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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Newberry County
Honorable Brooks P. Goldsmith, Judge

Case No: 2000-CP-36-0051
Appellate Case No. 2011-204368

STEPHEN ANDREW BECKHAM, 236548,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED ON APPEAL

I.

Did the PCR Judge correctly deny relief respecting alleged incidents involving his jury when the "implied bias" doctrine from an Illinois federal circuit case has no application, when prejudice may not be presumed, and when the record is replete with evidence to support the findings that Petitioner failed to prove actual prejudice; nevertheless, this Court need not address the failure to establish actual prejudice because Petitioner abandoned the argument by citing no authority and providing a conclusory argument? (Petitioner's Questions I, II, and III)

II.

Did the PCR Court properly overrule Petitioner's objection to questions to the jurors whether purported external contacts during sequestration affected their ability to remain fair and impartial? (Petitioner's Argument IV)

III.

May Petitioner challenge the PCR Court's denial of summary judgment on appeal when denial of summary judgment is never appealable; nevertheless, the post-convictoin relief court properly denied summary judgment and thereafter correctly determined the issue was not cognizable for post-conviction relief; moreover, Juror Grimes was not disqualified from jury service. (Petitioner's Arguments V and VI)

IV

Did the PCR Court err in denying Petitioner's motion to reopen the record for additional discovery and litigation when the document upon which he relied to make the request was something known by his attorney prior to the conclusion of discovery and the evidentiary hearing and when Petitioner failed to show that reopening the record for the purpose sought would make a difference in the outcome of the case? (Petitioner's Argument VII.)

V.

Did the PCR Court properly refused to apply a cumulative error analysis when cumulative error analysis does not apply, where Petitioner must present proof of prejudice for each issue raised and where Petitioner failed to make the requisite showing? (Petitioner's Argument VIII.)

STATEMENT OF THE CASE

Petitioner is currently confined in the South Carolina Department of Corrections. He was indicted for murder, conspiracy, and kidnapping, and the State provided notice of intent to seek the death penalty. Petitioner proceeded to trial before the Honorable Henry F. Floyd and a jury with jury selection taking place from September 14, 1996 through September 18, 1996, and the guilt phase of the jury trial commencing on September 19, 1996 through October 1, 1996. At the conclusion of the guilt phase of the trial, Petitioner was found guilty as indicted. The penalty phase of the trial was held October 4, 1996. At the conclusion of the penalty phase, the jury unanimously founds beyond a reasonable doubt the existence of the following aggravating circumstances: 1) the murder was committed while in the commission of a kidnapping, 2) the murder was committed while the victim was subjected to physical torture, and 3) the defendant caused or directed another to commit murder, and, having found the aforementioned aggravating circumstances beyond a reasonable doubt, unanimously recommended a sentence of life imprisonment. Petitioner was sentenced to confinement for life for murder, thirty (30) years for kidnapping, and five (5) years for conspiracy. He was represented by Jack B. Swerling, Esquire, and Richard A. Harpootlian, Esquire.

An Appeal was was perfected. This Court affirmed Petitioner's convictions and sentences. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999).

Petitioner filed an application for post-conviction relief on February 15, 2000, First Amended Application on August 1, 2002, Second Amended Application on June 2, 2010, and Third Amended Application on August 30, 2010. The State made Return on April 20, 2000 and Amended Return to the Third Amended Application on September 15, 2010. The PCR court denied a motion for summary judgment after hearing argument prior to convening the

evidentiary hearing. An evidentiary hearing into the matter was convened on September 28 – 30, 2010, at the Newberry County Courthouse. Petitioner was present at the hearing and was represented by Diana Holt, Esquire, Charles Grose, Esquire, and Tara Shultz, Esquire. Assistant Attorney General Jennifer Kinzeler and Senior Deputy Assistant Attorney General Salley Elliott appeared for Respondent. Subsequent to the hearing, the parties conducted depositions *de benne esse* of the Honorable Henry Floyd, Townes Jones, Esquire, and Jack Swerling, Esquire. Petitioner made two motions to reopen the record and motion to reconsider to which the Respondent made return and the PCR court denied. A hearing was held on the second motion. After receiving post-hearing briefs and memoranda from the parties, the Honorable Brooks P. Goldsmith issued an order dated September 7, 2011, vacating Petitioner's sentence for kidnapping and denying relief on all other grounds. Petitioner filed a post-trial motion on September 19, 2011, asking the circuit court to reconsider its order denying Petitioner's second motion to reopen the record, moving for a new trial, and moving to alter or amend the judgment pursuant to Rule 59(e), SCRCP. Respondent made Return. Petitioner submitted a Reply to the Return on October 6, 2011 and Judge Goldsmith denied Petitioner's post-trial motions to reconsider, for a new trial and to alter or amend by order filed November 21, 2011.

Petitioner appealed on December 5, 2011. A petition for writ of certiorari was submitted by Petitioner and this Return to Petition for Writ of Certiorari follows.

RESPONDENT'S STATEMENT OF FACTS

For purposes of this Return, Respondent will present its statement of facts within each of its arguments herein, as necessary and applicable.

ARGUMENTS

I.

Did the PCR Judge correctly deny relief respecting alleged incidents involving his jury when the "implied bias" doctrine from an Illinois federal circuit case has no application, when prejudice may not be presumed, and when the record is replete with evidence to support the findings that Petitioner failed to prove actual prejudice; nevertheless, this Court need not address the failure to establish actual prejudice because Petitioner abandoned the argument by citing no authority and providing a conclusory argument? (Petitioner's Questions I, II, and III)

Petitioner alleged in his application and litigated at the post-conviction relief (PCR) hearing the issue that he was deprived of a fair trial because his jury was exposed to what he characterized as "highly prejudicial extraneous information and third-party contact" concerning the motel rooms of Jurors Galbreath, Capps and an unidentified juror and from a comment made by a patron at a diner as well as the failure by the SLED sequestration team to either notify the prosecutors, defense counsel, and the trial judge about these matters or failure to fully inform about the matters or the brief investigation conducted by an uninvolved agent into the matter of one of the motel rooms as well as an "investigation" conducted by the forelady. Petitioner asserts on appeal that the PCR court erred in failing to find that he met his burden of establishing prejudice by presumption, application of an "implied bias" doctrine or otherwise.

A.

Petitioner alleges that the PCR court committed an abuse of discretion in failing to find actual prejudice. Petitioner does not explain what the abuse is. Respondent submits that this claim is unsupported and Petitioner cited so little authority that the issue must be considered abandoned on appeal. An appellate court will deem conclusory and unsupported claims abandoned. Savannah Bank, N.A. v. Stalliard, 734 S.E.2d 161 (S.C. 2012). An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not

supported by authority. Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011); Bryson v. Bryson, 662 S.E.2d 611 (S.C. Ct. App. 2008). Petitioner cites no case law, and no specific facts. Therefore, Respondent requests this Court to consider this claim abandoned. Respondent should not be made to spend hours searching for specific refutations and the appropriate legal authority when Petitioner complains of abuse of discretion, without explaining *why* this amounts to an abuse of discretion.

If the issue is not considered abandoned, Respondent submits that the post-conviction relief judge did not commit error: the record is replete with well-reasoned, findings fully supported by evidence in the record. App. 3448-3510. In a PCR proceeding, the Applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When reviewing the decision of the PCR court, the appellate court is concerned with whether there is probative evidence to support the decision. Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011), citing Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010). Our appellate courts will reverse the post-conviction relief court only where there is no probative evidence to support the findings or where the decision is controlled by an error of law. Id.

The post-conviction relief court found that there was no evidence of break-ins or unauthorized intrusions into Juror Galbreath's hotel room when he was absent or that anyone "went through" juror Galbreath's suitcase as opposed to the suitcase being moved for cleaning or other purposes by authorized individuals and that Petitioner failed to show prejudice from the incidents because Galbreath and the three other jurors with knowledge specifically testified that the incidents were not related to the trial, were not related to the evidence or matters being presented at trial, were not related to their service as jurors and did not interfere with their ability to remain fair and impartial throughout the trial. These findings are fully supported by the record

before this Court. Due to page constraints, Respondent incorporates fully herein its Memorandum in Support of Denial of Post-Conviction Relief and Reply to Applicant's Post-Hearing Brief which outlines the evidence and provides citations to the record supporting these findings and conclusions of the PCR court. App. 2771 - 2872; 3014 – 3067.

Similarly, the PCR court determined that Agent Talbert's contact with juror Galbreath in response to his first report about his suitcase or contents being moved only extended to Galbreath and that Talbert that merely asked why Galbreath believed someone went through his suitcase. The contact was made in response to his report and Talbert did not discuss the facts of the case or trial. The court also found there was no evidence the other jurors were aware of the purpose of Talbert's presence and no evidence established that the inquiry had any prejudicial impact on Galbreath or any of the other jurors. (Supp. App. pp. 30 – 31). In fact, the record shows that if Talbert responded to the hotel, she did so based upon Galbreath's complaint. The subject of Talbert's inquiry was limited to Galbreath's suitcase and was not a personal inquiry or investigation about or into any juror, including Galbreath. Respondent also notes that while Galbreath speculated that the contents of his suitcase could have been shuffled by agents looking for unauthorized reading material, he also speculated it could have occurred when hotel staff cleaned his room. The evidence presented at the hearing established that agents did not have access to juror rooms. The Court concluded that the matters respecting Galbreath's hotel room and Agent Talbert were incidental to and not related to the case being tried, and were not such by nature as to reasonably draw into question the integrity of the verdict and had no impact on any juror's ability to serve in a fair and impartial manner. (App. 3479-80). Again, due to page constraints, Respondent incorporates fully herein its Memorandum in Support of Denial of Post-Conviction Relief and Reply to Applicant's Post-Hearing Brief which outlines the evidence and

provides citations to the record supporting these findings and conclusions of the PCR court. App. 2771 - 2872; 3014 – 3067.

