STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Brian M. Gibbons, Presiding Judge

Appellate Case No. 2018-000779
Lower Case No. 2013-CP-29-00951

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S.C. SUPREME COURT

VERNARD JEROME MATHIS, #297034 Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

MEMORANDUM IN SUPPORT OF TIMELINESS OF APPLICATION FOR POST-CONVICTION RELIEF

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ATTORNEY FOR PETITIONER

I.

PROCEDURAL HISTORY

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lancaster County. The Petitioner was indicted for Murder (200-GS-29-1418), Armed Robbery (2001-GS-29-0250), First Degree Burglary (2003-GS-29-0524), and two counts of Kidnapping (2003-GS-29-0525 & 0526). John D. Clark, Esquire, represented Petitioner in the Court of General Sessions on these charges. Following trial by jury, Petitioner was convicted on all counts. On June 6, 2003, he was sentenced by the Honorable Paul E. Short, Jr. then circuit court judge, to life imprisonment without the possibility of parole pursuant to S.C. Code §17-25-45.

A direct appeal was filed on Petitioner's behalf. Appellate Counsel submitted a no-merit brief pursuant to *Anders v. California,* 386 U.S. 738, 87 S. Ct. 1396 (1967). Petitioner submitted a *pro se* brief in response to the no-merit submission by his court-appointed appellate counsel. The appeal was subsequently dismissed. *State v. Mathis*, Op. No. 2005-UP-375 (S.C. Ct. App. Filed June 13, 2005). Petitioner filed a Petition for Rehearing. The Court of Appeals issued orders denying the Petition for Rehearing and denying Petitioner's Petition for Rehearing *en banc* on September 20, 2005. Petitioner next petitioned the South Carolina Supreme Court of South Carolina for a Writ of Certiorari. His petition was denied by order dated November 2, 2006. The Remittitur was returned to the lower court on November 6, 2006.

Petitioner initially filed an Application for Post-Conviction Relief hereafter (PCR) on March 8, 2007 (2007-CP-29-0300). An evidentiary hearing was convened on that

application on August 25, 2008, before the Honorable Kenneth G. Goode at which Petitioner was present and represented by Tricia Blanchette, Esquire. By order dated October 14, 2008, Judge Goode denied and dismissed the application with prejudice. A PCR appeal was filed in that matter, and a Petition for Writ of Certiorari was filed in the South Carolina Supreme Court. The Petition was denied on December 2, 2010, and the Remittitur was sent on January 7, 2011.

Petitioner filed his most recent application for Post-Conviction Relief on July 9, 2013, and docketed at 2013-CP-29-051. In that PCR Application he alleged that:

> 1. The Petitioner's right to a fair trial, as guaranteed by the Fifth, Fourth, and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution, was violated in the trial court where a juror in his case, the foreman of his jury, failed to disclose a long history of employment in law enforcement including two positions which had put him in the position of working with the then Solicitor in Lancaster, John R. Justice, as well as his staff.
>
> a. Ronnie E. Roberts served as a juror at the Petitioner's trial. This juror, juror no. 111, was ultimately selected as the foreman of the Petitioner's jury. When the jury pool was asked if anyone in the group had any special relationship with Solicitor John R. Justice, or his staff, this juror failed to respond. The Petitioner has recently been able to confirm that this individual worked in law enforcement from approximately 1982 through December 31, 2000. His career included the following employment:
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> i. Kershaw Police Department from June 26, 2000 through December 31, 2000.
>
> ii. York Police Department from July 14, 1998 until April 7, 2000.
>
> iii. Lake City Police Department from July 15, 1996 until July 13, 1998.
>
> iv. The South Carolina Criminal Justice Academy from April 3, 1989 until July 23, 1996.
>
> v. University of South Carolina Police Department starting in 1989.

vi. Lancaster Police Department starting in 1982.

In at least two of these positions he would have worked on cases prosecuted by the Sixth Circuit Solicitor's Office where Solicitor John R. Justice was the chief prosecutor for that circuit continuously from his election in 1978 until his illness and death in 2006.

b. Cases brought by both the Lancaster Police Department and the Kershaw Police Department during this juror's employment by those law enforcement agencies were prosecuted by the Sixth Circuit Solicitor's Office.

c. The Petitioner has it upon information and belief that members of the Sixth Circuit Solicitor's Office involved directly in the Petitioner's trial were aware of this juror's relationship with their office and failed to disclose this information either to the Court *or* Counsel for the Petitioner.

d. The juror information form completed by this juror disclosed no facts which would have put the Petitioner, or his Counsel, on notice of this juror's law enforcement background or his longstanding relationship with the Sixth Circuit Solicitor's Office.

2. Members of the Sixth Circuit Solicitor's Staff were aware that the foreman of the Petitioner's jury was the retired Chief of Police for the Kershaw Police Department and failed to disclose this information to the Court or the Petitioner.

