THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Honorable Doyet A. Early, Circuit Court Judge

Appellate Case No.: 2018-000065

David Lee Meggett, Petitioner,

vs.

State of South Carolina, Respondent.

BRIEF OF PETITIONER

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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 to enter a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).

STATEMENT OF THE CASE

During the June 2009 term of the Charleston County Grand Jury, Petitioner was indicted for Burglary, First Degree, and Criminal Sexual Conduct, First Degree (2009-GS-10-4829, 4830). App. p. 848. On November 8, 2010, a trial was held in front of the Honorable Kristi L. Harrington and a jury. App. p. 1. Petitioner was represented by Beattie Butler, Esquire. On November 10, 2010, Petitioner was found guilty as indicted and sentenced to a term of thirty (30) years concurrently on both charges. App. p. 848.

A timely Notice of Appeal was filed, and the appeal was perfected by Breen Stevens, Esquire. The following issues were briefed on behalf of Petitioner:

1. The trial court erred by refusing Meggett's request for time to have a comforter examined for DNA, upon which he asserts a prior consensual encounter occurred between him and the complaining witness, and which, if positive, would have discredited the complaining witness's testimony regarding their relationship and prior sexual encounters.

2. The State's reference during closing argument to a lack of evidence supporting the interpretation of the defense's theory impermissibly shifted the burden upon Meggett as an indirect comment on the defendant's right to remain silent.

3. The trial court should have directed a verdict of not guilty for the offense of first degree burglary based upon the lack of evidence regarding Meggett's intent to commit a crime at the time he entered the dwelling.

App. p. 474. On June 5, 2012, an oral argument was conducted. An Opinion affirming Petitioner's convictions and sentences was entered on June 27, 2012. *State v. Meggett*, Op. No. 4994 (S.C. Ct. App. June 27, 2012). App. p. 544. The remittitur was issued on July 13, 2012.

On June 25, 2013, an Application for Post Conviction Relief was filed. App. p. 554. The State submitted a Return on December 11, 2013. App. p. 562. On September 8,

2014, Tricia A. Blanchette filed a Motion for Discovery, which was heard by the Honorable G. Thomas Cooper, Jr., on that same date at the Charleston County Courthouse. App. p. 567. On September 29, 2014, the Honorable G. Thomas Cooper, Jr. issued an Order Substituting Counsel and Authorizing Discovery in Post Conviction Relief. App. p. 572.

On December 21, 2015, Petitioner, through counsel, amended his Application by adding the following specific allegations to his original claim of ineffective assistance of trial counsel and added the claim of ineffective assistance of appellate counsel:

1. Ineffective assistance of trial counsel for failing to properly prepare and conduct a reasonable investigation into Applicant's case prior to going to trial.

2. Ineffective assistance of trial counsel for failing to communicate with Applicant adequately and timely prior to trial regarding the State's case, specifically the DNA evidence, which resulted in counsel's failure to obtain a DNA expert and the denial of a continuance motion for the testing of "critical" evidence.

3. Ineffective assistance of trial counsel for failing to consult with Applicant on and articulate a clear defense strategy prior to and during trial. Ineffective assistance for providing the jury with the following alternate and incomplete defense theories that lead to confusion and prejudice to Applicant: 1) Applicant engaged in consensual sex with the victim, and 2) the DNA and physical evidence does not establish that sexual intercourse took place between Applicant and victim on the date in question.

4. Ineffective assistance of trial counsel for informing the court that Applicant would testify to prior sexual encounters and informing the jury during opening and closing argument that Applicant engaged in a consensual sexual encounter with victim, yet advising Applicant to not take the stand at trial to testify to such.

5. Ineffective assistance of trial counsel for failing to question victim about her knowledge of Applicant's prior profession and possible motive for the allegations.

6. Ineffective assistance of trial counsel for failing to make a reasonable argument for a directed verdict on the burglary charge.

