No. 21-7584

IN THE SUPREME COURT OF THE UNTED STATES

WILLIAM O. DICKERSON,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

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CAPITAL CASE

PETITIONER'S QUESTIONS PRESENTED

1. Did the state postconviction court violate *Batson* and its progeny by refusing to consider evidence that this Court's precedent expressly permits?

2. Did the state postconviction court err in denying Mr. Dickerson's *Batson* challenge when the jurors' voir dire responses and a comparative juror analysis either fail to support, or expressly rebut, the Solicitor's proffered "race neutral" reasons?

3. Did Mr. Dickerson's trial counsel provide ineffective assistance in failing to subject the Solicitor's proffered "race neutral" reasons to the methodologies for identifying pretext recognized by this Court's precedent in, e.g., *Miller-El v. Dretke*, 545 U.S. 231 (2005)?

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, William O. Dickerson, is under a death-sentence in South Carolina for the sodomy, torture and murder of a former friend he believed had wronged him. He is currently in 28 U.S.C. § 2254 federal habeas proceedings in the District Court of South Carolina following the denial of relief in his state post-conviction action. (C/A No. 9:22-cv-108-SAL-MHC). His petition, though, is based on the denial of relief from his state post-conviction action. The record neither supports the requested review nor Dickerson's assertions of error.

Dickerson's present argument rests largely on misstatements or omissions of facts that Respondent identifies in this response, *see* Rule 15, Supreme Court Rule. For Questions 1 and 2, he forwards arguments for a claim that was not considered on the merits in state post-conviction litigation. A freestanding *Batson v. Kentucky,* 476 U.S. 79 (1986) challenge was not allowed under the jurisdiction limitations of the post-conviction relief statute because a motion was made, and denied, at trial. While he was not allowed to "re-do" his trial motion in his post-conviction action, Dickerson was allowed to make a related claim of ineffective assistance, but could not carry his burden of proof under *Strickland v. Washington,* 466 U.S. 668 (1984). At bottom, Dickerson seeks a fact-intensive, and fresh, individual case review without the jurisdictional bar imposed by the State, and without regard to the limitations inherent in his offered proof as found by the state post-conviction judge. He has failed to show a significant issue worthy of this Court's review in context of his case. The petition should be denied.

LIST OF PARTIES TO THE PROCEEDING

Respondent agrees that all relevant parties are reflected in the caption.

RELATED PROCEEDINGS

Dickerson incorrectly asserts this action arises from state habeas. (Pet. at ii). This matter arises from proceedings initiated and governed by the South Carolina post-conviction relief statutes, S.C. Code Ann. § 17-27-10 *et.seq.* Otherwise, Respondent agrees with the listing of related proceedings in the petition which reflects Dickerson's jury trial, direct appeal, post-conviction relief action and appeal, and his now pending federal habeas action filed pursuant to 28 U.S.C. § 2254.

CITATIONS TO OPINIONS BELOW

The Supreme Court of South Carolina declined to review the post-conviction relief judge's denial of relief. Neither the Supreme Court order nor the amended order denying relief is published. The order denying the petition for appellate review is provided in Dickerson's petition appendix, (Pet. App. at 1), as is the amended order denying post-conviction relief, (Pet. App. at 5-82). These documents are also available through Supreme Court of South Carolina's docket system, c-track, at https://ctrack.sccourts.org/public/caseView.do?csIID=68163.

JURISDICTION

Dickerson's timely petition for rehearing to the Supreme Court of South Carolina in his post-conviction relief appeal was denied on October 13, 2021. This Court's records show an extension for filing his petition with this Court up to and including March 11, 2022. The petition's certificate of service reflects March 11, 2022.

Consequently, the petition appears timely. Dickerson claims jurisdiction pursuant to 28 U.S.C. § 1257(a). (Pet. at 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent submits this case involves the Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Respondent also submits as relevant S.C. Code § 17-27-20 (B), from the South Carolina Post-Conviction Procedure Act, which provides:

> This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

Respondent further submits that S.C. Code § 14-7-1110, which sets out the number of peremptory strikes allowed each party when murder is the crime at bar, is also relevant, and provides in pertinent part:

> Any person who is arraigned for the crime of murder ... is entitled to peremptory challenges not exceeding ten, and the State ... is entitled to peremptory challenges not exceeding five.

STATEMENT OF THE CASE

A. Facts of the Crime:

The crime began on March 6, 2006. Dickerson attempted to call his friend, soon to be his victim, Gerald Roper, but Roper did not respond. Dickerson, catching a ride from another friend, Antonio Nelson, found Roper at Ben Drayton's house. On the

way, Dickerson stated that he was going to "get some money," then the following occurred:

> When they arrived at Drayton's home, Dickerson entered brandishing his weapon and asking for money. Roper told Dickerson "I got your money," begging "don't shoot me" and "please don't kill me." Dickerson nevertheless fired a shot at Roper but missed. He then struck Roper in the head with the gun, dragged him out of the house, and forced him into Nelson's car. Dickerson then took Roper to Armon's house. [FN 1].
>
> Armon and Dickerson brought Roper inside and systematically tortured him over approximately thirty-six hours. It started with Dickerson continuing to hit Roper with the gun, knocking out some of his teeth. Armon then left to retrieve Dickerson's car and some drugs, and blood covered the inside of the house when he returned. Dickerson then called another friend of his, Rashid Malik, and threatened him with death if he did not come to Armon's house. [FN 2]. When Malik arrived, Roper was still conscious but clothed only in his T-shirt, and Armon was attempting to clean up the blood covering the house. Malik then joined Armon and Dickerson.
>
> Although Dickerson, Armon, and Malik all tortured Roper to varying degrees, Dickerson appeared to be the primary actor. [FN 3]. Through this entire ordeal, Roper suffered the following at the hands of Dickerson alone: choking, being tied up and placed in a closet, being sodomized with a gun and a broomstick, having his scrotum burned, being hit with a heavy vase and a mirror, and generalized beating and cutting. At one point, Roper began asking that they just let him die.
>
> All told, Roper received over 200 individual wounds to the outside of his body, including lacerations to his anus. He also received several internal injuries, including various broken bones in his face that caused it to appear misshapen, blunt force trauma to his neck resulting in the breaking of various structures, a broken tibia, broken fingers and wrist, brain swelling, and bleeding into the internal structures around his rectum as the result of objects being inserted into it. Although there is no definite timeline of events, Roper survived for eighteen to twenty-four hours after the sodomy occurred, and none of these wounds were inflicted post-mortem. No single wound was fatal. Instead, Roper died from the sum total of his injuries, apparently shortly after he was struck with the mirror and the vase on the morning of March 8.

As these events transpired, Dickerson made several phone calls to various people during which he discussed what he was doing to Roper. Many of them were to Dickerson's girlfriend, and she managed to record one of them containing his description of the sodomy and even Roper's own confirmation of what was happening. Dickerson also confirmed the sodomy, as well as the burning of Roper's scrotum, over the phone to another friend. In a later call to that same friend, he said that Roper was "gone." However, he told a different friend that Roper was all right but that Dickerson needed to run.

Dickerson and Armon wrapped Roper's semi-clothed body in a blanket and dumped it in the vacant townhouse next to Armon's. Dickerson then changed clothes and fled. Armon and Rouse attempted to clean Armon's house, but they abandoned it upon realizing their efforts would be futile. That same day, a woman who was planning to rent the vacant townhouse entered and discovered Roper's bloodied and mutilated body.

> [FN1] After dropping Dickerson and Roper off, Nelson left and did not return. There is no suggestion he knew of Dickerson's plans beforehand or had any involvement in the subsequent events.
>
> [FN 2] Malik attempted to bring Dickerson's mother to Armon's house to calm Dickerson down. When Dickerson learned of this, he threatened to kill Malik's mother and cut the baby out of Malik's pregnant girlfriend.
>
> [FN 3] Armon's girlfriend, Selena Rouse, was in and out of the house during that evening, along with her young son. At some point, Dickerson asked her whether he should let Roper live or die. However, there is no evidence that she actually participated in the torture.

State v. Dickerson, 716 S.E.2d 895, 898–99 (S.C. 2011).

B. Relevant Procedural History.

Dickerson was tried by a jury in April 2009, in Charleston County, South Carolina, on the charges of murder, criminal sexual conduct first degree, and kidnapping. The Honorable R. Markley Dennis presided. Jeffrey P. Bloom, Esq., and C. Andrew (Drew) Carroll, Esq. represented Dickerson.

The jury was selected with each side being assigned a certain number of peremptory strikes by state statute. S.C. Code § 14-7-1110 provided that the State would have 5 peremptory strikes available, and the defense would have 10.[1] The defense used all 10 against Caucasian jurors; the State used only 4 of their strikes, with 3 African American jurors seated with strikes available to the prosecution. (App. 6362). The jury selected showed 3 African American jurors were seated. The racial breakdown of the jury, therefore, generally corresponded with the community makeup of approximately "25.4 percent African-American, 70.2 percent Caucasian" for the Charleston County area in 2010. (App. 6366-67).

After selection, defense counsel made a *Batson* challenge to 3 of the State's 4 strikes. The trial judge required the State to place its explanation for the strikes on the record,[2] which the prosecutor clearly, and without hesitation, set out. (*See* BIO Appendix at 1-4 (App. pp. 2178-81)).[3] The trial judge confirmed from personal recollection the equivocation/struggle with the capital punishment questions posed for one juror (Ms. Toomer, Juror No. 315), which the prosecutor had also identified

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1 Dickerson's assertion that "the Solicitor used three of four peremptory strikes," (Pet. at 2), fails to acknowledge a first significant point – that the State did not use all of its available strikes.

2 South Carolina requires only a slight showing for a hearing: "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one." *State v. Shuler*, 545 S.E.2d 805, 810 (S.C. 2001). It is unsurprising that the trial judge advanced to step two of the *Batson* procedure.

