STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2016-002564

Damon Jacquise Jones, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
S.C. Bar # 102524
Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTION PRESENTED

I. **"Did both the original PCR judge and remand judge properly deny post-conviction relief where testimony regarding jury deliberations is inadmissible under Rule 606(b), SCRE, and Juror #86 did not intentionally conceal information during *voir dire*?"**

STATEMENT OF THE CASE

Procedural History

Trial

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted during the August 2005 term of the Spartanburg County Grand Jury for murder (2005-GS-42-3371). Christopher D. Brough, Esquire, ("Counsel") represented Petitioner. Solicitor Barry Barnette and Assistant Solicitor Jennifer Jordan represented the State. Applicant proceeded to trial on November 29, 2005, before the Honorable Paul M. Burch. On November 30, 2005, the jury found Petitioner guilty as indicted. Judge Burch sentenced Petitioner to a term of imprisonment for life without parole.

Direct Appeal

Petitioner filed a timely notice of appeal. The appeal was perfected by Robert M. Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Jones, Op. No. 2008-UP-424 (filed July 23, 2008). Petitioner filed a petition for rehearing, but that petition was denied by the court on September 23, 2008. Petitioner then filed a petition for a writ of certiorari to the South Carolina Supreme Court, which was granted on December 2, 2009. This Court affirmed the decision of the Court of Appeals, finding the issue not preserved for appeal. State v. Jones, Memo. Op. 2010-MO-20 (filed August 23, 2010). Petitioner filed a petition for rehearing, which this Court denied on September 22, 2010. The remittitur was returned on September 22, 2010.

PCR

Petitioner filed an application for post-conviction relief ("PCR") on December 15, 2011. Respondent made its return on February 16, 2012. Petitioner filed an amended application for PCR on March 9, 2012. An evidentiary hearing into the matter was convened on June 25, 2013, and concluded on June 26, 2013, before the Honorable R. Lawton McIntosh. Petitioner was present at the hearing and represented by C. Reed Teague, Esquire ("PCR Counsel"). Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Following the hearing, Judge McIntosh denied the application by written order dated February 26, 2014. Petitioner subsequently filed a motion for reconsideration and memorandum in support of the motion. Respondent filed a return to the motion. A hearing was held on May 22, 2014, and an order dismissing the motion for reconsideration was signed on May 29, 2014.

Petitioner filed a timely notice of appeal. Robert M. Pachak, Esquire, submitted a petition for writ of certiorari on November 13, 2014. Respondent filed its return on April 2, 2015. By order dated September 3, 2015, this Court granted the petition and remanded the case to allow Petitioner the opportunity to present evidence in support of his claim of juror misconduct.

Pursuant to this Court's order, an evidentiary hearing into the matter of juror misconduct was convened on November 9, 2016, before the Honorable Frank R. Addy. Petitioner was present at the hearing and represented by Rodney W. Richey, Esquire ("PCR Counsel"). Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Judge Addy denied relief and concurred with Judge McIntosh's prior findings in an order filed December 15, 2016. Petitioner subsequently filed a petition for writ of certiorari on August 18, 2017. This return follows.

STATEMENT OF THE FACTS

Jury Voir Dire

The jury *voir dire* took place on November 29, 2005. During the *voir dire*, Judge Burch asked whether any members of the petit jury panel had formed or expressed an opinion about the guilt or innocence of Petitioner. None responded. (App. p. 19, ll. 5-10). Moreover, Judge Burch asked whether any members of the panel were conscious of any interest, bias, or prejudice for or against Petitioner or the State. Again, none responded. (App. p. 19, ll. 11-15). Judge Burch asked whether anyone on the panel had an immediate family member who had been charged with, arrested for, or convicted of a crime involving murder, manslaughter, assault and battery, or a weapons charge. Juror #86 ("Ms. McGraw"), the juror against whom Petitioner alleges juror misconduct, submitted that her son had been convicted of domestic violence. (App. p. 22, ll. 16-19; p. 23, ll. 6-7). Judge Burch later asked whether anyone on the jury panel was presently employed or previously employed by any civilian or military law enforcement agency, to which one juror responded. (App. p. 24, l. 25 – p. 25, ll. 1-5).

