized PCR judges' findings of no prejudice because of overwhelming evidence of guilt, here the overall strength of the properly admitted evidence of Petitioner's guilt overcomes the individual impact of each instance of counsel's allegedly deficient performance. *Contra Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018), *reh'g denied* (June 12, 2018) ("As we explain below, the overall strength of the properly admitted evidence of Petitioner's guilt does not overcome the individual impact of each instance of trial counsel's

deficient performance"); *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018), *reh'g denied* (Mar. 29, 2018). In addition to the victim's testimony concerning the events leading up to the assault and the assault itself, her testimony that Petitioner had forcefully pulled her arm behind her back and choked her during the attack was circumstantially corroborated by Dr. Joseph Bianco, an expert in emergency medicine, who attended to the victim at the hospital. He testified that she told him she had been sexually assaulted, and she complained of pain in her arm and jaw. ***App. 286.***

On examination, he discovered bruising and tenderness in those areas and he opined that her injuries were consistent with having been grabbed or squeezed in the face or neck. ***App. 287-88; 295.*** Likewise, Detective Randy Gray, with the North Charleston Police Department, met with the victim one day after the incident. He testified that her neck injuries were significantly more visible, with prominent dark bruising visible around her neck. ***App. 253-54.***

Further, the victim spoke to Officer Robert Gooding and Sergeant Eric Jourdan, of the North Charleston Police Department, while she was still at the hospital. ***App. 155; 165-66, 212.*** As she was reporting what had occurred, she began receiving incoming calls on her cell phone, and she identified the caller as "Mike," the person who raped her. She told "Mike" that she was at the hospital. He apologized and said that he wanted to visit her there. ***App. 151-52; 213; 215; 222-23.*** He repeatedly encouraged her to leave the hospital and he asked if she was going to tell the doctors what had happened. ***App. 152-53.*** Following instructions from one of the officers, the victim asked "Mike" to come to the hospital and "Mike" said he would come visit her there. ***App. 153; 214; 233.***

The officers set up surveillance and waited for the caller to arrive. ***App. 168.*** Shortly thereafter, Petitioner arrived at the hospital and said that he was there to see the victim. Officer

Gooding detained him and took possession of his identification. ***App. 216***. When Officer Gooding thereafter showed Petitioner's identification to the victim, she identified Petitioner as "Mike," her rapist, without any hesitation. ***App. 153; 217***. However, she told the officers that she did not know Petitioner by the name listed on his identification. ***App. 153***. Police then arrested him. ***App. 217***.

Faye LeBoeuf, a nurse and expert in sexual assault examinations, subsequently performed a pelvic exam on her at the MUSC Women's Center. Ms. LeBoeuf discovered a small abrasion in the victim's vagina that was consistent with a forced sexual assault. ***App. 322-23***. Further, the abrasion likely occurred within the preceding twenty-four to seventy-two hours. ***App. 324***. Ms. LeBoeuf admitted that the victim's injuries could have potentially been consistent with consensual sex or other causes (***App. 328***) and there was no evidence of bruising or contusions on the victim's thighs or any redness, swelling, lacerations, or tears on the victim's inner thighs. ***App. 331***. However, she explained that injuries were not always present in sexual assaults. ***App. 337***.

Jennifer Clayton, a SLED DNA analyst, subsequently examined the evidence gathered in the case. ***App. 291***. When Ms. Clayton tested a vaginal sample collected from the victim during the sexual assault examination, she found that semen was "indicated because the P30 enzyme found in semen was present. ***App. 302; 314-15***. However, she was unable to develop a DNA profile from the sample, and could not identify the sample as coming from Petitioner. ***App. 302-17***.

STANDARD OF REVIEW

This Court's "standard of review in PCR cases depends on the specific issue before [the Court." *Smalls*, 422 S.C. at 180, 810 S.E.2d at 839. The Court "defer[s] to a PCR court's findings

of fact and will uphold them if there is evidence in the record to support them." *Id.* The Court "review[s] questions of law de novo, with no deference to trial courts." *Id.* at 181, 810 S.E.2d at 839.