3 Dickerson uses the names of the jurors. For clarity, the jurors were assigned a general number and a selection pool number. The selection pool number is reflected in the trial transcript pages as provided in the appendix to this brief in opposition. This chart may be of help in identifying the jurors at issue:

Ms. Gadsden:	Juror No. 101,	Selection Pool No. 10
Ms. Fields-Copeland:	Juror No. 92,	Selection Pool No. 11
Ms. Toomer:	Juror No. 315,	Selection Pool No. 16

for one strike. (BIO Appendix at 4). The trial judge similarly found the remaining two strikes were also for valid race-neutral reasons (a single mother work/equivocation (Ms. Gadsden, Juror No. 101/10) and "a number of charges of prosecution, a charge of shoplifting, a concealed weapon" charge a juror (Ms. Fields-Copeland, Juror No. 92/11) when no other juror had that "many ... for those things."). (BIO Appendix at 2-3). Trial counsel did not argue further after the prosecutor's reasons for the strikes were placed on the record.

On April 30, 2009, the jury convicted as charged. (App. pp. 3765-70).[4] On May 4, 2009, the penalty phase began. (App. pp. 3846-47). On May 7, 2009, the jury found three statutory aggravating circumstances which would allow the jury to consider a sentence of death[5]: 1) criminal sexual conduct; 2) kidnapping; and 3) torture, and recommended death. (App. pp. 4699-4703). Judge Dennis imposed a death sentence for murder, and thirty years on each of the other crimes. (App. pp. 4707-09). Dickerson appealed.

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[4] Dickerson incorrectly asserts that there was a "Joint Appendix" submitted in the post-conviction action appeal. (Pet. at 2 n. 1). State practice does not allow for a "joint appendix" but places a duty on the petitioner to provide the lower court record. *See* Rule 243 (d) and (f), *South Carolina Appellate Court Rules*. Respondent has referenced the appendix as provided by Dickerson in his post-conviction action appeal as "App." In contrast, references to the appendix filed with the petition in this Court will be designated "Pet.App." Respondent also notes that the District Court of South Carolina has a more complete record of the state court proceedings in the pending federal habeas action, and those records are available on PACER.

[5] This was more than sufficient to meet the required eligibility function as, under South Carolina law, only one statutory aggravating circumstance must be found to continue in sentencing. Further, South Carolina is not a "weighing state." After the return of any one statutory aggravating circumstance – which must be found beyond a reasonable doubt – the jury may then consider the whole of the evidence in determining the appropriate sentence, *i.e.*, selection, without further structure. *Middleton v. Evatt*, 77 F.3d 469 (4th Cir. 1996) (Unpublished) ("Under South Carolina law, a jury need not, and indeed should not, weigh the aggravating circumstances against the mitigating circumstances.").

Robert M. Dudek and Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, along with trial counsel Bloom, represented Dickerson on appeal. After hearing argument on May 24, 2011, the state court affirmed by published opinion issued October 3, 2011. *State v. Dickerson*, 716 S.E.2d 895 (2011). Though there was a *Batson* trial challenge, appellate counsel did not raise a *Batson* issue. *Id.* at 898. Dickerson sought rehearing, which was denied on November 17, 2011. This Court denied a petition for a writ of certiorari review on April 23, 2012.

Dickerson then filed an application for post-conviction relief (PCR) on May 16, 2012. By Order dated July 31, 2012, the Supreme Court of South Carolina assigned the Honorable Edgar W. Dickson as judge over the action. Judge Dickson appointed Elizabeth Franklin-Best, Esq., and E. Charles Grose, Jr., Esq., to represent Dickerson. Judge Dickson recused himself from further participation in this case by Order dated June 2, 2014, and the Supreme Court of Carolina assigned the matter to the Honorable G. Thomas Cooper, Jr. by order dated June 20, 2014.

Through the litigation, Dickerson's counsel filed several amendments to the application and raised various claims. On October 1, 2015, Respondent moved to strike or, in the alternative, to dismiss freestanding *Batson* issue(s) as not cognizable under the jurisdiction limitations imposed by the PCR statute. In an order filed December 8, 2015, Judge Cooper denied the motion finding Dickerson was raising the claim as an element to his ineffective assistance claim – a cognizable *Strickland* claim. (*See* Pet. App. at 24).

There were multiple parts to the evidentiary hearing: December 7-8, 2015, March 31, 2016, May 12, 2016, May 27, 2016, and, October 23, 2017. The testimony from former trial counsel confirmed not only counsel's experience, but also that counsel formed a team of experts to aid in defense investigation and development, and that counsel had access to funding. (*See* BIO Appendix at 5-6 (App. pp. 5828-29)). Of particular note, former counsel Jeffrey Bloom testified regarding his educational and legal background including experience in approximately 50 to 60 capital cases with 15 to 20 capital case jury trials, and that he had been a jury consultant and taught at capital litigation seminars on *Batson* and *Batson* motions, (BIO Appendix at 8-9 (App. pp. 6910-11)).

Further, Mr. Bloom reviewed the trial transcript and the *Batson* motion and his notes made on the defense copy of the individual juror's questionnaires. He confirmed as to Ms. Gadsen (Juror 101/10) that there was an entry: "Note to Judge: Need to be a work at 1:00 p.m." (BIO Appendix at 14 (App. p. 6930)).[6] He also testified as to the prosecution's trial reference to multiple criminal charges, including a gun charge, in regard to Ms. Fields-Copeland (Juror 92/11), that, "[i]f Solicitor Wilson stood in court and said that juror had those charges I didn't think Solicitor Wilson was making that up." (BIO Appendix at 18 (App. p. 6934), *see also* BIO at 21-22 (App. pp. 6937-38, noting he credited the Solicitor Wilson statement, noting that she had

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6 Mr. Bloom confirmed the note, but suggested that it may have been for that day. Ultimately, he conceded that he had no specific recollection, but, again, he agreed the note existed and was made at the time of the trial. (BIO Appendix at 14-16 (App. pp. 6926-32)). He further testified, "I believe since I didn't make any further comment my motion on its face was sufficient." (BIO at 16 (App. p. 6932)).

afforded counsel "every courtesy," acknowledged her "professionalism" and "courtesy" to defense counsel)). Further, when asked to review certified copies of documents from the "magistrate level or municipal level" confirming those charges, Mr. Bloom testified, "I did not question Solicitor Wilson's representation that she had legitimate information that a juror had a prior record. I would not have questioned her on that. And, obviously, she was right...." (BIO Appendix at 26-27 (App. pp. 6936-37)).

Additionally, Dickerson's PCR counsel offered a broad statistical study of certain cases tried by Solicitor Wilson, and new criminal history reports run for the post-conviction review. Mr. Bloom testified that he had previously used statistical studies in North Carolina – a jurisdiction that had a statute that allowed such evidence – and confirmed that criminal history reports are not uniformly disclosed to the defense in South Carolina. (BIO Appendix at 24 and 18 (App. pp. 6940 and 6934)).

The record also shows that the offered statistical study was amended during the collateral proceedings and the numbers decreased based on additional information, and the study's author admitted that accounting for additional information and variables would be preferred. (BIO Appendix at 29 and 27 (App. pp. 6791 and 6789)). Further, the record also shows the judge disallowed information arising from jury trials after the 2009 trial based on *Strickland's* contemporaneous-to-trial inquiry on trial counsel's available material for any *Batson* challenge potential argument. (Pet. App. at 25; *see also* BIO Appendix at 31 (App. p. 6793)).[7]

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[7] Dickerson's petition argument based upon perceived issues in *State v. Broughton,* which is extensively used in argument, is improper. (Pet. at 8-10). *Strickland* does not allow it, nor did the State court. Even so, it is telling that Petitioner does not include any ruling by the trial court. (*See* Pet. at 8-10 and 11 n. 8). He is depending on his own view of the irrelevant facts of a separate case to

Further still, PCR counsel offered training materials from the South Carolina Prosecution Coordination (a prosecutor's training organization), but those materials were found protected by privileged, and consistent with established State appellate precedent on this same issue, the PCR judge did not consider those items as they would not be available to counsel for any *Batson* argument.[8] (Pet. App. at 26-28). *See also State v. Daise,* 807 S.E.2d 710, 720 (S.C. Ct. App. 2017) ("The circuit court reviewed the Commission materials in camera and ruled they did not 'include any abusive instructions or teaching materials, nor use of improper technique.' The court also found the materials were 'generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trial.' We agree.").[9]

The State presented an expert in statistics, Dr. Robert Michael Norton, retired statistics and mathematics professor from College of Charleston. Dr. Norton noted the following criticisms which the PCR court listed in its order as follows:

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attempt to persuade the court that combination of non-errors could be error. This does not show a factual basis for any question worthy of this Court's review.

8 Dickerson's reference to those materials is improper (Pet. at 10-12). The privilege, which is not unusual, stands. For instance, Mr. Bloom confirmed that similar such teaching materials for the defense were often "the property of the organization putting on the seminar and they are included overall in those materials and they are for defense attorneys attending those seminars" in explaining why he would not be able to disclose defense materials he had reviewed. (BIO Appendix at 10 (App. p. 6912)). At any rate, Dickerson makes grossly misstates as to perceived intent while omitting critical facts developed at trial such as the fact that Solicitor did not consult the materials, that the materials admonished and denounced discriminatory strikes, and recited the holding of cases.

9 As with the presentation of the irrelevant assertions regarding the *Broughton* case, see n. 7 supra, Dickerson also hopes to persuade this Court to revisit the teaching materials to find suspect reference to employment, connection to law enforcement, demeanor or appearance, or connection to convicted defendants is suspect as reasons for exercising peremptory strikes. (Pet. at 10-12). Again, he seeks to bundle a combination of non-errors (here, non-discriminatory reasons) to make a discriminatory pattern.

