CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE EDWARD SNEED,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Kerry Gerace Levy*
Ayanna Williams
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520

* *Counsel of Record*
Member of the Bar of the Supreme Court

Counsel for Petitioner, Willie Edward Sneed

Dated: October 3, 2019

QUESTION PRESENTED

After an evidentiary hearing, the post-conviction court found that the trial prosecutor intentionally discriminated against African-American jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and that appellate counsel was ineffective for failing to raise that claim on appeal. Without disturbing the lower court's factual findings, the Pennsylvania Supreme Court reversed that ruling on appeal, and the district court denied habeas relief. The question presented is:

In light of the post-conviction court's finding of intentional discrimination—a finding that has not been challenged by any reviewing court—did the Third Circuit Court of Appeals violate the standard for considering an application for certificate of appealability when it held that no jurist of reason would debate the merits of the underlying *Batson* and ineffectiveness claims?

TABLE OF CONTENTS

TABLE OF APPENDIX

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

OPINIONS BELOW

The order of the United States Court of Appeals for the Third Circuit denying a certificate of appealability appears in the appendix (App-1-2).

The opinion of the United States District Court for the Eastern District of Pennsylvania denying the petition for habeas corpus relief is unreported and appears in the appendix (App-3-45).

JURISDICTION

The Court of Appeals denied a certificate of appealability on June 5, 2019. On August 22, 2019, Justice Alito extended Petitioner's time to petition for certiorari to October 3, 2019. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

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

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

28 U.S.C. § 2254 provides in relevant part:

> **(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Procedural History

On March 14, 1985, Petitioner was convicted of first degree murder and related charges by a jury in the Pennsylvania Court of Common Pleas, Philadelphia County (Ivins, J.) for the death of Calvin Hawkins. After a sentencing hearing on March 15, 1985, Petitioner was sentenced to death. The Pennsylvania Supreme Court affirmed the convictions and sentence on direct appeal. *Commonwealth v. Sneed*, 526 A.2d 749 (Pa. 1987).

On January 16, 1997, Petitioner filed a *pro se* petition for habeas corpus relief under the Post Conviction Relief Act (PCRA). On July 20, 1999, then-Governor Thomas Ridge issued a warrant scheduling Petitioner's execution for September 14, 1999. On July 22, 1999, Petitioner filed an emergency motion for stay of execution. The Pennsylvania Court of Common Pleas (Temin, J.) granted the stay of execution and ordered the filing of a counseled, amended PCRA petition. On December 31, 1999, Petitioner filed an amended PCRA petition.

Following a motion to dismiss by the Commonwealth, the PCRA court granted an evidentiary hearing on the following two issues: 1) whether the trial prosecutor used his peremptory challenges in racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); and 2) whether trial counsel was ineffective for failing to develop and present available mitigating evidence at sentencing. The PCRA court did not rule on Petitioner's remaining claims. Evidentiary hearings were held on September 10-14, 2001 and November 6, 2001.

On January 4, 2002, the PCRA court granted Petitioner a new trial on the *Batson* claim and a new penalty hearing on the basis of trial counsel's ineffectiveness. App-65.[1]

On June 19, 2006, the Pennsylvania Supreme Court overturned the PCRA court's grant of a new trial and upheld the grant of a new penalty hearing after an appeal by the Commonwealth. *Commonwealth v. Sneed*, 899 A.2d 1067 (Pa. 2006).[2] The court determined that that 1) *Batson* did not apply retroactively to Petitioner's case and that his claim was waived because it was not raised at trial or on direct appeal, relying on state retroactivity rules, and 2) Petitioner's related claim of ineffective assistance of counsel for failing to raise a *Batson* challenge on direct appeal was meritless because even if counsel had raised the claim on appeal, there was no guarantee that the court would have addressed the merits of the claim. App-56-57.