During the evidentiary held in this matter testimony came to light, as will be discussed *infra,* which supports the following additional claim.

3. The State improperly failed to report direct communication between the Solicitor's Office and Juror Roberts after he was summoned for jury duty, but before Petitioner's trial.

Petitioner subsequently filed a Motion for Leave to Conduct Discovery on October 7, 2013. Respondent filed its Return to Motion for Leave to Conduct Discovery on October 18, 2013, in which Respondent consented to Petitioner's motion with the following stipulations:

1. Deposition questions for witnesses are limited to those related to juror's law

enforcement background and disclosure at *voir dire* and Assistant Solicitor's knowledge of such.

2. Respondent has the option to utilize live testimony from either witness if considered necessary for a hearing.

3. The costs of the depositions and copies of transcripts are paid for by Petitioner.

Respondent subsequently filed its Return and Motion to Dismiss on January 30, 2014. On April 22, 2014, Petitioner deposed Ronnie Ellison Roberts (Juror) and Thomas William Holland, Esquire (Assistant Solicitor) at the Lancaster County Courthouse. Petitioner was present during these depositions and represented by undersigned counsel. Respondent was represented by Mary S. Williams, Esquire and J. Croom Hunter, Esquire. After these depositions, Respondent filed an Amended Return and Motion to Dismiss on July 1, 2014. Respondent's Motion for Dismissal was denied and an evidentiary hearing was granted by Order signed by Judge Brian M. Gibbons and filed with the Clerk of Court's Office on October 29, 2014.

An evidentiary hearing was convened in this matter on November 22, 2016 before the Honorable Brian M. Gibbons at the Lancaster County Courthouse. The Petitioner was present at this hearing and was represented by undersigned counsel, Tara Dawn Shurling. The Respondent was represented by Patrick Schmeckpeper, Assistant Attorney General. At the conclusion of this evidentiary hearing the Court granted leave to submit memoranda on the respective positions of both parties in lieu of full closing arguments.

The Petitioner's Application for Post-Conviction Relief was Dismissed by Order dated***. Petitioner filed a Motion to Alter or Amend, pursuant to Rule 59(e), SCRCP, On ***. Said motion was denied by Order filed on ***. Petitioner's Notice of Appeal from both orders was filed with this Honorable Court on ***. Petitioner now sets forth herein the

reasons why his appeal should be allowed to move forward, his position concerning the timeliness of his PCR Application and the reasons why, he most respectfully submits that the lower court erred in finding that his application was not timely filed.

II.

Timeliness of Application

Prior to the most recent hearing held on this PCR Application, the Respondent conceded the timeliness of this Application and agreed that the matter should be scheduled for a hearing on the merits. After a change in designated Counsel for Respondent, the State renewed their Motion to Dismiss on the theory that Petitioner could have, through the exercise of due diligence of either himself or his PCR Counsel, could have raised this claim in his PCR action which ended in a dismissal on October 14, 2008. Said Order was affirmed on appeal on December 2, 2010 when Petitioner's Petition for Writ of Certiorari was denied.

Notwithstanding the renewal of its Motion to Dismiss, at the evidentiary hearing held on this Application Respondent ***"stipulated that the Petitioner actually did in fact learn of this issue within one year of filing and would be timely."*** PCR Tr. p. 5, ll. 21-25 (Emphasis added). Nevertheless, Respondent argued the current application is, ***"excessive [sic] and untimely."*** PCR Tr. p. 5, ll. 20-21. Respondent essentially argued that while the current PCR action is timely from when Petitioner *did* find out about the problems with this juror, it is not timely from when they believe he could and should have found out. Specifically, Respondent summarized the State's position by saying ***"the State contends though that the Petitioner did not file within one year of being able to reasonably with***

good effort to find this information out." PCR Tr. p. 6, ll. 1-4. Petitioner responded to the argument as follows:

> With regard to the renewal of the motion for summary judgment concerning timeliness, it is our understanding as I believe respondent has conceded, that the application was filed within one year of the disclosure of the information that started this inquiry to Shareka Jones who was a client of Thomas Holland after he left the solicitor's office and went in to private practice.
>
> It is my understanding that their only remaining contention having conceded that point is that this information concerning the juror, Mr. Roberts, was such that it could have been discovered through the exercise of due diligence prior to the original post conviction relief proceeding.

PCR Tr. p. 6, l. 22- p. 7, l. 10.

...

