

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein

Appellate Case Number:2018-000970

Antwan McMillan,.....Petitioner

v.

State of South Carolina,.....Respondent

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Did the PCR court err finding trial counsel's performance reasonable when counsel's deficient *voir dire* concealed a juror's marital relationship with a law enforcement officer employed by the same agency which investigated Petitioner?

REASONS JUSTIFYING A GRANT CERTIORARI

The Court should grant this petition to insure that an accused's use of *voir dire* allows for the intelligent and effective use of his peremptory strikes. Such a holding will comport with current South Carolina law concerning use of peremptory strikes. Such a holding is necessary to ensure a fair trial as South Carolina already employs one of the most minimal *voir dire* processes in the United States.

STATEMENT OF THE CASE AND THE FACTS

Petitioner was arrested on or about June 5, 2010 and charged with seven criminal counts. He was eventually indicted, along with two co-defendants, for three counts of Attempted Murder, three counts of Attempted Armed Robbery, and one count of Possession of a Weapon During the Commission of a Violent Crime. Appendix, p. 1-14. He and one co-defendant were tried by a jury in the Colleton County Court of General Sessions from August 29-September 1, 2011 with the Honorable Perry M. Buckner, III. presiding. Appendix, p. 45.

During *voir dire* and jury selection, no juror indicated a relationship by either blood or marriage to a member of the Colleton County Sheriff's Department (CCSO), the agency which investigated this case. Appendix, p. 53-104. Nonetheless, after the fourth witness, Juror 102 (Juror) informed the trial judge that she had a concern about serving, indicating in a note: "I need to make sure that I'm a suitable juror for this trial due to the status of my husband." Appendix, p.

231, l. 15-16. Thereafter, the trial court individually examined the juror¹ and, finding no bias, allowed her to remain over the objections of Petitioner's trial counsel. Appendix, p. 231, l. 2- p. 243, l. 17.

During this trial, the State elicited testimony from 18 witnesses of whom 12 were law enforcement officers or other government agents. Appendix, p. 46-49. A second co-defendant testified as a state's witness along with his father and a female acquaintance of the three accused. Three persons testified as victims of the crimes.

At trial, co-defendant James Davis, Jr. testified that he, Petitioner and co-defendant David Jakes blocked the exit ramp near Interstate 95 at dusk in an attempt to rob two women who were standing beside their stranded vehicle. Appendix, p. 259. l. 14- p. 261, l. 14. When a third member of the stranded travelers, an active duty soldier in the US Army, made his presence known, the evidence indicated the soldier and Jakes engaged in prolonged gun fire. Jakes was struck and during the break in shooting, the male victim reloaded his gun. Appendix, p. 204-225.

Davis' testimony indicated that Petitioner then drove Jakes along with Davis away from the scene. Davis indicates the three met with two females who then assisted in the transportation of Jakes to the hospital for treatment for his multiple gunshot wounds. The three victims suffered no physical injury from the gunplay and lost no items of property. Appendix, p. 244- p. 304.

Petitioner's defense theory was mis-identification of him as a perpetrator. None of the three victims could identify any of their assailants and no law enforcement officer witnessed any

¹Another juror issue arose moments before the verdict and is discussed as a matter of factual context below. This second juror issue is not before this Court.

criminal conduct. None of the forensic evidence presented through more than 100 exhibits directly implicated the defendant. Appendix, p. 45- p. 769.

Petitioner presented the testimony of the lead detective during his case in chief. Appendix, p. 617- p. 638. Petitioner elicited testimony that cooperating witness Davis's first statements to law enforcement also exculpated Petitioner. Petitioner also elicited testimony that co-defendant Jakes provided a statement to law enforcement which exculpated the Petitioner.

In an effort to counter this, the State elicited evidence from the lead detective indicating that he could not corroborate the existence of the third person Jakes implicated instead of Petitioner.