7. Ineffective assistance of trial counsel for failing to put up a defense through witnesses and evidence.

8. Ineffective assistance of trial counsel for failing make the arguments made on direct appeal regarding the State's closing argument; thus, failing to properly preserve the issues for appeal.

9. Ineffective assistance of trial counsel for arguments made to the jury during opening and closing arguments that interjected consensual sex into the trial, help support the State's theory of the case and provided the jury with two conflicting defense theories.

10. Ineffective assistance of appellate counsel for failing to argue that Applicant had consent to be in the dwelling he was charged with burglarizing.

11. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

App. p. 576.

On April 1, 2016, Petitioner filed a Motion for Indigent Funds. App. p. 579. On April 18, 2016, a hearing was held at the Charleston County Courthouse in front of the Honorable Doyet A. Early. App. p. 594. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. At the conclusion of the hearing, Judge Early took the matter under advisement. Thereafter, Judge Early informed both parties that he intended to deny the motion and requested that the State submit a proposed Order. As was addressed on the record at the evidentiary hearing, a signed Order was not issued until November 30, 2016 and was filed on December 7, 2016. App. p. 622.

On December 7, 2016, an evidentiary hearing was conducted at the Charleston County Courthouse in front of the Honorable G. Thomas, Cooper, Jr. App. p. 624.

Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Alicia Olive, Assistant Attorney General.

At the start of the evidentiary hearing, Petitioner's counsel made a motion to verbally amend the Application to include a claim of ineffective assistance of counsel for failure to make a *Batson* challenge at trial. App. p. 632. Respondent objected. App. p. 633. After hearing from both parties and inquiring of defense counsel, the motion was granted. App. p. 634

During the evidentiary hearing, Petitioner took the stand and called the following witnesses: Bernard Kelly, Beattie Butler, Esquire, and Breen Stevens, Esquire. The State called Chad Simpson, Esquire. At the conclusion of the hearing, the court took the matter under advisement and requested proposed Orders from both parties. On September 18, 2017, an Order of Dismissal was issued by the Honorable G. Thomas Cooper, Jr. App. p. 770. Petitioner, through counsel, filed a timely Motion, Pursuant to Rule 59, SCRCP. App. p. 832. Respondent filed a Response. App. p. 839. On December 12, 2017, an Order Denying Applicant's Motion to Alter or Amend the Judgment was issued. App. p. 847.

On January 17, 2018, Petitioner, through counsel, filed a Notice of Intent to Appeal. A Petition for Writ of Certiorari and Appendices were filed on August 24, 2018. Respondent filed a Return on September 24, 2018. On April 2, 2021, the South Carolina Court of Appeals issued an Order granting certiorari as to Question 1 and denying as to Question 2 and 3, from which this Brief follows.

ARGUMENT

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

A. Standard of Review

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

B. Summary of the Evidentiary Hearing Testimony

On December 7, 2016, an evidentiary hearing was conducted at the Charleston county Courthouse in front of the Honorable G. Thomas, Cooper, Jr. App. p. 624. Applicant was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Alicia Olive, Assistant Attorney General.

At the start of the evidentiary hearing, Petitioner's counsel made a motion to verbally amend the Application to include a claim of ineffective assistance of counsel for failure to make a *Batson* challenge at trial. App. p. 632. The State objected but did not request a continuance. App. pp. 633-634. After hearing from both parties and inquiring of defense counsel, the motion to amend was granted. App. p. 634.

During the evidentiary hearing, Petitioner took the stand and called the following witnesses: Bernard Kelly, Beattie Butler, Esquire, and Breen Stevens, Esquire. The State called Chad Simpson, Esquire.

When called to the stand, Bernard Kelly explained he had been friends with Petitioner since childhood. App. p. 638. He recalled seeing on the news that Petitioner had been charged. He further recalled thinking it was "strange" that Petitioner had been charged since he had previously seen Petitioner and victim together and was introduced to victim. App. pp. 638-640, 643-644. He testified that he was not contacted by defense counsel or anyone on Petitioner's behalf prior to trial. App. p. 641. He stated that he would have been willing to discuss his interaction with Petitioner and victim with defense counsel, and he would have been willing to testify at trial.[1] App. pp. 641-642.