- He critiqued the report as being incomplete from a mathematical and statistical perspective because the sample used, the "universe of cases" was not a true "random sample" as is accepted in statistics;

- He criticized the report as incomplete and simple because it didn't speak to other factors that go into making a strike;

- He also critiqued the report as failing to show causation. He said it merely showed a correlation between strikes and race which he likened to a type of conclusion that is "over simplistic" for the proposition stated;

- He also testified it would not be sound practice to include the same case twice as was done in one instance (Beyah) because some variables going into the jury pool would overlap and by counting each of two strikes occurring in one case, you're counting data twice without qualifying it.

(Pet. App. at 44).

The PCR judge asked the witness whether – "from a statistical perspective" – a court should rely on the study to establish whether the prosecution "routinely excluded black jurors in jury selection," the witness replied, "Not by itself." (Pet. App. at 44). Rather, the witness again underscored the need for determining or considering "correlating variables, the idea of selecting the populations, how you pick a sample." (Pet. App. at 44).

By Order dated June 26, 2018, filed June 27, 2018, Judge Cooper denied relief. On July 11, 2018, Dickerson filed a Rule 59(e), SCRCP motion. On July 16, 2018, the State filed its response in opposition to the motion.[10] By order dated July 20, 2018, filed July 25, 2018, Judge Cooper denied the motion to alter or amend; however, Judge Cooper acknowledged that he had inadvertently used several section headings

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10 This response in not included in the appendix before the Supreme Court of South Carolina in the petition provided by Dickerson's counsel; however, it does show as filed in the Clerk of Court's office. See https://jcmsweb.charlestoncounty.org/PublicIndex/CaseDetails.

from the State's briefing that should not have been included, (App. p. 9488), and filed an Amended Order Denying Post-Conviction Relief on July 25, 2018, with those corrections. (App. pp. 9490-9567).

In addressing the ineffective assistance/*Batson* related claim, the judge found "the cognizable claim rests on the sufficiency of the *Batson* motion made at trial." (Pet. App. at 31). He noted that though *Strickland* required a showing of prejudice, "*Strickland* prejudice is often impossible to show due to the nature of the equal protection error." (Pet. App. at 31). The PCR judge found Dickerson's multiple accusations against the prosecutor's "integrity and character" were "unsupported by the record before th[e] Court." (Pet. App. at 32). The PCR judge afforded "deference to the credibility determination" made by the trial judge. (Pet. App. at 32). Further, the PCR judge credited the prosecutor's clear PCR testimony that she did not engage in discriminatory jury strikes, and did not consult educational materials from office manuals, as, for her it is a "moral decision" and not right for the defendant or potential juror for a prosecutor to make discriminatory strikes. (Pet. App. pp. 30-31). The PCR judge, assessing the testimony, found "[t]he credibility of that testimony is further corroborated by the trial record made at the time of the *Batson* motion and ruling finding the reasons for the strikes were not race motivated," and defense counsel's trial motion and his PCR testimony. (Pet. App. at 34).

Further, the PCR judge rejected Dickerson's offered comparative juror analysis first noting Dickerson's allegation that one juror (No. 209) actually had an extensive record that was not disclosed was false. The record found that reflected an alias with

the Juror's name showed different dates of birth, "vastly different locations for a span of activity (Alaska rather than South Carolina)," and inconsistent employee and residence information that simply could not be reconciled with known facts. (Pet. App. at 34 and 41-42). Further, the judge resolved that the prosecution's "basis for the strikes have been a part of the public record since the 2009 trial" and Dickerson failed to show any "contradict[ion.]" (Pet. App. at 35).

The PCR judge acknowledged the offered statistical study, but found it failed to overcome the credible testimony and record evidence that supported finding the strikes were not pretext and not discriminatory. (Pet. App. at 35-36). He acknowledged Dickerson's argument that Ms. Gadsen (Juror No. 101/10) "'was unequivocal in her responses that 'work would pose no problem'" but noted that Dickerson did not contest that defense counsel's note indicated at least one concern about being at work at a particular time, 1:00 pm," or the court records showed the juror was indeed single. (Pet. App. pp. 37-38). The PCR judge then considered the specific portion of the juror's responses which showed there may indeed be a "hardship" on the juror personally if she left work at 7:00 am to come to court by 9:00 am, that she had been putting in extra work hours, but she would ask to be reassigned. (Pet. App. at 38-39). There simply was much in the record to support a concern that the juror would try to work to avoid a hardship. (Pet. App. at 39). As to questioning her about equivocal responses on the penalty, the PCR judge found the record reflected the juror's written response to opinion on capital punishment was not

clear. (Pet. App. at 39). He resolved that the questioning was "unsurprising" in a capital case. (Pet. App. at 40).

As to Ms. Fields-Copeland (Juror No. 92/11), the PCR judge noted that Petitioner's comparisons with jurors with records indication driving while intoxicated or under suspension did not compare with the multiple convictions for the juror and definitely not the gun conviction. (Pet. App. at 42).

The PCR judge acknowledged Dickerson's abandonment of his claims of pretext against Ms. Toomer (Juror No. 315/16), especially given the trial judge confirmed on the record that he shared the recollection of hesitancy in the juror's responses. (Pet. App. at 42).

The PCR judge acknowledged Dickerson's argument that the Prosecution Commission teaching programs taught evasion of *Batson* but found not only did the Solicitor not consult such resources, but the State's appellate court of appeals, considering the same materials and arguments, found "the information does not support his claim." (Pet. App. at 42 and 53-54).

Finally, acknowledging the statistical argument, but found it of little value in this case where the report, twice amended, "merely compared numbers of strikes" generally, and failed "to address even the mere existence of additional reasons for striking jurors" or show any "practice" or trend from the solicitor's office, or "address the reasons" as reflected on the record." (Pet. App. at 43). Further, the authors of the study acknowledged that "variables 'must be considered'" though they were lacking here. (Pet. App. at 43). Further, the PCR judge found credible and persuasive

the testimony from Dr. Robert Michael Norton that underscored the need for "correlating variables" in addition to application of other statistical principles for a scientifically reliable statistical conclusion. (Pet. App. at 44-50).

He concluded that Dickerson failed to show either *Strickland* deficient performance or prejudice. (Pet. App. pp. 54-55).[11] Dickerson appealed to the Supreme Court of South Carolina, and included these allegations[12] pertinent to the petition here:

1. Ineffective Assistance:

   A) Trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment to the Federal Constitution and *Strickland v. Washington,* 46 U.S. 668 (1984) by failing to advance a comparative juror analysis under the third prong *Batson* when he raised in *Batson* challenge.

   B) Defense counsel rendered ineffective assistance of counsel by failing to litigate the issue of defense counsel's access to the same juror information as was in the possession of the prosecution prior to the jury strike.

   C) Defense counsel rendered ineffective assistance of counsel by failing to secure available criminal records of jurors by requesting the trial court judge issue a subpoena to the FBI, Criminal Justice Information Services Division prior to the jury strike.

2. The Ninth Circuit Solicitor committed prosecutorial misconduct and denied Dickerson's rights to due process and equal protection of the law by striking qualified African-American jurors from his venire because of their race.

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11 In another misstatement of fact, Dickerson argues that the judge ruled on both the freestanding and ineffective assistance of counsel claim. (Pet. at 14). He simply omitted the first sentence of the included quote that shows the wrongness of his assertion. The quote is preceded by: "Additionally, no prejudice flows from any juror-related claim." (Pet. App. at 54).

12 As phrased by the State based on his arguments. Dickerson failed to separately set out his claims.

The State made a return to the petition, and Dickerson filed a reply. On August 6, 2021, the Supreme Court of South Carolina denied the petition. On October 13, 2021, the state court also denied a timely petition for rehearing, with two members indicating they would have granted rehearing "as to the *Batson* issue." (Pet. App. at 162). With rehearing denied, the state court issued the remittitur.

As noted above, Dickerson is currently in federal habeas proceedings in the District Court of South Carolina.

REASONS WHY CERTIORARI SHOULD BE DENIED

State law prevented Petitioner from raising the trial issue of "prosecutorial misconduct" in the collateral proceedings absent a claim of ineffective assistance. Consequently, the post-conviction action judge limited review of the evidence to that appropriate under *Strickland v. Washington*, 466 U.S. 668 (1984). Further, as the recitation of facts shows, the post-conviction judge did not overlook Dickerson's arguments and evidence – he simply found them not persuasive under an ordinary application of the *Strickland* test in light of the record. While Dickerson argues that no prosecutor should be allowed to use strikes in a discriminatory fashion, (*see* Pet. at 15), that is hardly contested – there just was no such improper conduct here. Dickerson fails to show any error for review. The petition should be denied.

I. Dickerson was not denied opportunity to present his argument and evidence on the ineffective assistance of counsel claim; rather, he failed to carry his *Strickland* burden of proof.

Dickerson argues that the PCR judge erred in "refusing" to consider his "evidence of" the prosecution's discrimination in violation of this Court's precedent in

Flowers v. Mississippi, 139 S.C.t 2228 (2019). (Pet. at 16-17). This Court indeed listed a variety of ways to attempt to show discriminatory intent. *Id.* at 2243. But nothing in *Flowers* indicates the proffer of evidence must be found persuasive.

Here, as determined by the state court, there is no "evidence" that actually supports any discrimination by the prosecution. The evidence offered did not overcome the clear and candid responses on the prosecution's strikes as supported by the record and PCR testimony. Moreover, Dickerson's offered evidence offended the contemporaneous rule of *Strickland* which controls in claims of ineffective assistance of counsel, and his offered evidence of a conspiracy to train prosecutors to discriminate effectively just simply did not show what he contended. Lastly, Dickerson's statistics were insufficient for proof in this case, especially where the authors of the study expressed that more variables were desirable for a more robust consideration. Dickerson demonstrated neither deficiency or prejudice.