On September 6, 2006, the Pennsylvania Supreme Court denied re-argument and relinquished jurisdiction to the PCRA court. App-63. The PCRA court scheduled a hearing for December 27, 2006, to determine the status of the remaining claims.

Prior to the hearing, Petitioner filed a "protective" habeas petition in federal district court on December 4, 2006. The PCRA court orally denied the remaining

---

[1] The PCRA court's opinion, issued on November 25, 2003, appears in the appendix (App-64-79).

[2] The opinion of the Pennsylvania Supreme Court appears in the appendix (App-46-63).

guilt phase claims without holding an evidentiary hearing and issued an opinion on March 14, 2007. Petitioner appealed, and the Pennsylvania Supreme Court quashed the appeal on December 13, 2007, because the lower court's order was not entered on the docket. The PCRA court entered an order dismissing the remaining claims on October 21, 2009, and the Pennsylvania Supreme Court affirmed and remanded for a new penalty phase hearing on June 4, 2012. *Commonwealth v. Sneed*, 45 A.2d 1096 (Pa. 2012). The Commonwealth did not seek death after remand, and on December 8, 2012, Petitioner was re-sentenced to life in prison without possibility of parole.

After the federal case was removed from civil suspense, Petitioner filed an updated petition for habeas corpus relief on October 25, 2013. On September 6, 2018, the district court denied habeas relief and a Certificate of Appealability. *See* App-45 (Memorandum and Order of September 6, 2018) (Rufe, J.). In its opinion, the district court adopted the reasoning of the Pennsylvania Supreme Court and concluded that trial counsel could not "be faulted for failing to raise a *Batson* issue at trial because *Batson* did not yet exist." App-10. Petitioner then applied for a Certificate of Appealability in the Third Circuit, which was denied on similar grounds. *See* App-1-2 (Order of June 5, 2019).

Petitioner now requests this Court grant a writ of certiorari.

Facts Relevant to this Petition

Voir dire in this case was conducted from March 5 through March 8, 1985—while certiorari in *Batson v. Kentucky*, 476 U.S. 79 (1986), was pending in this Court. Neither the voir dire nor the prosecutor's notes provide the racial make-up of the jury or venire. At the evidentiary hearing on the *Batson* claim, Petitioner submitted into evidence voter registration records of the jurors stricken and empaneled at trial. The prosecution stipulated to the authenticity and accuracy of these documents. In addition to the documentary evidence, Petitioner introduced a chart demonstrating the pattern of strikes used by the prosecutor to exclude African-American prospective jurors. *See* App-68.

The prosecutor struck Linwood Gillette, an African-American man, who worked at a hospital and was married with seven adult children. Mr. Gillette indicated that he would be able to vote for the death penalty in an appropriate case. He further explained that he would decide the case based on the facts presented to him and the law provided by the court and that he would be a fair and impartial juror. NT 3/7/85, 92-97. The prosecutor did not ask him any questions. *Id.* at 97. The prosecutor struck Jack A. Shields, III, an African-American man, who served as a member of the Army Reserves and who stated that he would be a fair and impartial juror. *Id.* at 163-69. Sherry L. Windley, an African-American woman who worked as a nurse, also was struck by the prosecutor. Ms. Windley indicated that she would be fair and impartial but was struck by the prosecutor without being asked a single question. *Id.* at 195-98.

Finally, the prosecutor struck Nathaniel V. Anderson, an African-American man, who worked as a stationery store deliveryman. Mr. Anderson indicated that he would be able to vote for the death penalty and would be a fair and impartial juror. *Id.* at 199-203. Just as with Mr. Gillette and Ms. Windley, the trial prosecutor did not ask Mr. Anderson a single question during voir dire. *Id.* at 202. Of the four African-American jurors, the prosecutor only questioned one—Mr. Shields—and the questions asked were superficial at best and not probative of Mr. Shields' ability to serve on the jury. *See id.* at 168-69 (questions related to his high school and birth order).

