No._____

IN THE
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Petitioner,
vs.

RAYMOND LEWIS YOUNG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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September 14, 2018

QUESTION PRESENTED FOR REVIEW

I.

Whether, upon reversing Respondent's conviction on grounds that: "The trial court erred in failing to conduct a proper analysis under the third step of a *Batson* review," the South Carolina Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court, and whether the South Carolina Supreme Court improperly allowed that decision to stand by declining to conduct a discretionary review of the Court of Appeals' decision despite the existence of these conflicts.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of South Carolina, respectfully petitions for a writ of certiorari to review both the judgment and relief granted by the South Carolina Court of Appeals and the South Carolina Supreme Court's refusal to exercise discretionary review of that judgment.

OPINION AND ORDERS BELOW

The South Carolina Court of Appeals' unpublished opinion, Op. No. 2017-UP-426 (filed November 15, 2017), is reprinted in the Appendix. (App.pp.2-11). The South Carolina Court of Appeals' order denying Petitioner's petition for rehearing is also reprinted in the Appendix. (App.pp.12-13). Finally, the South Carolina Supreme Court's order denying Petitioner's petition for writ of certiorari is reprinted in the Appendix. (App.pp.14-15).

JURISDICTION

The judgment of the South Carolina Court of Appeals was entered on November 15, 2017 and did not rest on an adequate and independent state law ground. The order of the South Carolina Supreme Court denying Petitioner's petition for writ of

certiorari was entered on April 19, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and Sup. Ct. R. 10(c).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the Constitution of the United States provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

On November 15, 2017, the South Carolina Court of Appeals issued an unpublished opinion that reversed Appellant's convictions and sentences for seven counts of attempted murder, one count of second degree assault and battery by mob, and one count of conspiracy, and remanded for a new trial. *State v. Young*, Op. No. 2017-UP-426 (S.C. Ct. App. filed November 15, 2017) (App.pp.2-11). In its unpublished opinion, the Court of Appeals found the

trial court erred in denying Respondent's *Batson v. Kentucky*, 476 U.S. 79 (1986), motion. Specifically, the Court of Appeals concluded: "The trial court erred in failing to conduct a proper analysis under the third step of a *Batson* review." It found: "Rather than considering the State's failure to articulate a race neutral reason for its disparate treatment of the jurors, the [trial] court seemingly found only that the reason given in the first place was race neutral."

Petitioner's petition for rehearing was denied by the South Carolina Court of Appeals on January 18, 2018, and Petitioner's petition for a writ of certiorari was denied by the South Carolina Supreme Court on April 19, 2018. (App.pp.12-15).

Petitioners contend the South Carolina Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court and now ask this Court to issue a writ of certiorari to review both the judgment of the South Carolina Court of Appeals and the South Carolina Supreme Court's refusal to exercise discretionary review of that judgment.

STATEMENT OF THE CASE

Respondent was indicted at the May 2012 term of the grand jury for Greenville County, South Carolina, for one (1) count of second-degree assault and battery by mob, one (1) count of possession of a

weapon during the commission of a violent crime, one (1) count of conspiracy, and seven (7) counts of attempted murder. Respondent was represented by John Abdalla, Esquire, of the Greenville County Bar. Petitioner was represented by Assistant Solicitor Katrina Salisbury of the Thirteenth Circuit Solicitor's Office. On January 7-11, 2013, Respondent and three of his eight codefendants proceeded to a joint trial by jury pursuant to which all four were found guilty of the seven counts of attempted murder and the single count of second-degree assault and battery by mob. Respondent was also found guilty of conspiracy but was found not guilty of possession of a weapon during the commission of a violent crime. Respondent was sentenced by the Honorable Edward W. Miller to thirty (30) years' concurrent imprisonment for each count of attempted murder, five (5) years' concurrent imprisonment for conspiracy, and ten (10) years' consecutive imprisonment suspended upon the service of five (5) years' probation for second-degree assault and battery by a mob. He timely filed a notice of intent to appeal his conviction and sentence and the parties submitted briefs addressing the five issue raised by Respondent on direct appeal.

