

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN 27 2019

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Brian M. Gibbons, Circuit Court Judge

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

VERNARD JEROME MATHIS, #297034,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AMENDED PETITION FOR WRIT OF CERTIORARI

TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S. C. 29204
(803)738-8622 Phone
(803)738-1600 Fax
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR PETITIONER.

INDEX

Index	i
Questions Presented.....	1
Statement of the Case	1
Relevant Testimony	2
Argument	20
Question I.....	20
Question II	22
Question III and IV.....	24
Conclusion	25

QUESTIONS PRESENTED

I.

Was Petitioner's Application for Post-Conviction Relief timely filed pursuant to S.C. Code Ann. §17-27-45(C), where he demonstrated below, and Respondent conceded, that it was filed within one year of his discovery of the new evidence asserted concerning the foreman of his jury?

II.

Did the lower court err in failing to grant Petitioner relief where he met his burden of proof in establishing that his right to a fair trial, as guaranteed by the Fifth, Sixth, 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 Petitioner's 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?

III.

Did the lower court err in failing to grant Petitioner's request for a new trial where the evidence adduced below established 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?

IV.

Did the lower court err in failing to grant Petitioner's request for a new trial where the evidence adduced below established that members of the Sixth Circuit Solicitor's Office improperly failed to report direct communication between the Solicitor's Office and Roberts after he was summoned for jury duty, but before Petitioner's trial?

STATEMENT OF THE CASE

The procedural history of this case, prior to the PCR Court's ruling on this application, is accurately set in the Memorandum in Support of PCR filed by Petitioner on April 24, 2017. Following that submission, an Order of Dismissal was filed in this PCR on February 22, 2018. Petitioner subsequently filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCF. Said Motion was denied by Order dated March 26, 2018. Notice of Appeal from said orders was filed on April 23, 2018. Petitioner's Memorandum in Support of Timeliness was filed with this Honorable Court on May 11, 2018. By letter Order dated December 24, 2018, Petitioner was

granted leave to proceed with this appeal. He now seeks certiorari in order that he might submit full briefs on the issues summarized herein.

Summary of Relevant Portions of Depositions

Ronnie Ellison Roberts

In 2003 Roberts was employed by a mortgage insurance company and described his job as a training manager. Prior to that, he taught criminal law at Northeastern Technical College for two years. App. p. 1130, l. 25-p. 1133, l. 14. Roberts initially stated that prior to that he retired as Police Chief for the City of York, on April 7, 2000. He subsequently admitted that after leaving the York Police Department he took the position as Chief of Police in the Town of Kershaw from about June, 2000 to December, 2000, when the City did away with its police department. App. p. 1133, l. 15- p. 1134, l. 25. Roberts's lengthy history of employment in law enforcement is documented in his deposition which establishes the following employment timeline:

- November 17, 1975 – February, 1982, he was with the Lancaster Police Department.
- 1982 – 1986 Director of Public Safety, USC Police Department , USC Lancaster, S.C.
- 1986 – 1989 Police Chief at USC Police Department in Columbia, S. C.
- 1989 – 1996 Instructor for the South Carolina Criminal Justice Academy
- July, 1996 – July, 1998 Chief of Police Lake City Police Department
- July, 1998 – April, 2000 York Police Department
- Chief of Police, Kershaw Police Department, June 26, 2000- December 31, 2000.

App.p. 1133, l. 15 – p. 1137, l. 22. Roberts recalled serving on Petitioner's jury in June, 2008, and confirmed that he was appointed as foreman on that jury. App. p. 1137, l. 25- p. 1138, l. 6.

When asked if he recalled being asked during *voir dire* whether he had any relationship with the Sixth Circuit Solicitor's Office, Roberts not only said "no" but added, "*Of course I have no relationship with them.*" App. p. 1139, ll. 5-11. He repeated his claim that he didn't recall being asked the question about his relationship with the Sixth Circuit Solicitor's Office, and stated that the only person he knew in that office was Solicitor John R. Justice. App. p. 1142, ll. 12-18.