Unlike the Petitioner, according to testimony both Jakes and Davis confessed to involvement in the crimes. Further, forensic evidence also linked Jakes' wounds to the gunfire. However, the physical evidence only linked Petitioner to the vehicle used in the crime and not to the crime scene itself.

The jury deliberated for nearly four hours and returned with three questions or requests. Appendix, p. 728- p. 745. The jury returned a verdict convicting Petitioner of three counts of Assault and Battery, First Degree, three counts of Attempted Armed Robbery, and one count of Possession of a Weapon During the Commission of a Violent Crime. Appendix, p. 745-748. Petitioner was sentenced to 10 years for the assault convictions, 20 years for the robbery convictions, and five years for the gun charge with one assault sentence running consecutive to one of the robbery sentences. Appendix, p. 770-776.

Petitioner filed a direct appeal arguing that the trial court should have struck Juror for cause. As framed on appeal, the Court of Appeals opinion "determine[d] solely whether Juror

was impartial.” Appendix, p. 779. After analysis, the Court of Appeals determined that no bias was revealed during the trial court’s inquiry. Appendix, p. 781.

Further, the Court of Appeals noted that no presumption of bias existed because there was no concealment by the juror. The Court of Appeals expressly noted “no voir dire question required Juror to respond with her husband’s employment.” Appendix, p. 781. Thus, the Court of Appeals affirmed the trial court’s refusal to dismiss Juror.

The South Carolina Supreme Court initially granted a petition of certiorari to entertain the direct appeal issue; however, the Court subsequently dismissed the petition as improvidently granted. Appendix, p. 782-783.

Petitioner then filed an application seeking post conviction relief. PCR counsel framed this issue as whether trial counsel was ineffective when he “failed to properly request adequate voir dire which resulted in the seating of a juror who was married to a member of the prosecuting law enforcement agency.” Appendix, p. 790.

A merits hearing was conducted in the Court of Common Pleas on June 6, 2017. Appendix, p. 801- p. 841. Petitioner presented the testimony of trial counsel who indicated that he was mistaken in failing to request voir dire as to any juror’s relationship with a member of the CCSO or any other law enforcement agency. He indicated that he had no strategic reason for this failure as this is a question he normally asks.

Further, Petitioner noted that trial counsel had peremptory strikes left to use at the time Juror was presented before the parties.

The PCR court requested proposed orders. She signed the Order of Dismissal finding that trial counsel was neither deficient nor was any prejudice shown. Appendix, p. 856- p. 870.

Petitioner filed a Notice of Appeal and Proof of Service and this Petition follows². Appendix, p. 872-873.

SUMMARY OF ARGUMENT

Trial counsel rendered deficient performance when his omission during voir dire concealed material information affecting Petitioner's exercise of his peremptory strikes. Had Petitioner been represented by competent counsel, he would have employed adequate voir dire and exercised a peremptory strike against this juror. Given the conflicting evidence implicating Petitioner, there is a reasonable likelihood that the outcome of the proceeding would have been different but for the deficient performance of trial counsel.

STANDARD OF REVIEW

The "standard of review in post-conviction relief (PCR) cases depends on the specific issue before" the reviewing court: it will defer to a PCR court's findings of fact and "will uphold them if there is evidence in the record to support them"; but will review "questions of law *de novo*, with no deference to trial courts". State v Smalls, 810 SE2d 836, at 839 (SC 2018).

ARGUMENT

Trial counsel was deficient in failing to request voir dire concerning a potential juror's relationship with law enforcement. Had he made this request, Juror would have revealed her marriage to a member of the Colleton County Sheriff's Office, the agency which investigated this case. Petitioner would have then exercised a peremptory strike and this juror would not have been seated; instead, trial counsel's deficiency concealed this material factor.

²Undersigned counsel and his associate were hired to file this Petition and did not serve as PCR counsel at the trial level.

Law Concerning Claims of Ineffective Assistance of Counsel

There are two components for a court to analyze in a claim of ineffective assistance of counsel (IAC). Strickland v. Washington, 466 U.S. 668 (1984). First, the reviewing court must determine if the acts and omissions of counsel fell below an objective standard of performance. Second, the reviewing court must determine if it is reasonably likely that the outcome of the trial would have been different had counsel not performed deficiently.