On November 15, 2017, the South Carolina Court of Appeals issued an unpublished opinion that reversed Respondent's conviction and sentences and remanded for a new trial. *State v. Young*, Op. No. 2017-UP-426 (S.C. Ct. App. filed November 15, 2017) (App.pp.2-11). Petitioner submitted a petition for rehearing on November 30,

2017, and Respondent filed a return on December 18, 2007. By order filed January 18, 2018, the South Carolina Court of Appeals denied the petition for rehearing. (App.pp.12-13). Petitioner submitted a petition for a writ of certiorari to the South Carolina Supreme Court and in an order filed April 19, 2018, the petition was denied. (App.pp.14-15).

STATEMENT OF FACTS

As summarized in the prosecutor's opening statement at trial, in the early morning hours of July 17, 2011, a group of friends was hanging out in the parking lot of the Lil' Cricket gas station on Whitehorse Road in Greenville County, South Carolina. They gathered at the Lil' Cricket following a trip to the hospital where they had visited a friend who was shot earlier that night during a fight at the nearby Red Planet nightclub. Unbeknownst to the friends, eight young men had devised a plan to retaliate for the fight at the Red Planet. Respondent, his three codefendants at trial and four other codefendants parked behind the Lil' Cricket, approached the front of the gas station on foot, drew firearms, and opened fire. Seven people were shot as the victims ducked and ran for cover during the attack. Before the commencement of the trial, four of the eight original codefendants entered guilty pleas to charges associated with the shooting.

After accepting the pleas, the trial began and the trial court conducted jury qualification and selection

proceedings. As part of jury qualification, the trial court asked if any member of the jury panel was related by blood or marriage, or if they had a business, personal, or social relationship with any of the four co-defendants, the seven shooting victims, or the more than 75 potential witnesses. None of the jurors responded in the affirmative. Similarly, there was no response when the judge asked if any juror knew of any reason he or she should not serve or could not be fair and impartial. The trial court then proceeded with jury selection, with Petitioner and counsel for Booker, who was elected by the four codefendants to act on their behalf, exercising peremptory strikes until twelve jurors and two alternates were seated. Juror 106, Cynthia Foxx, a white female, was seated fourth. Juror 281, Valisa Smith, a black female, was struck by the State after the ninth juror was seated. Juror 81, Anatolya Dodd, a black female, was struck by the State after the eleventh juror was seated. Juror 215, Lee Montgomery, a black male, was struck by the State after the twelfth juror was seated, during the selection of the two alternates. At the conclusion of jury selection, the defendants advised the trial judge they had a matter regarding jury selection they would like to take up outside the presence of the jury.

The jury was excused and the defendants made an objection to the jury selection pursuant to *Batson*, pointing out that out of the six peremptory challenges it exercised, Petitioner struck three black individuals. The trial court noted three black jurors had been seated on the jury, Juror 293, Juror 308,

and Juror 18, but acknowledged Juror 281 was an African-American struck by the State with its fourth challenge, Juror 81 was an African-American struck by the State with its fifth challenge, and Juror 215 was an African-American struck by the State when selecting the first alternate. The defendants said they were challenging all three strikes in their *Batson* motion. The prosecutor proceeded to give the following explanations for her strikes:

> With respect to Juror 281, Ms. Smith, I noted during jury qualifications that Ms. Smith expressed some concerns regarding her ability to withstand the duration of the trial. She indicated she had a substantial number of health issues and wanted to be excused based on those issues. That's my basis for striking Ms. Smith.
>
> Ms. Dodd, is Juror 81, and my notes indicate that Ms. Dodd lives on Prancer Avenue in Greenville County. It's my understanding that some of the witnesses in this case live in the area of Prancer Avenue and I was quite simply concerned that juror may become family[sic] with the witnesses even though she may not recognize their names off hand. That's my basis for striking her.
>
> And then Mr. Montgomery lives at

> Piedmont and I have the same reservations. There are many of these witnesses that live in the Piedmont area and have residences in Piedmont and again just out of an abundance of caution, I was concerned that he may be familiar with some of the witnesses in this case and decided that another alternate may be a better choice.