When Beattie Butler took the stand, he recalled his representation of Petitioner, but he could not remember how many times they met prior to trial. App. p. 645. He testified that he saw in his notes that he had needed to get phone records, which he assumed were between Petitioner and victim, but he did not know what became of it beyond the notes. App. pp. 645-646.

Regarding Mr. Kelly, Attorney Butler said his notes did not reference Mr. Kelly and he did not recall Petitioner asking him to speak to Mr. Kelly. App. pp. 646-647. When asked about the individuals he asked victim about at trial, he indicated that he did not recall why he did not locate or look into those individuals. App. pp. 174, 648-649. In response to whether he was able to locate any witnesses to establish that victim was a

[1] During cross-examination, Mr. Kelly acknowledged a 1996 arrest charge for giving false information and explained it was the result of a traffic stop. App. pp. 642-643.

squatter, Attorney Butler responded that he was not trying to establish that victim did not have a right to be in the house but that she was looking for money. App. pp. 648-649.

Turning to the agreement to not mention Petitioner's NFL career during trial, Attorney Butler stated he could not recall why he made that decision, but he could hazard a guess that he was concerned with jurors researching Petitioner and finding prior sexual misconduct allegations.[2] App. pp. 649-650. He agreed that if he could have established victim knew about Petitioner's NFL career, it would have impeached her testimony. App. pp. 183-184, 650.

Attorney Butler was directed to the transcript, which reflected that four of the State's strikes were used on African Americans, and he was asked why he did not raise a challenge pursuant to *Batson*. App. p. 10, 651. He responded that he did not have an independent recollection. App. p. 651, lns. 5-11. When asked if a *Batson* motion was a motion he typically makes in a case, he testified: "I have made them and I have declined to make them." App. p. 651, lns. 12-14.

On cross-examination, Attorney Butler again stated that he did not have a specific reason for not making a *Batson* motion. App. pp. 694, 697. When asked if the racial make-up of the jury could have had an impact on his decision, he responded: "It likely could." App. p. 696, lns. 10-19.

On redirect, Attorney Butler acknowledged that the State struck two black females that answered that they had a family member in prison (Juror #134, 214), but the State sat a white female juror with a family member in prison and on probation (Juror #274). App. pp. 10, 47-49, 53-56, 702. He further acknowledged that the State struck a

[2] On cross-examination, he testified that he was not concerned that any prior allegations would come in if Petitioner testified. App. pp. 693-694.

black male after seating Juror #274. App. pp. 10, 702-703. He stated that he could have argued that the State's race neutral reason behind its strikes was pre-textual, but he did not make a *Batson* challenge. App. pp. 703-704.

On re-cross, Attorney Butler was asked to review his notes and if there was anything "contained in those notes that would have given you a reason not to make a *Batson* motion?" App. p. 705, lns. 5-6. He responded that there was nothing in his notes to corroborate his prior testimony that a reason could be getting a worse jury. App. p. 705, lns. 7-8. He further responded: "I can't tell you that I went through the thought process of noticing that the State had used for four or five strikes on African-Americans and, therefore, I could make a *Batson* motion, but chose not to, because I liked the jury. I can't say that I did that. But that could be a reason why I might not have." App. p. 705, lns. 9-14.

When asked about his motion for a continuance for time to conduct DNA testing of a comforter, he explained that he thought he would get the continuance. App. pp. 12-17, 657-659. He indicated that he told Petitioner's family to secure the comforter, but he did know if it was secured or ever made available for testing. App. pp. 659-660. Attorney Butler confirmed that it would have helped show the critical nature of getting the comforter tested if he had informed the trial court that Petitioner may not take the stand. App. pp. 660-662.