Thereafter, Judge Burch promptly asked whether anyone on the panel had ever been the victim of a violent crime or had a close personal friend or family member who had been a victim. However, the transcript reveals the next response from the jury panel was in response to the previous question about working in law enforcement – Juror #96 replied that he had been working with the Solicitor's Office a month earlier. (App. p. 25, ll. 11-17). Judge Burch replied, "Okay, anybody else?" (App. p. 25, l. 22). Two jurors proceeded to actually answer the question about being victims of violent crime, but were followed in response by another juror asserting they had worked for the Landrum Police Department. (App. p. 25, ll. 23-25 – p. 26, ll. 1-5).

Juror #86, Ms. McGraw, did not respond to the question about being a victim of a violent crime. After this moment of apparent confusion in which answers were being given to a question out of sequence, the *voir dire* proceeded onto other matters.

Testimony from 2013 PCR Hearing

At the PCR hearing convened on June 25, 2013, PCR Counsel recounted Mr. Kershner, a juror in the trial, wrote a letter to Counsel after the trial indicating he overheard Juror #86 tell another juror during deliberations about an incident in which her ex-husband pointed a gun at her. PCR Counsel characterized the story as "something in relation to a gun that can be taken as a violent crime." (App. p. 507, ll. 6-14). PCR Counsel recalled Mr. Kershner wrote Counsel indicating he had been the lone holdout on the jury, but decided to vote guilty after Juror #86's comment and "additional other things." (App. p. 507, ll. 15-18).

Petitioner and Respondent agreed a new trial is only required in cases of concealment of information during *voir dire* if the juror intentionally concealed information and the information would have supported a challenge for cause or would have been a material factor in the party's peremptory challenges. Both agreed intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that a juror's failure to respond is unreasonable. (App. p. 509, ll. 23-25 – p. 510, ll. 1-8). However, Respondent noted, "I think Rule 606 is pretty clear that information that was discussed during jury deliberations ... [is] prevented from coming in unless it has to deal with fundamental fairness issues." (App. p. 510, ll. 15-25).

Judge McIntosh eventually agreed to hear some evidence on the issue of juror misconduct. (App. p. 513, ll. 15-17). Before the court heard testimony from the witnesses, PCR

Counsel presented Judge McIntosh with State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001). Respondent presented Judge McIntosh with Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008), and State v. Franklin, 341 S.C. 555, 534 S.E.2d 716 (Ct. App. 2000). (App. p. 514, ll. 8-15).

Petitioner questioned Juror #86 on direct examination, though Judge McIntosh instructed her he would not let her "get into the jury discussions." (App. p. 517, ll. 5-6). Juror #86 testified she did not remember being questioned during *voir dire* whether she had ever been the victim of a violent crime. (App. p. 517, l. 25 – p. 518, ll. 1-2). Juror #86 testified she did indeed make reference to her ex-husband and a .357 gun, but it was only in the context of an incident in which her ex-husband was threatening to shoot *himself* and she took the gun from him. (App. p. 518, ll. 3-25 – p. 519, ll. 1-3). Petitioner then began to question Juror #86 about the jury deliberations, at which point Judge McIntosh ordered the questioning to end.

Once Judge McIntosh brought an end to the questioning about jury deliberations, Petitioner moved to make a proffer of additional testimony from Juror #86 regarding her conversations with a private investigator, Calvin E. "Skip" Smith, III, ("Investigator"), that Petitioner's Appellate Counsel had hired in which she allegedly told the private investigator her husband did hold a gun to her head. (App. p. 520, ll. 13-23). Petitioner also proffered testimony of Mr. Kershner regarding Juror #86's alleged comments about her husband holding a gun to her head. (App. p. 521, ll. 4-12). The court went on to hear testimony about various other allegations in the hearing but made no further mention of juror misconduct. (App. p. 525, ll. 8-10).

Testimony from 2016 Remanded PCR Hearing

Following the remand, at the PCR hearing on November 9, 2016, Petitioner asked Juror #86 whether she remembered the question about being a victim of a violent crime. Juror #86 testified she would have answered no because she did not consider herself a victim of a violent crime. (App. p. 805, ll. 14-20). Juror #86 further testified she did not say she had a gun pointed at her and, even further, she had never been the victim of a violent crime. (App. p. 805, l. 25 – p. 806, ll.1-6). She then affirmed she was completely truthful in answering the *voir dire* questions. (App. p. 806, ll. 7-9).