The defendants responded that they did not believe these to be satisfactory racially neutral reasons because during voir dire the court had named all potential witnesses and already gave the jurors the opportunity to identify any they knew.

The trial judge disagreed, said the prosecutor had given race neutral reasons for her strikes, and said the defendants were going to have to show something more to prove purposeful discrimination. Counsel for Sadler [Thomas Quinn, Esquire], who had not been elected to speak on behalf of all four codefendants, then stated: "One thing I would point out to the Court is Juror 106, No 12 on the list, Ms. Fox [sic]. So the extent that they are striking the jurors in Piedmont, Juror No. 106, Cynthia Fox [sic], it was a white female and it provides her address as 13 Piedmont Avenue in Piedmont, no less, and yet she was not struck by the State." The prosecutor replied:

> Your Honor, I just didn't indicate on my list that that was an address that I had some concern about. So[me] I do

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

Ultimately, the trial court ruled:

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

After addressing other pretrial matters, the jury was sworn and the case proceeded to trial. Petitioner presented testimony from more than

twenty-five witnesses including the seven shooting victims, several additional fact witnesses, numerous police investigators and forensic experts, and three of Respondent's co-defendants. Each defendant chose not to testify in his own defense. Following a brief charge conference, Petitioner and each defendant gave a closing argument and the trial court instructed the jurors on the relevant law. The twelve member jury found Respondent guilty of the seven counts of attempted murder and the single count of second-degree assault and battery by mob. Respondent was also found guilty of conspiracy but was found not guilty of possession of a weapon during the commission of a violent crime.

Although there is no mention in the trial transcript of a juror being excused during trial and being replaced with an alternate, the jury "Random Strike Sheet," which was included in the record before the state courts, includes small handwritten notations indicating Juror 20, Melissa Baker, who was seated as the seventh juror, was excused at some point on January 8, 2013, the second day of the trial proceedings, and was replaced by Juror 41, Alcestis Thompson, who had been selected as the first alternate. These notations were not discovered by Petitioner until after the South Carolina Supreme Court denied Petitioner's petition for a writ of certiorari to the South Carolina Court of Appeals. Consequently, the alternative argument made to the state courts, that "any error by the trial court in regard to Juror 215 was entirely harmless," is admittedly not valid and is therefore not being

raised in the petition now being submitted to this Court.

REASON CERTIORARI SHOULD BE GRANTED

I. In reversing Respondent's conviction on grounds that: "The trial court erred in failing to conduct a proper analysis under the third step of a *Batson* review," the South Carolina Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court, and the South Carolina Supreme Court allowed that decision to stand by declining to conduct a discretionary review of the Court of Appeals' decision despite the existence of these conflicts.

In its unpublished opinion, the South Carolina Court of Appeals found the trial court erred in denying Respondent's *Batson* motion. It held: "The trial court erred in failing to conduct a proper analysis under the third step of a *Batson* review." Specifically the appellate court found: "Rather than considering the State's failure to articulate a race neutral reason for its disparate treatment of the jurors, the court seemingly found only that the

reason given in the first place was race neutral." Petitioner submits the South Carolina Court of Appeals decided this important and incredibly consequential federal question in a way that conflicts with relevant and controlling decisions of this Court, including *Foster v. Chatman*, 136 S.Ct. 1737 (2016); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005); and *Felkner v. Jackson*, 562 U.S. 594 (2011).

Particularly, the decision conflicts with this Court's decisions in two critical ways. First, rather than giving the deference this Court requires an appellate court give to the trial court's ruling on the issue of discriminatory intent, the South Carolina Court of Appeals appears to have ignored that ruling and improperly engaged in its own *Batson* analysis, as if it were the trial court making the initial determination. The appellate court failed to properly recognize the trial court's pivotal role in evaluating *Batson* claims, which turns largely on an evaluation of the credibility of the prosecutor in determining if purposeful discrimination was shown. Second, rather than consulting the totality of the facts in the record and all of the circumstances that bear upon the issue of racial animosity as required by this Court, the South Carolina Court of Appeals focused solely on the prosecutor's initial articulation of the proffered reasons for the challenged strikes without considering either her later, more specific explanation, or the compelling facts and circumstances in the record which support the trial court's ultimate conclusion during the third stage of

the *Batson* analysis that it "[did not] see any discriminatory intent."