Roberts admitted calling the Solicitor's Office after being summoned for jury service. He stated, "*I called and talked to someone and told them, you know, with my background would it not disqualify me. And they said as long as I could do a fair trial, you know, to come up, that they would not excuse me. So I came up.*" App. p. 1142, l. 18-22. He said he could not recall who he spoke with at the Solicitor's Office. App. p. 1142, l. 23- p. 16, l. 2. Roberts claimed, "*The only one I knew was the one who is now the Sheriff. I knew him. I didn't know the others.*" App. p. 1143, ll. 11-14 and 23-25. He claimed he did not know who the witnesses were going to be at the time he was seated. He testified that the list of potential witnesses *was not read during* jury selection. App. p. 1143, ll. 15-22. The record of the *voir dire* of Petitioner's jury very clearly reflects that this is not true. App. p. 814- p. 816. The jury pool was asked, "*Do any members of the Petit Jury panel have any relationship or contact with Solicitor John Reid Justice or any member of the Sixth Judicial Circuit's Solicitor's Office. If so stand.*" App. p. 819. Roberts did not respond to this question. Roberts admitted in his PCR testimony that he knew Barry Faile, a law enforcement witness for the State. He also added, "*But that's the only one I knew by name.*" App. p.1142, l. 23-p.1144, l. 5. He said he knew Solicitor Justice, but claimed he had only spoken with him one time, and that was in a case where he was a prosecution witness. App. p. 1146, ll. 6-25.

When questioned more closely about knowing Witness Faile, Roberts again qualified his answer noting that, "*As far as I can remember*" he was the only witness he knew from this trial App p. 1145, ll. 3-6. Roberts claimed he *did not* discuss his law enforcement background with the members of Petitioner's jury. App. p. 1145, ll. 18-20. He qualified his answer by stating, "*I don't remember doing that.*" He admitted that one of the other jurors, Eddie Lewis, knew him. App. p. 1145, ll. 21-25.;App. p. 1146, l. 2-3; App.p. 897. Roberts admitted Law Enforcement

Witness Barry Faile knew about his career in law enforcement. App. p. 20, l. 14-p. 1148, l. 8; App. p. 1148, ll. 6-8.

Roberts eventually admitted that he knew Senior Assistant Solicitor, Doug Barfield. App. p. 1148, l. 14- p. 1149, l. 3. When he received the letter about the deposition, he admitted he called and spoke with Barfield about it. App. p. 1149, ll. 17-23. Roberts stated that Barfield knew some of his family members. App. p. 1150, ll. 9-14. . Roberts claimed that when he called the Solicitor's Office about his jury summons he spoke with "*whoever answered the phone.*" App. p. 1150, ll. 23-25. He did, however, disclose the gender of the person he spoke with by saying, "*I told him*" I was retired. App. p. 1151, ll. 3-7. *See also*, App. p. 1153, l. 15-17. He clearly stated, "*I wasn't trying to get out of it*", but noted he didn't "*think anybody would let him sit anyway.*" App. p. 1151, ll. 9-11. (Emphasis added). When asked if he would have answered the question concerning knowing or having contact with the Solicitor's Office *if he had heard it*, he responded "*yes*" and noted that this issue was why he had called the Solicitor's Office. App. p.1153, ll. 10-19.

When asked if he had any cases with the Solicitor's Office while he was Kershaw City Police Chief, he said "*no*". He then qualified his answer by saying, "*I don't think we had any General Sessions or anything that came up through them.*" App. p. 1155, ll. 15-17. Roberts admitted that he knew the Defense would not want a police officer on any jury. App. p. 1157, ll. 2-5. He said that was why he called the Solicitor's Office. His testimony shows that he knew how the jury system worked and was aware that either side could use a peremptory strike to remove him from service. App. p. 1157, ll. 2-16. As previously noted, he was also with the Lancaster Police Department for six years during the tenure of John Justice as Solicitor for that circuit.

Roberts testified that when he called the Solicitor's Office, "*He told me to come up, and he might could release me, but he didn't. He kept me all week.*" App. p. 1156, ll. 8-21 (Emphasis added). See also, App. p. 1158, l. 15-16. He went out of his way to let the prosecution know he would be in the jury pool that week, but he did nothing to reveal the fact to Defense Counsel, but rather assumed "*the defense attorneys did their own leg work and knew.*" App. p. 1157, ll. 13-18. Roberts did nothing to bring his long history as a law enforcement officer to the attention of the Court either. He also admitted that he did nothing to try and be excused from jury service at this trial. App. p. 1158, l. 5- p. 32, l. 9. Roberts admitted that when the Court asked if any of the prospective jurors had contact with the Solicitor's Office he did not disclose his previous work with the Solicitor's Office, nor did he tell the Court and Defense Counsel about having called the Solicitor's Office about being called for jury service the week of this trial. App. p. 1159, l. 13-25.