A. *The PCR judge correctly found Dickerson's allegation of prosecutorial misconduct for an alleged violation of Batson is a direct appeal issue and is not cognizable in post-conviction relief.*

Dickerson suggest that a *Batson* error is structural, (Pet. at 15), but his claim rests on ineffective assistance. As a result, *Strickland* controls and Dickerson was obligated to show deficient performance and prejudice. *Accord Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) ("The prejudice showing is in most cases a necessary part of a *Strickland* claim.").

Because a PCR action is not a substitute for direct appeal, see S.C. Code Ann. § 17-27-20(B), a PCR applicant cannot assert any issues in his PCR action that could

have been raised on direct appeal. *See Simmons v. State*, 215 S.E.2d 883, 885 (S.C. 1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also Drayton v. Evatt*, 430 S.E.2d 517, 520 (S.C. 1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). Consequently, in light of the statute and case law, the PCR judge correctly ruled as a matter of state law that the arguments were cognizable only as part of the ineffective assistance of counsel claim, and he was required to show deficient performance and prejudice.

B. *The PCR judge correctly found Dickerson's allegation of trial counsel's deficient performance in not advancing a comparative juror analysis based upon criminal record entries and purported differences in questioning was not supported in fact.*

It is well-settled that it violates equal protection for a party to use a strike to discriminate by race or gender. *See, e.g., J.E.B. v. Alabama,* 511 U.S. 127 (1994); *Georgia v. McCollum,* 505 U.S. 42 (1992); *State v. Shuler,* 545 S.E.2d 805 (S.C. 2001). After a party explains the strike, it is up to the contesting party to show pretext and purposeful discrimination. *Flowers*, at 2241. "The trial judge must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Id.* The PCR court found Dickerson was not entitled to relief, not because of a failure to consider the evidence, but a failure of the evidence to undermine the credibility ruling made at trial.

1. The Record supports the trial judge's finding that the Solicitor's responses were credible and Dickerson failed to show credible and persuasive evidence of pretext during the PCR action.

Dickerson made a number of allegations against the Solicitor's reasons as offered at the 2009 trial but each failed. As a general point, the PCR judge found that Dickerson had the opportunity to ask the Solicitor the basis for questions, or confront her with the questioning style, both in her deposition and her subsequent PCR hearing testimony. However, he did not avail himself of the opportunity to develop these points. Had he done so, credibility could have been assessed more fully. The PCR judge found this failing telling. (Pet. App. at 32). Further, the PCR judge appropriately gave deference to the trial court's ruling on credibility. (Pet. App. at 32-33, citing *Davis v. Ayala*, 576 U.S. 257 (2015)).

The PCR judge found Dickerson had failed to address critical testimony from the Solicitor which included, in relevant part, a denial that she had ever trained anyone to discriminate, and that she does not personally strike on the basis of race or gender for this reason: " Because I don't think it's right. I don't think it's right for the defendant. I don't think it's right for the juror who has a right to be a part of our system." (Pet. App. at 33-34). Similarly, the PCR judge quoted from the Solicitor's testimony that she did not go to any educational materials in the office in preparation to strike a jury, and did not need to go such materials as it is a moral decision for her not to discriminate. (Pet. App. at 33-34).

The PCR judge found "[t]he credibility of that testimony is further corroborated by the trial record made at the time of the *Batson* motion and ruling finding the

reasons for the strike were not race motivated," especially in light of defense counsel's comments at trial, and his testimony during the PCR hearing. (Pet. App. at 34). Dickerson did not contest that defense counsel's notes from trial indicated general support for a concern for Juror #101's work commitments at least at one point during the process. (Pet. App. at 37).

Dickerson's position in PCR was further undermined when he argued that Juror No. 209 had a criminal history, discovered by investigation in PCR, which was not disclosed by the Solicitor. But, upon examination of the juror information from trial compared to a criminal history produced for the PCR, the PCR judge found the juror's name was listed as an alias; there were different dates of birth and vastly different geographical area involved; consequently, those differences prevented from a conclusion the two were one in the same. (Pet. App. at 34). Dickerson abandoned that argument in his petition for appellate review. (See PCR Appeal Petition, pp. 18-20). It is still, however, part and parcel of the whole of the case before the PCR judge.

Further still, Dickerson's argument was undermined by review of the record on the third strike – the one for Ms. Toomer (Juror No. 315/16). The record fully and fairly supports the responses given. Judge Dennis, at the time of the *Batson* motion, confirmed his own observations of the juror's hesitancy as was similarly referenced by the Solicitor. (Pet. App. at 42). This was no vague suggestion that was not obvious to others.

The Solicitor's responses for all the strikes were equally steady and clear, and not contradicted by any fact at trial. *See Foster v. Chatman,* 578 U.S. 488, 507 (2016)

(noting "the prosecution's principal reasons for the strike shifted over time" which "suggest[ed] that those reasons may be pretextual").

In sum, the reasons for the Solicitor's strikes have not been hidden nor are they suspect. The reasons for the strikes have been a matter of record since the 2009 trial. Those strikes were explained to the satisfaction of the trial judge and still remain fully and fairly supported by the trial record. The PCR judge reasonably found Dickerson failed to show deficient performance by defense counsel.

2. *The Record does not support Dickerson's allegations of differing treatment of similarly situated jurors on the basis of their criminal histories or his allegation of suspect questioning as evidence of possible pretext.*

The PCR court reviewed the record in detail. In particular, the PCR court started with the reasons for the strikes as placed on the record and the other evidence produced during the PCR hearing which, in turn, supported those reasons. (*See* Pet. App. at 36-37). The PCR judge found "no inconsistency or factual error to indicate pretext." (Pet. App. at 37). The record supports his conclusion.

As noted above, Dickerson abandoned any effort to challenge the prosecution's strike of Ms. Toomer (Juror No. 315/16), so, with only two remaining, his "pattern" argument is immediately diminished. Further, the PCR judge correctly found Dickerson's specific PCR arguments in regard to Ms. Gadson (Juror No. 101/10) and Ms. Fields-Copeland (Juror No. 92/11) are not supported.

Dickerson argues the PCR judge was wrong in failing to consider Juror Gadson offered that work would not be a problem. However, the PCR judge considered the whole of the evidence, which did show a concern for work and a hardship if she had

to work and attend trial. (Pet. App. at 38-39). The PCR judge also considered defense counsel's notes that indicated in connection with this juror at least one concern about being at work at a particular time, 1:00 pm. (Pet. App. at 37). Of note, defense counsel did not argue that a concern for work was not reasonable, which lends some support that his note suggests at least a reasonable conclusion that perhaps work could very well be an issue. The PCR judge found specific record support that "there was a concern that the juror would try to work, and, logically, if she was 'picking up' overtime, there is a need for additional work," and concluded Dickerson failed to show pretext. (Pet. App. at 39). Contrary to Dickerson's assertions, the PCR judge's decision is well-supported by the record. The conclusion that there was concern about a work conflict is not "untrue" as Dickerson asserts. (Pet. at 19).

Similarly, as to his complaints that the Solicitor did not ask any questions about the juror being single, thus the fact is "unsupported by her responses," (Pet. at 20), is misleading. No questions were necessary for this fact. Defense counsel's information from trial confirmed that the fact the juror was single was information available from review of the juror questionnaire. (App. p. 4561). Also in defense counsel's records was a notation the juror "backs up" when discussing the penalty. (App. p. 4561). Dickerson's claim the hesitancy was not enough when compared to others, (Pet. at 20), is an argument of degree and impression, not fact and pretext.

Further, the PCR judge rejected Dickerson's argument of a difference in questioning this juror on the penalty as opposed to others, again after review of the record, finding "the voir dire transcript demonstrates that the question was posed

because the prosecutor 'couldn't read [the] handwriting on the question number forty-seven' on the questionnaire which asks, 'What is your opinion, if any, about the death penalty.'" (Pet. App. at 39). Thus, the reason for posing that question was actually in the record and verifiable. He also rejected Dickerson's additional argument that the questions to the juror were meant to elicit information to use in a strike. The PCR judge rejected that argument finding the record supports that the Solicitor's concern was actual concern over the juror's work obligations, not pretext. (Pet. App. at 40). Dickerson could show "no indication that any of the other jurors asked about having to leave court proceedings," and the PCR judge found no similarly situated juror was seated. (Pet. App. at 40). Similarly, the PCR judge logically found no cause to question the reason the Solicitor would ask if a juror could "put a man to death," as that "is an unsurprising question for voir dire in a death penalty case" and was "also echoed in the other questions." (Pet. App. at 40). Again, the record simply did not support Dickerson's strained allegations of pretext.

As to Ms. Fields-Copeland (Juror No. 92/11), Dickerson argues pretext because the Solicitor did not ask questions about the juror's criminal convictions. (Pet. at 22). However, the PCR judge logically concluded "the Solicitor was already aware of those convictions, and it is unclear as to what should be asked to explore the conviction in reference to the discretionary *voir dire* for discretionary strikes." (Pet. App. at 41).

As to Dickerson's argument that three white males had DUI and DUS convictions, (Pet. at 23), the PCR judge found he again failed to show similarly situated jurors as "he does not show multiple convictions, or a gun conviction in any

of the records" and the record supported "the Solicitor's truthful response that other jurors seated did not have the same type of history or quantity of convictions." (Pet. App. p. 42).

In sum, the PCR judge carefully considered but ultimately rejected Dickerson's argument in support of his assertion of ineffective assistance in the *Batson* challenge. The record supports the PCR judge's fact-findings and those findings support his reasonable application of the *Strickland* test.