ARGUMENT

This Court must either dismiss certiorari as improvidently granted or affirm the PCR judge's denial of Petitioner ineffective assistance of counsel claim because the record supports the PCR judge's finding that Petitioner failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), from counsel's failure to argue a *Batson*[1] motion. Also, Petitioner's argument that the PCR judge's "findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors that were struck and sat on the jury" is not properly before this Court because Petitioner did not present it to the PCR judge, it was not argued in his proposed order, and he did not include this argument in his Rule 59(e), SCRCP, motion.

Respondent submits that this Court must either dismiss certiorari as improvidently granted or affirm the PCR judge's denial of Petitioner ineffective assistance of counsel claim because the record supports the PCR judge's finding that Petitioner failed to prove either deficient performance or prejudice under *Strickland* from counsel's failure to argue a *Batson* motion. *See App. 823-26.* Also, Petitioner's contention that the PCR judge's "findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors that were struck and sat on the jury" is not properly before this Court because he did not present it to the PCR judge, either in his proposed order or his Rule 59(e), SCRCP, motion.

The petitioner in a PCR action, bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must make a twofold showing. First, he must demonstrate that his attorneys' "representation fell below an objective

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

standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 688-89. (Citation omitted).

Even if an inmate proves deficient performance, he must also prove that he was prejudiced by his attorney's ineffectiveness. This requires proof "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Instead, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687).

In *Batson*, the United States Supreme Court overruled *Swain v. Alabama*, 380 U.S. 202 (1965), and held that the Equal Protection Clause of the Fourteenth Amendment "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." *See Batson*, 476 U.S. at 97-98. More recently, the Court explained in *Flowers v.*

Mississippi, 139 S.Ct. 2228, 2243 (2019), that:

> In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding. See [*Foster v. Chatman*, 578 U. S. ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016)]; *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (*Miller-El II*). Moreover, the Court has extended *Batson* in certain ways. A defendant of any race may raise a *Batson* claim, and a defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races. See [*Hernandez v. Texas*, 347 U.S. 475, 477-478, 74 S.Ct. 667 (1954)]; [*Powers v. Ohio*, 499 U.S. 400, 406, 111 S.Ct. 1364 (1991)]. Moreover, *Batson* now applies to gender discrimination, to a criminal defendant's peremptory strikes, and to civil cases. See *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 129, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

See also Rivera v. Illinois, 556 U.S. 148, 148 (2009) ("Under *Batson* ... and later decisions applying *Batson,* parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors based on race, ethnicity, or sex").

The South Carolina Supreme Court explained in *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006), that:

> We set forth the proper procedure for a *Batson* hearing in *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) (citing *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)).After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. This explanation is not required to be persuasive or even plausible. 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 the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. *Adams*, 322 S.C. at 123-24, 470 S.E.2d at 371-72; *Haigler*, 334 S.C. at 629-30, 515 S.E.2d at 90-91.

See also Rice v. Collins, 546 U.S. 333, 338-39 (2006).

Both the jury selection sheet and the trial transcript here reflect that the prosecution exercised four of its five peremptory strikes to remove African-American veniremen. Also,

counsel did not make a *Batson* motion contesting the prosecutor's use of his strikes, after six African-Americans were seated as petit jurors. Four of these seated African American jurors were women and two were men. ***App. 2-H; 51-71.***

Lead trial counsel, Beattie I. Butler, Esquire, testified at the PCR hearing that he had made *Batson* motions in some cases tried both before and after Petitioner's trial, and that he had not made *Batson* motions in other cases. Although he could not remember why he did not make a motion in this case, he testified that he would have made the motion if he had thought the State's use of its strikes was an issue. He also conceded that the "50/50" racial composition of the jury "likely could" have impacted his decision not to make a *Batson* motion. ***App. 651; 694-97.***

Assistant Ninth Circuit Solicitor Chad Simpson, Esquire, testified that he and Assistant Solicitor Culver Kidd prosecuted Petitioner. They were both involved in the voir dire and jury selection, and they collaborated on jury selection. ***App. 755-57.*** He did not independently recall the reasons the State struck the four African-American veniremen at issue, even after he had reviewed the trial transcript. Before his testimony, he had pulled and reviewed his entire case file. However, "[t]here is no information in there involving jury selection." He explained that the case files in the Solicitor's Office typically have only jurors' names, addresses and criminal history. ***App. 756.*** Additionally, the in-house juror information sheets of the Ninth Circuit Solicitor's Office only went back to January 2011 and Petitioner's trial was in November 2010. Likewise, the Charleston County Clerk of Court's Office purges its records after three years. So, he was unable to obtain any information concerning jury selection in this case. ***App. 758-59.***