Charles P. Mirarchi III, Esquire, who represented Petitioner at trial and on direct appeal, did not object to the prosecutor's exercise of peremptory strikes against African-American jurors. At the PCRA hearing, he did not provide any explanation for failing to raise the violation of Petitioner's equal protection rights when he had the opportunity. Rather, he testified that he had no recollection "at all concerning the voir dire in this case[.]" NT 9/13/01, 15.

The Commonwealth presented testimony from the trial prosecutor, James Long, Esquire and juror Nancy Venner, a white woman, who attempted to identify individual jurors who served with her at trial. Like Mr. Mirarchi, Mr. Long testified that he had no independent recollection of the jurors in this case or the reasons for his strikes. NT 9/14/01, 10-11. The PCRA court, after considering the voter registration records and testimony from the witnesses, concluded "that the

prosecutor struck four of the four known black jurors and that, under the circumstances, this raised the inference of intentional discrimination." App-69.[3]

Using the notes of testimony from jury selection and his personal notes from voir dire, Mr. Long testified about possible factors that may have influenced his jury selection decisions. NT 9/14/01, 12-18. The PCRA court, after observing Mr. Long's demeanor and evaluating the actual content of his testimony, determined that Mr. Long's explanations were "not credible." App-70. "Indeed, [the] [c]ourt found that instead of being race neutral, the prosecutor's reasons for striking the black jurors was pre-textual, and thus a *Batson* violation, particularly because the prosecutor did not strike white jurors who came within the same parameters cited by the prosecutor as justifying his strike of the four black jurors. . . . The evidence show[ed] that the sole record of the striking of the four black jurors was racially motivated and was a violation of *Batson*, and Counsel was ineffective for not raising this claim on appeal." App-70-71.

[3] More specifically, the PCRA court was "unimpressed with the certainty of [Ms. Venner's] testimony and did not find that this one witness established that any black jurors actually sat on the jury." App-68-69.

REASONS FOR GRANTING THE WRIT

I. In Denying Petitioner's Application for Certificate of Appealability, the Third Circuit Interpreted "Reasonable Jurists" Too Narrowly

A. Legal Standards

The Third Circuit violated the principle set forth in *Buck v. Davis,* 137 S. Ct. 759 (2017), by finding that reasonable jurists would not debate Petitioner's *Batson* ineffectiveness claim. In *Buck*, this Court cautioned against interpreting reasonableness narrowly. *Id.* at 773. At the certificate of appealability (COA) stage, "the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

In *Buck*, defendant was convicted of capital murder and sentenced to death. Defendant petitioned the federal court for writ of habeas corpus after his state habeas petitions were denied. The United States District Court for the Southern District of Texas denied relief and defendant's request for COA. Defendant appealed, and the Fifth Circuit also denied COA. This Court held that, at the COA stage, a court of appeals is merely required to determine if the district court's decision was debatable. *Id.* at 760.

Moreover, this Court warned against interpreting reasonableness narrowly, stating that "[w]hen a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of COA based on its

adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336-37) (alteration in original). This Court further explained that merely because a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. *Id.* at 774. A claim can be debatable "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

Here, Petitioner has argued that it is at least debatable that counsel was ineffective for failing to object at trial or argue on appeal that the Commonwealth used its peremptory challenges in a racially discriminatory manner. The PCRA court's granting of a new trial based on *Batson* and appellate ineffectiveness supports Petitioner's argument. The Third Circuit rejected Petitioner's application for COA, stating that Petitioner has not made a substantial showing of the denial of a constitutional right and jurists of reason would agree that Petitioner's counsel did not perform unreasonably by failing to raise a claim on direct appeal pursuant under *Batson*. App-1-2.

The Third Circuit, like the Fifth Circuit in *Buck*, inverted the statutory order of operations and decided first the merits of the appeal rather than what reasonable jurists might debate. As set forth below, the fact that the Third Circuit has not clearly ruled on what level of prejudice is to be shown in a *Batson* ineffectiveness

claim leaves the issue of prejudice open to debate. Further, the fact that the only jurist to consider the merits of the underlying *Batson* claim and the derivative ineffectiveness claim granted relief shows that the issue is, at minimum, debatable.