The South Carolina Court of Appeals misapplied well-established federal precedent in reversing the trial court's *Batson* determination on the issue of discriminatory intent and remanding Respondent's conviction and sentence for a new trial. That order should be reversed and this case should be remanded to the South Carolina Supreme Court for further proceedings consistent with *Batson* and its progeny.

A. *Batson* Framework

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a juror on the basis of race. *Batson,* 476 U.S. at 89. Indeed, "the 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Foster*, 136 S.Ct. at 1747 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)). This Court has set forth a three-step inquiry for evaluating whether a prosecutor executed a peremptory challenge in a manner which violated the Equal Protection Clause. *Purkett v. Elem,* 514 U.S. 765, 767-68 (1995). "First, a defendant must make a prima facie showing that a peremptory challenged has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown

purposeful discrimination." *Snyder*, 552 U.S. at 476-77 (internal quotation marks and brackets omitted). The ultimate burden always rests with the opponent of the strike to prove purposeful discrimination. *Purkett,* 514 U.S. at 768. Thus, step three of the above analysis requires the court to carefully evaluate whether the party asserting the *Batson* challenge has *proven* racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. *Id.* (emphasis added); *see also Batson,* 476 U.S. at 93-94 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence).

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

of these witnesses that live in the Piedmont area."

Although the trial court invited Respondent and his codefendants to attempt to make a showing of purposeful discrimination as to each of the three strikes, they chose to focus solely on Petitioner's strike of Juror 215, Mr. Montgomery. Counsel for Sadler stated: "One thing I would point out to the Court is Juror 106, No 12 on the list, Ms. Fox [sic]. So the extent that they are striking the jurors in Piedmont, Juror No. 106, Cynthia Fox [sic], it was a white female and it provides her address as 13 Piedmont Avenue in Piedmont, no less, and yet she was not struck by the State." To the extent Respondent argues his challenge to Juror 215 encompassed a challenge to Juror 81 because the prosecutor's race neutral reasons were both based on their home addresses, his argument fails because he never argued to the trial judge that Prancer Avenue is in Piedmont. This is likely because Prancer Avenue is not in Piedmont, and instead is located ten miles north.

As to Juror 215, the prosecutor's explanation initially appeared to be pretext because Ms. Foxx, a white woman from Piedmont, was seated on the jury while Mr. Montgomery, an African-American man from Piedmont, was later struck. The inquiry at Respondent's trial, however, continued when the trial judge asked the prosecutor for further explanation. She replied:

> Your Honor, I just didn't indicate on my list that that was an address that I

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

While necessarily observing the prosecutor's demeanor when she gave this explanation, the trial court found it did not "see a discriminatory intent" in the explanation. This implicit credibility finding was a large part of the basis upon which the trial court grounded its conclusion that the State's reason given for striking Juror 215 was not pretext. Additionally, the totality of the facts and circumstances present in the record supported the decision.

B. Deference to the Trial Court

"On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless clearly erroneous." *Snyder*, 552 U.S. at 477. Recently, in *Foster*, this Court held the prosecutor's strikes of two black prospective jurors violated Foster's rights under *Batson* and reversed the Georgia Supreme Court's rejection of his *Batson* claim. However, even after reviewing a record rife with evidence of discriminatory intent, before this Court took the drastic action of reversing Foster's conviction, it emphasized that the third step of the

Batson analysis "turns on factual determinations, and, 'in the absence of exceptional circumstances,'" the appellate court must defer to the trial court's factual findings "unless [it] concludes they are clearly erroneous." *Foster*, 136 S.Ct. at 1747 (quoting *Snyder*, 552 U.S. at 477).