Petitioner then questioned Juror #86 as to whether she remembered talking to the Investigator Calvin Skip Smith. Juror #86 recounted Mr. Smith "constantly" coming to her door and trying to get her to sign papers she had not read. She testified she would not sign something she had not read. (App. p. 806, ll. 10-22).

Juror #86 testified her ex-husband would "fake an overdose" or threaten suicide on numerous occasions. She recounted one incident in which he held a gun to his head but she was able to convince him to give her the gun. "That's the kind of thing he did," she explained. (App. p. 807, ll. 7-18). Juror #86 testified she brought the incident up during jury deliberations when a gun from evidence was being passed around. Another juror did not want to touch the gun out of fear, but Juror #86 explained to the other juror she was not afraid of guns and had, in fact, convinced her husband to hand over a gun with which he was threatening to kill himself. (App. p. 807, ll. 19-25 – p. 808, ll. 1-5). Juror #86 testified she did not make the statement to one person specifically, rather just a statement relevant to the conversation while the jurors were looking at the gun in evidence. (App. p. 808, ll. 21-25 – p. 809, ll. 1-2).

Juror #86 did testify that if her ex-husband had pointed a gun at her and threatened her, she would have considered herself a victim of a violent crime. (App. p. 810, ll. 11-16). On cross-examination, Juror #86 twice affirmed she did not believe herself to be a victim of a violent crime. (App. p. 809, ll. 3-8; p. 810, ll. 2-5). Juror #86 also testified her ex-husband was not charged for the incident involving the gun. (App. p. 810, ll. 21-25).

Mr. Kershner testified he contacted Counsel about a week after the trial "basically over the behavior of the jury." (App. p. 812, l. 12). At this point, Respondent objected again as to the hearsay regarding jury deliberations. (App. p. 812, ll. 17-19). Judge Addy responded, "Under 606, I don't think you can talk about or we can't elicit testimony about what was said in the jury room. I think that's off limits..." (App. p. 812, ll. 24-25 – p. 813, ll. 1-3). Mr. Kershner then testified he heard Juror #86 say her husband pointed a firearm at her. (App. p. 813, ll. 14-16).

When asked why, if this concerned him so much, he waited until a week after trial to bring this to anyone's attention, Mr. Kershner explained he wanted to "defuse" himself of any emotion or prejudice first. (App. p. 815, ll. 10-16). Respondent noted Mr. Kershner could have raised this issue before the jury even made a decision, to which Mr. Kershner respondend, "[m]y words were I deliberated for a week, made sure I had all my facts together. Kind of like writing a term paper. You don't sit down and write one the very day." (App. p. 816, ll. 15-20). Mr. Kershner also testified he was eager to return to work in Charlotte after the trial and felt pressured to reach a verdict that evening. (App. p. 816, ll. 24-25 – p. 817, ll. 1-16). Mr. Kershner admitted he did not think the sentence was a "fair and just decision." (App. p. 815, ll. 17-20). Moreover, Mr. Kershner admitted the sentence factored into his decision to write the letter to Counsel. (App. p. 815, ll. 21-24).

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). This Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey, 363 S.C. at 368, 610 S.E.2d at 814). This Court also gives great deference to the PCR court's credibility findings. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (Stating the court gives great deference to a PCR court's findings when matters of credibility are involved.). In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The original PCR judge and remand judge properly denied post-conviction relief where testimony regarding jury deliberations is inadmissible under Rule 606(b), SCRE, and Juror #86 did not intentionally conceal information during *voir dire*.

Rule 606, SCRE

Petitioner's argument that the original PCR judge and remand judge erred in finding Rule 606(b), SCRE, prohibits the admissibility of testimony or affidavits from Mr. Kreshner, Juror #86, and Investigator Smith regarding the discussions that occurred during jury deliberations is

without merit. Rule 606(b), SCRE, prohibits a juror's testimony or affidavit concerning "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..." Rule 606(b), SCRE. Furthermore, it is a general rule a juror may not present testimony as to the deliberations in the jury room; as to any mistake, irregularity, or misconduct on the part of the jurors; or which would impeach the verdict or contradict the record. Barsh v. Chrysler Corp., 262 S.C. 129, 203 S.E.2d 107 (1974); State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967); Caines v. Marion Coca-Cola Bottling Co., 196 S.C. 502, 14 S.E.2d 10 (1941). However, an affidavit of a juror has been admitted on a post-trial motion "with great hesitation" when there was an allegation that a party to the suit had attempted to influence one of the jurors. Cohen v. Robert, 33 S.C.L. (2 Strob.) 410 (1848).