As to items of clothing missing from Juror Capps' hotel room, the PCR court again found that Petitioner failed to show the matter had any prejudicial impact on Juror Capps or any of the other jurors and the ability of the few jurors who were aware of the matter to be fair and impartial. The PCR court concluded the missing items of clothing were unconnected with Petitioner's trial and the matter was not of such nature as to affect the jurors or verdict. (Supp. App. 3483-3485). The findings and conclusions are supported by the evidence before the PCR judge as outlined by and incorporated fully herein in Respondent's Memorandum in Support of Denial of Post-Conviction Relief and Reply to Applicant's Post-Hearing Brief. App. 2771 - 2872; 3014 – 3067.

As to the comment made by a patron at a diner, the PCR court found that the matter was explored on the record at trial and that the only evidence presented at the evidentiary hearing that differed from the trial record was that another juror, Juror Connally, might have overheard the comment in addition to Edna Capps who reported the incident and other jurors had some recollection of it, perhaps when it was reported or the jurors were questioned. The PCR record also differs from the trial record only with respect to the fact that two jurors believed the patron who made the comment was escorted out of the restaurant by SLED agents. However, the PCR court concluded that the trial judge's inquiry and responses by the jurors applied to whatever any juror heard or saw and no juror indicated at the time that the incident would cause them any problem in continuing as a juror and deciding the case fairly and impartially. The jurors confirmed this fact at the PCR hearing. App. 3491-92. The PCR court found Petitioner failed to show any prejudice from the additional facts about the incident presented at the evidentiary

hearing in that the jurors indicated at trial and at the PCR hearing that whatever they saw or heard at the restaurant respecting the patron and the patron's comment had no impact on their ability to remain fair and impartial. The findings and conclusions are supported by the evidence before the PCR judge as outlined by and incorporated fully herein in Respondent's Memorandum in Support of Denial of Post-Conviction Relief and Reply to Applicant's Post-Hearing Brief. App. 2771 - 2872; 3014 – 3067.

As to the intoxicated hotel guest who entered the open doorway of one of the jurors to offer the juror a drink from a bottle of alcohol, the PCR court found that this contact was an attempt by the hotel guest to be friendly and social. The court concluded that Petitioner failed to present any evidence that the guest communicated anything directly or indirectly to the unidentified juror in question. The court further concluded that the contact was incidental and unrelated to the trial, did not constitute an assault, and did not result in discussion about facts, evidence or matters pending before the jury or that any prejudicial information was conveyed. The court determined the encounter was not of the nature that would affect the verdict of the jurors and that is was not necessary to address SLED's failure to report because Petitioner failed to show any prejudice. Of the three jurors who had any knowledge- hearsay or otherwise – about the encounter specifically stated that it had no impact on their ability to be fair and impartial. The Court also found that the trial judge did not require SLED to report every incidental matter having no bearing on a juror's ability to serve or the outcome of Petitioner's trial. The court also specifically rejected Petitioner's claim that this incident was "presumptively prejudicial" and found that Petitioner must demonstrate prejudice. (Supp. App. 3496 – 3449). Again, due to page constraints, Respondent incorporates fully herein its Memorandum in Support of Denial of Post-Conviction Relief and Reply to Applicant's Post-Hearing Brief which outlines the evidence

and provides citations to the record supporting these findings and conclusions of the PCR court. App. 2771 - 2872; 3014 – 3067.

Lastly, as to the alleged "investigation" conducted by the forelady of the jury, the PCR court found Petitioner failed to establish who the forelady spoke with or that the forelady's simple and limited inquiry of jurors whether they noticed any problems with luggage without providing any other information or explanation had anything to do with the trial, the facts being presented at trial, or the ability of the jurors to serve. The court also concluded this was not a matter the forelady needed to report and that Petitioner failed to establish the requisite prejudice. Because prejudice was not established by Petitioner, the PCR court found it unnecessary to even address the question of misconduct when it is incumbent upon Petitioner to establish both factors to be successful. (Supp. App. pp. 3500 – 51). The findings and conclusions are supported by the evidence before the PCR judge as outlined in Respondent's Memorandum in Support of Denial of Post-Conviction Relief and Reply to Applicant's Post-Hearing Brief which Respondent fully incorporates herein. App. 2771 - 2872; 3014 – 3067.

When reviewing the decision of the PCR court, the appellate court is concerned with whether there is probative evidence to support the decision. Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011), citing Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010). The PCR decision will be reversed on appeal where there is no probative evidence to support the findings or where the court's decision is controlled by an error of law. Id. The PCR court engaged in the proper legal analysis in reaching its findings and conclusions. See State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626 , 627 -28 (2000). No burglaries occurred or improper investigations into jurors or juror conduct was conducted or improper third party contact or prejudicial extraneous information conveyed with the exception of the comment at the diner which adequately

addressed at trial so as to include anything a juror might have seen or heard. The findings are supported by abundant evidence in the record as outlined and argued in Respondent's Memorandum in Support of Denial of Post-Conviction Relief and Reply to Applicant's Post-Hearing Brief. App. 2771 - 2872; 3014 – 3067. The petition for writ of certiorari must be denied.

B.

Because Petitioner could not establish actual prejudice, he argues that the PCR court erred in failing to apply the doctrine of "Implied Bias", which Petitioner urged the PCR court to apply in his Brief in Response to the State's Memorandum in Support of Denial of Post-Conviction Relief. App. 2896-2902. Petitioner renewed the argument and request in a Rule 59(e) motion after trial. App. 3521. He relied upon the federal circuit case, Hudley v. Godinez, 975 F.2d 316 (7th Cir. 1992).

Obviously, no error was committed when the post-conviction relief court declined to apply federal case law from Illinois. This authority is not mandatory, and the PCR court was under no obligation to apply it to this case. Petitioner presents no compelling argument or precedent for why this court should apply this doctrine. The decisions of this Court require an analysis for prejudice and do not presume bias. See State State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999) and cases cited herein on pages 12-13. The PCR court's ruling was correct and did not constitute an error of law.

C.

Because Petitioner could not establish actual prejudice, he also contends the alleged incidents involving the jurors are "presumptively prejudicial *de jur,*" or presumptively prejudicial as a matter of law and that the PCR court erred in failing to so find. However, Respondent submits that the PCR court properly declined to presume prejudice. Petitioner first argued for this presumption in his third amended application. (App. 481-82). The PCR order found this standard inapplicable. (App. 3462-3467). Petitioner renewed the argument and request in his post-trial motions which were denied. App. 3520; 3556-57.

Respondent submits that the burden of proof is on the Petitioner in a post-conviction relief proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 111, 334 S.E.2d 813 (1985); Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983); Rule 71.1(e), SCRCP. Moreover, it is the defendant's burden to prove that any purported unauthorized communications with jurors resulted in actual juror partiality; "prejudice is not to be presumed." United States v. Pennell, 737 F.2d 521, 532 (6th Cir. 1984), citing Smith v. Phillips, 455 U.S. 209 (1982), supra. The remedy for allegations of jury tampering, misconduct, or bias is not an automatic new trial, but rather a hearing at which a defendant has the opportunity to prove actual bias. Smith, 455 U.S. at 215 (emphasis added); United States v. Olano, 507 U.S. 725 (1993)(rejecting the defendants' claim that the alternate jurors being present during jury deliberations constituted a presumption of prejudice automatically requiring a new trial).

Even in Remmer, infra, upon which the Petitioner heavily relies, the Court did not grant a new trial based on a presumption of prejudice, but rather instructed the lower court - once the defendant proved an unauthorized contact occurred and was of such a character as to reasonably

draw into question the integrity of the verdict - to conduct a hearing to "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial." Remmer v. U.S., 347 U.S. 227 (1954); Remmer v. U.S., 350 U.S. 377 (1956). Only after a hearing covering the "total picture" did the Court ultimately grant the defendant a new trial – significantly, on a very narrow set of facts that are not present in the instant case. Id. Thus, Remmer does not stand for the proposition that any of the alleged incidents in this case, even if true as alleged, are presumptively prejudicial as a matter of law.

Furthermore, this Court has repeatedly held that it is the defendant who must prove prejudice from outside or improper influence on the jury. See State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999)(the Court rejected a presumption of prejudice analysis and held that a defendant must establish he was denied a fair trial as a result of an alternate juror's momentary participation in jury deliberations. In requiring a defendant to demonstrate prejudice, the Court reiterated that "unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict."); See also State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998), cert denied, 525 U.S. 1077, 119 S.Ct. 816 (1999); State v. Carmack, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010); State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999)("At oral argument before this Court, the state maintained that jury misconduct in the form of premature deliberations did not warrant automatic reversal, and that the burden was on the defendant to demonstrate that such deliberations affected the jury's verdict. We agree.")(emphasis added); State v. Hunter, 320 S.C. 85, 463 S.E.2d 314 (1995); State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) (holding that the burden of proof was on the defendant to show not only error but resulting prejudice from the jurors' reading of trial-related newspaper article); State v. Bonneau, 276 S.C. 122, 276 S.E.2d 300 (1981)(holding that it is the defendant's burden to demonstrate the

presence of an alternate juror denied him a fair trial); State v. Carrigan, 284 S.C. 610, 328 S.E.2d 119 (Ct.App.1985) (holding mere fact that conversation occurred between juror and witness for State did not necessarily prejudice defendant); State v. Smith, 338 S.C. 66, 525 S.E.2d 263 (Ct. App. 1999)(the general test for evaluating alleged juror misconduct is, first, whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence); State Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000)(where a defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). Significantly, in Pittman, this Court upheld the trial court's decision to deny the defendant's motion for a new trial where the trial court found that, even though some juror misconduct occurred, the defendant failed to meet his burden of proving prejudice. Id. at 556-57.

II.

Did the PCR Court properly overrule Petitioner's objection to questions to the jurors whether purported external contacts during sequestration affected their ability to remain fair and impartial? (Petitioner's Argument IV)

Petitioner alleges that the PCR court erred in allowing the Respondent to improperly question jurors during the PCR hearing, citing Rule 606(b), SCRE. The issue as presented in the Petition for Writ of Certiorari is an analysis of the grammatical construction of the rule[1]. Respondent submits that the argument Petitioner presents on appeal was not properly presented to and ruled upon by the PCR judge and may not be presented for the first time on appeal. Nevertheless, the PCR court correctly ruled the testimony admissible.