> Your Honor, it's the Petitioner's position that his right to a fair trial was violated by the intentional withholding of information relevant to a juror who not only served in his case but who ultimately served as foreman at his trial. It's his position that this information was deliberately withheld not only by the juror, Mr. Roberts, but the State's own agents; the solicitors, and investigators, law enforcement officers and even court personnel were aware of this information and no one disclosed it either to the Petitioner or to his counsel or to the Court, and that that failure to disclose certainly was a violation of his right to due process of law and his right to a fair trial. We are asking for vacation of the judgment and sentence against him on that basis.
>
> Now, with regard to the State's position that this is an issue that could have been and should have been raised in the initial application for post conviction relief, ... the standard, as the Court is well aware, is due diligence. Whether or not the evidence existed at the time of the original proceeding and whether or not it could have been ferreted out by counsel at the time through the exercise of due diligence. In this case that standard would appear to apply somewhat twice in the sense that we are addressing the question of whether or not trial counsel could have ferreted out that information at the time of the original trial and to a lesser degree and with regard to the State's argument that it should have been raised in the context of the original initial collateral review. Whether or not the Petitioner acting through his post-conviction relief counsel could have, and should have, raised this issue in the initial PCR proceeding.

> It is our position that with the information that was subsequently disclosed to him by a member of the solicitor's own team at this trial after he left the solicitor's office, that post conviction relief counsel had no reason to question the validity of the answers given by sworn jurors at the time of the trial. That there was nothing that hinted of impropriety in the jury selection process until the disclosure to his credit by Tom Holland, and that there was nothing trial counsel and PCR counsel, specifically at the first PCR proceeding, could have done or would have done in the exercise of due diligence short of conducting a background check on ever juror. And that I would submit is not being pragmatic.
>
> As the Court knows I do probably more post conviction work than any lawyer in this state. And essentially the Court would be asking – the respondent would be asking the Court to adopt a standard that would say that a lawyer has an obligation to do a background check on all the potential jurors involved in a case at the time of a PCR to determine whether there is potentially any problem with the jury selection process and we would submit that is an untenable burden to expect a defendant in the South Carolina judicial system to bear in the context of collateral review and for that reason we would submit that the State's argument in this regard is not meritorious and ask that the Court allow us to proceed with the merits of the issue before the Court bearing in mind that it's certainly our position that his first opportunity reasonably to raise this issue was after the disclosure was made by the former assistant solicitor who disclosed the misconduct before the Court today.

PCR Tr. p. 10, l. 13- p. 13, l. 8.

This Court took the Motion to Dismiss under advisement and proceeded to hear testimony and evidence concerning the merits of Petitioner's claims. PCR Tr. p. 13, ll. 9-15. At the conclusion of the testimony presented at the merits hearing, Respondent argued that:

> The fact of the matter is counsel could have found this information out by simply asking the jury or requesting the judge ask the jury if anybody had any prior law enforcement experience.

PCR Tr. p. 112, ll. 19-22. This Court inquired as to whether Trial Counsel's failure to request such a *voir dire* question was raised in the initial PCR action. In response to the

Court's inquiry, PCR Counsel summarized Trial Counsel's testimony at the current hearing on that issue.

> It was not, Your Honor, and I'm sorry Mr. Clark is no longer here but it is my understanding that – well, and he testified here today if he had known the background of that information he most certainly would have struck him and he has indicated to me that if he had any information concerning that juror that he certainly would have asked that the Court inquire further. But he just had no hint that that problem existed.

PCR Tr. p. 113, ll. 1-9.

As the record reflects, John Clark, Trial Counsel had left the courtroom at the time of this Court's inquiry. The PCR hearing transcript actually reflects that he verified that he had plenty strikes left at the time Juror Roberts was called, and that he absolutely would have used one of his remaining strikes to exclude Juror Roberts from service if he had known about his lawn enforcement background. His testimony further confirmed that he was never given any additional information concerning the jury pool, prior to the jury selection, by either Juror Roberts or the Solicitor's Office. PCR Tr. p. 60, l. 25- p. 61, l. 13.

Juror Roberts denied even hearing certain questions the Court asked during jury selection. As noted at length above, despite claiming in his PCR testimony that he actually did need to get out of jury service if he could, he claimed to have been so inattentive that he just didn't hear questions to which he could have responded and avoided service. With that in mind, even if the question had been asked, there is ample reason to believe this juror would not have responded to it. He clearly admitted not responding to other *voir dire* questions that he should have responded to if he had heard them.

Respondent's argument with regard to the timeliness of the application before the court ignores several crucial factors. Petitioner could have raised a Sixth Amendment allegation in his first PCR action concerning the failure of trial counsel to request a *voir dire*

question concerning current or former law-enforcement employment. In order to ***successfully*** raise such a claim however, Petitioner would have been required to do demonstrate, not only that trial counsel was deficient for neglecting to request that specific *voir dire* question, but also that he was prejudiced by the failure of counsel to make that request.

The burden of proof is on the Petitioner in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State,* 340 S.C. 112, 531 S.E.2d 294 (2000)*; Rule 71.1(e), SCRCP.* In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Petitioner must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. *Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007). Under the *Strickland Standard,* it is not necessary that an Petitioner prove that counsel's deficient performance more than likely altered the outcome of his trial, but rather he is required to establish a probability sufficient to undermine confidence in that outcome. *Strickland, supra*, 466 U.S. at 697.