Attorney Thomas William Holland

Holland was an Assistant Solicitor in the Sixth Circuit at the time of Petitioner's trial. App. p. 1168, ll. 1-9. He participated in the prosecution of Petitioner, but was not present during all the jury selection. App. p. 1168, ll. 10-24. He recalled being told by either "*a court person*" or law enforcement that the jury looked good, and that the foreman was a former Chief [of Police] in Kershaw. App. p. 1169, l. 17- p. 1170, l. 16. He then heard "*other law enforcement officers connected with [Petitioner's] case discussing the fact that Mr. Roberts was on the jury.*" App. p. 1170, l. 17-p. 1171, l. 2.

Holland recalled being shocked that Roberts was on the jury, and admitted he didn't understand why he wasn't struck. He said he heard multiple people, law enforcement and court personnel, discussing it. App. p. 1171, l. 3- p. 1172, l. 12. He admitted that these individuals

obviously thought it was significant enough to bring to his attention. App. p. 1172, ll. 14-18. Holland brought what he had been told to the attention of one of the two senior prosecutors; either Solicitor John Justice or Senior Assistant Solicitor Doug Barfield. He stated that he “*would assume*” he would have talked with Doug Barfield rather than Solicitor Justice. Holland Dep. p. 8, l. 19- p. 9, l. 6. *See also*, App. p. 1174, l. 24- p. 1175, l. 11. He recalled asking how Roberts could have gotten on the jury and questioning whether the defense lawyer ran out of strikes. He remembered asking whether Defense Counsel knew the foreman was former law enforcement. His deposition confirms that he was told the defense did not run out of strikes and further, that the senior prosecutor’s response was “*I don’t know what he knew kind of thing.*” App. p. 1173, ll. 6-12. When he asked if they should disclose this information, or should have disclosed, he was told, “*No, he answered all the questions.*” App. p. 1173, ll. 12-19. He acknowledged that with this being a murder case, there would have been 2-3 alternate jurors selected. App. p. 1175, ll. 12-18.

The trial record shows that three (3) alternate jurors were selected. App. p. 876, l. 13- p. 878, l. 22. The record documents that the defense had only used three of its ten strikes at the time Roberts was seated. App. p. 870, l. 9- p. 874, l. 12. The *Voir Dire*, establishes that the defense actually only used three (3) strikes during the entire selection process. App. p. 870, l. 9- p. 876, l. 10. When asked if he ever considered disclosing the background of this juror to the defense team, Holland stated no, and went on to explain “*it was their case...*” App. p. 1175, l. 23- p. 1176, l. 6. Holland appeared to downplay how pleased the law enforcement officers involved in this case were about getting a former Chief of Police on this jury, he admitted that they were all happy about it. App. p. 1177, l. 13- p. 1178, l. 18. He acknowledged that a defense attorney would be expected to use a peremptory strike to excuse a former law enforcement

officer from service provided he had strikes available. App. p. 1178, l. 19- p. 1179, l. 14.

After Holland left the Solicitor's Office, he conveyed information about this situation to one of his clients who knew Petitioner and who in turn set up a telephone call between him and Petitioner. App. p. 1176, ll. 7-19. He acknowledged that after his telephone conversation with someone who identified himself as Petitioner, he was contacted by the late Dave MacDougal, who identified himself as an investigator hired to investigate reports that Roberts was former law enforcement. App.. p 1177, ll. 2-9. He confirmed that law enforcement officers at the trial were happy about the fact that they had Roberts, a former law enforcement officer, on the jury. App.p. 1177, l. 13-p. 1178, l. 17.

Summary of Relevant Testimony from the PCR Evidentiary Hearing

Testimony of Ronnie Roberts

Roberts, testified that after receiving notice that he was being called for jury service he called "*the Solicitor's Office and...asked to be dismissed because of I figured they would not let me serve anyway being a former police officer.*" App.. p. 1019, ll. 5-13. When asked whether he "*asked to be dismissed*", he answered affirmatively. App. p. 1019, ll. 14-15. After being reminded of his sworn statement in his deposition that he had not called the Solicitor's Office with the intent to try and get out of jury service, Roberts stated, "*I actually can not remember. I called the solicitor's phone number that was in the book and I know I spoke to someone. I can not remember who I spoke with.*" App. p. 1020, ll. 15-17. Although he stated in his deposition that he was not trying to get out of jury service when he called the Solicitor's Office, he claimed at this hearing that he actually was. Next he backtracked and admitted he *had not* ever asked to be relieved [from jury service]. App. p. 1019, l. 19- p. 1020, l. 7. He then claimed that he had called to inquire as to whether he would be allowed to serve in light of his lengthy law

enforcement career. App. p. 1020, ll. 3-10. Immediately after this testimony, Roberts qualified his response, saying, "*to the best of my knowledge.*" App. p. 1020, l. 12.