Similarly, in *Miller-El*, albeit under a more stringent federal habeas standard of review, this Court placed significant weight on the trial court's factual findings as to the nonpretextual nature of the state's race neutral explanations for its strikes. *Miller-El*, 545 U.S. at 240. It ultimately held the state court's conclusion that the prosecutors' strikes of two black jurors were not racially determined was shown to be wrong to a clear and convincing degree and therefore warranted reversal the Fifth Circuit Court of Appeals' denial of habeas corpus relief, but it did so only because of the extensive evidence in the record demonstrating pretext, not by ignoring the appropriate deference to be given to the trial court in finding no discriminatory intent. *Miller-El*, 545 U.S. at 240-66.

This Court's requirement for deference at the third stage of a *Batson* analysis stems in part from its recognition that: "The trial court has a pivotal role in evaluating *Batson* claims." *Snyder,* 552 U.S. at 477. Indeed, a *Batson* determination "turns largely on an 'evaluation of credibility.'" *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (quoting *Snyder*, 552 U.S. at 477). This Court has explained: "[s]tep three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and 'the best evidence

[of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.'" *Snyder*, 552 U.S. at 477. "The trial court's determination [regarding demeanor, credibility, and discriminatory intent] is entitled to 'great deference' and 'must be sustained unless it is clearly erroneous.'" *Felkner*, 562 U.S. at 598.

In Respondent's case, the trial judge's *Batson* determination was succinct and clear: "I don't see a discriminatory intent inherent in the proponent's explanation." That determination necessarily involved an evaluation of the prosecutor's credibility and a finding that she was credible. That credibility finding must be given great deference and may not be set aside unless clearly erroneous. Because the trial court was in the best position to evaluate demeanor and credibility, its finding should control unless sufficient evidence was either presented by the opponent of the strike or was in the record before the trial court, and demonstrates the credibility finding to be clearly erroneous. The denial of Respondent's *Batson* motion was simply not reversible error and did not warrant the drastic decision to reverse Respondent's conviction, particularly where the prosecutor gave a more detailed and specific explanation of the reason for her strike after the inference of pretext was raised. Similar to the state appellate court's decision reviewed in *Felkner*, the trial court's determination was "plainly not unreasonable" under the circumstances of Respondent's case. *Felkner*, 562 U.S. at 598. Consequently, the South Carolina Court of Appeals' reversal is, as was the Court of

Appeals for the Ninth Circuit's reversal in *Felkner*, "as inexplicable as it is unexplained." *Id.* It should similarly have been reversed by the South Carolina Supreme Court and Petitioner now asks that this Court reverse and remand for further proceedings.

C. Consideration of all Facts and Circumstances

"[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478. Thus, while it is the trial court's duty to determine if the defendant has established purposeful discrimination, a defendant may rely on "the totality of the relevant facts about a prosecutor's conduct during the defendant's own trial" and "all relevant circumstances to raise an inference of purposeful discrimination." *Miller-El*, 545 U.S. at 239-40. By the same token, the State and the trial court may rely on all relevant facts and circumstances in the record to refute or reject the mere inference of purposeful discrimination. As noted above, the trial court plays a pivotal role in evaluating *Batson* claims and that role involves considering all circumstances, not simply the general reason first proffered for a strike in isolation.

Here, the South Carolina Court of Appeals failed to properly recognize or consider all of the circumstances under which the challenged strikes were exercised, including an examination of the

additional explanation offered for the prosecutor's residential location based strikes. At step three of the *Batson* analysis, the prosecutor explained the particular Piedmont address for Juror 215 gave her pause, while the particular Piedmont address for Juror 106 did not, even though they were both residential addresses in the Piedmont area of greater Greenville. This distinction alone distinguishes the two jurors and provides an evidentiary basis for the trial court's decision. The trial court listened to the prosecutor's explanation in the context of all of the circumstances of the case known at the time of the challenge and concluded: "I don't see a discriminatory intent." Those circumstances included the facts that: (1) the prosecutor only exercised six of her ten possible peremptory strikes during jury selection; (2) out of the six strikes exercised by the prosecutor only three, or fifty percent, were of African-Americans; (3) prior to exercising the challenged strikes, the prosecutor chose not to strike three African-Americans who were seated on the jury; and (4) in a trial with seventy-five possible witnesses it was entirely plausible that certain juror addresses raised greater concern than others, even when those residences were from the same general area of Greenville. Where Respondent, as the opponent of the strike, offered no evidence to make the trial judge doubt the prosecutor's more precise explanation, and he made no motion or request to attempt to further explore whether such evidence might exist, he failed to carry his burden of proof and his *Batson* motion was appropriately denied.