In *McCoy v. State*, 401 S.C. 363 737 S.E.2d 623 (2013), our Supreme Court dealt with a case involving a juror issue similar to the one before the score. In that case, the high court clarified its position that a Post-Conviction Relief action is the proper manner in which to raise such claims. In so ruling, the Supreme Court cited *State v. Sheppard*, 155 Vt. 73, 582 A.2d 116, 118 (1990), with approval, for the proposition that an allegation of "juror misconduct discovered post-trial is not properly considered 'after discovered evidence'; rather, it is a separate basis for a new trial." The Supreme Court went on to hold that a new trial is warranted based on such a claim if the Petitioner is able to demonstrate that the juror in question intentionally concealed information; and that the information would have supported either a challenge for cause or would have been material to a party's use of its peremptory strikes. *McCoy*, *supra*, citing, *State v. Woods*, 345 S.C. 583, 587-89, 550 S.E.2d 282, 284 (2001). In so ruling, the Supreme Court once again rejected the State's view that a new trial would only be warranted where the Petitioner was able to show that he was prejudiced by the juror's failure to disclose the information in question. At the core of the Supreme Court's ruling in both *Woods*, *supra*, and *McCoy*, *supra*, is the recognition that both trial judges and attorneys rely on receiving accurate information from the venire which they can use to effectively screen out biased jurors. *See, State v. Kelly*, 331 S.C. 132, 145-46, 502 S.E.2d 99, 106-07 (1998). .

In *McCoy*, the Supreme Court found that the PCR Judge erred in summarily dismissing an Application for Post-Conviction Relief dealing with an allegation of juror misconduct where "genuine issues of material fact" existed concerning whether the claim in *McCoy* was time barred and/or successive. The *McCoy* case was remanded for a hearing on

these issues. In the present case, a hearing has already been held following this Court's Order denying the State's request for summary dismissal.

At the time of the initial collateral review of his case, Petitioner had not received the information ultimately provided to him by former Assistant Solicitor Holland. Therefore, while he could have made an unsupported claim that a *voir dire* question concerning current or former law enforcement employment should have been requested, he would have had absolutely no basis for demonstrating that he was prejudiced by this omission on the part of trial counsel. Adopting Respondent's argument concerning this issue would open an enormous Pandora's Box. Even if a defense attorney could be found ineffective for failing to ask for any particular *voir dire* question, the Petitioner could never win relief on the basis of that deficiency without a known factual basis for a finding of prejudice. Adopting the Respondent's position, would effectively place the burden on every post-conviction relief Petitioner, convicted by jury, to conduct an independent background check on every member of the jury from their case. This requirement would put an enormous financial burden on PCR Petitioners and would potentially result in unnecessary invasions of the privacy of jurors. Given the fact that the vast majority of PCR cases are handled by court-appointed lawyers, such a finding would in turn further burden the scarce resources allocated for indigent defense in South Carolina by requiring court-appointed PCR counsel to petition the circuit court for money to fund these background investigations. Such petitions would place an unnecessary burden on the court's time and resources as well inasmuch as such requests would no doubt necessitate hearings. Not only that, but in some circumstances, virtually no amount of digging could result in the discovery information to support such a claim. The logic advanced by Respondent would require a PCR lawyer to do

background checks on all the jurors in his client's case to determine multiple factors; some of which would be far more difficult to investigate than others. For example, counsel would have to cast a very wide net to determine whether a juror, or any of their family members, close friends or colleagues, had ever been the victim of a violent crime. Applying the Respondent's reasoning, such an investigation would be necessary to support a claim that a defense attorney was ineffective for failing to ask for a *voir dire* question designed to get that information out of the members of the jury *venire*. Such an expansive view of due diligence would require such action if the court were to hold that an individual could not bring a second PCR action at a later date upon discovering, by way of example, that a juror's fiancé had been brutally murdered in the same fashion as the victim in his client's trial. If an application raising such an issue were to be deemed untimely even though made within 365 days of discovering facts that would support the claim, PCR counsel in future cases would be left with no choice, but to conduct broad, and very expensive, background checks on all jurors in every case involving a jury trial and a jury *venire* that was not asked every conceivable *voir dire* question. On the other hand, the discovery of such information about a juror *after the fact* is relatively rare and the few successive PCR applications necessitated by such discoveries hardly tax the system in the manner the analysis urged by the State would. Petitioner prays that this Court recognize that such an outcome is not reasonable and has the potential to unnecessarily burden PCR Petitioners, PCR lawyers, the Indigent Defense System and the circuit court.

Furthermore, in this case, the fact that the Solicitor's Office had direct contact with a member of the pool from which Petitioner's jury would ultimately be pulled was not discovered until the depositions were taken on this current application. Since the fact of the

telephone conference was not disclosed by the State, there is no way counsel from Petitioner's first PCR, or the Petitioner himself, could have discovered that it took place prior to the first PCR action.