B. The Third Circuit's Conclusion that Counsel Was Not Effective in Failing to Raise the Equal Protection Was Debatable among Jurists of Reason

1. At trial

At the time of Petitioner's trial, *Batson* had not been decided, and *Swain v. Alabama*, 380 U.S. 202, 203-04 (1925), which required defendants to prove systemic discrimination, controlled. For this reason, the Third Circuit concluded that "jurists of reason would agree with the District Court's conclusion that . . . trial counsel did not render ineffective assistance by failing to challenge the prosecution's peremptory challenges as discriminatory." App-1.

While the court is correct that *Batson* had not been decided, that does not mean that a defendant's equal protection rights were left unprotected. This Court had long held that a state denies equal protection of the laws when a defendant is tried before a jury where jurors are purposefully excluded because of their race. *See Batson*, 476 U.S. at 84-85 (citing cases); *see also Swain*, 380 U.S. at 203-04 ("a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause").

Moreover, at the time of Petitioner's trial, objections were commonplace among practitioners in Philadelphia. Indeed, in other Philadelphia homicide cases before this trial and pre-*Batson*, defense counsel raised objections to the

discriminatory use of peremptory challenges by prosecutors under the existing law.[4] For example, in *Commonwealth v. Lambert*, a Philadelphia homicide trial conducted in 1984, counsel challenged the prosecutor's strike of an African-American prospective juror and "pointed out that there was a 'new panel decision . . . adopting the use of procedures in Massachusets [sic] and California that you just can't indiscriminately use peremptories because of race which is a noted characteristic of this district attorney's office.'" *Lambert v. Beard*, No. 02-9034, 2007 WL 2173390, *19 (E.D. Pa. Jul. 24, 2007).[5] Counsel renewed the challenge in post-trial motions. *Id.* at *20.

Similarly, in *Commonwealth v. Hardcastle*, a Philadelphia homicide trial conducted in 1984, "counsel moved for a mistrial on the grounds that the prosecutor's use of the peremptory challenges violated both the state and federal constitutions." *Hardcastle v. Horn*, 368 F.3d 246, 251 (3d Cir. 2004). Applying

---

[4] Objections also were made in non-homicide cases in Philadelphia at this time. *See, e.g.*, *Commonwealth v. Dinwiddie*, 542 A.2d 102, 103 (in 1984 trial for robbery and criminal conspiracy, "[o]n two separate occasions, [trial] counsel objected to the prosecution's peremptory challenges alleging that the prosecution excluded five potential jurors solely because they were black and members of the defendant's race").

[5] Counsel likely was referring to *People v. Wheeler*, 583 P.2d 748 (Cal. 1978) and *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979). The petitioner in *Batson* relied heavily on these decisions to argue that the United States Supreme Court should grant certiorari to address whether the use of peremptory challenges to remove prospective jurors on the ground of group bias in a single trial violates the Constitution. *See Batson v. Kentucky*, No. 84-6263, 1985 WL 669926, *26-34 (U.S. Jun. 27, 1985).

Swain, the trial court denied the motion. *Id. See also Lark v. Beard*, 495 F. Supp. 2d 488, 493 (E.D. Pa. 2007) (in 1985 trial, counsel "raised the issue of the Commonwealth's improper peremptory strikes and sought to preserve the record of the racial composition of the jury").[6]

Further, the *American Bar Association Standards for the Defense Function* (1979), in effect at the time of Petitioner's trial encouraged counsel to "prepare himself . . . prior to trial to discharge effectively his . . . function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected and the exercise of both challenges for cause and peremptory challenges." Standard 4-7.2. Selection of Jurors; *see also NLADA Counsel Standards* (1985), Standard 11.7.2. Voir dire and Jury Selection (same).