He had also run "rap sheets" on the four jurors using their first and last names, gender and race, but he discovered that "the names were too common." ***App. 755-56.*** Still, he testified that he takes the concerns of *Batson* "very seriously, almost to a fault" and he felt that the

ultimate composition of Petitioner's jury reflected this. ***App. 758***. While he would have had a race-neutral reason for his use of his strikes if counsel had made a *Batson* motion, he was unable to recall those reasons six years after the trial. ***App. 758-59***.

Petitioner's appellate attorney, Breen Stevens, Esquire, testified that he saw where the State had exercised four of its five peremptory challenges on African-American veniremen in the course of reviewing the transcript on appeal.[2] He speculated that he might have been able to show that an explanation given by the State was possibly pretext if an argument on this basis had been made at trial. ***App. 706-10***. However, the record supports the PCR judge's finding (***App. 825***) that his testimony does not support the present claim "because he candidly admitted that he only had a cold record and that he did not know why the State struck any juror, since the State was not required to explain its strikes at trial." *See* ***App. 708-09***.

In denying relief on this claim, the PCR judge found that:

> The current record simply does not support the conclusion that there was a racial animus for any of the strikes used by the prosecution. Although the State's first challenge was used to strike juror 134, an African-American female, the Court notes that the very first juror seated, juror 184, was African-American female. Also, two more African Americans were seated as jurors before the State struck juror 214, an African-American female. Further, a total of six African Americans served on the petit jury. *Tr. p. 2-H.*
>
> The Court finds that the testimony of trial counsel and Mr. Simpson was credible. Thus, the Court finds that the State exercised its peremptory challenges with both an awareness of and sensitivity to the requirements of *Batson*. The Court further finds that counsel, who was a very experienced public defender, would have made a *Batson* motion if he felt that one was appropriate. See *Howell v. Trammell*, 728 F.3d 1202, 1227 (10th Cir. 2013) ("Because Howell has not shown any *Batson* violations, he cannot show counsel erred in failing to object. Thus, he is not entitled to habeas relief"); *Chanh Minh Dang v. Giurbino*, 589 F. App'x 385, 386–87 (9th Cir. 2015), *cert. denied*, 135 S.Ct. 2864 (2015); *Com. v. Dennis*, 552 Pa.

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[2] The Court Reporter's header for Mr. Stevens' testimony incorrectly reflects it is the direct examination of trial counsel, Mr. Butler, but it is actually Mr. Stevens' testimony. ***See App. 706***.

> 331, 343, 715 A.2d 404, 409 (1998) ("Appellant offers no evidence that the prosecutor exhibited racial animus in striking African–American venirepersons. Indeed, the impaneled jury included four African–American jurors and one African–American alternate, which indicates a lack of racial animus. Trial counsel was not ineffective for failing to raise a plainly baseless *Batson* claim"). As a result, the Court finds that Applicant has not overcome *Strickland*'s strong presumption that "under the circumstances, the [failure to make a *Batson* motion] 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (citation omitted). *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. *See also Burt v. Titlow*, 134 S.Ct. 10, 17 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance' ") (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052); *[Richter,]* 562 U.S. at 105, 131 S.Ct. at 787 (quoting *Strickland*).

App. 825-26.

Again, an appellate court "defer[s] to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls*, 422 S.C. at 180, 810 S.E.2d at 839 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013))). *See also Flowers*, 139 S.Ct. at 2244 ("The Court has described the appellate standard of review of the trial court's factual determinations in a *Batson* hearing as 'highly deferential.' .... 'On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous' ") (citations omitted); *State v. Blackwell*, 420 S.C. 127, 143 n. 12, 801 S.E.2d 713, 722 n. 12 (2017) ("The dissent agrees there is evidence to support the trial court's conclusion; however, it finds the decision is against the preponderance of the evidence. In reaching this conclusion, the dissent disregards our deferential standard of review and effectively acts as a trial court rather than an appellate court"), *cert. denied,* 138 S.Ct. 985 (2018).