> 3. *The PCR judge did not err in declining to find trial counsel ineffective for not litigating access to criminal histories when case law does not support Dickerson's position and Dickerson failed to show prejudice in this case.*

Dickerson maintains that counsel was ineffective in failing to litigate to have access to criminal histories in order to make a comparative analysis, and should not have relied upon the State's representations at trial. (Pet. at 26). This point is moot as Dickerson failed to show any information that tended to support pretext. Even so, and as the PCR court found in rejecting Dickerson's claim, state law is against his position. (Pet. App. at 50). *See State v. Childs,* 385 S.E.2d 839, 841 (S.C. 1989) (finding a criminal defendant was not "entitled to criminal records checks or records of arrest" as "[n]o right to discovery exists in a criminal case absent statute or court rule"). *See also State v. Matthews,* 373 S.E.2d 587, 591 (S.C. 1988) (pre-rule decision holding "[b]ackground information on the venire, if any, held by the solicitor here qualified as 'internal prosecution' matter connected with the prosecution of the case ... not subject to disclosure."). As the PCR judge found, precedent from other jurisdictions show similar decisions on the issue. (Pet. App. at 51, citing to *Kelley v.*

State, 602 So.2d 473, 478 (Ala. Crim. App. 1992) ("This court has held that arrest and conviction records of potential jurors do not qualify as the type of discoverable evidence that falls within the scope of *Brady* and that a trial court will not be held in error for denying an Petitioner's motion to discover such documents."); *State v. Weiland,* 540 So. 2d 1288, 1290 (La. App. 5 Cir. 1989) ("Weiland complains because his request for the rap sheets of prospective jurors was denied by the trial judge. A defendant is not entitled to this information.")).[13]

Finally, the PCR court also noted that a "pre-selection request would had to have been for all the potential jurors," thus, overly broad and burdensome. (Pet. App. at 52). Essentially, if allowed, that would allow the sharing of law enforcement records runs for all names, even those not ever considered for selection on the jury. As the PCR court found, that broad approach is "unnecessary" and runs afoul of the protections afforded those records. (Pet. App. at 52).

At any rate, given the fact that in the 2009 trial defense counsel was not entitled to this information as a matter of state law, the PCR court fairly decided Dickerson could not show ineffective assistance. (App. p. 9513).

C. The PCR judge found Dickerson's after-trial, general statistical study was not persuasive rather than unavailable for consideration.

Dickerson argues his statistical information was not considered. (Pet. 16-17). However, the record shows the PCR judge simply found the study was of limited

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13 The PCR judge issued an order to the FBI to obtain new history runs. The original sheets were not available. Testimony at the PCR hearing established the restriction for maintaining the rap sheets, including the direction to destroy the items after trial. (App. pp. 6864-65).

persuasive force. He did consider the possible weight of Dickerson's statistical study of the Solicitor's strikes in other trials, and also Dickerson's reliance on *Miller-El v. Dretke*, 545 U.S. 231 (2005) in support of his claim. (Pet. App. at 35 and 43-47).

Citing to *Miller-El*, the PCR court correctly noted such general statistics, *according to this Court*, did not have the weight of other evidence. (Pet. App. p. 35-36). The prosecution in *Miller-El* used strikes in such a way as to exclude "91% of the eligible African-American venire members." 545 U.S. at 241.[14] This Court continued, however, and reasoned: "More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Id.* Thus, this Court's precedent shows a focus on the facts of the individual case, not mere statistical calculations, and the PCR court did so, as well. *See also Flowers,* at 2245 ("The numbers speak loudly" when reviewing the strikes over the multiple trials *for that particular defendant*"). The PCR judge here, however, did not err, or offend this Court's precedent, in not finding the general statistical study offered in this case as unpersuasive.

The PCR court recognized that statistical studies from these same individuals who authored the study for Dickerson have been academically considered. However, their other studies were generally rated valuable because of the consideration of variables. See Ann M. Eisenberg, *Removal of Women and African Americans in Jury*

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14 The prosecution in *Miller-El* also utilized a practice for "shuffling of the venire panel," which allows for restructuring of the panel order and prevents some potential jurors from even being reached. 545 U.S. at 253-54. South Carolina does not have such a practice. (App. p. 9520). The PCR judge correctly found a "key basis" of the "case for discrimination" in *Miller-El* is not present here. (Pet. App. at 35).

Selection in South Carolina Capital Cases, 1997-2012, 9 Ne. U.L. Rev. 299, 322–23 (2017) (describing the North Carolina study by O'Brien and Grosso, "Their study used detailed, descriptive information about one sample of venire members in order to control for factors other than race that may have accounted for the decision to strike."). The PCR judge noted that the study's authors had previously written: "To account for other factors that might bear on the decision to strike, more detailed information about individual venire members ***must*** be considered." (Pet. App. at 43, citing Barbara O'Brien & Catherine M. Grosso, *Report on Jury Selection Study*, 8 (2011), http://digitalcommons.law.msu.edu/facpubs/331/) (emphasis added). Here, though, the PCR judge noted multiple missing, but logical, variables in the study presented. The judge reasoned: "There has been no explanation as to why this bare study should be accepted in light of the author's own recognition that variables 'must be considered.'" (Pet. App. at 43).

Further, the PCR judge found credible and persuasive the testimony from Dr. Robert Michael Norton, retired statistics and mathematics professor from College of Charleston, particularly his opinion that reliance would be misplaced based on the study's lack of "correlating variables" and uncertainty in the sufficiency of the sample selection. (Pet. App. at 44). The PCR judge agreed with the variables observation, noting the study did not exactly reflect the readily available information from the jury strikes from the 2009 trial. (Pet. App. at 45). For instance, the PCR court noted the record showed the State only used 4 of its available 5 strikes for the main jury; and the defense only challenged 3 of those 4. (Pet. App. at 45). Additionally, the

study did not take into account that 3 African-American jurors were presented and the State, with available strikes, did not exercise those strikes. (Pet. App. at 45). Further, as far as the totality of the jury composition in this case, even the statistical study author Professor O'Brien who testified in the state PCR had to agree the jury makeup "appears to be roughly proportional to the population according to the census," with 3 African American jurors seated and 9 Caucasian jurors seated. (Pet. App. at 45).

The PCR judge also noted additional issues with the study, such as some of the cases referenced in the study reflected that *Batson* motions were made, and the responses had already been given judicial, specific consideration as to credibility and propriety. (Pet. App. at 46). Yet, the study sought to use these non-errors to argue error. And, the information presented showed that the prosecutor routinely did not use all available strikes, and in one case used in the study, the Solicitor didn't use any strikes at all. (Pet. App. at 46).

In short, the PCR court properly considered there are multiple factors involved. He also correctly noted that the Supreme Court of South Carolina had viewed with disfavor the use of "gross statistics and probabilities" in support of post-conviction relief allegations, particularly where "the petitioner has elected not to consider various intangible factors entering into prosecutorial decisions." *Thompson v. Aiken*, 315 S.E.2d 110, 111 (S.C. 1984). (See App. p. 9532). Though a different discretionary matter was the subject of the study in *Thompson*, as the PCR judge found, "the logic

is applicable" given that "[p]eremptory strikes are by nature defined as subjective, nuanced and individual juror fact-driven." (Pet. App. at 47-48).

In sum, the PCR court's determination is consistent with this Court's reference to statistics. Even dramatic numbers such as those in *Miller-El, supra*, can be less persuasive than real, case-specific information. The PCR judge's reasoning does not offend this Court's precedent.

D. *The PCR judge correctly found Dickerson's reliance on general education materials to assert prosecutors are taught how to avoid detection of discriminatory strikes found no support in the ordinary teaching materials submitted.*

Dickerson maintains his argument that "The Prosecutor's Handbook" is a guide to concealing improper motive when responding to a *Batson* challenge and should be considered in support of his claim. The materials constituted protected work product and would not be available for defense counsel to use for a trial motion. (See Pet. App. 53-54, citing *State v. Daise,* 807 S.E.2d 710 (S.C. Ct.App. 2017)). It would be difficult to fault counsel under a proper *Strickland* analysis. Even so, the materials do not show what Dickerson contends. The PCR judge found reliance on the handbook was misplaced when the South Carolina Court of Appeals had just recently reviewed the handbook/materials offered in a separate case and found them "irrelevant to a *Batson* motion analysis." (Pet. App. at 26, citing *Daise*). Of note, the Court of Appeals in *Daise* conducted their own review and found nothing in "the approximately 1000 pages of Commission materials sealed for appellate review" that actually showed a vehicle for "encouraging prosecutors to strike jurors for impermissible reasons—race-based or otherwise." *Id.* at 720-21. The Court of

Appeals considered the materials to be ordinary educational presentations. *Id.* Further, part of the material directed specifically "'DO NOT RELY ON STEREOTYPES & PREJUDICE.' " *Id.* at 721.

Simply, reference to cases and discussion of *Batson* motion specifics do not make Dickerson's argument any better. Discussion of such is widely accepted. The *Trial Handbook for South Carolina Lawyers* by Alex Sanders and John S. Nichols (Fifth Edition), well-supports this assertion. Section 6:9 of the handbook, titled "Valid and invalid explanations for striking jurors," reflects such a listing divided into explanations that "have been held to constitute valid, racially neutral explanations for striking jurors" and those considered "not valid, racially neutral explanation." (emphasis in original). The PCR did not err in finding Dickerson's argument that similar educational material is an attempt to teach prosecutors how to thwart *Batson* is strained and unpersuasive.

Moreover, the handbook or other prosecutorial training materials were not available to defense counsel in preparation for trial, nor could they be produced pre-trial as a matter of law. As *Daise* also shows, Dickerson's counsel could not avoid the work product protections in order to receive the information. 807 S.E.2d at 720. The PCR judge correctly found no persuasive value to Dickerson's argument, and should not have found counsel deficient in not obtaining that which he is not entitled to have.

II. The PCR judge correctly rejected evidence Dickerson offered that offended the contemporaneous-to-trial limitations necessary for a proper *Strickland* analysis.