[1] Petition for Writ of Cert, pages 33-37. "Consideration of the language appearing before and after the word 'except' is critical. Before providing for the exception, Rule 606(b) prohibits consideration of any effect on the 'juror's mind or emotions' or the juror's mental process.'"

The question, answer, and objection to the first juror questioned in this regard is as follows:

> MS. KINZELER: Mr. Grimes, the things that we have been talking about today, did the things we have been talking about today affect your ability to remain a fair and impartial juror in this case?
>
> MR. GRIMES: I don't believe they did, no.
>
> MR. GROSE: **Objection, your Honor. That is a legal conclusion, and it is Rule 606(B)**.
>
> MS. KINZELER: Your Honor, I'm ready to respond when you're wanting to hear a response.
>
> THE COURT: Rule 606(B) says what?
>
> MR. GROSE: Rule 606(B) has to do with inquiry into the validity of a verdict or indictment and limitations on questions that can be asked and **this is ultimately a determination for the Court to make**.
>
> MS. KINZELER: Your Honor, Rule 606(B) permits, let me find the specific language, except a juror may testify on the question as to whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon them . . . . [W]e're not asking Mr. Grimes about the deliberative process, we're asking about his ability to listen, to remain fair and impartial, which in the question that would have been asked had the matter been raised at the time.
>
> MR. GROSE: Your Honor, I think that the questions that would have been asked if these matters had been raised at the time were, you know what happened, and then Judge Floyd could make the determination, and so, you know, it's proper to ask Mr. Grimes about these incidents but **it is not proper to ask him to draw the conclusion that is a matter of law for the Court.** I mean, we're asking him about extraneous influences and then it is for the Court to make a determination as to what effect that had on the trial.

THE COURT: Hold on. Overrule the objection, I will permit it.

App. 1534-36 (Emphasis added). Later versions of the objection only present a rote statement of the rule name:

MS. SCHULTZ: Objection, Your Honor, Rule 606(B).

THE COURT: Overruled, noted.

App. 1562. No ground other than calling forth the general rule number was provided in this or subsequent objections. *E.g.* App. 1562, 1594-95, 1605, 1606-07, 1620-21, 1826, 1834-35. An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. McCain v. Brightharp, 730 S.E.2d 916 (S.C. Ct. App. 2012); State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005). Petitioner may not object on one ground at trial and then present a different ground on appeal. State v. Samuel, 400 S.C. 593, 753 S.E.2d 541 (Ct. App. 2012). It is also well-settled that an objection must be on a specific ground. See State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)(general objection which does not specify particular ground on which objection is based is insufficient to preserve question for review); State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct.App.1999). A rote recitation of "objection" is not enough to preserve an issue on appeal, the specific grounds must be stated. State v. Holley, 136 S. C. 68, 134 S. E. 213 (1926); State v. Rucker, 86 S. C. 66, 68 S. E. 133 (1910).

The relevant objections made during the PCR hearing are not the objections presented in Petitioner arguments in his Petition for Writ of Certiorari. Petitioner's only substantial objection has nothing to do with the construction and interpretation of the rule. App. 1534-36. Their remaining objections are simple recitations of "Objection, 606(b)" (App. 1652 etc.) or, in one

case, just "objection" which preserved nothing for appellate review. (App. 1607). Petitioner did not mention the language of the statute he is attempting to construe before this Court, much less argue his interpretation of the statute. Petitioner did not refer back to his earlier argument in support of the first objection raised to this question and did not ask the court to consider future objections to be considered as having been made on that ground. Therefore, the subsequent objections preserved nothing for appeal. This Court need not reach the issue.

Assuming arguendo the issue is preserved, the PCR judge properly admitted the jurors' testimony about whether they could remain fair and impartial. Admission of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. An abuse occurs when there is no evidentiary support for the ruling or the ruling is controlled by an error of law. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006). Rule 606(b), SCRE provides:

> **(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The judge properly admitted the answers of Juror Grimes and the other jurors who were questioned similarly. The jurors were not questioned about matters occurring or discussed in the jury room during jury deliberations or any matter that caused the jurors to assent to or dissent

from the verdict but inquired whether purported outside contacts occurring during trial but before deliberations was brought to improperly bear on the jurors. As Respondent argued at the hearing, ". . . [W]e're not asking Mr. Grimes about the deliberative process, we're asking about his ability to listen, to remain fair and impartial, which is the question that would have even been asked had the matter been raised [at the time of the incident]." App. 1535, Lines 21-25.

Petitioner misconstrues the plain language of Rule 606(b). The meaning or application of court rules is interpreted in the same manner as statutes. See Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) (interpreting the South Carolina Rules of Civil Procedure with the rules of statutory construction). "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." Id.; State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008).

The meaning of Rule 606(b), SCRE is plain and unambiguous: when inquiring into a verdict, jurors may not testify about their mental processes or that of other jurors *during deliberations*, except to ask about extraneous prejudicial information that affected the jury or outside influences upon individual jurors. There are two commas in the sentence: one after the word "indictment" and one after the word "therewith." The commas separate the rule into three parts: (1) when the rule applies, (2) general rule against juror deliberation testimony, and (3) exceptions to the general rule against juror testimony.

Petitioner argues that the exceptions are unrelated to the rule. They state that "Neither exception allows consideration of the external or internal influence on the 'juror's mind or emotions' or the 'juror's mental process.'" (Pet. Cert. p. 34) But the structure of the rule reveals that the exceptions depend on the rule against juror testimony. The word "except" indicates a

relationship between the preceding text and the following text. Rule 606(b), SCRE. Petitioner's construction is not the plain meaning of the rule and must fail.

Next, Petitioner cites case law to support his position, but offers no case specifically addressing this question. The case law is irrelevant, refers to juror testimony in the jury deliberation room, or contradicts his argument. To the extent Petitioner relies on State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003) as authority that this Court has refused to consider similar testimony from jurors (Cert. Pet. 36), he is incorrect:

> "In addition, appellant submitted sworn statements from nine death penalty qualified jurors. In seven of these statements, qualified jurors stated their relatives had been questioned by either detectives or unknown individuals. One juror stated an unknown person questioned his great aunt, mother, and thirteen year old daughter. Some jurors stated concern about the investigation, **one expressly noting he felt as if the questioning amounted to jury tampering**."

State v. Bryant, 354 S.C. 390, 394, 581 S.E.2d 157, 160 (2003)(emphasis added). Moreover, the other arguments Petitioner makes in reliance on Bryant are not relevant to this Court's review of the admissibility of evidence.

Petitioner's reliance on the federal cases Stockton[2] and Fullwood are also misplaced. Both cases are distinguishable in that the matters in question there concerned violations occurring during jury deliberations, not before. In Fullwood v. Lee, 290 F.3d 663, 679 (4th Cir. 2002), a juror testified that another juror was strongly influenced by her anti-death penalty husband: "[i]t was obvious to me that the pressure brought upon her by her husband caused her

[2] Petitioner quotes *Stockton's* presumption of prejudice. (Pet. Cert. p. 34). The presumption in *Stockton* is irrelevant to whether evidence is admissible. Again, presumptions are about the substance of the evidence, not whether the evidence was properly admitted.

to *vote exactly the way he wanted her to.*" While it is true that the husband attempted to influence her before and during the deliberations, the goal was to make the juror vote a certain way, and thus concern the deliberations. This information went directly to discussions and decisions to assent to or dissent from the verdict. The matter explored in Stockton v. Com. of Va., 852 F.2d 740, 742 (4th Cir. 1988), occurred when the jurors were in sentencing deliberation.

Petitioner also cites Remmer II for the presumption of prejudice but presumption of prejudice is not relevant to this Court's current inquiry of this issue on appeal. Presumption of prejudice was clearly not offered in support of the objection to the testimony and may not be offered for the first time on appeal. Nevertheless, Remmer provides no support to challenge the admissibility of evidence or a Rule 606(b) violation. Federal Rule of Evidence 606(b) was enacted in 1975, and Remmer was decided in 1956. Additionally, Remmer contradicts Petitioner's position because the court considered the juror's testimony about the offer the FBI agent made before deliberations. Remmer v. U.S., 350 U.S. 377, 381 (1956). In other words, the testimony was admitted into evidence: The Court could not have considered it on appeal otherwise. The same appears to be true in State v.Bryant , 354 S.C. 390, 581 S.E.2d 157 (2003). Nevertheless, the question presented in this case about the admissibility of the testimony was not addressed by this Court in Bryant.

Furthermore, the Supreme Court of the United States has admitted testimony from a juror on identical grounds to those to which Petitioner objects. As stated above, similar testimony was admitted in Remmer II. In Parker v. Gladden, a juror testified about improper communications between bailiffs and jurors while walking on a sidewalk during trial. 385 U.S. 363, 363-364 (1966). The Supreme court stated that " . . . one of the jurors testified that she was prejudiced by

the statements". Id. at 365. Like the current case, the conduct occurred before jury deliberations, and reached the mind of the juror, yet was admitted.

The public policy reasons for Rule 606(b) do not prohibit the testimony admitted in this case. The concern that finality to litigation must be preserved is actually fostered by admission of this testimony. See Fed. R. Evid. 606 advisory committee's notes (1974 Enactment, note to subdivision (b)). The preservation of juror privacy free from post-trial scrutiny to allow full and free debate during deliberations necessary to the attainment of just verdicts is also not implicated. The question did not pertain to the deliberations. Id. None of the policy reasons or concerns extends to conduct before juror deliberations.

Respondent submits that there is little reason to extend the scope of Rule 606(b) as Petitioner suggests. There is no need to prohibit juror testimony about the incidents in this case because such testimony does not destroy the privacy of deliberations, nor the juror's ability to engage in free debate.