As both the original PCR judge and remand judge correctly found, Mr. Kershner's testimony purporting to evidence juror misconduct is prohibited by Rule 606(b). (App. p. 829). Before he admitted on cross-examination that Petitioner's sentence factored into his decision to raise this allegation against Juror #86, Mr. Kershner testified he heard Juror #86 tell another juror during deliberations about an incident in which her husband pointed a gun at her. (App. p. 813, ll. 14-16). While Petitioner argues this testimony is exempt from the rule because the testimony would evidence misconduct during *voir dire* and not jury deliberations, the rule makes no latent distinction between the two when the testimony nevertheless requires the juror to "intrude into the privacy of the jury room." State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995).

In this case, the only evidence of alleged misconduct is testimony clearly of the nature contemplated by Rule 606(b). Petitioner's argument that the remand judge erred because Mr. Kershner's testimony constitutes a "fundamental fairness" exception to Rule 606 is without merit. In Hunter, this Court held juror testimony involving internal misconduct is competent only when necessary to ensure fundamental fairness. Id at 88. However, as the remand judge correctly held, "[E]ven assuming that this evidence or Mr. Kershner's testimony were admissible, this evidence is clearly insufficient to implicate the fundamental fairness of the underlying trial." (App. p. 829).

Petitioner's reliance on Hunter is misguided, as the misconduct alleged in Hunter is readily distinguishable from the allegations against Juror #86. In Hunter, a juror alleged a fellow juror used racial slurs and racist language multiple times throughout the jury deliberations. Id at 87. This Court held that allegations of racial prejudice do involve principles of fundamental fairness. Id. at 88. Notably, however, this Court found despite the inappropriate racial slur made by a juror, Hunter was not denied a fair trial. Id. at 89. The allegation raised by Mr. Kershner against Juror #86, even assuming the allegation to be true, is a far cry from the allegations of overt racism addressed in Hunter. Even gender-based insults by jurors during deliberations have been held to not give rise to such an exception. See State v. Franklin, 341 S.C. 555, 534 S.E.2d 716 (Ct. App. 2000). As the remand judge noted, our legal system acknowledges and encourages jurors to bring their life experiences with them to the jury box, and jurors are commonly told that they should use and apply those experiences in making their decisions. (App. p. 830). Therefore, the remand judge did not err in finding Rule 606(b) prohibited testimony as to Juror #86's alleged anecdote during jury deliberations.

Petitioner argues Investigator's affidavit dated July 18, 2008 (Applicant's exhibit 2) was also not prohibited by Rule 606(b) because it does not address a juror testifying about deliberations. However, the affidavit specifically states Mr. Kershner alleged misconduct **in the deliberations** because Juror #86 said **during deliberations** her ex-husband held a gun to her head. Investigator goes on to explain his conversation with Mr. Kershner and Mr. Kershner's vivid description of Juror #86 and her comments **during deliberations**. (App. p. 654). The remand PCR judge did not find Investigator's affidavit wholly inadmissible, but rather, only "to the extent... [it] violates Rule 606." (App. p. 830). Like Mr. Kershner's testimony regarding the substance of the jury discussions during deliberations, Rule 606(b) also prohibits the parts of Investigator's affidavit addressing those discussions.

Intentional Concealment

Notwithstanding the inadmissibility of the testimony regarding discussions during jury deliberations, the original PCR and remand judges still considered the testimony in finding Petitioner failed to meet his burden of proof. A new trial on the basis of juror misconduct is warranted only if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013). The original PCR judge and remand judge both correctly found Petitioner failed to meet his burden of proof as to either requirement. (App. pp. 242; 333).

First, it must be recognized the original PCR judge found Juror #86's testimony to be credible. (App. p. 738). The remand judge, after hearing further testimony, "wholeheartedly" concurred with the original PCR judge's assessment of Juror #86's credibility. (App. p. 829).