Here, the PCR judge's finding that the record did not "support the conclusion that there was a racial animus for any of the strikes used by the prosecution" is supported by the testimony

of both trial counsel and Mr. Simpson. Likewise, counsel's testimony supports the finding that, as an experienced attorney, he "would have made a *Batson* motion if he felt that one was appropriate."

Further, the PCR judge's reliance on *Strickland*'s "strong presumption" of competent representation was not clearly erroneous. *See Strickland*, 466 U.S. at 689. Since its decision in *Strickland*, the Supreme Court has reiterated this "strong presumption," *e.g.*, *Maryland v. Kulbicki*, 577 U.S. 1, 136 S.Ct. 2, 3 (2015); *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986), and it has unequivocally held that this "strong presumption," cannot be overcome by a silent record. *See Burt v. Titlow*, 571 U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance' ") (citing *Strickland*, 466 U.S. at 689). *See also Fretwell v. Norris*, 133 F.3d 621, 623-24 (8th Cir. 1998) (reversing the district court's grant of the writ based in part on counsel's inability to recall because this is contrary to the presumption of correctness); *Murtishaw v. Woodford*, 255 F.3d 926, 949-50 (9th Cir. 2001) (where record did not reflect whether counsel gave advice, court would not presume to the contrary that advice had not been given); *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001) (stating that "[w]here, as here, the evidence does not clearly explain what happened, or more accurately why something failed to happen, the party with the burden loses" and holding that trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance). Moreover, the record supports application of this presumption to the present claim.

Petitioner asserts for the first time on appeal that the PCR judge's "findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors

that were struck and sat on the jury." Respondent submits that this argument is not preserved for appellate review because Petitioner did not present it to the PCR judge in either his proposed order or in his Rule 59(e), SCRCP, motion. ***App. 832-37***. See *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) ("Because [applicant] did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge"); *Burgess v. State*, 402 S.C. 92, 95, 738 S.E.2d 264, 265-66 (Ct. App. 2013).

More importantly, none of the evidence that Petitioner claims the PCR judge failed to address, in itself, demonstrates racial animus. Indeed, as Petitioner's appellate counsel correctly observed, the record did not demonstrate racial animus. Petitioner contends that "if a comparative juror analysis would have been conducted under step three," counsel could have shown that the State struck two African American jurors (Jurors # 134 and # 214) who had a family member incarcerated, but that a "similarly situated white female (Juror #274) was [seated], who had several family members incarcerated." Brief of Petitioner at 22. However, this argument is fallacious because it presupposes that the State struck Jurors # 134 and # 214 because they had a family member incarcerated when *there is absolutely no evidence that this was the reason they were struck.*

Petitioner cannot show that these jurors were similarly situated because there may have been other reasons for striking these jurors, apart from having incarcerated family members. For instance, Juror # 134 testified that "I just get ... nervous real easy" and "I start shaking like. I'm a nervous person." ***App. 55***. This would have been a race-neutral reason inapplicable to Juror # 274. Other race-neutral reasons not present in the trial transcript may have existed for striking

this juror as well as Juror # 214. The prosecutor simply had no recollection of the reasons for the use of the strikes because of the passage of time and he did not have any manner to refresh his recollection, despite his valiant efforts to find information with which to do so. Also, counsel did not attribute any racial animus to the strikes. Respondent submits that it would be contrary to *Strickland*'s strong presumption of reasonable performance to infer deficient performance and prejudice based on this record. *See Burt*, 571 U.S. at 23; *Romine*, 253 F.3d at 1357.

Further, any suggestion of racial animus to the prosecution's strikes necessarily turns a blind eye both to the racial composition of Petitioner's jury and to lead trial counsel's experience as a criminal defense attorney. ***App. 645, lines 7-12***;[3] *See Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) (reversing the PCR court's finding that counsel was ineffective for failing to use a peremptory strike as her client instructed and finding that he process of jury selection inherently falls within the expertise and experience of trial counsel); *Romero v. Lynaugh*, 884 F.2d 871, 878 (5th Cir. 1989) ("The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts. Indeed, we recognize this cold fact of life by our standard for reviewing the rulings of judges presiding over jury selection"); *Cordova v. Johnson,* 993 F.Supp. 473, 530 (W.D.Tex. 1998) ("Selecting a jury is more art than science. There is nothing unreasonable or professionally deficient in a defense counsel's informed decision to rely upon his own reading of venire members' verbal answers, body language, and overall demeanor") (footnote omitted) (internal quotation