Attorney Butler acknowledged that he stated the following to the trial court: "The only issue in the matter to be tried today is whether the sex that occurred on the incident date was consensual or by force." App. pp. 11, lns. 17-19, 652. He also acknowledged that he informed the trial court that evidence of sexual intercourse on several prior

occasions would be introduced through Petitioner's testimony.[3] App. pp. 11, lns. 20-24, 652-653, 662-663. He explained that he planned for Petitioner to testify and he was surprised when the trial judge did not give them additional time to discuss whether or not Petitioner would testify. App. pp. 273-275, 376-378, 653-654. He recalled the decision was made late in trial for Petitioner to not take the stand. App. pp. 654-655. On cross-examination, he stated that it was Petitioner's decision whether or not to take the stand, but the decision was made under his advice. App. pp. 691-692.

When asked why he went into the details of night in question during his opening argument if it was still an open question if Petitioner would testify to those details, he responded that he thought he knew for certain that Petitioner was going to testify. App. pp. 667-668. He made it clear that he would not have gone into those details if he had known Petitioner would not testify. App. pp. 668-670, 679-680. He said he found Petitioner's account to be credible and believable. App. pp. 669-670.

Regarding the matters of defense strategy and his arguments before the jury, Attorney Butler conceded that he could see how it could be interpreted that his trial strategy shifted from consensual sex to a lack of DNA evidence that sexual intercourse occurred. App. pp. 656-657. He insisted that he stayed the course with consensual sex and did not abandon that defense. App. pp. 656, 673, 683-684. He also explained that he did not find the defenses to be mutually exclusive, but he did agree he could have probed the lack of DNA evidence harder. App. pp. 680-681.

[3] Regarding the motion to introduce evidence of prior sexual encounters, Attorney Butler reviewed the motion and explained that the court's ruling appears "kind of confusing." He explained that he understood that Petitioner could testify to prior sexual encounters with victim. App. pp. 652-653, 663-664.

In closing, the State argued: "And in the opening statement Mr. Butler told you, yeah, they had sex on that bed. That's been consented to." App. p. 424, lns. 20-22. When asked about the State's argument, he said he guessed his opening corroborated victim's testimony. App. pp. 681-682. Later on in closing argument, the State concluded: "The defense in their opening gave a story that completely defies all common sense that, oh, they had consexual (sic) – consexual sex – consensual sex on the bed, he stops midway through then he assaults her. Defies common sense." App. p. 426, lns. 20-24. After reviewing the argument, Attorney Butler testified that he should have objected to the State's comments. When asked if he thought he opened the door to the comments, he responded – "Well, that's the question isn't it?" – he went on to testify that he either opened the door or failed to properly object. App. pp. 682-684, 690. He said it was on him if he should have objected. App. p. 690.

Turning to the burglary charge, Attorney Butler could not recall why he did not go further into the consent prong of the burglary charge to the jury or in his directed verdict argument. App. pp. 102, 373, 375, 685-686.

When Breen Stevens, Esquire, took the stand he acknowledged that he was previously at the Office of Appellate Defense and handled Petitioner's direct appeal. App. p. 706. He indicated that he was currently working as a public defender. App. p. 714. He went through the process he utilized to identify and brief the issues presented to the appellate court. App. pp. 706-707.

He indicated that one of the first issues he always would check for is a "*Batson* issue." App. p. 707. Referring to the transcript, he indicated that four out of five strikes used by the State were on African Americans, so he thought it was important to keep an

eye on the basis for that – to see if there was a challenge on race or gender raised by the defense. App. pp. 708-709. He shared his personal like of a good *Batson* issue on appeal. When asked to address the viability of the issue on appeal if Attorney Butler would have made a *Batson* challenge, he responded positively and explained the argument available since the State struck two African American female jurors and sat a similarly situated white female juror. App. pp. 707-710.

Turning to the continuance issue that was preserved and raised on appeal, he stated that he agreed that the DNA evidence was critical, and he agreed that Petitioner was prejudiced when the trial court did not allow time to get the testing completed. App. pp. 711-712. When asked if he saw a "conflict" between Attorney Butler's opening regarding consensual sex and later argument regarding lack of evidence of sexual intercourse, he responded that he thought it was a daunting task in a CSC case to argue consent when the victim is a devout lesbian, especially in a case where the client did not testify. App. pp. 712-714. He testified that his job as an appellate defender is easier when there is a clear trial strategy going forward, which was not the case here. App. pp. 713-714. He indicated that he would have raised the issue regarding the State's comments about what Attorney Butler said in opening, but he opined that Attorney Butler likely opened the door to the State's argument. App. pp. 715-717.

When Petitioner took the stand, he recalled meeting with Attorney Butler two times, an initial meeting and a meeting informing him about the upcoming trial. App. pp. 721-722. He requested that Attorney Butler obtain victim's phone records because the records would show victim contacted him about coming over on the night in question. App. pp. 721-723, 746-748. He also requested that Attorney Butler contact potential

witnesses including Bernard Kelly, who had seen him with the victim, and the individuals he knew as Spider and Pirate, who were regularly at victim's house. App. pp. 723-725.

He testified about playing in the NFL for ten years. App. pp. 725-726. He told counsel victim was aware of his NFL career since she had been out with him when people would bring up his NFL career. App. pp. 725-727. He thought it could be part of her motive against him. App. App. p. 727. He recalled Attorney Butler telling him he did not intend to go into his NFL career at trial since the juror may think negatively about the victim being young versus him being a NFL player. App. p. 728.

Petitioner was surprised that counsel first came to him on the Saturday before trial to discuss the DNA evidence, which counsel admitted in his motion for a continuance. App. p. 12, 728. Petitioner informed counsel that there were two comforters with potential DNA evidence of prior sexual intercourse with victim. App. p. 730. Even though counsel informed the trial court that he knew where the comforter evidence was located, Petitioner said counsel did not do anything to secure it or preserve it. App. p. 730. He testified that he asked PCR counsel to locate the comforters without success. App. p. 730.

At the beginning of trial, Attorney Butler informed the court: "I had reviewed all the evidence, and there was no probative DNA evidence at all that point from the rape protocol kit." App. pp. 13, lns. 10-13, 731-732. When asked about this statement, Petitioner explained that this conclusion was not conveyed to him. App. p. 732. He explained that a proper understanding of the DNA evidence prior to trial would have factored into what strategy to pursue and whether he should take the stand. App. pp. 732-738.

Without a proper understanding of the DNA evidence prior to trial, Petitioner explained that he understood the defense to be that consensual sexual intercourse occurred on the night in question. App. p. 732-734. He understood that he was going to take the stand and testify about prior consensual sexual encounters with victim. App. pp. 734-736. He did not agree with victim's testimony regarding one prior sexual encounter. App. p. 736.

While on the stand, he recounted the details of the night in question, and he said he was willing to testify and anticipated he would testify at trial. App. pp. 734-738, 740-745. He described meeting with Attorney Butler and seven to eight people during trial about whether he should take the stand. He remembered a majority of the people saying he should not testify. He recalled Attorney Butler advising him not to take the stand but leaving the decision to him. App. pp. 736-738. He was adamant that if counsel had explained that he had already told the jury the details of the night and without Petitioner's testimony the State could argue that the opening argument was not supported by the evidence presented at trial, he would have taken the stand. App. pp. 738-739.