Roberts testified that he did not remember who he had spoken with when he called the Solicitor's Office. He stated, "*I actually can not remember. I called the solicitor's phone number that was in the book and I know I spoke to someone. I can not remember who I spoke with.*" App. p. 1020, ll. 15-17. Roberts told whoever he spoke with about being "*a former law enforcement*", but said he did not know whether the length of his law enforcement career "*came in to play*" during the conversation. App. p. 1020, ll. 20-25. Roberts testified that he could not recall whether the person he spoke with during his call to the Solicitor's Office was someone who already knew him "*as a former law enforcement officer.*" He denied recalling whether he already knew the person prior to that telephone call. App. p. 1021, ll. 1-9. He testified that he "*was told I had to report and that, you know, if they had issues with my background that I would be dismissed or struck. However they call that. That they don't choose you to be on jury.*" App. p. 1021, ll. 11-16.

Roberts admitted that during his deposition he repeatedly referenced the person he spoke with in his telephone call to the Solicitor's Office as, "*he*", but reiterated his earlier testimony that he could not recall who the man he spoke with was. App. p. 1021, l. 17- p. 1022, l. 9. Roberts testified that once they got to Court, he thought, "*Mr. Justice was in charge then.*" App. p. 1022, ll. 9-13. Roberts testified that although he assumed the Solicitor knew about his phone call to the Solicitor's Office, he did not actually know. App. p. 1022, ll. 10-20. Respondent stipulated to Roberts' law enforcement background as reflected in the pleadings. App. p. 1023, ll. 11-20. Roberts claimed he answered all the questions asked during the jury selection and did not stand when the question was asked about any relationships with the Solicitor's Office

because he “*did not have any connection with them at that time.*” App. p. 1124, l. 12- p.1125, ll. 10-11. Roberts denied having stated in his deposition that he had no recollection of even being asked the *voir dire* question concerning any relationship with the Solicitor’s Office. App. p. 1025, l. 22- p. 1026, l. 1. *See also*, App. p. 1016, l. 5- p. 1019, l. 14. He admitted that in his deposition he initially claimed John Justice was the only person he knew in the Solicitor’s Office. App. p. 1026, ll. 5-20. He claimed he did listen to the questions put to him during the *voir dire*. App. p. 1028, ll. 23-25. He, however, testified that he could not recall being asked whether he had any special relationships with any of the potential witnesses. App. p. 1027, ll. 1-5. Roberts admitted he had stated at his deposition that at the time he was seated he did not know who the State’s witnesses would be and did not hear a list of witnesses read out during the *voir dire*. In his hearing testimony he reiterated his claim that he did not hear a list of witnesses being read. App. p. 1027, ll. 6- p. 1028, l. 15. Roberts went on to admit that during his deposition he stated that he *did not* recall being asked about any connection with the Solicitor’s Office during *voir dire*. He had no explanation for his inability to recall a list of witnesses being read during *voir dire*; save the passage of time. App. p. 1029, ll. 1-5.

Roberts testified that he remembered being asked a question during his deposition about whether he recalled a *voir dire* question concerning whether he had any connection with the Solicitor’s Office. He acknowledged that in his deposition he stated he did not recall being asked that question. App. p. 1029, ll. 6-22. When asked if he also recalled saying during his deposition that if he had heard the question about any connection with the Solicitor’s Office, he would have answered and acknowledged that he knew the Solicitor, Roberts, responded “*I don’t know how to answer that.*” App. p. 1029, l. 23- p. 1030, l. 1. He then went on to claim that if he had heard that question concerning any connection with the Solicitor’s Office, he *would not* have