With reference to what Petitioner submits is the only legitimate statue of limitations issue properly before the Court, the operative question boils down to whether or not Petitioner (or his first PCR attorney) could have found out this information earlier through the exercise of due diligence. Petitioner's position concerning this issue is extensively covered in both his Memorandum in Support of Post-Conviction Relief, his subsequent Proposed Order submitted with leave of Court on February 15, 2015 and the Rule 59(e) Motion to Alter or Amend, SCRCP, filed by Petitioner in response to the Order of Dismissal filed in this matter. In addition to those arguments set for above, Petitioner would specifically point out the following points in response to the language of the Order of Dismissal filed in this matter.

Essentially, the operative question is whether it is reasonable to expect any attorney handling a Post-Conviction Relief case to conduct a full background check on every juror who served in a case in order to determine whether his client can meet the prejudice prong of the *Strickland v. Washington*[1] standard on a question of whether Trial Counsel was ineffective for neglecting to request a *voir dire* question addressing prior law enforcement employment, or, any other *voir dire* inquiry which might have been neglected. Undersigned PCR Counsel would argue that any trial attorney should always request the *voir dire* question at issue and notes that in recent years that has actually become a fairly standard *voir dire* question. Where such a *voir dire* question is not requested by trial counsel, it is one thing to raise an allegation addressing that omission

[1] 466 U.S. 668, (1984).

and quite another to be prepared to meet the *second* prong of the standard; the showing of *prejudice* which is necessary for a successful Sixth Amendment challenge. Obviously, Petitioner's attorney in his first Post-Conviction Relief case could have raised an allegation that Trial Counsel was ineffective for failing to request such a *voir dire* question. He *could not*, however, have been prepared to demonstrate prejudice unless he had conducted a full background check on every person who served on that jury. Without any hint of evidence that someone on the jury had previously worked in law enforcement industry, PCR Counsel would have no real reason to raise the allegation much less to conduct such an investigation. Such an exercise would not be cheap. PCR Counsel, who practices extensively in this area of the law, would assert that by conservative estimates, it would cost a minimum of $6,000.00 to $12,000.00; to conduct background checks on the previous employment history of all 12 persons who served on a given Petitioner's jury. That estimate assumes that you have some idea that the prior employment of the members of the jury should be the focus of your investigation. Such a background check can not be compared with a basic criminal record check where anyone can on line to the SLED website and request such a criminal record check for a modest fee of approximately $25.00. If you add to that investigation questions concerning whether any jurors have been the victims of similar crimes to that for which your client was tried, and other such potential issues, the price tag for such investigations would skyrocket. Assuming the Petitioner were indigent, and the vast majority of PCR Petitioners are, court-appointed PCR Counsel would have to petition the court for the funding to conduct such background checks. At this point the logic in this argument becomes somewhat circular. If there was nothing in the responses to *voir dire* questions

that *were* asked to hint of a prior background in law enforcement, then it would be fairly predictable for any circuit judge to rule that there was no evidence to support the request for such funding, and PCR Counsel would be highly unlikely to be granted funding for such an investigation. Even in a case where an Petitioner has retained PCR Counsel, most of those individuals have barely been able to afford the cost of their attorney's legal fees, and would not have the resources to pay for a private investigator to conduct background checks on all the jurors who served in his case. If such an Petitioner applied for State funding, he would likely be told that the judge could not approve funding for him to conduct "a fishing expedition." The Order of Dismissal in Petitioner's case finds that, "because Roberts' law enforcement background was discoverable at the time of Petitioner's trial, Petitioner should have raised this issue in his first PCR hearing." Order, pg.24, para. 3. That conclusion presupposes that either Trial Counsel should have requested the *voir dire* inquiry in question even if there was no evidence to suggest that one of more jurors may have had a law enforcement background, or, that Trial Counsel had the funding to conduct a full background check *on the entire jury pool* announced for that upcoming term of court before jury selection for the term began. As discussed above, where the *voir dire* question related to current or prior law enforcement employment was not requested, based on the State's position, as adopted by the lower court, the inquiry on collateral review would require PCR Counsel to conduct a full background check on all the juror's who served.

Petitioner asks this Court to consider that this ruling would no doubt result in every court-appointed PCR lawyer, and many retained ones, feeling compelled to request public funding to conduct background checks on every juror in every single Post-

Conviction Relief case involving a jury trial. Petitioner would submit that this would put an unreasonable financial burden on any PCR Petitioner. In short order, application of this expectation with regard to what is reasonable preparation for jury selection, would create the demand for adequate time and sufficient funding to conduct such investigations *in advance of every single jury trial.* Petitioner respectfully asserts such an expectation is not reasonable and the judicial system would buckle under that burden.

The operative question is not whether or not Petitioner could have raised an ineffective assistance of counsel allegation against his trial attorney, John D. Clark, for failing to request this *voir dire* question, but rather, whether or not, ***through the exercise of due diligence***, Petitioner, and/or his PCR Counsel, could and should have raised this issue in his first PCR. Petitioner submits that most, if not all, circuit judges would have found that there was no reason to have done so based on the information on the juror questionnaires *and* the responses to the *voir dire* questions asked by the Court. Obviously, even if the juror questionnaires did not give rise to the request for this question in advance of jury selection, Trial Counsel still could have requested it *if* any of the *voir dire* responses had provided a hint that the inquiry was necessary. Theoretically, an Petitioner could even have alleged that such a *voir dire* question should be requested by any competent lawyer when selecting a jury for any trial. In the PCR context, the next question becomes whether they could and should have conducted background checks on all the jurors in this case in order to "dig up" evidence to supply a foundation for raising the allegation *and necessary to a demonstration of prejudice* flowing from Trial Counsel's failure to ask for this *voir dire* question.

Petitioner raised this allegation in a timely manner after the first time he had any information that there was a problem with one of the jurors who served in his case. He urges this Court to recognize that ruling that this Application was not timely based on the analysis argued by the State, is not only unfair to him to a degree that it raises a viable due process challenge, but this holding would open a Pandora's Box of monumental proportions when it comes to any future PCR (dealing with a jury trial) where there is any *voir dire* question that the PCR lawyer believes should have been requested and wasn't.

Petitioner further submits that the merit of his position on the timeliness issue in this case, is confirmed by the Supreme Court of South Carolina's decision in *Robertson v. State*, 418 S.C 505, 795 S.E.2d 29 (S.Ct. filed December 14, 2016) wherein the PCR Application was filed within one year of Petitioner Robertson's discovery that his previous PCR Counsel was not qualified to represent him in a death penalty PCR pursuant to S.C. Code § 17-27-160(B). In ruling that Robertson's Second PCR action was procedurally proper, this Honorable Court did not see fit to find that Robertson, or his court-appointed attorney in his first PCR action, could have discovered this information in time to raise it in the first PCR effort. Admittedly, Robertson was indigent and was represented by court-appointed Counsel whereas Petitioner was represented by retained counsel in his first PCR action. Petitioner would note, however, that our Supreme Court has never before set a lower standard for due diligence by court-appointed lawyers versus retained ones. In addition, the factor that Robertson, and or his first PCR Counsel, would have needed to research and investigate was far simpler and easier to investigate than the matter currently before this Court. Literally all Robertson, or his first PCR Counsel, would have needed to do in order to raise his claim in the first PCR was to have looked at the statutory provisions pertaining to

an Petitioner's rights with regard to PCR Counsel in a death penalty case and then asked the Court to confirm that court- appointed counsel met those requirements before moving forward with his collateral review. Obviously court-appointed PCR Counsel in a capital case could have, and arguably should have, looked up the appropriate statutory provisions and determined whether he was in fact qualified under the required mandated by South Carolina law. If that attorney had any question concerning whether his experience met those requirements set by §17-27-160, he could easily have put the question to the Court prior to proceeding to represent Robertson in that action. If he did not meet the experience requirements set by law, it would have been incumbent upon him, as an officer of the court, to ask to be relieved on that ground. Toward that end, Robertson himself could certainly have asked his court-appointed lawyer, prior to the case being heard, what experience he had that met the requirements of the operative statutory provision. Notwithstanding these factors, this Court declined to find Robertson's second PCR was procedurally barred his failure to raise the claim in his first PCR. Here, in order to have raised *and had any chance of prevailing* on this issue in his first PCR, Petitioner and/or his first PCR Counsel would have had to do full background checks on all twelve (12) of his jurors to see what if anything they could discover about them and their backgrounds to support a claim that trial counsel was ineffective for neglecting to request any number of potential *voir dire* questions that were not asked during the selection of his trial. As the Supreme Court concluded in *Robertson*, *supra*, the appropriate ruling in this case is that Petitioner's second PCR was procedurally proper.

Furthermore, the Order of Dismissal adopts the Respondent's reasoning that Petitioner's current PCR was untimely filed *even if* the Court applies the date upon which