The remand judge found Mr. Kershner's testimony to be "simply less credible" than Juror #86, noting he appeared to have "buyer's remorse" after hearing Petitioner's sentence. (App. p. 829). The remand judge not only agreed with the original PCR judge that Mr. Kershner's testimony was prohibited by Rule 606(b), SCRE, but further found "Mr. Kershner was motivated primarily by his discomfort with the jury's decision to convict [Petitioner,]" a decision in which he played a role (App. p. 829). The remand judge found Mr. Kershner's testimony closely resembled the affidavit from Shumpert, and Mr. Kershner likely only contacted Counsel about the issue because he was likewise suffering from a case of "buyer's remorse." Shumpert v. State, 378 S.C. 62, 68, 661 S.E.2d 369 (2008). (App. p. 829). The PCR judges were in the best position to determine credibility and, as such, the findings must be given great deference. Smith; McCray; Solomon (Stating the court gives great deference to a PCR court's findings when matters of credibility are involved.). See also Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).

Second, Petitioner failed to satisfy the first prong of McCoy, which requires the concealment of information by the juror to be intentional. McCoy, 401 S.C at 371. As the remand judge properly observed, "Assuming for the moment that Juror #86's ex-husband may have pointed a gun at her at some point in the past, her failure to disclose this information during *voir dire* was clearly inadvertent and unintentional." (App. p. 829). At the original PCR hearing in 2013, Juror #86 testified that she did indeed make reference to her ex-husband and a gun during deliberations, but only in an anecdote about her ex-husband threatening *suicide*, not pointing a gun at her. (App. p. 518, ll. 3-25 – p. 519, ll. 1-3). This contradicts Mr. Kershner's testimony and affidavit statements that she told a story about her ex-husband pointing a gun at her. (App. p. 813, ll. 14-16). The contrast between the two accounts, as well as the relevance of

the "victim of a violent crime" classification, leads to a great importance of the credibility findings in this case. As mentioned above, both the original PCR judge and remand judge found Juror #86 to be credible and more credible than Mr. Kreshner. (App. pp. 738; 829).

In Shumpert, a juror provided an affidavit alleging jurors had remarked during deliberations that the defendant would have testified if he was not guilty. Shumpert, 378 S.C. at 67. The court found the allegation of misconduct did not rise to the level necessary for the testimony to be admitted, but also noted the juror's allegations "too closely resemble[d] a case of buyer's remorse from a guilty verdict to be given much credence." Id. at 68. Similarly, Mr. Kershner's admissions during cross-examination that he felt Petitioner's sentence was unfair and the sentence factored into his decision to raise the allegation further support the remand judge's findings that Mr. Kershner was merely driven by what the court in Shumpert referred to as buyer's remorse. (App. p. 815, ll. 17-24).

It should also be noted Petitioner has referenced an affidavit prepared by a hired investigator purporting to document a statement by Juror #86 after the trial that her ex-husband had in fact pointed a gun at her. (App. p. 806, ll. 10-22). After being expected to testify at the remanded PCR hearing, Investigator Smith was "apparently ill" and did not testify. (App. p. 803, ll. 10-15). The court was set to reconvene a month later for Smith to testify via Skype, but he was not communicating or cooperating with Petitioner. (App. p. 828). Given the strong credibility findings in favor of Juror #86 and against Mr. Kershner, and the great deference given to credibility findings, it is only reasonable to conclude that Juror #86's version of events is more likely than Mr. Kershner's.

Notwithstanding the deference to be given to the PCR court's credibility findings, Petitioner contends the record does not support the credibility findings. (PWC p. 8). Instead, Petitioner argues this Court should find Mr. Kershner's testimony (a juror who made the allegation against Juror #86 a week after the trial and admitted Petitioner's sentence was unfair and played a role in his decision to bring forth his allegations against Juror #86) and the affidavit of an investigator (who was hired and presumably paid by Petitioner, was not present to testify at the first PCR hearing, was ill and unable to testify at the second PCR hearing, and refused to cooperate or testify when given a third opportunity to testify via Skype) more credible than Juror #86's testimony that was witnessed first-hand by **two** separate judges and found to be credible by both.