Under these circumstances, trial counsel should have been aware that objections to the prosecutor's discriminatory use of peremptory challenges could—and should—be made. Counsel's failure to object constituted deficient performance.

---

[6] In a number of other contemporaneous cases, Pennsylvania courts found that Philadelphia prosecutors used all or most of their peremptory strikes against African Americans but held that there was no remedy under the law at the time. *See, e.g.*, *Commonwealth v. Henderson*, 438 A.2d 951, 952-53 (Pa. 1981) (Philadelphia prosecutor used peremptory strikes to eliminate all blacks); *Commonwealth v. Brown*, 417 A.2d 181, 186 (Pa. 1980) (Philadelphia prosecutor used all 16 peremptory strikes against blacks); *Commonwealth v. McKendrick*, 514 A.2d 144, 150 (Pa. Super. Ct. 1986); *Commonwealth v. Edney*, 464 A.2d 1386, 1390-91 (Pa. Super. Ct. 1983); *Commonwealth v. Green*, 400 A.2d 182, 183-84 (Pa. Super. Ct. 1979); *Commonwealth v. Fowler*, 393 A.2d 844, 846 (Pa. Super. Ct. 1978); *Commonwealth v. Jones*, 371 A.2d 957, 958 (Pa. Super. Ct. 1977); *Commonwealth v. Harrison*, 12 Phila. Co. Rptr. 499, 516, 1985 WL 384524 (Phila. C.P. Jun. 5, 1985).

Virgin Islands v. Forte, 865 F.2d 59, 62-64 (3d Cir. 1989) ("[E]ven discounting for our advantage of hindsight, we think an attorney prior to *Batson* should not have been startled at the suggestion that the Supreme Court would hold the practice of prosecutors to challenge peremptorily jurors on racial grounds to be unconstitutional."); *see also Everett v. Beard*, 290 F.3d 500, 506, 513-14 (3d Cir. 2002) (finding counsel was deficient for failing to object to jury instructions where Pennsylvania law was not "settled" at the time). The Third Circuit's conclusion that counsel was not ineffective for failing to object to the violation of Petitioner's equal protection rights at least is debatable among reasonable jurists.

Although the Third Circuit did not reach the question of prejudice, it also is plainly debatable whether counsel's failure to raise an objection was prejudicial as a matter of law. Because *Batson* error is structural error, if counsel was deficient for failure to raise *Batson* error, then Petitioner should not be required to show actual prejudice. *See Batson*, 476 U.S. at 84, 100 (reversal required where defendant shows purposeful discrimination); *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) ("revers[ing] the conviction . . . without inquiry into whether the defendant was prejudiced in fact by the discrimination [,]" where racial discrimination has altered the composition of the indicting grand jury).

This Court recently acknowledged, without resolving, the clear split in federal and state authority regarding whether structural errors, like a *Batson* violation, are *per se* prejudicial when raised via ineffectiveness claims. *See Weaver*

v. Massachusetts, 137 S. Ct. 1899, 1907 (2017). In *Weaver*, this Court held that in the context of a public trial violation during jury selection—where the error was neither preserved nor raised on direct review but later raised as an ineffective assistance of counsel claim—a defendant must demonstrate prejudice to secure a new trial because, while a public trial violation is a structural error, it does not always lead to fundamental unfairness. *Id.* at 1904.

In contrast to public trial violations, this Court has long recognized that discrimination in jury selection undermines the fairness of trial: "It is an affront to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Georgia v. McCollum*, 505 U.S. 42, 57 (1992); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) ("The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings."); *Powers v. Ohio*, 499 U.S. 400, 411 (1991) ("[R]acial discrimination in the selection of jurors . . . places the fairness of the criminal proceeding in doubt."); *Batson*, 476 U.S. at 87 (1986) ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."); *Foster v. Chatman*, 136 S. Ct. 1737, 1760 (2016) (Alito, J. concurring) ("Compliance with Batson is essential to ensure that defendants receive a fair trial."). In light of this jurisprudence, harmless error review should not apply to a *Batson* violation raised under *Strickland* because such a violation constitutes structural error that cannot be harmless.