Dickerson was limited in one regard – the PCR judge applied *Strickland's* contemporaneous-to-trial limitation. 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). As the PCR judge found in the circuit court litigation, "evidence related to cases tried by the Ninth Circuit Solicitor *after* [Dickerson]'s May 2009 trial" was not relevant. (Pet. App. at 24-25). Additionally, the PCR judge found, even in considering the prior trials, Dickerson failed to show a pattern of violations, but relied on one anomaly finding of a violation from one trial in 2004:

> Apart from the well-established fact that discovery is not allowed in criminal proceedings and [Dickerson] has not shown how trial counsel should be criticized for failing to obtain the additional information about any of these unrelated cases, [Dickerson] has attempted to thrust great weight on the fact that an adverse ruling was made in one case, *Beyah*, in regard to one strike. Reliance on *Beyah* to establish some sort of pattern is suspect for its isolated nature.

(Pet. App. at 25). Dickerson relies again on this one finding, but curiously, it is not the focus in his petition compared to the *Broughton* case of perceived error. (*See* Pet. at 10). However, there remains a distinct lack of a pattern to consider. Further, the PCR court noted, "the larger point is that the relevant consideration here is the *Batson* motion already in the record," and the reasons for the strikes are already a part of the record. (Pet. App. at 25). That is not error.

III. The PCR judge correctly found Dickerson failed to show prejudice even if he could somehow show deficient performance because the jury was not tainted by counsel's error, if any occurred.

Petitioner could not show *Strickland* prejudice because there is no basis for finding the jury seated was unqualified. (Pet. App. at 54-55). Regardless of whether Dickerson could show deficient performance in some specific, having failed to show prejudice, he was not entitled to relief. *Strickland. See also Young v. Bowersox*, 161 F.3d 1159, 1160-61 (8th Cr. 1998) (no presumed *Strickland* prejudice in *Batson* context). *Cf. Weaver,* 137 S.Ct. at 1913 (considering showing of *Strickland* prejudice even if counsel deficiency alleged involves what would be considered a pure structural error on direct appeal review). Once again Dickerson has shown no cause for review.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully Submitted,

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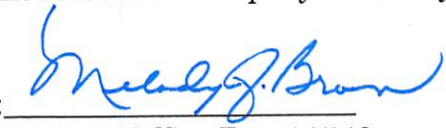
By: 

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May 11, 2022

BRIEF IN OPPOSITION

APPENDIX

APPENDIX

A

-- I will come down and we will do that with the court reporter. Solicitor, would you approach, as well?

SOLICITOR WILSON: Yes, sir.

BENCH CONFERENCE:

THE COURT: Let's take them one at a time. Which one first?

MR. BLOOM: Your Honor, we would have a *Batson* Motion. My particulars -- well, first I would note for the record that the State used four strikes for the first panel of twelve jurors. Three of those were black females and they would be juror ten in the order, Juror 101, and ---

THE COURT: Let's just refer to the list that you have. Number ten?

MR. BLOOM: Yes, sir.

THE COURT: No challenge as to -- for three?

MR. BLOOM: No, sir.

THE COURT: Solicitor, give me your race-neutral or gender-neutral reason for striking juror number ten.

SOLICITOR WILSON: Your Honor, juror ten was a CNA, as I recall, who worked

from 11:00 to 7:00 and I recall that she had an issue if it would conflict with her employment. I had that concern. Also she is a single mother with two children and she would be missing work throughout the week. I believe at one point she said that she would consider the death penalty but at another point she couldn't vote for it

THE COURT: Okay. I find those reasons to be race-neutral and gender-neutral. Is there any other juror who was selected who was a single mother or who worked as an CNA, who ---

MR. BLOOM: No, sir.

THE COURT: Okay. I find that to be a race-neutral, gender-neutral reason. I further find that the court is not aware of any pretextual situation, so there is no pretextual and that Motion is denied.

MR. BLOOM: Your Honor, I would just note for the record that Juror 101 is an African American female?

THE COURT: (Affirmative nod), she is. Next?

MR. BLOOM: Also number

eleven.

SOLICITOR WILSON: She has a number of charges for prostitution, a charge for shoplifting, a concealed weapon, ---

THE COURT: Do we have knowledge of anyone else on the jury who has a prior arrest?

MR. BLOOM: I don't know of any.

SOLICITOR WILSON: She had qualified convictions.

THE COURT: All right. I find that to be a race-neutral, gender-neutral reason. Are you aware of any juror that has any record, that is sitting?

SOLICITOR WILSON: Not that many or not for those things.

THE COURT: Very well, that's fine. Prostitution, shoplifting.

SOLICITOR WILSON: And for a concealed weapon.

THE COURT: And concealed weapon. I find that is not pretext.

The next juror for which the State exercised a strike was an African

American female, can you tell me your race-neutral or gender-neutral reason for striking that juror?

SOLICITOR WILSON: Your Honor, again she was a juror who said, when I was examining her or asking her questions, she first said that she could never give the death penalty, then she said that she could, she didn't answer the question on her questionnaire and she seemed to struggle with ---

THE COURT: That's fine. I recall that she was inconsistent and I find that to be a race-neutral and gender-neutral reason. Your Motion is denied.

MR. BLOOM: Thank you, and I have nothing further.

THE COURT: Thank you.

(BENCH CONFERENCE CONCLUDED)

THE COURT: Are there any other matters from the state or from Mr. Dickerson before we ask the jury to come forward?

SOLICITOR WILSON: None from the State, Your Honor.

THE COURT: Anything else, Mr.

APPENDIX
B

year of that, I worked with the Horry County public defender's office for seven years and was the chief public defender there for the last four of those years. In 1992 to '99, I was a Richland County public defender, and then have been in private practice since 1999.

Q. And how long have you been involved in capital cases?

A. Six months into my stint as a baby public defender in Horry County, I had my first capital trial.

Q. And have you taken a lot of continuing education in capital litigation?

A. I, I have. I have taken annual courses in capital litigation training, as well as taught courses in capital litigation training.

Q. And isn't it true that you, you have some expertise in voir dire and that line, that aspect of ---

A. Given ---

Q. --- capital litigation?

A. --- my experience in a number of capital jury trials, I did for a period of time for maybe five to six years consult with attorneys on jury selection and voir dire in capital cases.

Q. Okay, and how did you ---

A. I don't do that anymore.

Q. I'm sorry? Okay. How did you get involved in this case?

A. I got a phone call from Drew Carroll that he was appointed by Judge Dennis, and Judge Dennis had given Drew some leeway to kind of select his cocounsel, and Andrew and I had worked on the *Von Dohlen* case together. That's spelled V-O-N, second name Dohlen, D-O-H-L-E-N. And had brought that to successful conclusion, and Drew asked me to be cocounsel on the case with him.

Q. Okay, and once you became counsel on the, on the case, did you assemble a team, defense team?

A. We did and you want me to go through the list of who we got or?

Q. Yes, please.

A. Okay. We hired Dale Davis, and her first name is D-A-L-E, as a mitigation investigation investigator. She had a lot of experience in that area and resided in Charleston County. We hired Vicki Childs as a fact investigator. She also lived in the Charleston County area and had a lot of experience in investigations and was licensed by SLED. After that, Drew and I began to consult in terms of what other experts we would need either, either to consult with or perhaps testify in the case.

Q. Okay, and did you receive all the funding that you requested? Do you recall?

A. Yes. Judge Dennis did not deny us any funding request at all.

APPENDIX
C

THE COURT: You may proceed.

MS. BROWN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. BROWN:

Q. Good morning, Mr. Bloom.

A. Good morning, Ms. Brown.

Q. I know that you have testified before in December and I'm trying not to go over too many of the same things but just by way of introduction so we can kind of focus this morning on particular issues your general education, law education, would you start with your law school and any other educations that you've had after that.

A. Yes. I attended the Columbus School of Law at Catholic University in Washington D. C. from 1980 to 1983. I graduated in 1983 with juris doctorate. I proceeded to take the North Carolina and the South Carolina Bar examines. I have taken continuing legal education courses since then, mostly in the areas of criminal law and litigation.

I have instructed in the areas of criminal law and litigation including capital defense. I am also an associate clinical professor of neuropsychiatry and behavioral science at the South Carolina University School of Medicine in Columbia. It's an honorary position not a paid position. I lecture about once a

year to the graduate fellows on issues pertaining to psychiatry and the law.

Q. Okay. And when did you begin the assistant professor position?

A. Dr. Jeff McKey got me involved in that when he was at William S. Hall. I believe it was around 1999, roughly.

Q. 1999. Okay. So you had been a professor for sometime when you represented Mr. Dickerson in his 2009 trial?

A. Yes, and again, it's an honorary title.

Q. Yes, sir. And moving specifically to capital litigation, how many cases have you handled in total?

A. Capital cases?

Q. Uh-huh.

A. Probably well over 50, and probably over 15 of those have been jury trials, between 15 and 20.

Q. That actually went through the full trials?

A. Right, and probably 50 -- well, somewhere between 50 or 60 capital cases in all.

Q. And could you share with us how many appeals you have been involved in from capital trials?

A. That are included in that number appeals would be half a dozen maybe, six, seven.

Q. And how many times have you been a jury consultant

for others?
A. Probably a couple dozen, two or three dozen times.
Q. And do you also advise informally?
A. Yes.
Q. And have you testified before in this State as an expert in capital litigation?
A. I have, prior to Green vs. State.
Q. And prior to the 2009 trial at issue in this proceeding?
A. Correct.
Q. Okay. And have you actually taught at capital CLE seminars?
A. Yes.
Q. Have you taught about creating themes and maintaining themes within the capital trial?
A. Yes.
Q. And have you also taught about selection of jurors in capital trials?
A. Yes.
Q. And would that include reference to Batson and Batson motions?
A. Yes.
Q. And do you have handouts that you give to the attendees of the seminars?
A. Usually.

Q. Do you happen to have those with you today?
A. No. I don't have any handouts with me today that I've used in the past.
Q. Would you share those handouts with us at a later time?
A. I'm not sure I can. Usually, they are the property of the organization putting on the seminar and they are included overall in those materials and they are for defense attorneys attending those seminars. So I'm not sure I'm at liberty to share them.
Q. They are restricted by intent to the defense attorneys attending?
A. They may be, yes, ma'am.
Q. Well, let me just ask you generally when you prepare a handout and you would reference Batson would you explain the case law that was relevant to Batson motions?
A. Yes. I'm not trying to be cagey about that. I mean, generally, the content of those handouts are of an outline nature. It would outline case law relevant to voir dire starting with Morgan vs. Illinois, as well as state case law, and things of that nature.
Q. Holdings and what was there and what was acceptable?
A. Yes, ma'am.

APPENDIX
D

This is volume five of the record on appeal that is already part of the record here and I would ask you to look at 2028 and see if this refreshes your recollection somewhat about the Batson motion.

A. Okay.

MS. BROWN: May I approach, Your Honor?

THE COURT: Certainly.

(A document was handed to witness.)

A. Sure.

(PAUSE.)

A. I'm sorry. How far did you want me -- do you want me to keep reading until the end of the motion?

Q. Just until Judge Dennis denies the motion, please. I think it's about four pages.

A. Okay.

Q. It goes to maybe page 2031.

A. Okay.

(PAUSE.)

A. All right. I've read from page 2028 to 2031.

Q. Does that refresh your recollection a bit?

A. Generally.

Q. Oh, okay. Now, you made a Batson motion. You noted that four strikes were used and only three of those were the ones you are contesting, and they were the strikes against three African American female jurors; is

that fair?
A. Yes, ma'am.
Q. Okay. I want to ask you --
A. And that's reflected on page 2028.
Q. Thank you, sir. And the Court asked the Solicitor to give the reason for the strikes and I just want to look at the individual reasons, and this is 2028 at line 24 and the first juror is number 101, a Ms. Gadsden?
A. Actually, juror number 10, as I'm reading it.
Q. That I believe -- well, let me back up so I can explain this for the Court. You had a strike sheet with new numbers that you used for this jury strike; is that correct?
A. I don't recall.
Q. Okay.
A. If that's in the record I accept that. I just don't have it -- I don't remember.
Q. I can tell you it is in the record. I just want to get the sheet to see if that will refresh your recollection.
A. Sure.
MS. BROWN: May I approach, Your Honor?
THE COURT: Sure.
Q. I am showing you volume nine and page 4469-447 and see if that refreshes your recollection of the strike

number.
A. Okay. Yes. This is the strike sheet.
Q. Okay. And the number referenced refers --
A. Oh, I see. Yes, ma'am.
Q. Do you remember? Okay.
A. Right. There is -- on a strike sheet there is a chronological number of the jurors qualified starting with one and going up through, it appears -- it's a little cut off on the flip side but it looks like 43, and then on the right-hand column is their actual juror number as summoned. So in the transcript for page 2028 juror number 10 and 101 are one in the same so. . .
Q. And that's a Ms. Gadsden?
A. Correct, and Ms. Gadsden is G-a-d-s-d-e-n.
Q. Okay. And the reason reflected in the transcript, do you recall Solicitor Wilson stating her reason?
A. Well, it's in the transcript so that's her reason.
Q. Okay. And that is a work issue conflict with employment possibly, single mother, two children, and then a problem with the way that she responded in voir dire. I just wanted to ask you to also look at the record on page 4561, and that's in the prior volume I handed you.
A. Okay.
Q. And that's Ms. Gadsden's juror information,

correct?
A. Correct.
Q. And you have some handwriting at the top of that page?
A. Correct.
Q. Okay. And what does the handwriting at the very top of that page reflect?
A. In terms of my rating of her I gather you are asking?
Q. It's a quotation, I believe, at the very top that you have noted, right at the very top of the page.
A. Quote, I never really thought that much of it, end quote.
Q. If I may approach and I might help.
A. I have several entries on that. I'm not sure --
Q. I know. It's a lot on there.
A. I'm not sure which one you are asking --
Q. It's right here, the very, very top.
A. Oh, the very top. Okay.
Q. Yes, sir.
MR. GROSE: And what page of the record are we on, again?
A. 4561.
It says, Note to Judge: Need to be at work at 1:00 p.m.

Q. So your information and what the Solicitor is saying, very compatible, isn't it?

A. I don't know. I have a note here that apparently the juror sent a note to the Judge that she needed to be at work at 1:00 p.m. That could be just the day of voir dire. I don't have any independent recollection of what that means, if she was trying to tell the Judge she had to be there at work every day or just that day that we were doing voir dire of her. I would assume the way I wrote that it would be that she needed to get out of voir dire that particular day by 1:00 p.m. and she was asking the Judge if he could hurry up with her.

Q. So you noted that and the Solicitor also referenced a problem possibly with having to get out for employment as well. So my question to you, was there anything that you could say that would somehow undermine the factual basis for the reason given?

A. Well, you know, I don't know if I can answer that question. Again, I'm not trying to be cagey. I mean, you're asking me to go back to, you know, jury selection 10 years ago and see if I have a response to Solicitor Wilson's comments now, and I can't do that.

I mean, I don't have any notes from that time. I see my jury sheet here. I would have to say I don't think my note at the top of the page that she needs to be

to work at 1:00 p.m. supports Solicitor Wilson's position. That to me indicated she needed to be out that particular day at 1:00 p.m. If she had to leave every day at 1:00 p.m. I would have said juror has to leave every day at 1:00 p.m. So I don't think I can -- I can't rebut Solicitor Wilson's comments in the record as I sit here today.

Q. I think that's a very fair characterization and it has been very many years --

A. Yeah.

Q. -- but at the time you had all that information and there was nothing in there that caused you to say, Wait a minute, my information is different, because that's not reflected in the record, contemporaneous record of the Batson motion, right?

A. Well, again, I think Solicitor Wilson's reasons were her reasons. I think I made the motion and I obviously felt --

Q. Let me clarify. I'm just looking at this one juror, nothing else.

A. Sure.

MR. GROSE: I'd like for him to finish his answer.

A. I believe since I didn't make any further comment my motion on its face was sufficient.

Q. In fact --

A. I felt the issue had been preserved.
Q. Okay. In fact, when asked if there was any other thing you wanted to put on the record you said, No, sir, to Judge Dennis on line 14 of the record, correct?
A. Well, that was my answer. Again, I can't speak to what was in my head 10 years ago or more.
Q. Understood, Understood.
Okay. I'd like to go to the next one, and I think we need to flip over to the next page. You started actually on line 25 and you said also number 11, and that would be on the strike sheet that you identified, correct?
A. Right. So the last one we just talked about is juror number 10 in sequence, Ms. Gadsden, whose juror number was 101. The next one appears to be, in the record, going by the strike sheet on page 4470, would be in sequential order juror 11, Ms. Fields-Copeland, and that's F-i-e-l-d-s-C-o-p-e-l-a-n-d, and her actual juror number was 92.
Q. Okay. And the reason for the strike there was the number of charges for prostitution, a charge for shoplifting, concealed weapon, though she had qualified convictions to be considered. And you were asked if you had knowledge of anyone else, any juror who had a prior arrest, I suppose such as these, and you said, I don't

know of any. I wanted to ask you, if you recall, did you have any concern about the fact that those charges existed?

A. I took Solicitor Wilson at her word. If Solicitor Wilson stood in court and said that juror had those charges I didn't think Solicitor Wilson was making that up. I'm not sure what you are asking.

Q. Right. No, that's --

A. Right.

Q. I understand your response specifically. Now, you are aware that NCIC reports are run by the prosecution for all jurors?

A. Yes.

Q. Have you ever asked for all of them?

A. Yes.

Q. And what was the response?

A. Sometimes we would get them, sometimes we didn't. Sometimes the judge would order the solicitor to give them to us as the juror came up.

Q. And in this case you didn't ask for any of that; am I correct?

A. I don't recall. I really don't. I mean, if there is nothing in the record where I moved for the Court to have the Solicitor give us criminal records then it wasn't done. I just don't recall. I don't know if I

asked Solicitor Wilson independently out of court. I just don't recall independently.

Q. Okay. If you did -- well, let me back up for a minute. You have reviewed an NCIC report. I mean, you've worked in Federal Court?

A. Sure.

Q. And you've reviewed those before. Some of the entries are correct and some are not correct, right?

A. Sure.

Q. It's a law enforcement tool. It's as good as the information that goes in?

A. Right.

Q. But if you wanted to determine whether the charges existed or not you would go to the individual counties, correct?

A. Correct.

Q. Are you familiar with booking reports?

A. Yes.

MS. BROWN: Okay. Your Honor, I'd like to have this document marked as an exhibit for I. D.

THE COURT: Go ahead.

(WHEREUPON, Defendant's Exhibit Number 4, a Document, was marked for identification only.)

BY MS. BROWN:

Q. Mr. Bloom, I'd like to show you what's been marked

as the State's Exhibit Number 4 and ask if that kind of form is something you are familiar with.

A. Yes, ma'am.

Q. Okay. And can you tell us what that form is?

A. It is a North Charleston Police Department booking report. It appears to be on this juror. The names match, and the gender matches. I'm trying to see if they have it. Yeah, and the race matches. And it states this booking report is for prostitution -- or soliciting prostitution, excuse me, is the first charge, and the second charge is resisting arrest. Tickets were issued.

There is another booking report. I'm just seeing if the incident dates are different or if they are all the same. Then there is a separate booking report, it appears for this juror. The names match, the race and gender match, and it is for shoplifting.

And the third page is for this juror. The race and gender match and it is for -- and the name matches, and it is for possession of concealed weapon and possession of drug paraphernalia. They all appear to be magistrate level or municipal level charges.

Q. Okay. And the documents that you hold, state's exhibit for identification, do they reflect a true copy seal from the clerk?

A. Yes.

MS. BROWN: Your Honor, we would move State's Exhibit 4 into evidence.

MR. GROSE: No objection based on them being true copies, Your Honor.

THE COURT: Without objection.

(WHEREUPON, Defendant's Exhibit Number 4, a Document, was admitted into evidence.)