Additionally, at the original PCR hearing, Juror #86 testified she did not even remember a *voir dire* question about whether she had ever been the victim of a violent crime. (App. p. 517, l. 25 – p. 518, ll. 1-2). This stands to reason, as the transcript evidences confusion and disorganization surrounding the *voir dire* question at issue. Prior to the question about violent crime, Judge Burch asked whether anyone on the jury panel was presently employed or previously employed by any civilian or military law enforcement agency, to the response of one juror. (App. p. 24, l. 25 – p. 25, ll. 1-5). This question was immediately followed by the question at issue. However, the transcript reveals that jurors began answering both Judge Burch's previous question regarding employment with law enforcement and whether anyone had been the victim of a crime. (App. pp. 24-26). The remand judge noted, "[N]o other jurors responded to the court when this question was asked." (App. p. 829). Petitioner calls this misstatement to the attention of this Court noting, "[t]he assertion that no other juror's responded is factually

incorrect. The record reflects that Jurors #96, #131, #127, and #147 all responded when asked if any member of the jury pool had been the victim of a violent crime." (PWC p. 9). However, Juror #96 and Juror #147 were not responding to the question about being a victim, but rather to the previous question of whether they had worked for law enforcement. (App. pp. 24-26). And the fact the remand judge originally did not realize there were responses to both questions further evidences the confusion that is apparent when reading the transcript. With responses being made out of sequence to an earlier question and lack of order among the responses from the jury panel, there is a reasonable probability Juror #86 either did not hear or notice the question about being the victim of a violent crime.

In addition to the possibility Juror #86 never heard the *voir dire* question at all, the question of whether anyone had been a victim of a "violent crime" was too ambiguous for her lack of a response to constitute "intentional concealment." To constitute intentional concealment, the question posed to the jury on *voir dire* must have been reasonably comprehensible to the average juror and the subject of the inquiry must have been of such significance that the juror's failure to respond is unreasonable. State v. Woods, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001). As the remand judge correctly found, "To the extent the trial court did not sufficiently explain what it meant by 'violent crime,' Juror #86's failure to respond to the question was reasonable and clearly inadvertent." (App. p. 830). The remand judge noted that the trial court did not give any specific examples as to what constitutes a "violent crime," and the legal definition of a violent crime may differ widely from common lexicon. (App. p. 829). In fact, Juror #86 testified at the remanded PCR hearing, testimony found credible, that if she was asked the question, she would have said no because she does not believe herself to be a

victim of a violent crime. (App. p. 805, ll. 14-20). Juror #86 further testified she did not say she had a gun pointed at her and repeatedly reaffirmed she had never been the victim of a violent crime. (App. p. 805, l. 25 – p. 806, ll.1-6).

It was absolutely reasonable for Juror #86 not to respond to the question despite the fact she had taken a gun from her ex-husband who was threatening suicide. This incident would not lead a reasonable person to believe they had been the victim of a violent crime. Even assuming *arguendo* that her ex-husband actually did point a gun at her in the past, it is clear that Juror #86 does not consider herself to be a victim of a violent crime and therefore could not have *intentionally* concealed information. There was ample probative evidence for the remand judge to conclude, "Assuming for the moment that Juror #86's ex-husband may have pointed a gun at her at some point in the past, her failure to disclose this information during *voir dire* was clearly inadvertent and unintentional." (App. p. 829).

Furthermore, during *voir dire*, Juror #86 informed Judge Burch her son had been convicted of domestic violence. (App. p. 22, ll. 16-19; p. 23, ll. 6-7). The record does not reveal any further statements made by Juror #86 during *voir dire*, but her offer of this information to Judge Burch refutes any assertion that Juror #86 would have concealed information to avoid being struck from the jury. If Juror #86 was of the mind to intentionally conceal information, it would have been logically inconsistent for her to offer other potentially relevant information during *voir dire*.

For these reasons, Respondent submits there is ample probative evidence to support the judge's finding that Petitioner has not met his burden of proving juror misconduct because Petitioner cannot establish that Juror #86 intentionally concealed information.

CONCLUSION

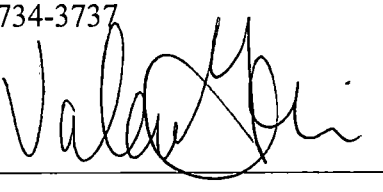
For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to more fully brief the issues discussed herein.

Respectfully submitted,

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
S.C. Bar # 102524

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 

December 20, 2017

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2016-002564

Damon Jacquise Jones, ...Petitioner,

v.

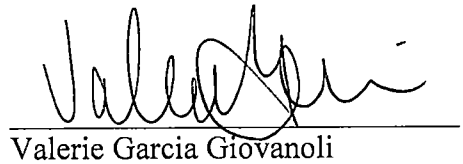
State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Valerie Garcia Giovanoli, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 20th day of December, 2017.



Valerie Garcia Giovanoli
S.C. Bar # 102524
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT