STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID JAKES,

PETITIONER

APPELLATE CASE NO. 2013-002571

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals correctly affirmed the trial court in allowing Juror 102 to remain seated on the jury when she disclosed, after the jury was seated and sworn, that her husband had been a full time deputy with the Colleton County Sheriff's Department until two and one/half years ago and was currently a reserve deputy?

STATEMENT

On October 28, 2010, the Colleton County Grand Jury indicted Jakes on three counts of attempted armed robbery, and possession of a weapon during a crime of violence. On August 25, 2011, the Colleton County Grand jury indicted Jakes on three counts of attempted murder. On August 11, 2011, a pretrial hearing on a motion to quash the indictments was held for Jakes and one of his co-defendants, Antwan D. McMillan before the Honorable Perry M. Buckner, III. Jakes was represented by Harris S. Beach, and the state was represented by Amanda Haselden and Ben Shelton. On August 29 – September 1, 2011, Jakes and McMillan proceeded to trial jointly before Judge Buckner and a jury. Jakes again was represented by Harris Beach, and the state by Amanda Haselden and Ben Shelton. The jury found Jakes guilty of three counts of the lesser included offense of attempted assault and battery, and three counts of attempted armed robbery, and possession of a weapon during a crime of violence. Judge Buckner granted a directed verdict on another charge, possession of a stolen pistol. R. 566, ll. 2 -4. Judge Buckner sentenced Jakes to a total incarceration of thirty-five years. R. 718, ll. 1 – 21. Jakes' attorney filed a notice of appeal. The Court of Appeals issued a published opinion on July 10, 2013 affirming appellant's convictions and sentences. State v. Jakes, Op. No. 5158 (Ct. App. filed July 20, 2013). Counsel filed a petition for rehearing which was granted. The Court of Appeals refiled a new opinion on September 25, 2013 again affirming appellant's conviction and sentences. State v. Jakes, Op. No. 5158 (Ct. App. filed September 25, 2013). The Court issued a third unpublished opinion on October 2, 2013. State v. Jakes, 2013-UP-360 (Ct. App. filed October 2, 2013). Counsel filed a second petition for rehearing which was denied on November 12, 2013. A petition for a writ of certiorari was filed with the Supreme Court which this Court granted on August 6, 2014. This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court by allowing Juror 102 to remain seated on the jury when she disclosed, after the jury was seated and sworn, that her husband had been a full time deputy with the Colleton County Sheriff's Department until two and one/half years ago and was currently a reserve deputy.

On June 3, 2010, Jeanine Metzfield was following her daughter, Amanda Metzfield and Amanda's husband, Jesse King, with a U- Haul trailer as they were moving to Florida. As they were passing through Colleton County, engine troubles with her truck forced them to stop and transfer the U-Haul to the other vehicle. R. 147, ll.15 – 25; R. 148, ll. 1 – 25.

They stopped on the exit ramp around midnight. As Jesse knelt down to work on the truck, a car stopped in the middle of the intersection. A male jumped out of the back seat with a large pistol in his hand and a black t-shirt over most of his head. R. 149, ll. 1 – 25; R. 150, ll. 1 – 25; R. 151, ll. 1 – 25. The man said to Jeanine to either "put'em up, pretty lady" or "get'em up, pretty lady." R. 152, ll. 1 – 25.

At that point, Jesse, who was an explosives disposal specialist with the Army, jumped up, pulled his gun, and ordered the man to get back in his car and leave. The man then pointed his gun at Jesse. Jesse shot at the man several times until the man fell. Then the people in the car started firing at Jesse. The injured man dropped his gun and crawled into the car, and the car drove away. R. 171, ll. 1 – 25; R. 172, ll. 1 – 25; R. 174, ll. 1 – 25; R. 175, ll. 1 – 25. Jesse called 911. R. 176, ll. 1 – 24.

According to the testimony of the third co-defendant, James Davis, Jakes came and picked him up from his house on June 3, 2010 to go out and "look for girls." They picked up McMillan, and then returned to Jakes' grandmother's house for him to get his gun. Although the Cadillac

Jakes was driving belonged to his grandmother, McMillan started driving. R. 210, ll. 14 – 25; R. 213, ll. 1 – 25; R. 216, ll. 1 – 25; R. 217, ll. 1 – 25; R. 218, ll. 1 – 25; R. 219, ll. 25; R. 220, ll. 1 – 25; R. 221, ll. 1 – 25; R. 222, ll. 1 – 25; R. 223, ll. 1 – 25.

On the way to Walterboro, they saw the three victims on the side of the road at I-95. McMillan then had the idea to rob them as he said it would be easy. Davis said he did not want any part of it, but Jakes said he would do it. R. 225, ll. 1 – 25; R. 226, ll. 1 – 25.

When the car stopped, Jakes jumped out pointing his gun at the people telling them to "Give it up." Then Davis heard gunshots, and McMillan allegedly started shooting through the car window. Then he realized Jakes was shot, and he opened the car door for Jakes to get in the car. R. 227, ll. 1 – 25; R. 228, ll. 1 – 25; R. 229, ll. 1 – 25; R. 230, ll. 1 – 25; R. 231, ll. 1 – 25.

Jakes was screaming for them to take him to the hospital, but they were going home. They passed some friends, including LaToya Bryant, who transported Jakes to the hospital. R. 232, ll. 1 – 25; R. 233, ll. 1 – 25; R. 236, ll. 1 – 25; R. 237, ll. 1 – 8; R. 273, ll. 8 – 25; R. 283, ll. 1 – 25; R. 284, ll. 1 – 25; R. 285, ll.1 – 24.

Lieutenant Fred Inabinett with the Colleton County Sheriff's Office testified for Co-Defendant McMillan that he took a statement from Jakes after Jakes requested to see him about fourteen months after the incident. According to the testimony, Jakes admitted being at the scene but said McMillan was not there. He said the third person was J-Sneez. R. 569, ll. 1 – 25; R. 570, ll. 1 – 25; R. 571, ll. 1 – 25; R. 575, ll. 1 - 5.

Jakes allegedly told him they were drinking heavily that day. When they saw the victims on the side of the road, Jakes remembered seeing only the two women. R. 574, ll.1 – 25; R. 575, ll. 5 – 25; R. 576, ll. 1 – 25; R. 577, ll. 1 – 25; R. 578, ll. 1 – 25; R. 579, ll. 1 – 25. Jakes said they stopped to check a donut tire they were using when he saw the two women. Jakes said he did not have his

gun in his hand when he got out of the car. He did yell to the women; "Hey pretty lady!" R. 579, ll. 1 – 25; R. 580, ll. 1 – 25. When the male victim stood up and Jakes saw he had a gun, then Jakes retrieved his gun. Then the male victim started shooting at him, and Jakes was injured. R. 580, ll. 1 – 25; R. 581 ll. 1 – 25. Jakes' gun was not fired. R. 447, ll. 2 – 25; R. 448, ll. 1 – 25; R. 449, ll. 1 – 25.

After the testimony of the three state's witnesses, the trial judge *in camera* told the attorneys that he received a note from Juror 102, Yvonne Lightsey, signed by the jury Foreperson. R. 197, ll. 1 – 24. The note read:

> I need to make sure that I'm a suitable juror for this trial due to the status of my husband.

R. 197, ll. 15 – 17.

The judge, with the agreement of the attorneys, called the juror into the court room and discussed the issue after he confirmed there was a Deputy Lightsey on reserve status with the Colleton County Sheriff's Office. Juror Lightsey revealed that her husband for the first few years was a full time deputy with the Colleton County Sheriff's Office. For the past two and one/half years, he was a Reserve Deputy. When the judge asked her if that would affect her ability to give a fair and impartial trial, she replied no. R. 198, ll. 1 – 25; R. 199, ll. 1 – 25: R. 200, ll. 1 – 25; R. 201, ll. 1 – 25; R. 202, ll. 1 – 25. The judge said he did not ask a question about spouses during *voir dire*. R. 203, ll. 1 – 25.

Jakes' attorney, to which McMillan's attorney joined in, then objected to Juror 102 continuing on the jury. The judge told them that they did not present a question for *voir dire* related to this issue. R. 204, ll. 1 – 25; R. 208, ll. 7 – 13. Jakes' attorney argued that Juror 102's responses to the questionnaire from the Clerk of Court's office lists her husband as Environmental Health

Management, but had nothing about his being a reserve deputy. The judge then reviewed the form from the Clerk's Office which indicated the husband was Environmental health Management and reserve deputy. R. 205, ll. 1 – 25.

After reviewing the attorney's form from the Clerk's Office, the judge said that the Clerk's Office did not transmit everything the juror filled out on the Clerk's form to the form the attorneys received. The judge said it was a Scribner's[sic] error. Defense counsel argued that the juror did not indicate during *voir dire* that she had knowledge of any of the Sheriff's Department witnesses. R. 206, ll. 1 – 25; R. 207, ll. 1 – 25. Counsel argued that they may have used their strikes differently if they had known the husband was a deputy. The judge refused to excuse the juror. R. 204, ll. 8 – 25; R. 208, ll. 1 – 13.

At the time Juror 102 was seated during jury selection, Jakes had exercised three of his five strikes. R. 77, ll. 1 – 25; R. 78, ll. 1 – 25; R. 80, ll. 1 -25. The trial judge had granted each defendant five strikes. R. 75, ll. 1 – 8.

In State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007), the Court of Appeals held that the decision on whether to dismiss a juror and replace her with an alternate was within the sound discretion of the trial court, and such decision would not be reversed on appeal absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); U.S. Const. Amend. 14.

In State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001), the Supreme Court held:

> All criminal defendants have the right to a trial by an impartial jury. U.S. CONST. amends. VI and XIV; S.C. CONST. art. I, § 14. To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). "Through the judge, parties have a right to question jurors on their *voir dire* examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge." Gulledge, 277 S.C. at 370, 287 S.E.2d at 490.

In State v. Woods, *supra,* the Supreme Court held that when the court finds that the juror intentionally concealed the information, and that the information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges, the trial court must grant a motion for a new trial. Material means "of such a nature that knowledge of the item would affect a person's decision-making." Black's Law Dictionary 1066 (9th ed. 2009).

The two prong analysis as stated in State v. Woods, *supra,* should not apply in Jakes' case. The issue is not whether the juror intentionally or non-intentionally concealed information, the issue is whether the omitted information, that she was married to a reserve deputy, from the jury information sheet provided by the Clerk of Court's Office, would have been a material factor in the use of Jakes' peremptory challenges. This information would have been used by defense counsel in the exercise of preemptory strikes. It was material to the peremptory challenges as the attorneys said they would have used their strikes differently.

The Court of Appeals affirmed the trial court's ruling. The Court of Appeals held that Jakes cited no authority for his specific proposition that a trial court abuses its discretion in not removing a juror when a defendant contends he would have exercised his peremptory challenges differently had he known "material" but previously omitted facts about any particular juror, regardless of that juror's professed impartiality. Therefore, the court proceeded to determine solely whether the juror

was impartial. The Court held that the trial judge's refusal to excuse the Juror and to substitute her with an alternate was not an abuse of discretion because the juror was impartial.

The Court of Appeals misapprehended the issue when they wrote that because they found no intentional concealment, they did not need to determine whether the information would have been a material factor in the exercise of peremptory strikes. Although the juror claimed to not be biased, due to the fact that she was married to a deputy sheriff who was in the business of fighting crime, bias on her part in a criminal trial would be inevitable. The Sixth Amendment to the United States Constitution provides that the accused in all criminal prosecutions shall enjoy the right to a trial by an impartial jury.

It was prejudicial to Jakes for the juror, whom he would have struck if he had known of her husband's employment as a deputy, was allowed to remain on the jury. It was material because this information would have affected appellant's decision regarding the jury. Because the judge did ask during *voir dire* if any juror was a member of law enforcement, this should have prompted the juror to believe that marriage to a law enforcement officer was a problem as any reasonable person would have believed. In fact, the juror did come to believe it could be a problem as she finally came forth.

Defense counsel did not ask about spouses on *voir dire* because that information was provided on the jurors' questionnaires from the Clerk's Office; however, it was incomplete. The information for Juror 102 had her spouse listed as in environmental health management, but had nothing about his being a deputy. There was no need to ask the question. If the form had been blank regarding spouses, then defense counsel would have had a reason to ask. Defense counsel had every reason to rely on the information provided by the Clerk's Office.

In State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010), the Court of Appeals held that the trial court did not abuse its discretion in declining to remove a juror after the juror informed

the court that the murder victim's estranged wife was the sister of someone he supervised, where the juror did not conceal any information requested during the voir dire.

Jakes' case is distinguished from Burgess in that the relationship of Juror 102 to her husband was closer than the relationship in Burgess which was more removed and involved an employee of the juror involved. Jakes' case is also distinguished from Burgess in that the juror in Burgess' case notified the court before opening statements of the relationship. In Jakes' case, the juror volunteered the information after voir dire, and after the testimony of the three victims.

In Rivera v. Illinois, 556 U.S. 148 (2009), the United States Supreme Court held that the Due Process Clause safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial. The Supreme Court also wrote that courts typically designate an error as "structural", therefore requiring automatic reversal, only when the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

The Court of Appeals cited the case of State v. Cochran, 369 S.C. 308, 321, 631 S.E.2d 294 (Ct. App. 2006). However, the Court also held in that case that "perceived prejudice of a juror may serve as a basis for exercising a peremptory challenge." The fact that the juror's husband was a deputy sheriff in the same county was "perceived" prejudice. The Court in Cochran, Id. wrote:

> Beyond a challenge for cause, this court has held that "the principle function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause." State v. Short, 327 S.C. 329, 335, 489 S.E.2d 209 (Ct. App. 1997). , *aff'd,* 333 S.C. 473, 511 S.E.2d 358 (1999). It follows, then, that perceived prejudice may serve as a basis for exercising a peremptory challenge. Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution.

369 S.C. at 321, 631 S.E.2d at 302-302 (Ct App. 2006).

The information that Juror 102 was married to a reserve deputy who had been a full deputy until two and one/half years ago would have been a material factor in the use of the peremptory strikes. The trial judge abused his discretion by not removing the juror which was prejudicial to Jakes---especially in light of the fact that Jakes did not seek a mistrial but rather moved to replace the juror with one of the three alternate jurors. R. 206, ll. 1 – 25; R. 207, ll. 1 – 25; R. 208, ll. 1 – 5. Finding that it was a Scrivener's error did not lessen the prejudicial impact to Jakes.

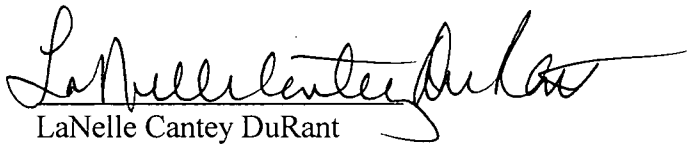
In State v. Smalls, 336 S.C. 301, 309, 519 S.E.2d 793 (Ct. App. 1999), the Court of Appeals held:

> Furthermore, no showing of actual prejudice is required to find reversible error for the denial or impairment of the right to a peremptory challenge. Ford at 66, 512 S.E.2d at 504; State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999). Accordingly, Smalls' convictions for first degree burglary and attempted grand larceny are reversed and remanded.

CONCLUSION

Based on the above, Jakes' convictions and sentences should be reversed, and his case remanded for a new trial.

Respectfully submitted,



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ATTORNEY FOR PETITIONER.

This 3rd day of September, 2014

STATE OF SOUTH CAROLINA
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THE STATE,

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V.

DAVID JAKES,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. David Jakes #347615, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of September, 2014.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of September, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.