[3] Counsel testified that he had been practicing law for twenty years at the time of the PCR hearing and he had spent eighteen of those years as a public defender in three counties. ***Id.*** So, he would have been practicing law for almost fourteen years at the time of Petitioner's November 8-10, 2010 jury trial.

omitted), *aff'd*, 157 F.3d 380 (5th Cir. 1998). Therefore, the record supports the PCR judge's conclusion that Petitioner failed to overcome *Strickland*'s presumption of competent representation.

Nor can Petitioner show any prejudice from counsel's performance. "Even assuming trial counsel was deficient for failing to make a *Batson* motion, *Batson* errors are not presumptively prejudicial when raised in an ineffective assistance of counsel claim." *Tolen v. Cartledge*, No. 1:15-CV-02503-RBH, 2017 WL 4250179, at *11 (D.S.C., Sept. 26, 2017) (citing *United States v. King*, 36 F. Supp. 2d 705, 710 (E.D. Va. 1999)), *appeal dismissed*, 733 Fed.Appx. 140 (4th Cir., Aug. 03, 2018). To show prejudice under *Strickland*, Petitioner was required to prove "that there is a reasonable probability that, but for counsel's [failure to make a *Batson* motion], the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In other words, he was required to prove that he would have received a new trial but for counsel's failure to make a *Batson* motion. He cannot meet that burden here.

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Yet, "the law is well settled that the defendant has no right to a trial by any particular jury or jurors and has the right only to a trial by a competent and impartial jury." *State v. Rogers*, 263 S.C. 373, 382, 210 S.E.2d 604, 609 (1974). *See also State v. Gaskins*, 284 S.C. 105, 114, 326 S.E.2d 132, 138 (1985) (same); *State v. Stanko*, 376 S.C. 571, 576, 658 S.E.2d 94, 96-97 (2008). Absent contrary indications, jurors are presumed to be impartial. *Poynter v. Ratcliff*, 874 F.2d 219, 221 (4th Cir.

1989) (quoting *Irvin v. Dowd*, 366 U.S. at 723).[4]

Because Petitioner has never alleged - much less proven - that a biased juror served on his jury, he cannot establish that he was prejudiced by trial counsel's alleged ineffectiveness. *See Magazine v. State*, 361 S.C. 610, 616-18, 606 S.E.2d 761, 764-65 (2004) (PCR judge erroneously granted relief on grounds of ineffective assistance of counsel based on counsel's use of only two of ten available peremptory strikes at retrial on charges of criminal sexual conduct and other crimes. Even though counsel's reasons for using only two strikes constituted deficient performance, there was no prejudice since "Respondent did not present any evidence to support a finding that counsel's error resulted in a violation of Respondent's right to a trial by a competent and impartial jury"), *abrogated on other grds*, *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Tolen*, No. 1:15-CV-02503-RBH, 2017 WL 4250179, at *11 ("Even if trial counsel had requested a *Batson* hearing and made a prima facie showing, Petitioner cannot demonstrate prejudice in failing to make a *Batson* motion where there is no evidence that the State lacked a race neutral explanation and no evidence of purposeful discrimination. Petitioner has failed to establish a reasonable probability that the trial court would have found the State in violation of *Batson* if trial counsel had made a *Batson* motion. As the PCR court observed, Petitioner's jury was racially diverse. Because Petitioner has failed to demonstrate that he suffered any prejudice as a result of trial counsel's failure to make a *Batson* motion, the PCR court's rejection of that claim was not contrary to, or an unreasonable application of, clearly established federal law"), *appeal dismissed*, 733 Fed.Appx. 140 (4th Cir., Aug. 03, 2018); *United*

[4] " 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.' " *Dennis v. United States*, 339 U.S. 162, 172 (1950) (quoting *United States v. Wood*, 299 U.S. 123, 145-46 (1936).