After Petitioner rested, Chad Simpson, Esquire, was called to the stand by Respondent. App. p. 755. He recalled being involved in the prosecution of Petitioner's case. App. p. 755. He remembered being involved in *voir dire* and jury selection, but he specifically did not recall striking the jury. App. p. 755. He explained how he unsuccessfully attempted to pull information from the file regarding jury selection, and any testimony he offered would be about his "typical process and not his specific recollection from this case." App. p. 756, lns. 1-20. He shared some of the information he would typically consider when exercising strikes. App. p. 757. When asked if he would

have been prepared to respond to a *Batson* challenge, he indicated that would have but he had "no recollection whatsoever of the basis in my mind at the time for striking the jury." App. p. 758, lns. 13-19. Based upon his general practice, he responded that he would have had a race neutral reason for striking the jurors. App. p. 759, lns. 5-8.

C. Argument

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238, 467 S.E.2d 926 (1996); *see also Cherry v. State*, 300 S.C. 238, 386 S.E.2d 624 (1989); Rule 71.1(e), SCRCP.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance

must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18.

Petitioner submits that the lower court erred in finding that counsel was not deficient nor was there resulting prejudice when counsel failed to enter a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). Petitioner submits that the lower court'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. As a result, the evidence in the record does not support the lower court's ruling and must be reversed.

At the evidentiary hearing, trial counsel was directed to the transcript, which reflected that four of the State's strikes were used on African Americans, and he was asked about not making a *Batson* challenge. App. p. 10, 651. Attorney Butler responded that he did not have an independent recollection as to why he did not make a motion. App. p. 651. When asked if a *Batson* motion was a motion he typically makes in a case, he testified: "I have made them and I have declined to make them." App. p. 651, lns. 12-14.

On cross-examination, Attorney Butler again stated that he did not have a specific reason for not making a *Batson* motion. App. pp. 694, 697. When asked if the racial make-up of the jury could have had an impact on his decision, he responded: "It likely could." App. p. 696, lns. 10-19.

On redirect, Attorney Butler acknowledged that the State struck two black females that answered that they had a family member in prison (Juror #134, 214), but the

State sat a white female juror with a family member in prison and on probation (Juror #274). App. pp. 10, 47-49, 53-56, 702. He further acknowledged that the State struck a black male after seating Juror #274. Transcript pp. 10, 702-703. He stated that he could have argued that the State's race neutral reason behind its strikes was pre-textual, but he did not make a *Batson* challenge. App. pp. 703-704.

On re-cross, Attorney Butler was asked to review his notes and if there was anything "contained in those notes that would have given you a reason not to make a *Batson* motion?" App. p. 705, lns. 5-6. He responded that there was nothing in his notes to corroborate his prior testimony that a reason could be getting a worse jury. App. p. 705, lns. 7-8. He further responded: "I can't tell you that I went through the thought process of noticing that the State had used for four or five strikes on African-Americans and, therefore, I could make a *Batson* motion, but chose not to, because I liked the jury. I can't say that I did that. But that could be a reason why I might not have." App. p. 705, lns. 9-14.

When Breen Stevens, Esquire, took the stand he acknowledged that he was previously at the Office of Appellate Defense and handled Applicant's direct appeal. App. p. 706. He indicated that he was currently working as a public defender. He went through the process he utilized to identify and brief the issues presented to the appellate court.

He indicated that one of the first issues he always would check for is a "*Batson* issue." App. p. 707. Referring to the transcript, he indicated that four out of five strikes used by the State were on African Americans, so he thought it was important to keep an eye on the basis for that – to see if there was a challenge on race or gender raised by the

defense. App. pp. 708-709. He shared his personal like of a good *Batson* issue on appeal. When asked to address the viability of the issue on appeal if Attorney Butler would have made a *Batson* challenge, he responded positively and explained the argument available since the State struck two African American female jurors and sat a similarly situated white female juror. App. pp. 707-710.

In response, Respondent called Chad Simpson, Esquire, to the stand. App. p. 755. He recalled being involved in the prosecution of Petitioner's case. App. p. 755. He remembered being involved in *voir dire* and jury selection, but he specifically did not recall striking the jury. App. p. 755. He explained how he unsuccessfully attempted to pull information from the file regarding jury selection, and any testimony he offered would be about his "typical process and not his specific recollection from this case." App. p. 756, lns. 1-20. He shared some of the information he would typically consider when exercising strikes. App. p. 757. When asked if he would have been prepared to respond to a *Batson* challenge, he indicated that would have but he had "no recollection whatsoever of the basis in my mind at the time for striking the jury." App. p. 758, lns. 13-19. Based upon his general practice, he responded that he would have had a race neutral reason for striking the jurors. App. p. 759, lns. 5-8.

In *State v. Inman*, 409 S.C. 19, 25-27, 760 S.E.2d 105, 108-09 (2014), the South Carolina Supreme Court explained:

> "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a [juror] on the basis of race or gender." *McCrea v. Gheraibeh*, 380 S.C. 183, 186, 669 S.E.2d 333, 334 (2008) (citing *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)); *see also Batson*, 476 U.S. at 89. The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection

Clause. *See Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

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

State v. Giles, 407 S.C. 14, 17, 754 S.E.2d 261, 263 (2014) (internal citations omitted); *see also Snyder v. Louisiana*, 552 U.S. 472, 476-77, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (*quoting Miller-El v. Dretke*, 545 U.S. 231, 277, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)).

Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible. *Purkett*, 514 U.S. at 768; *Randall v. State*, 716 So. 2d 584, 588 (Miss. 1998). The explanation must only be "clear and reasonably specific such that the [party asserting the *Batson* challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it." *Giles*, 407 S.C. at 21, 754 S.E.2d at 265; *see., e.g., id.* at 17, 754 S.E.2d at 262, 265-66 (finding that a defendant's explanation that he "did not feel the [struck] jurors were right for the jury," while "technically, semantically and intellectually racially neutral," would not allow the circuit court to "assess the plausibility of the proffered reason for striking the potential jurors").

In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the *Batson* challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. *State v. Green*, 655 So. 2d 272, 290 (La. 1995); see also *Batson*, 476 U.S. at 93-94 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence). During step three, the party asserting the *Batson* challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. *Edwards*, 384 S.C. at 508-09, 682 S.E.2d at 822; see also *Haigler*, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party proves that the "originally neutral reason was . . . a pretext because it was not

applied in a neutral manner." *State v. Oglesby*, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989).

Here, Petitioner is African American male, victim is a white female and four of the State's five strikes were utilized on African Americans. As was acknowledged and addressed by both trial and appellate counsel at the evidentiary hearing, the State struck two African American females, who responded that they had a family member incarcerated (Juror # 134, 214). App. pp. 10, 53, 55. Thereafter, the State sat a similarly situated white female (Juror #274), who had several family members incarcerated. App. pp. 10, 47-49. With strikes remaining after seating Juror #274, the State struck an African American male (Juror #183). App. p. 10. Trial counsel did not enter a *Batson* motion.

In the Order of Dismissal, the lower court failed to address the three step inquiry outlined above before finding "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." App. p. 826. The record, specifically counsel's own testimony, does not support a finding that counsel's failure to enter a *Batson* objection was sound trial strategy. Furthermore, it was error for the lower court to not address the three-step inquiry outlined above. Instead of applying the appropriate law, the lower court focused on the speculative testimony offered by Mr. Simpson. Petitioner submits that if the lower court had applied the three step inquiry and properly considered the testimony and evidence in the record, then the lower court would have found that counsel was ineffective and prejudice resulted.
In the absence of the lower court properly applying the three step inquiry, it is imperative for this Court to apply it. Without properly applying the three step inquiry, the lower

court made a conclusory finding that the "State exercised its preemptory challenges with both an awareness of and sensitivity to the requirement of *Batson*." App. p. 825.

Regarding the first step of the inquiry, counsel did not have an independent recollection of why he did not enter a *Batson* objection and acknowledged that there was a basis to do so. Additionally, appellate counsel immediately spotted the viability of a *Batson* motion upon reviewing the strikes exercised by the State. Again, Petitioner is an African American mail, victim is a white female, and the State exercised four of its five strikes on African Americans. Based upon the record, Petitioner urges this Court to find that the lower court erred in finding that counsel would have made a *Batson* motion if he deemed it viable when counsel repeatedly testified that he did not have an independent recollection or notes to establish why he did not make a *Batson* motion. Clearly, the record supports the basis for the entry of a *Batson* motion due to the race of the jurors struck.

In step two, the State merely denying a discriminatory motive would have been insufficient; however the State would have only needed to present a race or gender neutral reason for the strike. *State v. Casey*, 325 S.C. 44, 451-452, 481 S.E.2d 169, 171-172 (Ct. App. 1997). As stated, the lower court did not address nor did the Mr. Simpson offer a race neutral reason for the strikes of the African American jurors. Instead, the lower court based its ruling upon Mr. Simpson's testimony regarding his general practices in striking a jury. The record does not support a finding that the State had a race neutral reason. Nevertheless, in joining the lower court in speculation, even if a reason was offered the ultimate burden rests with the moving party in step three of the analysis.

Turning to the third step, to prove purposeful discrimination, "[t]he 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." *State v. Stewart*, 413 S.C. 308, 314, 775 S.E.2d 416, 419 (Ct. App. 2015); *see State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999). "Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E2d 805, 810 (2001). Here, if a comparative juror analysis would have been conducted under step three the defense could have shown that two African American females were struck, who responded that they had a family member incarcerated (Juror # 134, 214), while a similarly situated white female (Juror #274) was sat, who had several family members incarcerated. App. pp. 10, 47-49, 53-55. Petitioner submits that the transcript provides "direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race." *State v. Edwards*, 384 S.C. 504, 508-09, 682 S.E.2d 820, 822 (2009); *see also Haigler*, 334 S.C. at 629, 515 S.E.2d at 91. Therefore, if counsel had made the motion, there was evidence in the record to prevail on each step of the *Batson* analysis at trial and/or appeal.

As a result, Petitioner submits that the conclusory findings of the lower court based upon the speculative testimony of Mr. Simpson, discounting the testimony of Mr. Stevens and relying upon the speculative testimony extracted from trial counsel on cross are not supported by the record. The lower court must be reversed since the record supports a finding that counsel could have prevailed on a *Batson* motion and that counsel did not have an independent recollection or notes to substantiate why did failed to do so.

Interestingly, trial counsel informed the court at sentencing that Petitioner would not be speaking under his advice since "there's always the chance of an appeal," and he testified at the evidentiary hearing he found the Petitioner's version of events to be believable and credible. App. p. 467, lns. 11-14, pp. 669-670. Unfortunately, he did not preserve a *Batson* challenge for that chance on appeal nor ensure at the trial level the court addressed whether the State exercised purposeful discrimination in striking the jury in a case involving a white victim and African American defendant. Counsel's inaction is especially prejudicial considering the jury had to receive an *Allen*[4] instruction before reaching a guilty verdict. App. p. 454.

As a result, Petitioner urges this Court to find that the lower court clearly erred in denying relief from counsel's prejudicial inaction that resulted in his rights under the Equal Protection Clause of the Fourteenth Amendment not being protected.[5] Petitioner requests that this Court find that counsel rendered ineffective assistance that prejudiced Petitioner such that a new trial, with a jury that does not violate his rights under the Equal Protection Clause, is warranted.

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[4] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154 (1896).

[5] It must be noted that defense counsel did not testify that he consulted with Petitioner regarding the make-up of the jury before declining to make a *Batson* motion. The record establishes that Petitioner did not waive his right, via consultation with defense counsel and/or informed decision, to a jury that did not violate the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

As is argued in detail above, Petitioner would respectfully request that this Court reverse the denial of relief by the lower court.

Respectfully submitted,

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