Alternatively, it is plainly debatable that had counsel objected, counsel would have preserved the issue for appellate review. *See Forte*, 865 F.2d at 63-64 (counsel ineffective for failing to raise a *Batson* objection while *Batson* was pending but before it had been decided, thus preserving the issue for appellate review, even though it was likely that counsel would not have succeeded on the merits at trial); *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310, 1316 (11th Cir. 2003) (same); *see also Commonwealth v. McCormick*, 519 A.2d 442, 476 (Pa. Super. Ct. 1986) (remanding for *Batson* evidentiary hearing "where the objection to the Commonwealth's use of peremptory challenges ha[d] been properly preserved"). Indeed, the defendants in *Hardcastle* and *Lark*, though unsuccessful in their objections at trial, were granted relief on appeal. *See Hardcastle v. Horn*, 332 F. App'x 764, 766 (2009) (affirming grant of relief after evidentiary hearing in district court); *Lark v. Sec'y Pa. Dep't of Corr.*, 566 F. App'x 161, 161-62 (3d Cir. 2014) (same).

2. On appeal

Batson, decided in 1986, was the law before this case became final, as the Pennsylvania Supreme Court did not issue its direct appeal opinion until 1987. Moreover, in 1987, the United States Supreme Court held that *Batson* applied to all cases pending on direct appeal when *Batson* was decided—such as Petitioner's. *See Griffith v. Kentucky*, 479 U.S. 314 (1987).

At the time of Petitioner's appeal, and until late 1998, the Pennsylvania Supreme Court repeatedly applied the "relaxed waiver" rule to afford merits review

to constitutional claims of error raised in capital cases. *See Szuchon v. Lehman*, 273 F.3d 299, 326 (3d Cir. 2001) (noting that *Commonwealth v. McKenna*, 383 A.2d 174 (Pa. 1978) was the "seminal case" on relaxed waiver and "established that a claim of constitutional error in a capital case would not be waived by failure to preserve it");*Commonwealth v. Abu-Jamal*, 720 A.2d 79, 88 n.9 (1998) (noting the Pennsylvania Supreme Court's "tradition of entertaining all claims raised in a capital case, whether on direct appeal or collateral attack, irrespective of waiver").

The rule applied even where a procedural bar arose from a violation of rules of appellate procedure such as the bar against raising issues on appeal that were not preserved in the trial court, as in this case. *See, e.g.*, *Commonwealth v. May*, 656 A.2d 1335, 1343 n.7, 1344 n.9 (Pa. 1995); *Commonwealth v. Crispell*, 608 A.2d 188, 22 n.1 (Pa. 1992); *Commonwealth v. Nelson*, 523 A.2d 728, 736 (Pa. 1986). Thus, given that *Batson* was decided while Petitioner's direct appeal was pending, counsel's failure to raise and litigate the substantive *Batson* violation under relaxed waiver fell below a standard of objective reasonableness.

The Third Circuit, however, stated that counsel did not perform "unreasonably by failing to raise a claim on direct appeal . . . [because a] *Batson* claim would have been barred because Sneed failed to contemporaneously object to the prosecution's use of peremptory challenges or to the racial composition of the jury." App-1-2 (citing *Abu-Jamal v. Horn*, 520 F.3d 272, 280-81 (3d Cir. 2008)). This ruling is at best debatable and conflicts squarely with *Strickland* and its progeny.

First, the *Abu-Jamal* decision on which the Third Circuit relies, created a federal forfeiture rule for *Batson* claims raised by state prisoners in federal habeas proceedings and deemed otherwise meritorious *Batson* claims forfeited absent a contemporaneous objection even when the state courts did not find the claim procedurally barred and addressed the claim on the merits. *Abu-Jamal*, 520 F.3d at 284. This rule did not exist at the time counsel could have raised Petitioner's *Batson* claim on direct appeal.