A closer look at the South Carolina Court of Appeals' flawed analysis in comparison with the proper analysis repeatedly conducted by this Court helps to illustrate the error of reversal under the circumstances of Respondent's case. First, the South Carolina Court of Appeals improperly conflated the prosecutor's proffered reason for striking Juror 81 with her reason for striking Juror 215, thereby confusing its appellate review of the trial court's decision that there was no *Batson* violation. In *Foster*, this Court focused its attention individually on each juror struck and the reasons given for that strike in the context of the entire record. *Foster*, ___ U.S. at ___, 136 S.Ct. at 1748-54. In Respondent's case, the appellate court did not do this, instead grouping the two residential location based strikes together as one. This was improper.

Although the prosecutor explained she struck each of the two jurors in question because he or she resided in a particular geographic location and was concerned they would know witnesses from that location, the two residential locations were not the same. Counsel for Sadler merely identified a juror of a different race who was seated and who was from one of the two geographic locations named by the prosecutor. This information has no relevance to the second geographic location which was given as a reason for the other strike, and did nothing to support or carry the opponent's burden to prove purposeful discrimination as to that second juror. An example illustrates the fallacy of the South Carolina Court of Appeals' logic in this regard. Consider a *Batson* challenge where the proponent of

the strikes explains it struck one juror because she was from a particular neighborhood in Chicago and might know some witnesses who were also from that neighborhood in Chicago, and it struck a second juror because she was from a particular neighborhood in New York and might know some witnesses who were also from that neighborhood in New York. If the opponent of the strike then presents evidence that the striking party seated a juror from the New York neighborhood in question, it would carry significant weight in the trial court's determination of whether there had been a *Batson* violation as to the New York juror who was struck. However, it would have absolutely no relevance and should be given no weight in regard to the Chicago juror who was struck. It cannot be the rule that simply because both strikes were based on residential locations that both strikes constitute *Batson* violations, unless they were based on the same residential location. Here, the only strike that could have been impacted by the evidence submitted during step three of the analysis was that of Juror 215, and as explained below, even that evidence did not compel a finding of a *Batson* violation.

In regard to the strike of Juror 215, the South Carolina Court of Appeals seems to have overlooked the proper scope of the analysis on appeal, both as explained by this Court in *Foster*, *Snyder*, and *Miller-El*, and as applied by the Court in those cases. It failed to consider all of the relevant circumstances in Respondent's case before rejecting the trial court's *Batson* conclusion out-of-hand. As noted above, one of those key circumstances, and

one which was ignored by the South Carolina Court of Appeals, is the fact that three African-Americans had been seated on the jury without being stricken by the prosecutor at the time the *Batson* challenge was raised by Respondent. This Court has recognized that in any *Batson* analysis, consideration of such "bare statistics" is appropriate, and placed significant weight on statistics when the "numbers describing the prosecution's use of peremtories are remarkable." *Miller-El*, 545 U.S. at 240-41. Here, this most remarkable statistic, that three African-American jurors were not struck, demonstrates the prosecutor in Respondent's case was not motivated by race and was not exercising her strikes in an effort to purposefully exclude African-Americans from the jury. If she were, she would certainly have struck these three jurors when given the chance.

In *Foster*, the evidence overwhelmingly demonstrated the prosecutors were motivated in substantial part by race when they used four of the nine peremptory strikes they exercised to strike all four qualified African-Americans from the jury. *Foster*, 136 S.Ct. at 1743; 1754-55. This Court explained the prosecutor's proffered reasons for the strikes should be grounded in fact, not false or contradicted by the record, and not difficult to credit because the State willingly accepted white jurors with the same traits. *Id.* 136 S.Ct. at 1749-50. In *Foster*, there was not merely a single, isolated imprecise representation like the one first given in Respondent's case, which was later clarified without challenge. Instead, this Court found at least five

separate problems with the laundry list of reasons given by the prosecutors for the strikes. The record itself belied those reasons at every step of the analysis, and in regard to at least two of the four jurors, demonstrated pretext. *Id.*

Of particular interest in *Foster* is this Court's comparison of the residential location information given by a black juror who was struck, with that given by a white juror who was seated, and how that information failed to support the prosecutor's claim that he felt the struck juror was "less than truthful" in her answers during voir dire. *Foster*, 136 S.Ct. at 1751. This Court's comparison included a detailed consideration of the particular addresses and the distance each residence was from the house where the victim lived. *Id.* No similar information was considered in Respondent's case, and no inconsistencies in the prosecutor's more precise explanation of the difference between the two addresses were shown by Respondent.

Here, unlike in *Foster*, the only place the prosecutor's proffered reason for striking a black prospective juror could initially be said to apply to an otherwise similarly situated non-black panelist would be in regard to juror 215. The evidence in *Foster* was compelling because all of the proffered reasons applied just as well to non-black jurors who were not struck, and further attempts to explain those reasons fell flat. In Respondent's case, the proffered reasons clearly didn't apply to one of the strikes, applied only in a general sense to the second strike and not at all when you consider the two

residential location based strikes were based on very different locations, and only applied to the third strike until the solicitor more precisely explained the strikes were based on the specific addresses of the two people who lived in Piedmont. Respondent provided no evidence to show otherwise. Also, in *Foster* additional evidence in record, including the contents of the prosecutor's file, showed a pervasive underlying focus on race. No such evidence is present here, and any speculation to the contrary is refuted where the prosecutor chose not to strike three African-American jurors before the strikes in question. Based on a direct comparison with *Foster*, the trial court in Respondent's case properly denied the *Batson* claim because Respondent failed to carry his burden of proving intentional discrimination. The South Carolina Court of Appeals should have affirmed.

Similar to *Foster*, the evidence in *Snyder* was overwhelming that the prosecutor's proffered reasons for striking black prospective jurors were pretext for racial discrimination. *Snyder*, 552 U.S. at 485-86. In *Snyder*, all five of the prospective black jurors were eliminated. *Snyder*, 552 U.S. at 475-76. Furthermore, a primary reason given by the prosecutor for the strike examined was deemed suspicious because, when all considerations were taken into account, it simply did not make sense. *Snyder*, 552 U.S. at 479-83. Here, the reason first given by the prosecutor makes sense in that Petitioner would not want a juror from the same neighborhood as some witnesses, because that juror might be biased for or against those witnesses. In

Snyder, the initial suspicion was then reinforced by circumstances that were at least as serious for white jurors who were seated. *Snyder*, 552 U.S. at 483-84. These additional circumstances were shown by the record. *Id.*

In Respondent's case, the record is void of any additional circumstances in regard to the specific differences between Ms. Foxx's address and Mr. Montgomery's address and how they relate to particular witnesses, primarily because Respondent offered no evidence to refute the prosecutor's explanation that the two different Piedmont addresses did not raise the same concerns. As this Court recognized, when the proffered explanation is pretextual, it naturally gives rise to an inference of discriminatory intent. *Snyder*, 552 U.S. at 485. However, the decisive question is whether the reason should ultimately be believed. *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion) ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed."). *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("Rejection of the defendant's proffered [nondiscriminatory] reason will permit the trier of fact to infer the ultimate fact of intentional discrimination."). Here, the explanation given by the prosecutor was ultimately believed rather than rejected by the trial court. This decision was based on the credibility of the prosecutor's further explanation for the strike in the context of the entire record.

Again in *Miller-El*, as in *Foster* and *Snyder*, this Court found the evidence was damning and warranted reversal of the conviction. The state court's conclusion that the prosecutors' strikes of two African-American jurors were not racially determined was shown up as wrong to a clear and convincing degree. *Miller-El*, 545 U.S. at 266. In *Miller-El*, the prosecutors struck ten qualified black venire members and ended up with jury of nine whites, one black, one Hispanic, and one Filipino. *Miller-El*, 545 U.S. at 236 & 274. This Court noted it must do a side-by-side comparison between those struck and those who served. "If the proffered reason applies just as well to an otherwise similarly situated nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El*, 545 U.S. at 241. The Court found there were three white jurors who expressed nearly identical concerns about imposing the death penalty as the black juror struck. Here, the reason initially given for striking Juror 215 could initially be described as "nearly identical," but only up until the point the prosecutor explained there was a difference between the specific addresses of the two jurors. Once the explanation was offered, the two were no longer identical and the proffered reason did not apply "just as well." Respondent can point to nothing in the record to show otherwise, and did not make any further showing in this regard to the trial court.

In *Miller-El*, this Court had a particular problem with prosecutor suddenly coming up with a different reason for the strike when the defense called him on

the misstatement. *Miller-El*, 545 U.S. at 246. The Court said this "reeked of afterthought," showed pretextual timing, and was rendered implausible for other reasons. *Id.* Ultimately, the Court called the new reason mere "makeweight." *Id.* Here, the prosecutor simply elaborated on the previous reason given. It was not a new reason and therefore could not reek of afterthought. In regard to a second juror who was struck, this Court explained that reasons which seem reasonable on their face can have their plausibility severely undercut by the prosecutor's failure to object to other panel members who expressed views much like the struck juror. *Miller-El*, 545 U.S at 248. This is evidence of pretext. *Id.* However, the Court also recognized that the suggestion of pretext can be mitigated by further explanation and by data. *Miller-El*, 545 U.S. at 249. We have both further explanation and data demonstrating a lack of purposeful discrimination here. This Court noted a "late-stage decision to accept a black panel member" does not "neutralize the early stage decision to challenge a comparable venireman." *Miller-El*, 545 U.S. at 250. By comparison, in Respondent's case there was an early-stage acceptance of three African-American jurors, prior to the strikes in question. Unlike the data in *Miller-El*, this data does neutralize the import of the single, initially questionable late-stage strike, which was subsequently explained by the prosecutor to the satisfaction of the trial court.

Finally, in *Miller-El*, the case for discrimination went beyond the side-by-side comparisons to include broader patterns of practice during the jury

selection, such as shuffling of the venire panel, contrasting questions posed respectively to black and nonblack panel members, and a general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time of trial. *Miller-El*, 545 U.S. at 253-64. None of those broader patterns or practices is present in Respondent's case. In *Miller-El*, this Court concluded: "The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were made to deny." *Miller-El*, 545 U.S. at 265. There is simply no comparison to the lack of evidence of pretext in Respondent's case. Under a proper *Batson* analysis, the South Carolina Court of Appeals should have affirmed the trial court.

D. Conclusion

The trial court clearly followed the required three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. During that inquiry, the prosecutor provided racially neutral explanations for striking each of the three African-American jurors in question. Even though the explanation in regard to Juror 215 initially appeared to be pretext because a similarly situated juror of another race, Ms. Foxx, was seated on the jury, the trial judge observed the solicitor's demeanor during her explanation for the strike, made an implicit credibility finding that there was

no discriminatory intent in her explanation, and thereby concluded the reason given was in fact not pretext. That credibility finding must be given great deference and should not have been set aside by the Court of Appeals unless clearly erroneous. Further, upon close analysis, the solicitor's explanation distinguished between the two Piedmont jurors based on their particular addresses.

When all of the facts and circumstances of Respondent's case are combined with the prosecutor's specific explanation for her strikes of three African-American jurors, there is ample evidence to support the trial court's conclusion that Respondent failed to prove purposeful racial discrimination as to any strikes. The South Carolina Court of Appeals appears to have overlooked the proper *Batson* analysis established by this Court. It failed to recognize the trial court's consideration of all of the circumstances under which the challenged strikes were exercised, including an examination of the explanations offered for those strikes and the fact that three African-Americans were already seated on the jury, before concluding during the third stage of the *Batson* analysis that it "[did not] see any discriminatory intent." This Court should grant this petition for a writ of certiorari, reverse the South Carolina Court of Appeals, and remand this matter to the South Carolina Supreme Court for further proceedings.

Respectfully submitted,

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