answered, “*because I had no connection with the Solicitor’s Office at that time.*” App. p. 1030, ll. 2-6. In his PCR hearing testimony Roberts had admitted knowing both Solicitor John Justice and Deputy Solicitor Doug Barfield. He acknowledged that some of his family members “*possibly*” were acquainted with Barfield, noting “*I don’t know, but I’m assume [sic] they did because they were older then [sic] I.*” App. p. 1026, ll. 5-20. He declined to acknowledge that in his deposition he indicated that certain members of his family were acquainted with Barfield. App. p. 1026, ll. 16. He testified that he called the Solicitor’s Office to discuss this matter because, “*my concern was that most of the time when a policeman is called and they are not seated --- they’re really wasting time to be there as jurors when they are never utilized on the jury. So I assumed nobody would seat me because of that.*” App. p. 1027, ll. 17-21. He *denied* questioning whether he would even be qualified to serve on a jury due to his career background. App. p. 1027, ll. 12-17. After being read the specific *voir dire* question asked at trial concerning any relationship or *contact with* the Solicitor or anyone on his staff, Roberts then stated, “*I remember if that’s what they read, I remember that.*” App. p. 1032, ll. 17-25. He testified that he did not respond to this *voir dire* question because, “*I had no connection to the solicitor’s office or contact with them about this case.*” App. p. 1033, ll. 1-25.

Roberts acknowledged that in his deposition he stated that the only witness he knew from this trial was Barry Faile. App. p. 1034, ll. 4-9. His explanation for not responding to the *voir dire* question about witnesses was, once again, that he never heard the witness list read during *voir dire*. He declined to give any explanation for why he did not hear the list of witnesses being read. App. p. 1034, ll. 10-16. He admitted that he knew Barry Faile, but added, “*I had no relationship with him.*” App. p. 1034, ll. 17-18. When asked whether there were other law enforcement officers that he knew, he stated, “*Not that I remember.*” App. p. 1034, ll. 19-21.

Roberts admitted that in his deposition he had stated that Barry Faile was the only law enforcement witness at the trial that he “*knew by name.*” App. p. 1034, ll. 22-24. When asked exactly what he meant by his deposition statement that Faile was the only law enforcement witness that he “*knew by name*” and whether there were others that he saw [and recognized as law enforcement], but he “*just did not know their names*”, Roberts simply did not really answer the question, but rather repeated, “*you asked me if I knew anyone. He is the only one I knew by name.*” App. p. 1035, ll. 3-7 (Emphasis added).

When pressed, Roberts ultimately answered negatively when asked point blank whether he recognized any other witnesses at this trial as people he “*knew before that trial as being law enforcement.*” App. p. 1035, ll. 8-13. He added, however, that he “*knew the Sheriff, but he did not testify.*” App. p. 1035, ll. 14-15. Roberts ultimately changed his position again and testified that he would have disclosed his knowledge of the Solicitor if he had heard the question and “*If I had known that was that important I would have made that statement that I did, but I didn’t see where it would involve or keep me from, you know, serving on a jury.*” App. p. 1035, ll. 16-22. He then restated his position that he had no connections to the Solicitor’s Office or anyone involved in this case as far as he was concerned. App. p. 1035, l. 23- p. 1036, l. 4. During Roberts’s testimony the following question was asked, “*Mr. Roberts, is there any question that at the time you placed that phone call to the solicitor’s office you knew from your many years experience in law enforcement that no defense lawyer was going to want you on his jury if he knew your background?*” App. p. 1036, ll. 5-10. When pressed to acknowledge his statement in his deposition in which he clearly said he knew nobody was going to want him on their jury if they knew his background, he stated, “*I just said that, yes, ma’am.*” App. p. 1036, ll. 11-14. He declined to acknowledge that law enforcement and the prosecutors were “*basically on the same*

side” in the judicial system. When asked if he did anything to advise the Court, about his concerns regarding jury service, he responded, “*I notified the only person I knew that would have any control of that. I didn’t know anybody else to call.*” App. p. 1036, l. 15- p. 1038, l. 15. Roberts acknowledged that after twenty-five years in law enforcement he had a good general working knowledge of the judicial system and the court process. App. p. 1038, l. 24- p. 1039, l. 1. The entirety of his testimony in this PCR action leaves no doubt that he knew that any defense lawyer would strike him from jury service if they knew about his career in law enforcement. He was familiar with the jury strike procedure and stated he knew Petitioner’s lawyer could have struck him from jury service if he had known his background. App. p. 1039, ll. 2-10. Both during his term as Chief of Police in Kershaw, and his seven (7) years with the Lancaster Police Department, Roberts fell under the umbrella of the Sixth Circuit Solicitor’s Office.