Second, where, as here, counsel is not restricted by rules of waiver, appellate counsel is not absolved of his independent duty to investigate and raise all arguably meritorious issues—even if the issue is not preserved for appeal. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Showers v. Beard*, 635 F.3d 625, 635 (3d Cir. 2011) (counsel cannot make "a tactical decision not to include all of the arguments on appeal" without first "conducting an independent investigation"); *Everett*, 290 F. 3d at 509 ("A reasonably competent attorney patently is required to know the state of the applicable law[.]").

Counsel, who also represented Petitioner at trial, observed the prosecutor's racially-based exercise of peremptory challenges against African Americans first-hand. On direct appeal, counsel could have raised the *Batson* error, made a proffer of facts based on his personal knowledge or conducted a reasonable investigation

into the record as done by post-conviction counsel, and, at minimum, sought remand for a hearing at which the factual disputes could be resolved. *See Commonwealth v. Wilson*, 537 A.2d 370, 373 (Pa. Super. Ct. 1988) (where *Batson* claim is "of arguable merit," "there can be no tactical reason" for "counsel's failure to preserve this issue" and remanding for filing of post-trial motions *nunc pro tunc*).

Moreover, had the *Batson* claim been presented on direct appeal, it is debatable whether Petitioner would have had a reasonable probability of success on appeal. *See Eagle v. Linahan*, 279 F.3d 926, 943-44 (11th Cir. 2001) (counsel ineffective for failing to litigate Batson claim in state court appeal); *see also Judge v. Beard*, 611 F. Supp. 2d 415, 427-28 (E.D. Pa. 2009) (applying Strickland to find trial and appellate counsel ineffective for failing to raise new claim of constitutional error).

In *Linahan*, the court held that counsel was ineffective for failing to litigate a *Batson* claim on appeal and that petitioner should have been granted COA. The court reasoned that counsel's decision to omit the *Batson* claim from the appellate brief undermined confidence in the outcome of the appeal sufficient to satisfy the prejudice prong of *Strickland*. *Linahan*, 279 F.3d at 943-44. Further, in considering what showing a defendant would have to make regarding counsel's ineffectiveness at trial, the court stated: "[W]here counsel's constitutionally ineffective representation lets stand a structural error that infects the entire trial with an unconstitutional taint . . . we should not require the defendant to prove actual

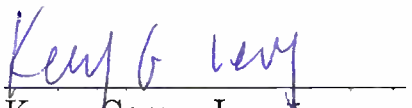
prejudice in the outcome of his trial." *Id.*; *see also Hall v. Warden, Lee Arrendale State Prison*, 686 F. App'x 671, 683 (11th Cir. 2017) (stating that structural error triggers presumed prejudice and therefore claim likely would have succeeded on direct appeal).

Here, the post-conviction court—the only court to hear evidence and consider the merits of the *Batson* claim and counsel's ineffectiveness—concluded that Petitioner's right to equal protection was violated because the prosecutor struck four African-American jurors solely on account of their race and granted Petitioner a new trial. These factual findings remain undisturbed. Under these circumstances, appellate counsel's failure to raise and litigate a meritorious issue arising out the prosecution's discriminatory jury selection constitutes prejudicially deficient performance. The Third Circuit's finding that appellate counsel did not perform deficiently in failing to raise the equal protection violation is, at least, debatable by reasonable jurists.

CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari and place this case on its merits docket. In the alternative, this Court should grant certiorari, vacate the decision below, and remand this case to the Third Circuit with instructions to grant a Certificate of Appealability.

Respectfully submitted,



Kerry Gerace Levy*
Ayanna Williams
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520

* *Counsel of Record*
Member of the Bar of the Supreme Court

Counsel for Petitioner, Willie Edward Sneed

Dated: October 3, 2019