Petitioner became aware of the problems with Juror Roberts. Petitioner most respectfully submits that the ruling of the lower court on this issue is predicated on a faulty timeline first argued by the State in its Proposed Order of Dismissal. The discussion of this issue at the PCR hearing consisted of the following. Notwithstanding the renewal of its Motion to Dismiss, Respondent ***"stipulated that the Petitioner actually did in fact learn of this issue within one year of filing and would be timely."*** Hearing Tr. p. 5, ll. 21-25 (Emphasis added). Nevertheless, Respondent continued, adding that, ***"with that regard the State contends though that the Petitioner did not file one year of being able to reasonably with good effort to find this information out."*** PCR Tr. p. 5, l. 25 – 4. Respondent argued the current application is, ***"excessive [sic] and untimely."*** PCR Tr. p. 5, ll. 20-21. Respondent essentially argued that while the current PCR action is timely from when Petitioner ***did*** find out about the problems with this juror, it is not timely from when they believe he could and should have found out. As noted above, Respondent summarized the State's position by saying ***"the State contends though that the Petitioner did not file within one year of being able to reasonably with good effort to find this information out."*** PCR Tr. p. 6, ll. 1-4. Subsequently, in Respondent's Proposed Order submitted to this Court in September, 2017, the State framed a ruling directly contradicting it's on the record stipulation and stating that because Attorney Holland said he had spoken with an investigator hired by Petitioner about this potential juror issue approximately one and a half to two years prior to his deposition in this PCR, the Application was not timely. Virtually that identical language, was ultimately adopted by the lower court in its Order of Dismissal, wherein it states,

> Holland testified at his deposition some years later, after he entered private practice, he was taking a Client to enter a plea in Spartanburg when a discussion came up about jury selection. Holland's former client was familiar with Petitioner's case, and at some point the client handed Holland a

> cell phone with Petitioner on the other end of the line. At that point, Petitioner apparently asked Holland about Roberts' seating on his jury. ***This Court finds that the date of that telephone conversation, or sometime prior to it, starts the timeline of when Petitioner learned of the facts on which he is basing the current PCR application.*** Holland testified that subsequent to his conversation with Petitioner, at some point he was contacted by Petitioner's private investigator, Dave McDougal. ***Holland testified that his contact with McDougal took place one and a half to two years prior to the deposition. The deposition occurred on April 22, 2014.*** Petitioner's Application was filed on July 9, 2013. In order for his claim to be timely, Petitioner's discovery of the alleged new evidence would have to have occurred after July 9, 2012. This Court finds given the timeline of events testified to by Holland at his deposition and evidentiary hearing Petitioner has failed to show that this PCR application was timely filed.
> Order, pp. 25 – 26, (Emphasis added).

Petitioner now respectfully asks this Honorable Court to recognize that there was no factual basis for this ruling inasmuch as the factual findings asserted therein are in error. The record below supports Petitioner's position that the State conceded that this Application was timely filed if the Court applied the date when the Petitioner found out the information about this juror through Holland during his representation of an acquaintance of Petitioner. As previously noted, at the PCR hearing, Respondent ***"stipulated that the Petitioner actually did in fact learn of this issue within one year of filing and would be timely."*** Hearing Tr. p. 5, ll. 21-25 (Emphasis added). Notwithstanding this stipulation, Petitioner presented testimony from Holland's former client, Shareka Jones, which verified that her conversation with Holland about Petitioner's jury took place as they were riding together to Spartanburg for her guilty plea proceeding. PCR Tr. p. 62, l. 2 – p. 66, l. 14. In light of the State's stipulation as to the timely filing of this application based upon when Petitioner found out from Holland's former client about the problems with Juror Roberts having been on his jury, Petitioner did not introduce documentation concerning the date that plea was entered and did not object to this witness being excused following her testimony. PCR Tr.

p. 66, ll. 15 – 22. Petitioner now asks that this Court take judicial notice of the data concerning Witness Shareka Jones' guilty plea to one count of Forgery on ***September 17, 2012***, found on the Spartanburg Country Seventh Judicial Circuit's Public Index. This entry addressing her plea of guilty on Indictment No. 2012-GS-42-04801 further documents that Ms. Jones' attorney on that charge was Thomas William Holland, Sr. As the Court is aware, the Application for Post-Conviction Relief currently before the Court was filed on July 9, 2013; well before the filing deadline of September 16, 2013, if the deadline date is properly calculated as 365 days from the date of the conversation Holland had with Petitioner on the date of Jones' Spartanburg guilty plea. In his Rule 59(e) Motion to Alter of Amend, Petitioner asserted that the lower court should take judicial notice of this public record and ask that it do so. He further requested however, that he either be permitted to submit certified true copies to the Court for filing as Petitioner's Exhibits in this PCR action, or, in the alternative that the hearing in this matter be reopened in order to afford Petitioner the opportunity to make a record concerning the date of Ms. Jones' guilty plea in Spartanburg Country at which she was represented by Holland, in the event the lower court found that it was necessary for Petitioner to introduce copies of the plea and sentencing records of Shareka Jones on this charge in order to prove that the public index is accurate. Had Respondent made an amendment to the State's position concerning the timeliness of this Application following Holland's testimony, PCR Counsel would have had the opportunity to introduce copies of these court documents at the hearing.