Relevant Law Concerning Voir Dire and Jury Selection

An accused's jury trial rights are defined by both constitutional requirements and statutory rights. Under the Sixth Amendment to the US Constitution, an accused is entitled to a jury trial in all criminal cases in which the potential punishment is more than six months. Sixth Amendment, US Constitution & Baldwin v New York, 399 US 66 (1970). Likewise, the South Carolina Constitution also requires a jury trial when an accused faces criminal punishment. Article 1, Section 14, SC Constitution.

The gravamen of the jury right is that the accused is entitled to an impartial jury. See Warger v Shauers, — US —, 135 S Ct 521 (2014). When an accused challenges a juror's presence on the jury for cause, the constitutional inquiry ultimately rests on the confidence of the trial court in the impartiality of that individual juror. Morgan v. Illinois, 504 US 719 (1992). If an accused is tried before an impartial jury, it is difficult to find the process constitutionally insufficient. Palacio v State, 511 SE2d 62, at 68 (SC 1999).

However, in South Carolina, state law also provides requirements regarding the impanelment and composition of a jury in a criminal case. To begin, a jury in the Court of General Sessions must be composed of 12 jurors. Article V, Section 22, SC Constitution. Also,

these jurors must be unanimous as to the verdict rendered. Article V, Section 22, SC Constitution.

Further, an accused is entitled to the employment of some voir dire prior to the selection process. Specifically, SC Code Section 14-7-1020 provides that a trial judge shall ask certain questions of potential jurors upon request of counsel for either party. Finally, an accused is entitled by statute to the right to exercise peremptory challenges. SC Code Section 14-7-1110.

South Carolina law also recognizes that certain information about a prospective juror might be considered “material” to the use of these peremptory strikes if there is a potential of bias. State v Coaxum, 764 SE2d 242, at 246 (SC 2014). In fact, the South Carolina courts have recognized that the concealment of material information from the accused may improperly impair the exercise of peremptory strikes regardless of the nature of the concealment. In a direct appeal setting, the concealment of this information from the accused may require the reversal of a guilty verdict and remand for a new trial. See State v Tucker, 815 SE2d 467 (SC Ct App 2018) citing Coaxum.

While such a claim is consistent with the analysis in Coaxum, no South Carolina appellate court has addressed whether counsel can be constitutionally ineffective when material information is concealed from the accused because of the deficient exercise of voir dire by his own trial counsel. Nonetheless, courts in other jurisdictions have made such a finding.

In State of Montana v Lamere, the Montana Supreme Court reviewed an accused’s convictions for aggravated assault and assault with a weapon. State of Montana v Lamere, 112 P3d 1005 (MT 2005). The juror at question in Lamere was the mother of an employee of the prosecuting attorney’s office. Lamere, at 108. The defense counsel did not become aware of this

relationship until a lunch break after the commencement of the trial and his objection to this juror's service was overruled by the trial court. Lamere, at 109.

In reversing this conviction, the Montana Court held that defense counsel was deficient³ when he failed “to take notice of the pertinent information in Whirry’s questionnaire result[ing] in inadequate questioning during voir dire which in turn led counsel to make uninformed decisions...” Lamere, at 1012. The Lamere Court noted that the juror indicated this relationship on a juror questionnaire but that accused’s indigent defense counsel failed to take notice of the answers. The Lamere Court then noted that trial counsel failed to ask this juror more than one question during voir dire.

The Lamere opinion references trial counsel’s admission that his failure was not part of trial strategy and was a “mistake.” The Court also noted the “natural inclinations of one whose life is committed to law enforcement” when discussing the importance of adequate voir dire. *Id.*, at 1011 (internal citations omitted).

The Lamere opinion recognized a duty of trial counsel to adequately question during voir dire so as to enable the intelligent exercise of peremptory challenges. *Id.*, at 1011. Specifically, the Court stated that counsel had an “obligation to read the juror questionnaire forms” and to “develop information in the record” but that counsel’s failure to do so “led counsel to make uninformed decisions regarding challenges. Lamere, at 1012. The Lamere Court addressed the prejudice prong of the claim by reference to structural error analysis but the application of this presumption of prejudice as a structural error may be in doubt after the US Supreme Court

³Unlike South Carolina, Montana recognizes claims of ineffective assistance of counsel on direct appeal if the trial record sufficiently documents the alleged act or omission and allows understanding of trial counsel’s reasons for such act or omission. Lamere, at 1009.

decision in Weaver v. Massachusetts, — US —, 137 S Ct 1899 (2017).

Likewise, in Goodspeed v State of Texas, the Court of Appeals of Texas, Texarkana addressed a claim of ineffective assistance of counsel for a failure to ask any questions during voir dire of the prospective jurors. 120 SW3d 408 (TX Ct App. 2003)(reversed and remanded, for further development of the record, by the Court of Criminal Appeals of Texas in Goodspeed v State of Texas, 187 SW3d 390 (TX Ct App 2005)). In reversing the conviction for aggravated sexual assault, the lower appellate Goodspeed Court indicated that trial counsel's "waiver of Goodspeed's right to solicit information from prospective jurors (when such information could only help assist in intelligently exercising peremptory strikes) falls well below the objective standard of reasonableness." Goodspeed, at 411. The lower Goodspeed Court found that "like a tiny pebble thrown in the midst of a calm lake, the ripple effects of ineffective assistance during voir dire permeate the trial from beginning to end. Goodspeed, at 413.

On further appeal, the Court of Criminal Appeals of Texas reversed the lower Court of Appeals of Texas, Texarkana because the record was inadequate to determine if some legitimate reason existed for this failure even though, in a concurring opinion, the Court had "doubts" whether counsel was "pursuing a reasonable trial strategy when he failed..." Goodspeed v State of Texas, 187 SW3d 390 (TX Ct Cr App 2005) & Goodspeed, at 394 (concurring opinion of Price and Cochran). This higher appellate opinion in Goodspeed did not reverse the lower Goodspeed Court's opinion that counsel can render deficient performance by omission during voir dire. In fact, the higher Goodspeed Court noted that this remand was consistent with dicta from a previous case indicating that "defense counsel has an 'obligation' to ask questions." Goodspeed, at 393 (internal citations omitted).

The analysis in both Lemere and Goodspeed are consistent with SC law.

In State v. Coaxum, the South Carolina Supreme Court held that the unintentional nature of the concealment of information about a juror is not a determinative factor in the analysis of error. 764 SE2d 242 (SC 2014). The Court in Coaxum found that a juror was properly removed mid-trial despite the unintentional nature of the concealment. The Coaxum court found the operative question to be whether “the information concealed.. would have been a material factor in a party’s exercise of its peremptory challenges.” Coaxum, at 246.

The analysis in Coaxum should be applied to Petitioner’s case.

Deficient Performance-Concealment by Deficiency

Petitioner’s trial counsel was deficient in his exercise of the statutory voir dire right.

Trial counsel did not request that the jurors be questioned as to their relationships with law enforcement, or specifically, the CCSO⁴. Appendix, p. 238, l. 22-24 & p. 809, l. 4-8. Trial counsel testified that he sometimes asks such a question and he “should do” so all the time but that he failed to do so here without reason. Appendix, p. 809, l. 9-16. The trial court even chastised trial counsel for his failure to ask this question when counsel objected to the continued service of Juror despite the fact the information about her husband was not revealed during trial prep, voir dire, or jury selection. Appendix, p. 238, l. 22-24.

Had trial counsel requested that the Court question the petit jury venire as to any

⁴While the trial judge did inquire as to the relation between any prospective juror and the prosecutors, defense attorneys, and the accused, he did not ask if any juror was related to the “State of South Carolina.” See SC Code Section 14-7-1020 (“The court shall...examine...a juror to know whether he is related to either party....”). While not an issue in this case, there is some chance that such a question would have required Juror to indicate she was related by marriage to an agent of the State of South Carolina.

member's relationship to law enforcement by blood or marriage, counsel would have learned of Juror's marriage to a member of the CCSO. This is the same office which investigated Petitioner and who employed witnesses who testified against Petitioner.

With such knowledge, trial counsel would have exercised a peremptory strike. Appendix, p. 809, l. 25- p. 810, l. 10. He stated as much at the PCR merits hearing. And he had such peremptory strikes remaining at the time he decided to allow Juror to serve. Appendix, p. 91- p. 96.

The Court of Appeals issued a merit opinion in the Petitioner's direct appeal addressing Juror's partiality. Appendix, p. 777-781. In this opinion, the Court of Appeals narrowed the issue on appeal to avoid any discussion about the use of peremptory strikes. Appendix, p. 779. The Court of Appeals expressly noted trial counsel's failure regarding voir dire. Appendix, p. 781.

Prejudice Resulting from Questionable Jury Qualification and Selection

While not constitutionally biased, the prospect that Juror harbored unexpressed bias is hard to ignore. While such bias in this case might not have risen to the level of constitutionally recognized impairment, such lingering bias would impact trial counsel's ability to persuade the juror to acquit Petitioner. In fact, it was Juror herself that raised the very question of her proper placement on the jury.

As noted above, 12 of the 18 witnesses were affiliated with law enforcement or related agencies such as emergency dispatch. Six of the law enforcement witnesses were employed by CCSO at the time of trial and a seventh was employed there during the investigation. Two other law enforcement officers testified and were employed by agencies in neighboring counties.

The juror issue caused such concern for the trial judge that he held a special hearing in which more detailed voir dire was conducted of Juror than any other juror. Appendix, p. 234 - p. 237. The trial judge even pulled the complete juror response forms from the clerk to ascertain how this information was not revealed during counsel's review of the responses. Appendix, p. 238, l. 18- p. 242, l. 5. The trial court then noted that trial counsel also failed, in addition to the deficient voir dire, to obtain the complete set of juror responses but instead only relied upon an incomplete summary. Appendix, p. 241, l. 2 - p. 242, l. 5.

Such lingering bias has been recognized by the Supreme Court of the United States in a case involving voir dire and jury selection. In Irvin v Dowd, the Supreme Court reversed a murder conviction despite an elaborate process indicating: "[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father." Irvin v Dowd, 366 US 717, 727-728 (1961).

While Juror claimed not to harbor constitutional bias, the prospect that Juror harbored unexpressed bias is hard to ignore. While such bias in this case might not have risen to the level of constitutionally recognized impairment, such lingering bias would impact trial counsel's ability to persuade the juror to acquit Petitioner. In fact, it was Juror herself that raised the very question of her propriety on the jury after she heard testimony from her husband's coworker.

As to any factual disputes, Juror necessarily had to evaluate the credibility of law enforcement's testimony and the integrity of CCSO's investigation. See Kyles v Whitley, 514 US 419, 445-449 (1995)(noting a common defense tactic is to discredit the integrity of the police investigation).

Of no small significance to the prejudice analysis, immediately before the verdict was returned, it was revealed that another juror who served in this case was disqualified by statute from serving⁵. Appendix, p. 741, l. 14- p. 744, l. 12. While any error in that situation is not an explicit issue in this Petition, two separate incidents of concealed information material to the jury selection process brings the integrity of the verdict square into question.

Weakest Voir Dire in the Nation

Finally, the deficient performance and prejudice in this case must be viewed against the context that South Carolina has one of the weakest voir dire processes in the country.

According to a joint survey by the National Center for State Courts and the State Justice Institute, less than 10 state courts rely on judge only conducted voir dire. See Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole L. Waters, Ph.D.; *The State-of-the-states Survey of Jury Improvement Efforts: a Compendium Report*, National Center for State Courts and State Justice Institute, April 2007, page 27. “Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable answers. Moreover, attorneys are generally more knowledgeable about the nuances of their cases and thus are better suited to formulate questions on those issues than judges.” Survey, p. 28

According to this study, voir dire in “[n]on-capital felony trials and civil trials required 2 hours, and misdemeanor trials only 1.5 hours in state courts and 1 hour in federal courts. These

⁵This juror was disqualified because he was convicted of a crime carrying a potential penalty of more than one year. He was on probation and supervised by an agent of the State of South Carolina-the very party adverse to Petitioner. This juror’s trial counsel was counsel for Petitioner’s co-defendant Jakes.

figures mask a great deal of variation, however. For example, South Carolina consistently reported the shortest average voir dire time (30 minutes) in both felony and civil trials, with Delaware and Virginia closely following (1 hour or less). South Carolina relies heavily on the use of written questionnaires that are distributed to attorneys before voir dire, rather than oral questioning in court.” Survey, p. 29.

In the case at bar, the entire voir dire and jury selection comprised a mere 42 pages of the transcript while the actual trial itself totaled nearly 600 pages. Appendix, p. 57-99 & p. 166 - 732. Given the vast difference in resources between State of South Carolina and Petitioner, who was represented at trial by indigent defense counsel, the seating of Juror 102 alongside another disqualified juror evidences a reasonable likelihood that the outcome of the proceedings would have been different but for trial counsel’s deficient performance.

Alternative Analysis-Structural Error Equals Automatic Reversal

As an alternative analysis of error in Petitioner’s case, a finding that attorney’s deficiency creates a structural error in the trial might trigger automatic reversal. The Supreme Court of the United States raised this question in the recent case captioned *Weaver v. Massachusetts*, — US —, 137 S Ct 1899 (2017). In *Weaver*, the Supreme Court recognized a disagreement concerning the automatic reversal rule for structural errors. *Weaver*, at 1907. The *Weaver* Court then resolved this question finding that some structural errors did not require reversal but then limited this holding “specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection.” *Id.*

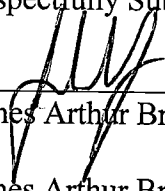
The type of error in *Weaver* is different from that of which Petitioner claims. To the extent that this Court finds the deficiency of Petitioner’s trial counsel structural, then reversal

should be automatic as this type of structural error is different than that in Weaver. Thus, the Court should find deficient performance and that the nature of the deficiency evades error review and pervades the entire trial to the point reversal is required.

CONCLUSION

Therefore, this Court should grant this petition, vacate Petitioner's convictions and sentences and remand this matter for a new trial.

Respectfully Submitted by



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both of Law Offices of Jim Brown, PA

Attorneys for the Petitioner

October 29, 2018
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THE STATE OF SOUTH CAROLINA
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The Honorable Diane S. Goodstein

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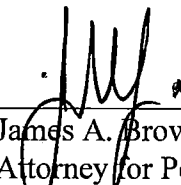
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PROOF OF SERVICE

Counsel for Antwan D. McMillan hereby certifies that he has prepared and served a Petition for Writ of Certiorari and the Appendix on this 29th day of October, 2018, upon the State, by depositing a copy, postage pre-paid, in the United States Mail, addressed to Attorney for Respondent, Christian Saville, Office of the Attorney General, PO Box 11549, Columbia, SC 29211-11549, (803) 734-3970.



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S.C. SUPREME COURT

October 29, 2018

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Antwan D. McMillan v. State of South Carolina - 2018-000970

Mr. Shearouse:

Please find enclosed for filing in the above referenced matter the following: an original and six (6) copies of the Petition for Writ of Certiorari and two (2) copies of the Appendix. One copy of the Appendix is unbound. Also included is the Proof of Service for the same. Please contact me if you have any questions or concerns.

Sincerely,


Jim Brown

w/ enclosures

cc: Christian A. Saville, Office of the Attorney General, w/ one copy of each
Antwan D. McMillan, w/ one copy of each