Lastly, Respondent notes that the PCR judge concluded that the very nature of each alleged instance of alleged external contact and communication were not of such character as to have been prejudicial. This Court can affirm the PCR court's order without reaching the question of admissibility of the juror testimony pursuant to Rule 606(b).

III.

May Petitioner challenge the PCR Court's denial of summary judgment on appeal when denial of summary judgment is never appealable; nevertheless, the post-convictoin relief court properly denied summary judgment and thereafter correctly determined the issue was not cognizable for post-conviction relief; alternatively, Juror Grimes was not disqualified from jury service. (Petitioner's Arguments V and VI)

Petitioner moved the PCR court for summary judgment on the ground juror John Grimes was a licensed private security guard which Petitioner contended was the functional equivalent

of a deputy sheriff and disqualified Grimes from jury service as a matter of law under S.C. Code sections 14-7-820 and 40-18-110. The motion was denied and Petitioner contends on appeal the denial of summary judgment was error because juror Grimes failed to disclose at the time of trial that he was licensed by SLED as a security guard. In a separate argument on appeal, Petitioner also asserts that, after denying the motion for summary judgment and hearing testimony on the issue, the post-conviction relief judge erred "by denying Beckham's motion for summary judgment" when the evidence showed Grimes failed to disclose that he was licensed by SLED as an armed security guard and was disqualified from jury service pursuant to S.C. Code Ann. section 14-7-820 (Supp. 2012).

Factual Background

Jury selection in this case included both a jury qualification stage and an individual voir dire of each juror. During jury qualification, the Honorable Henry Floyd asked if "any member of the jury panel [is] a commissioned law enforcement officer, that is, you have the power to make an arrest? If so, please stand." No one responded. Supp. App. 24. Judge Floyd then asked whether "any member of the jury panel has a member of their immediate family employed by the South Carolina Law Enforcement Division, commonly known as SLED? If so, please stand." Potential juror John Grimes stated that he has a "SLED card for a private security officer of property of Duke Power." Supp. App. 170. The subject came up again during John Grimes' individual voir dire. Each attorney had the opportunity to question him directly. Petitioner specifically asked John Grimes about his job as a security officer. Petitioner indicated that he "notice[d Grimes] was a security officer for Duke Power. Supp. App. 1075. Petitioner thereafter asked whether Grimes worked with law enforcement a lot and arrested people who trespass or commit crimes. Supp. App. 1075. Grimes disclosed that he had been at Duke Power for

seventeen years and "had the power to make arrests" but had never arrested anyone. Supp. App. 1075-76. There was no further inquiry, and Petitioner indicated he had no objection to the jury as impanelled. Supp. App. 1134-35. Judge Floyd found the jury qualified under the statutory requirements and that any other issues have been consented to or waived. Supp. App. 1135. Later, during trial, Petitioner expressed his satisfaction with the jury and indicated it was a jury he wished to keep. Supp. App. 3510.

At a PCR discovery hearing on September 17, 2010, former SLED Director Reginald Lloyd appeared as the only available counsel for SLED at the time. App. 1772-73. Director Lloyd explained that a search was conducted pursuant to Petitioner's request and it was determined that juror Grimes was not a constable but was licensed as an armed security guard. Lloyd explained that the only records SLED maintains for John Grimes relate to the application and renewals for that license consistent with Grimes' statements during jury qualification and individual voir dire which includes firearm qualifications, criminal records checks, and background checks. Director Lloyd explained that the powers of a private security guard are established by statute and not SLED and include the power to arrest like a deputy sheriff but limited to the particular property. He explained that SLED only regulates private security guards from the standpoint of firearm proficiency, background checks and criminal record checks. Rather than producing Grimes' entire file containing background and criminal records checks, Director Lloyd offered to certify that Grimes is licensed by SLED as a private security guard to which Petitioner agreed. App.1425-1430.

At the PCR hearing, John Grimes acknowledged that he has worked as an armed security officer for Duke Energy at Oconee Nuclear Station for thirty-two years. He stated that he must be registered by SLED to carry a firearm which includes an annual background investigation and

firearm proficiency. He has a card issued by SLED that allows him to carry a firearm. App. 1510-1512. Grimes testified that he was not then or at the time of Petitioner's trial a deputy sheriff or auxillary deputy sheriff but is "a security officer. On the property I'm paid to protect I have the power of arrest equivalent to a deputy but I am not a deputy sheriff." App. 1514 -15. Grimes explained that if he arrested anyone on Duke Power property, he must yield to local law enforcement officers and would have to call local law enforcement officers to transport the person arrested because he could not transport the individual off of the property. Grimes testified that all powers of arrest of a deputy sheriff are lost when he leaves Duke Power property. App. 1530; 1533.

Lieutenant Ben Moore also testified at the PCR hearing that he heads the regulatory department at SLED and is responsible for overseeing the constable program, security guard registration, private detective registration and licensing and the issuance of concealed weapons permits and retail pistol dealers' licenses. Moore testified that a private security officer like John Grimes must have four or more hours of firearms training from a certified security guard trainer at a technical school and not the Criminal Justice Academy while sheriffs and deputy sheriffs must complete training at the Criminal Justice Academy. He explained that sheriffs and deputy sheriffs are employees of the county but security guards are employees of the private companies that hire them. He stated that security guards protect the interests of the employer whose property they are hired to protect. App. 2065 – 72; 2077 – 78.

Lt. Moore testified that a security guard has the power of arrest of a deputy sheriff while on the property he is hired to protect but does not have the powers of arrest of a deputy sheriff once he steps off of his employer's property. Moore testified that if a private security guard apprehends someone on the private property of his employer, local law enforcement officers

must be contacted to come to the property to transport the person because a private security guard cannot transport the person apprehended off of the property of his employer. Moore stated that, unlike sheriffs and deputy sheriffs, private security guards are not trained to conduct criminal investigation or witness interviews and may not follow in hot pursuit or engage blue lights off of the property they are hired to protect. He also stated that, unlike sheriffs and deputy sheriffs, private security guards do not have the power or authority to investigate crimes and can only carry a firearm in an exposed manner while in uniform on duty on the property the security guard is hired to protect or en route to or from his place of employment. A private security guard does not have any authority off of the property of the employer and does not take an oath of office to uphold the United States Constitution or state constitution and does not possess a commission through the Office of the Secretary of State but merely receives a registration card providing private security guard status. The registration card received by John Grimes is "merely a registration card giving them the authority of a security officer. This status may be revoked if a private security guard impersonated a law enforcement officer or obstructed a law enforcement investigation. App. 2070 – 2080; 2083. Lt. Moore reiterated that, other than the power to arrest a person on the property of his employer by detaining the person, John Grimes, as a private security guard, does not have any authority of a deputy sheriff, sheriff, or constable and could do nothing more other than wait for the arrival of law enforcement officers. App. 2083 – 2089.

The Honorable Henry Floyd testified about his extensive experience as an attorney and trial judge is qualifying juries. Judge Floyd explained his interpretation of the purpose of making the inquiry of Petitioner's potential jurors whether any member of the jury

panel was a commissioned law enforcement officer was because as county officers, they are "political," and "you wouldn't want to put them under the pressure of having to make a decision" in a high profile trial. App. 2463 – 2465; 2507. Similarly, regarding "employees within the walls of the courthouse," Judge Floyd explained that in a courthouse, "everybody knows everything that's going on, and they talk about things." App. 2507 - 08. In his opinion, the reasoning behind this inquiry is based on the possibility that "these people might know something about the case more than they should know, so they should be excluded." App. 2506 - 08.

Initially, Petitioner moved the PCR judge for summary judgment asserting he was entitled to a new trial as a matter of law because juror Grimes was a "constable" who was disqualified from service on his jury pursuant to S.C. Code Ann. §14-7-820. App. 628. After learning that Grimes is not commissioned as a constable, but is a private security guard, Petitioner filed a Supplemental Memorandum in Support of the Petitioner's Motion for Summary judgment in which he asserted he was entitled to summary judgment on the ground that juror Grimes is the "functional and legal equivalent of a deputy sheriff" who was disqualified from jury service under S.C. Code Ann. §14-7-820 and S.C. Code Ann. §40-18-110. App. 1446. The Respondent filed its Return to the Petitioner's Motion for and Memorandum in Support of Summary Judgment. App. 1453. The PCR court heard Petitioner's motion on September 28, 2010, prior to convening the evidentiary hearing in this action. App. 1482-95. The Court denied the Petitioner's Motion for Summary Judgment on the record on that same day, and subsequently issued an Order denying the Petitioner's Motion for Summary Judgment on September 30, 2010. App. 1495 (verbal denial of summary judgment); App. 2445 (written order denying summary

judgment.) Petitioner moved the court to reconsider the ruling and the motion was denied. App. 3331. Testimony was thereafter presented by the parties on the issue during the post-conviction relief hearing.

A. Issue of the denial of summary judgment is not properly before this Court

First, as to Petitioner's contention that the PCR judge erred in denying a motion for summary judgment, Respondent submits that this Court need not consider the issue. An order denying summary judgment is not appealable. AJG Holdings LLC v. Dunn, 706 S.E.2d 23 (Ct.App. 2011); In re Rabens, 688 S.E.2d 602 (S.C. Ct. App. 2010); Bank of New York v. Sumter County, 691 S.E.2d 473 (2010); Provident Life and Acc. Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924 (Ct.App. 1994); Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct.App. 1994). The denial of summary judgment does not finally determine anything about the merits of the issue – only that the case should proceed to trial. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). Nor is the denial of summary judgment appealable after the matter is decided following a hearing or trial. Harris v. Campbell, 293 S.C. 86, 358 S.E.2d 719 (1987). Thus, Petitioner cannot appeal the denial of his motion for summary judgment.

B. Petitioner is barred from challenging Juror Grimes' status

Respondent submits the PCR court, after denying summary judgment, properly concluded Petitioner was barred from presenting the issue in PCR because it presents a claim that is not cognizable pursuant to S.C. Code Ann. §14-7-1030. Section 14-7-1030 requires all objections to jurors being called to sit on a trial to be made prior to the juror being impanelled or any issue or question arising out of an action or proceeding shall be deemed waived, "and if made thereafter shall be of no effect." See also State v. Parsons, 171 S.C. 449, 172 S.E. 424 (1934); State v.