Curiously, as noted above, the Order states, "*This Court finds that the date of that telephone conversation,* ***or sometime prior to it****, starts the timeline of when Petitioner learned of the facts on which he is basing the current PCR application.*" One can only

assume the statement, ***"or sometime prior to it"*** is based upon Holland's estimate that his conversation with Petitioner's Investigator, the late Dave McDougal, *took place one and a half to two years before the depositions* taken in this case on April 22, 2014. Respondent did not reference this time estimate in its summary of Holland's Deposition in its Proposed Order which was adopted by the lower court as its Order in the case. Order, pp. 8 – 9. Neither does the Order provide a page cite to the location of this time estimate in either Holland's deposition or his PCR hearing testimony. The deposition testimony in question is found at Holland Depo p. 22, l. 17 – p. 23, l. 1. The Order goes on to state that, "Petitioner has failed to show that his application was timely filed." Order, p. 25,l. 21 – p. 26, l. 2. Petitioner respectfully notes that this finding is not accurate. After Holland's estimate concerning when his conversation with Investigator Dave McDougal took place, he was specifically questioned further by Respondent's own Counsel concerning the order in which the events occurred. That colloquy specifically clarifies that that he first disclosed the information about what happened to his client as they were driving to her guilty plea proceeding in Spartanburg. That conversation took place before Holland subsequently spoke with Petitioner, and the conversation with Petitioner took place before Holland's conversation with Investigator Dave McDougal. Holland Depo p. 22, l. 17 – p. 24, l. 9. *This portion of the deposition expressly acknowledges that Holland spoke with his client, Shareka Jones, about the matter first, then he talked with Petitioner and that the conversation with Petitioner came before he spoke with Dave McDougal.* Holland Depo p. 24, ll. 5 – 9.

At no time following Holland's deposition did Respondent ever suggest that the date of contact with Investigator Dave McDougal provided a basis for claiming Petitioner

did not timely file is Application for Post-Conviction Relief. The Respondent in fact subsequently stipulated that the Application was timely based upon when Petitioner found out the information about Juror Roberts from Holland. Had Respondent ever made this assertion following the deposition and had they not stipulated to the timeliness of the Application based upon when Application discovered this information, Petitioner would have introduced documentary evidence to demonstrate that Investigator McDougal did not contact Holland until after Holland's conversation with Petitioner. Petitioner was not put on notice of this position until it received Respondent's Proposed Order. Even the language in the lower court order acknowledges that, "Holland testified that ***subsequent to his conversation with Petitioner***, at some point he was contacted by Petitioner's private investigator, Dave McDougal. Order, p. 25, ll.16-17. There is abundant testimony before this Court that Holland's conversation with Petitioner occurred on, or shortly after, the date of Jones' guilty plea in Spartanburg County. The only real point of contention is that Jones' testimony indicates that telephone conversation took place on the date Holland gave her a ride to Spartanburg for her plea hearing, PCR Tr. p. 63, l. 12 – p. 65, l. 20, whereas Holland testified that he remembered Jones' coming by his office sometime *"a couple weeks later"* and handing him a cell phone with Petitioner on the other end of the line. PCR Tr. p. 93, ll. 23 – 25. This discrepancy between their recollections concerning when Holland ultimately spoke with Petitioner has no impact on the timeliness issue inasmuch as the Application was timely filed even if Petitioner spoke with Holland and learned of this information the date of her guilty plea; September 17, 2012. If, as Holland recalled, his conversation with Petitioner did not take place until *"a couple weeks later"*, then Petitioner arguably had even more time to file pursuant to §17-27-45 (C).

III.

CONCLUSION

Based upon all the arguments and authorities set forth herein, Petitioner asserts that this PCR Application was timely filed and asks that he be granted leave to proceed with his PCR appeal on the merits of the claims raised below.

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ATTORNEY FOR PETITIONER

This 9th day of May, 2018.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Brian M. Gibbons, Presiding Judge

Appellate Case No. 2018-000779
Lower Case No. 2013-CP-29-00951

VERNARD JEROME MATHIS, #297034 Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Memorandum in Support of the Timeliness of Post-Conviction Relief Application in the above-entitled cause has been served upon opposing counsel, DeShawn Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 9th day of May, 2018.

Tara Dawn Shurling
Attorney for Petitioner

SWORN TO BEFORE me this 9th day of May, 2018.

Suzanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

LAW OFFICE OF

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May 9, 2018

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: Vernard Jerome Mathis, #297034 v. State of South Carolina
Appellate Case No. 2018-000779

Dear Mr. Shearouse:

Enclosed please find an original and one copy of my Memorandum in Support of Timeliness of Application for Post-Conviction Relief in the above referenced matter. I apologize for not providing my explanation at the time I filed the Notice of Appeal. If you would be so kind as to have your staff file the original and return the clocked copy in the enclosed self-addressed stamped envelope provided for your convenience, I would be most grateful. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures
cc: Deshawn Mitchell, Assistant Attorney General (w/enclosure)
Vernard Mathis, #297034 (w/enclosure)
Vernard Sparks (w/enclosure)