BY MS. BROWN:

Q. Mr. Bloom, may I ask you, if you wanted to determine whether the Solicitor was correct in her recitation that there were multiple charges and these kinds of charges noted for this juror could you have looked at this booking report and determined that that would have been correct?

A. Yes. But, again, I have no -- I did not question Solicitor Wilson's representation that she had legitimate information that a juror had a prior record. I would not have questioned her on that. And, obviously, she was right if that -- I mean, does that make sense?

Q. Yes.

A. I mean, if Solicitor Wilson stands up in court and says the juror has a prior record I take her at her word on that.

Q. Absolutely, and you had a good working relationship with the Solicitor's Office as far as discovery or

responding to your requests?
A. Ms. Wilson and Mr. DuRant treated Mr. Carroll and I with every courtesy and professionalism. I've dealt with other solicitors who did not do so much, but they were very courteous and professional with us and met with us on a number occasions over a number of issues.
Q. Okay. And the last juror, the strike that you questioned is on 2031. The reason for the strike is listed starting on line 4. This is juror number 315, a Ms. Toomer?
A. Yes. On the juror strike sheet, again, on page 4470 in sequential order is juror 16. The last name Toomer, T-o-o-m-e-r. Her juror number is 315. So I believe that's who we are referring to in this Batson issue on page 2030 and 2031 from the record on appeal.
Q. Okay. And at line 4, page 2031 Solicitor Wilson's response is that the juror essentially was waffling a bit, and starting on line 12 and reading through line 15 would you please publish Judge Dennis' response.
A. Okay. On page 2031 of the record of appeal line 12 through 15 reads by Judge Dennis, quote, That's fine. I recall that she was inconsistent and I find that to be a race neutral and gender neutral reason. Your motion is denied.
Q. Okay. Thank you, Mr. Bloom.

A. Uh-huh.
Q. Now, I'd also like to ask you about your use of statistical studies and arguments in Batson. Have you used statistical studies in Batson arguments in other cases?
A. That's a really good question. I am trying to recall in other cases if I have, and by statistical studies I take it you mean that I introduce into the record to the Judge a study which shows that a particular solicitor or geographic area or state exercises jury strikes in a racially unconstitutional manner? Is that what you are generally asking or --
Q. Generally. Anything that would study gender or study race and strike method.
A. I know I've done it in two North Carolina cases that I still have and that remains one of the issues in one of those cases. I'm trying to recall if I've done it in South Carolina cases in terms of a solicitor's or geographic area strikes, and I am not sure. I mean, I'd have to ponder that for a while and go back through all the cases I've had to see if I ever did that.
Q. Well, let me ask you --
A. I don't recall. I mean, I know it's an issue. I just don't recall as I sit here. As I say, I've done it in two North Carolina cases. We did an extensive study

regarding them. They were both capital cases in post conviction and habeas phase.

Q. Does the defendant's name of Blakeney --

A. Roger Blakeney. That's one of the North Carolina cases. And Blakeney is spelled B-l-a-k-e-n-e-y.

Q. Okay. And do you recall who would have helped you with that statistical study in that particular case?

A. Generally, they are known as the North Carolina Death Penalty Resource Center. That's not their name, they've changed it. I think it's CDPL now, Center For Death Penalty Litigation, and they assisted with that. They actually commissioned various statistical experts to do both county, geographic and statewide studies.

Q. Now, was that in connection with just PCR actions as you were handling it at that time or was that also in connection with the Racial Justice Act?

A. North Carolina for a time -- I'm also licensed in North Carolina. North Carolina for a time had something known as the RJA, the Racial Justice Act, and when that passed it allowed defendants both at the trial level and state capital post-conviction level to introduce both direct evidence as well as statistical evidence if there had been a history of racial discrimination by prosecutors' offices in selecting juries.

Subsequently, the Racial Justice Act was repealed

APPENDIX
E

so that is primarily a missing variable.
Q. Okay. And in your spreadsheet, which we have marked as Defendant's Exhibit 1 for this proceeding, and I don't even know if you can see this, Professor O'Brien, because it's very small print due to the fact that it is a spreadsheet, but this is the one that has V1001, V2003. Does that sound familiar?
A. Yes. Yes. I have that open on my computer.
Q. Okay. And that would have been the information that you were working on in this case, right?
A. Yes.
Q. Okay. And on that spreadsheet you actually have collected data under gender, correct?
A. Yes.
Q. It looks like a pretty good bit of data on gender, correct?
A. Yes. That we were able to reliably code.
Q. And that could be a variable, could it not?
A. It could be a predictor of strikes. Are you asking whether or not there could be a disparity based on gender?
Q. No. My question is simply statistics, not the legal ramifications or anything else. If you know that there is a variable that exists don't you usually account for that variable when you have sufficient information?

A. Well, it wouldn't -- it wouldn't explain any of the race effected unless there was a disparity based upon gender. So the only way it would matter in a statistical analysis would be if the prosecutor -- the solicitor was striking just strictly based on gender. So it actually isn't really separate from the disparity opinion. But, no, we did not control for gender.

Q. Okay. And you had age. It looks like you had a pretty good bit of information on age or at least a range?

A. Well, that was hit or miss.

THE COURT REPORTER: That was what? I'm sorry.

Q. Hit or miss.

Was that correct, Professor?

A. That's right. We did not have reliable information on age. Sometimes we had it, sometimes we didn't.

Q. Okay. And you also had marital status. Is that --

A. That's even less information on it. That was very erratic when we would get it or not.

Q. But you identified that as an area of possible variable that you would want information on if you could account for it.

A. Absolutely. All the information, all the things we asked for here -- you know, we talked about leaving this in the DCI but the hope is that if more information were

to become available later that we'd go through and code more thoroughly. We'd rather be working from the same DCI. As it stands now because so much of that information is missing that a lot of these variables are just missing. But ideally, if you have more information, sure, we'd be happy to code that.

Q. Why would you be going back to the study after you've introduced it and we've argued it in this case?

A. Well, in case -- just like what happened in the last case where there was new information provided that we could go back and code that information. If somehow more information came forward that the solicitor had access to and there's a question about whether we should account for it we want to leave that open. If we get more information and the Court wanted us to revisit it we could -- we'd be in a position to be able to do that.

Q. So you are telling us you are only talking about this case. You don't intend to use this study for something else, do you?

A. I have no immediate plans to use this study for something else.

Q. Do you have any plans?

A. Well, this would be something that perhaps -- you know, I've written quite a bit about jury selection. This would be something I could use. I have no plans to

do that because it's -- you know, it's a fairly -- I just don't have that on my agenda right now but that would be something that I could easily see myself talking about if I was writing an article on jury selection.

Q. Okay. If you were, hypothetically, writing an article and you wanted to compare what you did in this case with what you did in the article mentioned in footnote three and you don't have any variables accounted for how would you reconcile that?

A. Well, part of what I would try to do is I would hope I could get more information. Like I said, I'm always perceptive to more information or more cases to code. More information is always a benefit.

MS. BROWN: Your Honor, after identification we would move in Defendant's Exhibit 1.

A. I don't have any plans, and like I said, I don't, I mean, in the near future of writing the study up.

Q. Of writing the study up, correct?

I'm sorry, Professor. We have a little bit of a break-up issue and we are trying to get your testimony down accurately.

THE COURT: Repeat the last sentence.

Q. Would you please repeat the last sentence.

A. Yes. I have no plans any time in the near or intermediate future to write this study up for

publication.
Q. Or to use this information, correct?
A. No. I don't know how I would use it.
MS. BROWN: Your Honor, we'd move in Defendant's Exhibit 1.
THE COURT: Any objection?
MS. FRANKLIN-BEST: No objection, Your Honor.
THE COURT: Without objection.
(WHEREUPON, Defendant's Exhibit Number 1, a Document, was admitted into evidence.)
BY MS. BROWN:
Q. Okay. Professor, if we could move on to page six of your report. You included to two cases you discussed earlier this morning.
A. Yes.
Q. And when you added those two cases your numbers started to decrease, didn't they?
A. Yes. They did slightly.
Q. And on page seven there's also a little bit of a decrease as well, and that's that first paragraph on page seven?
A. Yes, I believe so.
Q. Okay. And then you added two new paragraphs on page seven: We also analyzed, and the average strike rate paragraphs.

A. Yes --
Q. Okay. In the we also analyzed paragraph you compared applicant's case to the others that you had. And, now, you hadn't done that before and why did it become important?
A. Just to clarify, are you talking about looking at the cases with Mr. Dickerson's and those that preceded that?
Q. Um, this is --
THE COURT: Yes.
Q. We also analyzed the data from only Mr. Dickerson's case --
A. Yes.
Q. -- and those that preceded it.
A. Yes. We had presented in the March 31st hearing this table four and five in response to, I think, some objections or some concerns that had been raised about the timing of the cases in comparison to Mr. Dickerson's, so I thought it was important to include that here because I know that had been a concern before and I talked about it in my testimony so I included that here just to be more thorough.
Q. Okay. Did you also consider it may affect admissibility?
A. No. I did not concern myself with questions of

admissibility.
Q. So this was just a scientific approach. There would be no reason for you to stop it at that point, the 2009 period, would it, from a scientific approach?
A. Well, I didn't -- I mean, the original approach is to look at all the cases and the study and this was responsive to the concerns I had --
Q. I'm sorry, Professor. Would you please repeat for the court reporter.
A. Yes. The original analysis, which we present here as well, is that we would look at the whole variable of cases, the whole universe of cases that we had to work with. This was simply to be responsive to the concern that I believe that your office had raised at the -- prior to and at the March 31st hearing. So rather than simply just offer another table I put some paragraphs and text explaining that.
Q. And do you remember that the Judge actually excluded that at the last hearing?
A. No. I'm sorry. I don't recall. I'm sure I was there for it but I just don't recall.
Q. Okay. And if we could move on to page nine of your report. And, Professor, just so you know we are almost at the end.
A. Okay.