Rayfield, 232 S.C. 230, 101 S.E.2d 505 (1958); State v. Gregory, 171 S.C. 535, 172 S.E. 692 (1934) ("accused who fails to exercise due diligence in discovering disqualification of juror before empanelling of jury cannot, after rendition of adverse verdict, ask court to disturb verdict"); Smith Oliver Motor Co., 174 S.C. 464, 177 S.E. 791 (1935) (new trial not be allowed where juror was improperly listed on venire and was also agent of party, since objection to juror should have been taken before trial); State v. Harreld, 228 S.C. 311, 89 S.E.2d 879 (1955) (appellant will not be permitted to take his chances upon a favorable verdict, and in case of disappointment, have the verdict set aside upon a technicality).

At trial, both the trial judge and Petitioner's trial counsel addressed juror Grimes' status as a private security guard for Duke Power and corresponding power to arrest on Duke Power property. The trial court judge specifically inquired of the jurors as to whether any of them were a county officer or employed within the walls of the courthouse, or whether any of them were commissioned law enforcement officers having the power to make an arrest to determine whether any of the jurors were disqualified under §14-7-820. Supp. App. 24. Subsequently, the trial court judge specifically addressed juror Grimes' status as a private security officer for Duke Power. Supp. App. 170. The issue was specifically addressed again by the Petitioner during juror Grimes' individual voir dire. Supp. App. 1075-76. The record is clear that juror Grimes' status as a private security guard for Duke Power, with the power to arrest on Duke Power property, was known to Petitioner before and during jury voir dire prior to juror Grimes being selected to serve on the Petitioner's jury, and that juror Grimes' status and function as a private security guard for Duke Power were clearly and adequately addressed by both the trial judge and the Petitioner at trial. Therefore, the Petitioner waived this allegation at the time the jury was impanelled and cannot now, after receiving an unfavorable verdict, present this claim.

In order to circumvent his waiver, Petitioner contends Grimes disclosed for the first time at PCR that he has the "powers of a deputy sheriff." This provides Petitioner no relief from the waiver. Grimes' testimony and his responses during *voir dire* prior to being selected as a juror for Petitioner's trial are both consistent and clear: John Grimes is a private security guard with the power to arrest only on the property of his private employer. Grimes qualified his "powers of a deputy sheriff" as limited to 1) for the laws of arrest and 2) to protect the property of his employer only. During *voir dire* Grimes testified that he is a private security guard with the power to arrest on the private property of his employer. Grimes' **function** as a private security guard and the power to arrest on Duke Power property was addressed on the record by the trial court and Petitioner's trial counsel. The fact that neither the trial court judge nor Grimes ever specifically used the phrase "powers of a deputy sheriff" is a distinction without a difference given that the powers he has, "of a deputy sheriff," were (and still are) to 1) powers of arrest 2) on the property of his employer as he so stated during *voir dire* and in his testimony at PCR. Grimes' testimony both at trial and during PCR was not limited to his "subjective view" of his employment but rather specifically addressed his **job function** as a private security guard employed by Duke Energy.

To the extent the Petitioner asserts that Grimes "disclosed for the first time" that he has the powers of a deputy sheriff to avoid the procedural bar presented in S.C. Code Ann. §14-7-1030 and the relevant case law which requires all objections to jurors being called to sit on a trial to be made prior to the juror being impanelled, Petitioner contradicts himself. Petitioner cannot assert that Grimes' describing himself as having the powers of a deputy sheriff has no bearing on whether he is disqualified under the statute because it is his "subjective view," and simultaneously rely on Grimes' failure to "disclose" the same information (specifically the

"powers of a deputy sheriff") during *voir dire* as a way to circumvent the fact that this ground was waived when it was not objected to or presented prior to Grimes' being impanelled as a juror. In short, if Grimes' "subjective view" is not outcome determinative then it makes no difference that Grimes did not use the words "powers of a deputy sheriff" in describing his power to arrest at the time of trial.

The fact that Grimes has now stated that he has the powers of a deputy sheriff for the laws of arrest on his employer's property does not change the fact that this ground was known to Petitioner prior to impanelment or could have been discovered through the exercise of due diligence. See State v. Gregory, 171 S.C. 535, 172 S.E. 692 (1934)("accused who fails to exercise due diligence in discovering disqualification of juror before impanelling of jury cannot, after rendition of adverse verdict, ask court to disturb verdict"); State v. Harreld, 228 S.C. 311, 89 S.E.2d 879 (1955); Wilson v. Childs, 315 S.C. 431, 434 S.E.2d 286 (Ct. App. 1993), *citing* Mew v. Railway Co., 55 S.C. 90, 32 S.E. 828 (1897)("where the disqualification relied on might have been discovered by the exercise of ordinary care, it affords no excuse for failing to make the objection in due season, since a party should not be permitted to take advantage of his own negligence."). Here, Petitioner must demonstrate he could not have discovered this ground through due diligence prior to the juror's impanelment. Wilson, 315 S.C. at 436; Southern Welding Works, Inc. v. K & S Constr. Co., 286 S.C. 158, 162, 332 S.E.2d 102, 105 (Ct.App.1985).

Moreover, §14-7-820 provides that:

> No clerk or deputy clerk of the court, constable, sheriff, probate judge, county commissioner, magistrate or other county officer, or any person employed within the walls of any courthouse is eligible as a juryman in any civil or criminal case; **provided,**

that no person may be disqualified under this section except as determined by the court.

(emphasis added). The South Carolina General Assembly amended §14-7-820 in 1986 – ten years prior to Petitioner's trial - to add the condition that no person may be disqualified under this statute **except as determined by the court**. See Act No. 340 § 2, eff March 10, 1986. The statute in place at the time of trial existed specifically included the conditional language. Necessarily, then, the Petitioner was not entitled to judgment as a matter of law on this issue where the statute in place at the time of the Petitioner's trial did not provide for an automatic disqualification, but rather required the trial court to make a finding on the issue. Here, the record is clear that Grimes' **function** as a private security guard with the power to arrest on the property of his employer and the applicability and or inapplicability of §14-7-820 were addressed by the trial court, and the trial court judge did not find Grimes disqualified under this statute. Where the purported disqualification was a finding to be made in the discretion of the trial court judge during *voir dire*, it was not appropriate for summary judgment on grounds advanced by Petitioner and was not an issue that is appropriate for PCR.

C. Petitioner failed to establish that a security guard is disqualified.

Respondent submits that Petitioner's assertion juror Grimes was disqualified from the jury as a matter of law fails on the merits. Respondent submits that Grimes is plainly not a sheriff or the functional equivalent of one for purposes of the statute. It is true that deputy sheriffs are excluded under S.C. Code Ann. §14-7-820. State v. Johnson 123 S.C. 50, 115 S.E. 748 (1923). It is also true that highway patrolmen are excluded. State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986). However, special sheriff deputies cannot be excluded. Bryant v. State,

264 S.C. 157, 213 S.E.2d 451 (1975). Additionally, a Navy criminal investigator who formerly worked at SLED cannot be excluded. State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986).

The reason that deputy sheriffs and patrolmen are excluded under §14-7-820 is because of their statutorily defined powers. In Johnson, the court noted that deputy sheriffs are expressly vested with "all the rights and powers 'prescribed by law for constables or magistrates', and [are] required to take the oath of office prescribed by the Constitution and statutes of this state." Johnson at 50, 115 S.E. at 749. In State v. Johnson, 123 S.C. 50, 115 S.E. 748 (1923), this Court held that a privately employed deputy sheriff for an industrial corporation was disqualified under §14-7-820 because he was vested with **all** the rights and powers prescribed by law for constables or magistrates, and was required to take an oath of office according to the South Carolina Constitution and state statutes. Significantly, in Johnson, this Court specifically rejected the contention that the defendant was entitled to a new trial as a matter of law even when a disqualification is established; the court must still determine whether the disqualification, if established, prejudiced the defendant. Id. at 749.

Conversely, in Bryant v. State, 264 S.C. 157, 213 S.E.2d 451 (1975), the Court held that a special deputy sheriff was not automatically disqualified because his duties were **confined** to the service of process and **did not include all** of the duties exercised by a bonafide law enforcement officer. Again, the Court also held the juror was not automatically disqualified from jury service without a showing of bias or prejudice. Id. 264 S.C. at 158. See also State v. Matthews, 291 S.C. 339, 343, 353 S.E.2d 444, 447 (1986)(rejecting this argument where the juror did not hold any of the positions covered by the statute). A showing of prejudice is required. In State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), this Court affirmed the defendant's conviction holding in relevant part that a juror, who was a corrections officer and

whose duties did not involve enforcing the criminal law of the state of South Carolina, was not disqualified pursuant to §14-7-820.

In State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986), this Court held that a highway patrolman was disqualified under §14-7-820 noting that the patrolman was "an officer of the state with **broad authority and power**, similar to that of a deputy sheriff, in enforcing the law." Id. at 334. In reaching its holding, the Court noted the highway patrolman, like a deputy sheriff, had the authority to serve criminal processes against offenders as sheriffs of the various counties, arrest without warrants, and that the patrolman had the same power and authority held by deputy sheriffs "for the enforcement of the criminal laws of the State." Id. In Cooper, this Court determined the patrolman was the functional equivalent of a deputy sheriff because the job functions require "constant reciprocity," and the only real distinction between the patrolman and a deputy sheriff was the patrolman's status as an officer of the State rather than the various counties. Id. at 335. The Court also noted the "natural bond" that develops between their respective law enforcement agencies – the South Carolina Highway Patrol and a county Sheriff's Department. Id. See also Gathers v. Harris Teeter Supermarket, Inc, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984)(testimony that man who accused plaintiff of shoplifting failed to give shoplifter *Miranda* warnings when he detained her was admissible because his failure to Mirandize her showed that man was not acting as a law enforcement officer, but, rather, was acting as a private security guard at the time he arrested her).[3]

[3] Respondent further notes that in Cooper, counsel for the defendant challenged for cause the seating of the patrolman as a juror given his law enforcement capacity, and the trial court overruled him. Counsel for the defendant then used one of his peremptory challenges to exclude the patrolman and exhausted his peremptory challenges prior to the impaneling of the jury. On direct appeal, the Court held that the trial court erred in overruling counsel's challenges to the patrolman being seated as a juror for the reasons stated above.

In State v. Brant, 278 S.C. 188, 293 S.E.2d 703 (1982), the defendant challenged his conviction for resisting arrest, arguing that the arresting security guard was not a law enforcement officer within the meaning of the statute and thus his charge and arrest were invalid. In Brant, the defendant was arrested by a security guard who observed him shoplifting from the store by which the guard was employed. Id. In affirming the conviction for resisting arrest, the Court read §16-9-310 (defining the term "law enforcement officer") together with §40-17-130 ("licensees granted arresting authority") – which provided that the security guard had "the authority and power which sheriffs have to make arrest...**but shall have such powers only on the aforementioned property**." The Court held that the security guard was a "law enforcement officer" within the meaning of the statute, given that the security guard had, by reading the statutes together, the power of a sheriff **1) to arrest** and **2) on the property of his employer**. Clearly, in addressing the defendant's challenge to the validity of his arrest by a security guard, the security guard qualifies as a "law enforcement officer" **for the purposes of affecting arrest on his employer's property** as that limited power is granted to security guards pursuant to a separate statute addressing arresting authority of security guards. The Court did not hold that the security guard is clearly a "law enforcement officer," *per se* or in every instance or without any further qualification. It is clear that the Court's holding that the security guard was a law enforcement officer applied to the security guard's authority to arrest a shoplifter on his employer's property when reading §16-9-310 together with the statute giving security guards the power to arrest, §40-17-130. If the Court held as Petitioner contends, that the security guard was a law enforcement officer, without any further qualification or limitation, the Court necessarily would not have endeavored to read the statutes in conjunction to reach its holding.

In the present case, it is clear that Grimes is and was at the time of Petitioner's trial a private security guard with the power to arrest but that power is limited to the property on which he is employed, and that his arrest powers are consistent with and limited by § 40-18-110. At the time of Petitioner's trial, this issue would have been governed by §40-17-20, et seq (repealed in 2000). Sections 40-17-20 through 40-17-130 essentially empowered private security guards to affect an arrest, as a public law enforcement official could, and nothing more - but only on the property he is hired to protect. See Chiles v. Crooks, 708 F.Supp. 127 (D.S.C. 1989); S.C. Code Ann. §40-17-20, et. seq. Section 40-18-110, the statute granting Grimes' the limited authority to arrest only on the property of his employer, did not empower Grimes to do anything more: he did not have any investigative authority, did not have the authority to affect an arrest once he stepped off of the property of his employer, could not engage in hot pursuit or illuminate blue lights off of his employer's property, did not have to take an oath, and was not empowered to enforce the criminal laws of the State. See Chiles, 708 F.Supp. at 131-32. Unlike the situation in Cooper and other authority relied upon by Petitioner, Grimes did not have any and all powers of a deputy sheriff on the property of his employer – only the power to arrest, and only on the private property of his employer. A security guard who is granted the powers of a sheriff's deputy to arrest on the property on which he is employed, pursuant to §40-17-130 (the statute that applied at the time of Petitioner's trial) and or to the current statute §40-18-110, is only required to complete twelve hours of training by a certified security guard trainer. To have any other authority or power to perform any function of a sheriff's deputy beyond the power to arrest on the employer's property, the individual would have to go through police academy training and would have be a bonafide police officer. In essence, Grimes could not perform any other functions of a sheriff's deputy when his power and authority is limited to that granted in §40-18-

110 and where he did not have any of the requisite training necessary to be able to perform any other function of a sheriff's deputy.

Thus, Grimes is clearly not the "functional or legal equivalent" of a sheriff or deputy sheriff where the **only** function akin to the functions of a deputy sheriff that Grimes had was the power to arrest and even that function was limited to the property of his employer, and nothing more. Grimes did not have any law enforcement authority when he stepped off the property of his private employer, and the only law enforcement authority Grimes conceivably had at the time of the Applicant's trial was limited to the 1) power of arrest, and limited to 2) only the property of his employer. Thus, he was not disqualified from jury service under §14-7-820.

D. **Petitioner is not entitled to automatic disqualification under §14-7-820.**

Petitioner alleges that he should be granted a new trial because juror Grimes should have been automatically disqualified from the jury. This is inaccurate. Disqualification under S.C. Code Ann. §14-7-820 is at the court's discretion. The statute states that "that no person may be disqualified under this section except as determined by the court." S.C. Code Ann. §14-7-820. "The qualification of a juror is addressed to the sound discretion of the trial judge, whose decision will not be disturbed unless wholly unsupported by the evidence." State v. Matthews, 291 S.C. 339, 343, 353 S.E.2d 444, 447 (1986) (citing State v. Gilbert, 277 S.C. 368, 287 S.E.2d 488 (1982)). Therefore, the issue Petitioner presents is not cognizable for PCR because the time for ruling on the disqualification rested with the trial judge. Simmons v State,264 S.C. 417, 215 S.E.2d 883 (1974).

E. **Petitioner failed to prove that juror Grimes was prejudiced.**

Case law establishes that disqualification is not automatic but rests on whether the objecting party proves *individual bias or prejudice*. Matthews at 343, 353 S.E.2d at 447 ("Even a special

deputy sheriff is not automatically disqualified without a showing of bias or prejudice.") (citing Bryant v. State, 264 S.C. 257, 158, 213 S.E.2d 451, 452 (1975)); State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983). This Court focused on the actual position of the jurors, not just the job title. In Bryant, the title 'special deputy sheriff' would seem to indicate that the juror should have been excluded as in Johnson. Yet, he was not, because that juror's job (to serve process) was not one that created any sort of bias towards defendants in a criminal trial. All of Petitioner's arguments address security guards in general, not Grimes and his duties. Petitioner wholly failed to prove that juror Grimes was biased or prejudiced. In fact, juror Grimes' testimony clearly illustrates the *lack* of contact he had with law enforcement and the court system:

- Grimes testified at the PCR hearing that he had worked as a security guard for thirty-two years. App. 1511.
- Grimes testified at the PCR hearing that he had never arrested anyone. App. 1530.
- Grimes did not believe his SLED card was anything but a license to carry a firearm card. App. 1512 (Referring to the SLED card as "a card that I have to carry while I'm carrying a firearm.")
- Grimes testified at the PCR hearing that he was not a deputy sheriff, nor an auxiliary deputy sheriff. App. 1514.
- Lt. Ben Moore, the officer in charge of licensing security guards, testified that security guards cannot prosecute arrests in magistrate's court, and they cannot even transport a criminal off their property to jail. App. 2081-87[4].
- Lt. Moore testified that security guards are *not law enforcement officers*; in fact, they can be prosecuted for impersonating a law enforcement officer. App. 2079-80.

[4] The cases that Petitioner cites to show that security guards may prosecute misdemeanors are based on a specific legislative delegation of that authority in S.C. Code Ann. 40-17-130 (1986). (Cert. Pet. 40-41.) That statute was repealed in 2000 and security guards can no longer prosecute misdemeanors. This is why Lt. Moore stated that security guards have no power to prosecute in magistrate's court.

Juror Grimes' testimony clearly demonstrates he had no personal bias and his duties do not bring him into contact with the court system. The trial court also specifically inquired about impartiality. Supp. 173-74; 1068-80. Thus, the PCR court properly denied Petitioner relief under S.C. Code Ann. §14-7-820.

F. Petitioner fails to show the statute should extend to security guards

In the Petition, Petitioner presents no reason that Grimes should have been excluded other than a conclusory statement that Grimes is a "law enforcement officer." (Cert. Pet. 41.) This is not true: Lt. Moore clearly stated that security guards were *not* law enforcement officers. App. 2079-80. Petitioner presents no compelling reason to extend the scope of this statute to include security officers. Respondent asks that this Court deny certiorari.

IV

Did the PCR Court err in denying Petitioner's motion to reopen the record for additional discovery and litigation when the document upon which he relied to make the request was something known by his attorney prior to the conclusion of discovery and the PCR hearing and when Petitioner failed to show that reopening the record for the purpose sought would make a difference in the outcome of the case? (Petitioner's Argument VII.)

Petitioner asserts the post-conviction relief court erred in denying two requests to reopen the record in this case to allow additional discovery and to present additional testimony and in denying his later motion for a new trial on the same grounds. Respondent submits Petitioner failed to show error in the post-conviction relief court's rulings denying the two motions to reopen the record or the motion to reconsider the rulings at which point Petitioner also requested a new trial. Petitioner failed to prove abuse of discretion, and failed to provide any relevant legal authority in support of his argument. Nevertheless, Petitioner failed to establish the requisite prejudice from the PCR court's ruling and the petition must be denied.

Factual Background

On January 10, 2011 and subsequent to the evidentiary hearing but before the post-conviction relief court's ruling on his application for post-conviction relief, Petitioner moved to reopen the record in this case and for the court to order SLED to produce a 1996 Jury Sequestration Manual. Counsel for Petitioner attached a 2000 Jury Sequestration Manual that counsel had in his possession since 2007 to the motion as the basis for the request. App. 3114. He argued that SLED published a first edition of a jury sequestration manual several months before his trial and the manual was not provided to him in discovery of the SLED file concerning his trial. On February 11, 2011, Respondent opposed the motion contending Petitioner failed to make a proper showing to reopen the record because Petitioner's counsel had knowledge and possession of the 2000 Jury Sequestration Manual since 2007. Respondent also opposed the motion because the 2000 Jury Sequestration Manual would not make a difference in the outcome of the case as it was expressly intended as instructional information and guide, was not mandatory, and made clear that the presiding judge would exercise his discretion to provide the instructions and orders he deemed appropriate respecting jury sequestration which may or may not comport with the contents of the document upon which Petitioner was relying to support the request to reopen the record. App. 3160 - 61. Petitioner indicates that he then submitted a request to SLED pursuant to the Freedom of Information Act for a 1996 SLED Sequestration Manual referenced in the document in Petitioner's possession. The letter making the request as it appears in the Appendix is dated February 16, 2011 and not February 22, as asserted by Petitioner. App. 3234. On February 23, 2011 and out of an abundance of caution, Respondent supplemented its response to the motion to reopen and attached documents it received from the

trial judge, the Honorable Henry Floyd, shortly before the hearing. App. 3167. The PCR Court issued an order denying Petitioner's motion to reopen the record, stating that "Discovery has been ongoing for almost 11 years" and that "[d]iscovery and litigation in this case must end." App. 3198.

On April 1, 2011, Petitioner moved the post-conviction relief court to reconsider its ruling denying his motion to reopen the record and attached a series of email communications between counsel for the parties about the document Respondent received from Judge Floyd and which was provided by Respondent to Petitioner and the PCR court in the supplemental response. App. 2304; 3281-83 (emails are in reverse chronological order: the first one is on page 3283). On April 10, 2011, Respondent filed its return to the motion to reconsider. App. 3290. On April 13, 2011, Petitioner filed a reply brief arguing that SLED and counsel for Respondent acted in concert to conceal material in the case. On April 19, 2011, Respondent replied, stating that it "regret[s] that the documents [received from Judge Floyd] were not produced earlier, but it most certainly did not hide the material." Respondent notes that the material attached to its Supplemental Return was received from the trial judge and not SLED. App. 3325. On May 20, 2011, the post-conviction relief court denied Petitioner's motion to reconsider. App. 3331.

On July 22, Petitioner filed a second motion to reopen the record, along with a proffer of the 1996 SLED Jury Sequestration Manual Petitioner indicates he obtained from SLED pursuant to the Freedom of Information Act request, and also moved to recuse the Attorney General's Office on the basis counsel in the Office would become a necessary witnesses. Petitioner also moved for a court order requiring the SLED information officer, Judge Floyd, SLED agents, and counsel for Respondent to present testimony on the issue. App. 3333. On August 4, 2011,

Respondent filed a return. App. 3374. A hearing on the motion was held on August 16, 2011. On September 7, 2011, the PCR court issued the PCR order on appeal and also issued a separate order denying Petitioner's second request to reopen the record. App. 3512. In it, the Court stated that "The documents proffered are guides only and are not binding upon the presiding judge. The specific instructions, process and procedure for the jury sequestration was within the discretion, control and authority of the presiding judge. Applicant fails to show prejudice." App. 3513.

On September 19, 2011, as part of his post-trial motions, Petitioner moved the court to reconsider its order denying his second request to reopen the record. He also moved for a new trial based upon the grounds previously asserted in his motions to reopen the record and motions to reconsider the denial of those motions and indicated Petitioner wanted a new trial to continue asking questions about the Jury Sequestration Manuals and the differences between them. App. 3519. On September 29, 2011 Respondent filed a return responding to the requests contained in the post-trial motions. App. 3535. On October 6, 2011, Petitioner submitted a Reply to Respondent's return on October 6, 2011. App. 3549. On November 17, 2011, the court issued an order denying Petitioner's post-trial motions. In total, seventeen motions, responses, replies and orders were filed on this issue.

Discussion

First, Respondent submits that Petitioner failed to cite any relevant legal authority, and has abandoned this claim. Petitioner alleges legal error[5]. However, Petitioner does not explain what error he is appealing, and does not explain how the authority he relies upon applies to the

[5] "Because the lower court's findings and conclusions of law are erroneous according to the record in this case, and state and federal law, the Court should grant certiorari to consider all questions presented." (Cert. Pet. p. 45.)

issue of the PCR court's denial of his motions to reopen the record and for a new trial. (Cert Pet. 45). An appellate court will deem conclusory and unsupported claims abandoned. Savannah Bank, N.A. v. Stalliard, 734 S.E.2d 161 (S.C. 2012). An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011); Bryson v. Bryson, 662 S.E.2d 611 (S.C. Ct. App. 2008). Specifically, when appellate counsel merely cites the testimony and arguments of trial counsel without adopting the argument, with no analysis as to why the cases relied upon apply, the issue may be considered abandoned. See State v. Hill, 394 S.C. 280, 296-297, 715 S.E.2d 368, 377-378 (Ct. App. 2011); State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (affirmed as modified by State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) (holding a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal); Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct.App.2006) (finding an issue listed in the statement of issues on appeal but not addressed in the brief is abandoned).

Petitioner cites extensive trial testimony, but the only legal authorities Petitioner cites are provided without analysis. (Cert Pet. 45.) Petitioner alleges a discovery violation without presenting any rules of discovery. Id. ("In the alternative, this Court should order a new PCR hearing based on the State's discovery violation . . .")[6]. Petitioner does not present the standard of review for analysis. Furthermore, Petitioner merely presents the factual arguments made to the PCR Court below without adopting the argument on appeal. (Cert. Pet. 45). Because Petitioner cited no standard of review, he does not and cannot explain why the facts he presented

[6] The issue of a discovery violation was never raised to and ruled upon by the PCR Court. Petitioner never moved for discovery sanctions. Petitioner's characterization of Respondent's actions is inaccurate and without support.

should move this Court to reverse the PCR Court's ruling, the issue has not been properly before this Court for consideration on appeal.

A. Petitioner failed to establish error.

Trial courts are accorded considerable latitude and discretion when ruling on a motion to reopen the record. Branco v. S.C. Dept. of Transp., 377 S.C. 124, 659 S.E.2d 167 (2008). A motion to reopen the evidentiary record is addressed to the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of that discretion. Id.; State v. Wren, 470 S.E.2d 111, 112 (Ct. App. 1996). Id. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (citing State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). The standard for a motion for a new trial is almost identical. The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Brinkley v. S.C. Dept. of Corrections, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) (citing Umhoefer v. Bollinger, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct.App.1989)). Both standards will be treated as one below. Petitioner failed to prove the court's findings were without factual support or were controlled by an error of law.

In denying the motions to reopen, the PCR court concluded that the manuals were "guides only and not binding upon the presiding judge" **and that Petitioner failed to show prejudice in that the manuals would not have made a difference to the outcome of the case**. App. 3513; 3198. The findings are supported by the record and were based upon a proper legal analysis.

The record before this Court reflects that the Honorable Henry Floyd testified that he was ultimately responsible for decisions to sequester Petitioner's jury and that he issued a specific sequestration order outlining his expectations and instructions to the sequestration agents and others involved with the jury, including the clerk of court. App. 2471-72. It was Judge Floyd's testimony that a number of circuit court judges working in collaboration with SLED developed a number of forms and other documents to provide some consistency and uniformity in handling jury sequestration matters. Judge Floyd's recalled that during the collaborative effort, a collection of documents was produced, including the sequestration order he issued in Petitioner's trial. (App. 2473-75). It is clear from Judge Floyd's testimony that many judges shared forms prior to the conclusion of the collaborative effort. (App. 2472-79). In fact, Petitioner elicited testimony from Judge Floyd explaining that prior to the issuance of a death penalty manual in 2001 or thereabout, judges used their own material and material obtained from other judges. Also, on examination by Petitioner, Judge Floyd testified that the sequestration order used in this case was likely developed from a collection of things, including the collaborative effort between the circuit judges and SLED. App. 2471-75. On direct examination by Petitioner, Judge Floyd stated that the sequestration order he issued for Petitioner's trial identified the jury sequestration records he wanted maintained by SLED, including a record of jurors' quarters. App. 2479. Further, Judge Floyd issued specific instructions for reporting juror incidents in this case. SLED agents were directed to use a protocol for a chain of command in which the sequestration team was required to communicate with Captain Webber. Captain Webber reported directly to Judge Floyd respecting **any matter that would affect the outcome of the trial**. App. 2480-81.

Respondent submits that the documents upon which Petitioner relied to move to reopen the record and for new trial clearly indicate it is intended as a "Blank Forms Package" and its

contents are recommended as guides only. The documents specifically contemplate and state that the presiding judge might have specialized instructions as to procedure which may or may not comport with the contents of the document. See App. 3118; 3169-3343 [Table of Contents stating "This manual is intended to be a guide to aid the lead agent in planning and conducting his or her assigned duties. It should be recognized that individual judges might have specialized instruction as to procedure."]; App. 3121; 3170; 3344 [Section 1, page 1stating "In the interest of uniformity of effort, this manual has been prepared as a guide for the agents of the Division to use accordance with the discretion of the judge."]. The documents provide instructional information as to recommended but not mandatory procedures. The documents indicate that the proposed order included in the packet of material and contents of the manual should be shared with the presiding judge but that the presiding judge will exercise his or her discretion to provide the instructions and orders he or she deems appropriate respecting jury sequestration. App. 3121; 3176; 3344 [Section 1, Page 1]. Reporting forms, form instructions, or form procedures contained in the documents of no moment when the presiding judge in Petitioner's case exercised his discretion and issued an order and provided directions specifically outlining the duties and responsibilities of the sequestration agents. The documents clearly do not create mandatory duties and obligations for the SLED agents but are intended for use by the trial judge. The documents provided no basis to allow for new discovery or to reopen the record and permit additional litigation or for a new trial.

Moreover, the actual documents used for the sequestration of Petitioner's jury were provided to Petitioner by SLED in 2001 and again shortly before the evidentiary hearing via discovery subpoena and clearly reflect that the documents were derived from samples. The existence of forms was testified to at the evidentiary hearing by Judge Floyd and Assistant

Solicitor Betty Strom. The sequestration order issued by Judge Floyd contains the notation "Sample Order for Sequestration" with the word "Sample" stricken. The record of Judge Floyd's testimony reflects that counsel for Petitioner interviewed Judge Floyd prior to the Post-Conviction Relief hearing and was free to explore any relevant issue. App. 2538.

Additionally, Betty Strom testified during the PCR hearing that she has seen a SLED protocol on juror sequestration, the sequestration order issued in this case contained language similar to the form sequestration order she has seen, and the sequestration order issued for Petitioner's trial was one typically used by judges for jury sequestrations around that time. App. 2007 – 2014. Petitioner conducted a discovery deposition of Ms. Strom and had the opportunity to explore the issue with her at that time.

Respondent notes that Petitioner particularly references a portion of the documents providing for sequestration agents to maintain a record of jurors' quarters at the hotel. He complains that he did does not have that record in his file and argued he should have be permitted to explore this issue. However, the jury sequestration order issued by Judge Floyd in Petitioner's case directed SLED to maintain a "record of jurors' quarters". App. 2214 [Petitioner's exhibit 5 page 4]. Petitioner was provided the sequestration order in discovery and was aware the record was one ordered by the presiding judge to be maintained. Petitioner specifically questioned witnesses, including Judge Floyd, on this point. App. 2479; 1643. It was obvious from a review of the jury sequestration file specifically used in Petitioner's trial and provided to the parties during discovery that this particular form was not included. The documents Petitioner offered in support of his request to reopen the record and for a new trial provided no basis for the PCR court permit new discovery or to reopen the record for additional litigation of the same or new issues.

As to use of SLED agents or as to particular agents who may serve on the sequestration team when SLED agents testify during the trial, Respondent submits that Judge Floyd directed SLED's participation in sequestering the jury and wished to have agents on the jury sequestration team who were unfamiliar to the families and who were not involved in or connected with the criminal investigation in order to prevent a "slip of the tongue." App. 2485; 2519-2520; 2522). Petiitoner's trial attorney, Jack Swerling, testified that counsel discussed the matter of the sequestration team with Judge Floyd at the time of trial and agreed that SLED would be the best agency to serve as the sequestration team for Petitioner's jury. App. 2559; 2672 – 76. The agreement was made by Petitioner at a time when SLED's role in the investigation and development of forensic evidence was known. He also testified that having agents from the Governor's security team or who were former customers of Smuggler's was of no significance. App. 2677-79.

As to Petitioner's claim the State possessed the SLED Jury Sequestration Manual and willfully failed to disclose it during pre-trial discovery, it is clear from a complete reading of the statements made and discussions held during the hearing respecting SLED's motion to quash that Director Lloyd was responding to the specific items requested in Petitioner's August 2010 subpoena. Petitioner requested SLED to produce the "file containing the Security Plan and all related documents for the trial of State v Stephen Beckham . . . ." Neither the material forwarded by Judge Floyd nor the Jury Sequestration Manuals consist of the actual documents used for Petitioner's trial. Rather, both appear to contain suggested forms for use if a security plan is used for a particular trial, if the presiding judge elects to use the forms, and if SLED is assigned the task. As Director Lloyd pointed out during the hearing, the meaning of "security plan" as used in Petitioner's subpoena was vague. App. 1403. Petitioner could have asked SLED to

produce its general policy and procedure but issued a subpoena for his sequestration file and the security plan maintained for his trial. App. 1403; 1413; 1418-21; 1443. As the information officer for SLED, Ms. Knox produced the file requested by Petitioner's subpoena. Petitioner should not now be allowed to contend anyone willfully failed to disclose documents. Moreover, Respondent reiterates that the word "protocol" at issue in this case during discovery by the parties, at the hearing on SLED's motion to quash, during the evidentiary hearing, and in Respondent's post-hearing brief pertained to a chain of command or procedure individual SLED agents employed when determining when and how to report incidents relating to jurors during Petitioner's trial. When Petitioner moved to reopen and for new trial, he attempted to assign a completely new meaning to the word than that used by the parties previously. Neither the material forwarded by Judge Floyd nor the SLED Jury Sequestration Manuals in Petitioner's possession provide the "chain of command" protocol which was at issue in this case. However, Judge Floyd provided specific instructions for reporting juror incidents in Petitioner's trial. Petitioner merely assigned a new meaning to the word "protocol" in order to reopen the case and present new issues about courtroom security. Petitioner's "willfull failure to disclose" argument is misplaced and the PCR court properly denied Petitioner's request to reopen the record, expand discovery requests and engage in new litigation after the evidentiary proceedings were concluded.

Moreover, the material forwarded by Judge Floyd was not identified to or by Respondent as a 1996 SLED Jury Sequestration Manual and the derivation of the material was not delineated. The material was disclosed by Respondent's counsel to Petitioner out of an abundance of caution. The identity, original source and the date of the material is not known. App. 2471-2475.

Nevertheless, the material forwarded by Judge Floyd, the 1996 Blank Forms Package, and the "2000 SLED Jury Sequestration Manual" specifically state that the documents are intended as guides only and contemplate that the presiding judge might have specialized instructions as to procedure which may or may not include the contents of the materials in question. The materials in question provide instructional information with recommended but not mandatory procedures and forms. The materials indicate that the sample sequestration order and other contents should be shared with the presiding judge but that the judge will exercise his or her discretion to provide the instructions and orders he or she deems appropriate for a particular jury sequestration, including whether courtroom security and a written security plan will be employed. While Petitioner insists that information should have been recorded on forms that are missing from his sequestration file, it is clear from all of the material Petitioner offered in support of his request to reopen the record that use of the recommended forms and procedure at trial was not mandatory and was solely within the discretion of the presiding judge.

Judge Floyd also made it clear in his testimony that he was ultimately responsible for the decision to sequester the jury. Judge Floyd issued a specific sequestration order in this case and also outlined his expectations, instructions and directions to the sequestration agents and others involved with the jury. App. 2471-2472. Further, Judge Floyd issued specific instructions for reporting juror incidents in this case. SLED agents were directed to use a protocol for a chain of command in which the team was required to communicate with Captain Webber. Captain Webber reported directly to Judge Floyd but only about matters impacting the trial. App. 2480-2481. Therefore, all of the documents offered in support of Petitioner's request to reopen the record and for a new trial consist of a compilation of suggested standard forms or procedure and are of no moment in view of the specific instructions given by the presiding judge about the

sequestration records he wanted maintained, the manner in which he wanted the sequestration team to operate, and production of the completed forms actually compiled during the trial. Petitioner failed to establish prejudice from any failure of SLED to follow precatory guidelines.

Petitioner also argues that the State complained about his efforts to seek the truth and pushed this Court for a "rush to justice" before the manual was discovered. He asserts that counsel for the Respondent intentionally withheld information in order to gain an advantage in the case. Respondent did not intentionally withhold the material forwarded by Judge Floyd or delay disclosure in order to gain an advantage. The circumstances have been fully explained. See App. 3167 [Respondent's Supplemental Return to Motion to Proffer, Produce, and Reopen the Record; 3289 [Respondent's Return to Motion to Reconsider Order denying Request to Reopen the Record]; 3325 [Respondent's April 19, 2011 letter response to Applicant's Reply]. This PCR court found the material disclosed by the Attorney General's Office to be of no moment and without a basis to allow the record to be reopened. App. 3198; 3512-13; see also Aug. 16, 2011 motion transcript pp. 15; 22-23.

Respondent also denies that it engaged in a "rush to justice." Petitioner initiated this action in February 2000. This case languished for eleven years. Finality must be realized at some point. It is absurd to suggest that there was a "rush" to conclude the matter, although there was a need to do so.

The findings of the PCR judge have evidentiary support and were not controlled by an error of law. The issue is without merit.

V

Did the PCR Court properly refused to apply a cumulative error analysis when the analysis is inapplicable, where Petitioner must present proof of prejudice for each issue raised and where Petitioner failed to make the requisite showing?
(Petitioner's Argument VIII.)

Petitioner alleges that "the cumulative effect" of all of the issues presented in his case deprived him of a fair trial and that that the purported "conspiracy" resulted "in a complete failure of the justice system in [Petitioner's] trial." Respondent submits that the post-conviction relief court properly rejected the Petitioner's assertion that the cumulative effect of the matters relating to the jurors, the failure to disclose those matters, and the jury service by juror Grimes taken together combined to deny Petitioner a fair trial. See Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), citing Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002); Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008); see also Fisher v. .Angelone, 163 F.3d 835 (1998).

"The cumulative error doctrine provides relief to a party when a combination of **errors**, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." State v. Richard Beekman, S.C. Ct. App. Op. No. 5145 (Filed June 26, 2013), citing State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). An argument based upon the cumulative error doctrine necessarily must fall if Petitioner failed to meet his burden of establishing that errors actually occurred. State v. Kornahrens, 290 S.C 281, 290, 350 S.E.2d 180, 186 (1986).

Respondent submits that the cumulative error doctrine simply does not apply to Petitioner's case because Petitioner failed to show error or prejudice as to any of the claims upon which he relies as a basis for asserting cumulative error. Therefore, the cumulative doctrine was not available to him. Rule 71.1(e), SCRCP, Butler, supra ; Griffin, supra; Pennell, 737 F.2d at 532; Smith, 455 U.S. at 215 (specifically holding that the remedy for allegations of jury tampering, misconduct, or bias is not an automatic new trial, but rather a hearing at which a defendant has the opportunity to prove actual bias)(emphasis added). The post-conviction relief court properly determined that Petitioner failed to show prejudice as to any of the matters alleged. App. 3462-3506. See State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009)(on direct appeal, noting that in order to qualify for reversal on ground of cumulative effect of trial errors, defendant must demonstrate errors adversely affected right to fair trial); State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008). As discussed in Argument I herein, where Petitioner failed to present any evidence that the nature of any of the particular matters alleged in this action had any bearing whatsoever on his right to a fair trial, the cumulative error doctrine is necessarily inapplicable. State v. Nicholson, 366 S.C. 568, 581, 623 S.E.2d 100, 106 (Ct. App. 2005), *rehearing denied, cert. denied.*

CONCLUSION

For the reasons set forth herein, Respondent requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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