States v. Lowery, No. CR. 8:05-524-HMH, 2008 WL 4832458, at *2 (D.S.C. Oct. 28, 2008) (" 'Other than baldly asserting that a *Batson* violation occurred in this case, [Lowery] has made no attempt to demonstrate that the jurors in his case were not impartial, or that there was any adverse effect on the trial's outcome.' Based on the foregoing, Lowery's trial and appellate counsel were not constitutionally ineffective for failing to challenge the composition of the jury. Further, Lowery has shown no prejudice") (citation omitted), *appeal dismissed*, 340 Fed.Appx. 848 (4th Cir., Aug. 12, 2009); *Jones v. Steele*, No. 4:15CV475 JCH, 2017 WL 4310268, at *2 (E.D. Mo. Sept. 28, 2017) ("[a] movant is entitled to a presumption of prejudice resulting from counsel's ineffective assistance during the jury selection process *only if* the movant can show that a biased venireperson ultimately served on the jury") (emphasis added). *See also State v. Letica,* 356 S.W.3d 157, 166 (Mo. banc 2011) (holding an erroneous ruling on a reverse-*Batson* challenge was harmless error where the ruling "merely resulted in the empaneling of an otherwise-qualified juror"); *United States v. Dawn*, 897 F.2d 1444, 1447-49 (8th Cir. 1999) (petitioner failed to make prima facie showing of *Batson* violation where prosecutor used six of seven peremptory challenges to exclude African-American venirepersons, prosecutor offered race-neutral reasons for the strikes, and defendant failed to present any other evidence of racial discrimination), *cert. denied*, 498 U.S. 960 (1990). *Cf. Strickland* 466 U.S. at 694 ("In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law"); *Hanna v. Ishee*, 694 F.3d 596, 616-17 (6th Cir. 2012) (counsel's failure to discover that a seated juror was a convicted felon was not prejudicial under *Strickland* because petitioner could not show actual bias).

Petitioner cannot show prejudice in this case for another very fundamental reason. As

discussed, the use of racially discriminatory peremptory challenges is condemned because it violates the Equal Protection Clause right of the excluded juror. *See Batson*, 476 U.S. at 97-98. *See also Flowers*, 139 S.Ct. at 2242-43; *Allen v. Hardy,* 478 U.S. at 255, (1986) ("Our holding [in *Batson*] ensures that states do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice"). Both the prosecution and the defense can make a *Batson* motion to protect the right of an improperly excluded juror, *see McCollum,* 505 U.S. at 54-55, as can both sides in a civil case. *See Edmonson,* 500 U.S. at 616.

"The right to vicariously assert a juror's equal protection claim is afforded to the parties because it is the only practical way of ensuring against discrimination in petit jury selection. Moreover, as was the case with the [*Mapp v. Ohio*, 367 U.S. 643 (1961)] exclusionary rule, the Supreme Court declined to apply *Batson* retroactively because it did not undermine the defendant's right to a fair trial. *Allen,* 478 U.S. at 258-60[.]" *Morales v. Greiner*, 273 F.Supp.2d 236, 252 (E.D.N.Y. 2003), *certificate of appealability denied*, 381 F.3d 47 (2nd Cir. 2004).

As the Court in *Morales* correctly analyzed in rejecting an identical claim,

> Because the unasserted *Batson* claim does not implicate any rights of the petitioner, it is difficult to see how the failure of petitioner's attorney to assert it constitutes "prejudice" as defined in *Strickland.* The issue bears no relation to the defendant's guilt or innocence and as such cannot undermine confidence in the verdict; nor does it raise any concern over the adversarial testing of the government's case. While *Batson* may have some incremental effect in protecting the interests of the parties in a neutral factfinder, *Allen,* 478 U.S. at 259, 106 S.Ct. 2878, there is no contention that the jury was unrepresentative or that the other procedural mechanisms in place did not ensure the jurors selected were "free from bias." *Id.* [Petitioner] cannot possibly demonstrate that the replacement of one or two admittedly impartial jurors with one or two other equally impartial jurors would have a reasonable probability of altering the verdict. There is simply no cognizable claim under *Strickland* where the ineffectiveness concerns an alleged *Batson* violation but no indication of an unrepresentative, biased, or otherwise unfair jury.

Morales, 273 F. Supp. 2d at 253.

CONCLUSION

Respondent submits that the Court should either dismiss certiorari as improvidently granted or affirm the PCR judge's denial of Petitioner's ineffective assistance of counsel claim for the foregoing reasons.

Respectfully submitted,

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