Roberts denied having multiple opportunities during the *voir dire* process to address the judge. App. p. 1039, ll. 21-23. He admitted that during his time with the Lancaster Police Department he was aware that the Chief Solicitor in that circuit was John Justice. App.p. 1041, ll. 5-20. Roberts further admitted he knew at least one other juror on this jury before the trial and that this person, Eddie Lewis, knew him as someone who had been in law enforcement. App. p. 1041, l. 21- p. 1042, l. 23. Throughout the PCR hearing Roberts consistently claimed that he only knew Deputy Solicitor Barfield by sight and that he only assumed his older brothers knew him “*because of his age*” and “*their similar time in school.*” He claimed that he did not make these assumptions until later and did not know Barfield “*at the time at the court.*” App. p. 1043, ll. 2-22. Roberts never directly addressed the inconsistency of his hearing testimony with his sworn statements concerning Barfield in his deposition. App. p. 1043, ll. 5-13. *But see*, App. p. 1148, l. 24- p. 1149, l. 3 and App. p. 1150, ll. 9-14. In his deposition, Roberts referenced the

person he spoke with when he called the Solicitor's Office by the pronoun "**he**". He also stated that he did not remember who he spoke with, saying, "*[w]hoever answered the phone.*" He specifically noted, "*I told **him** I retired.*" App. p. 1150, ll. 23-25; p.1151, ll. 3-7;p. 1156, ll. 8-21;p. 1158, ll. 15-16. In his hearing testimony, however, he revealed for the first time that when he called the Solicitor's Office he "*asked to speak with the solicitor.*" He then went on to renew his claim that he could not remember who he spoke with. App. p. 1044, l. 11- p. 1045, l. 10. Roberts was asked whether anyone on the jury, other than Eddie Lewis, knew him as a law enforcement officer. He responded, "*[n]ot as far as I know.*" App. p. 1045, l. 24- p. 1046, l. 2. When asked if he discussed his law enforcement experience with anyone on the jury during the deliberations, Roberts stated, "*I don't remember that I did.*" He then admitted that he **could not swear that he didn't.**" App. p. 1046, ll. 3-8. (Emphasis added). Roberts was unable to give any explanation for why he called the Solicitor's Office, rather than the Office of the Clerk of Court, concerning his jury service summons other than, "*I'm not sure. That's just who I knew to call. I knew he was over the cases. That's all I knew.*" App. p. 1057, l. 16- p. 1058, l. 3. At no time during his deposition, or his PCR testimony, did Roberts say that when he called the Solicitor's Office he was told they could not discuss his jury service with him, nor did he indicate that he was instructed to call the Office of the Clerk of Court about the matter. He claimed that one of the reasons he called the Solicitor's Office after receiving his jury service summons was that he, "*had a responsible job in Florence and I kind of was under pressure to be at work.*" He also stated that, "*I really didn't think they would let me serve because of my law enforcement background.*" App. p. 1052, ll. 3-12 and App. p. 1058, ll. 4-10. Roberts admitted that just a moment earlier he had given sworn testimony that his call to the Solicitor's Office was at least partially motivated by his desire not to miss work. He admitted that he had previously testified

that he knew no defense lawyer would want him on their jury if they knew his background in law enforcement. App. p. 1058, ll. 4-15. During the evidentiary hearing reference was made by the Respondent to the fact that it had been “*several years*” since Roberts deposition was taken in this case. App. p. 1051, ll. 3-6. It was suggested that, given the passage of time, Roberts might not have a perfect memory of “*every line of testimony in the deposition.*” App. p. 1051, ll. 7-11. The deposition was taken on April 22, 2014 and the PCR hearing was held on November 22, 2016. In his hearing testimony, Roberts admitted receiving a copy of his deposition from the Court Reporter to “read and sign.” He did not report any errors in the deposition to the Court Reporter. He denied reviewing his copy of the deposition in preparation for the PCR hearing. When directly asked whether he had reread his deposition after receiving a subpoena to testify at the evidentiary hearing, he answered, “*No, Ma’am.*” App. p. 1056, l. 23- p. 1057, l. 15. Thereafter, a bench conference was held, after which the lower court allowed both sides to question Roberts further. App. p. 1060, ll. 4-18. When asked by PCR Counsel what materials he had with him on the witness stand, he responded, “*Letters you sent me.*” App. p. 1060, l. 21- p. 1061, l. 1. When questioned concerning what was in the red folder, he stated, “*that’s the deposition, statement that I made, I guess.*” App. p. 1061, ll. 2-3. When asked to admit that he had in fact been sitting in Court reading his deposition, Roberts testified, “*I have not opened it today or yesterday, no, ma’am.*” App. p. 1061, ll. 4-6. When asked point blank, “*You deny that you have been sitting here reading your deposition?*”, Roberts responded, “*I do.*” App. p. 1061, ll. 7-9. He was subsequently required by the Court to hand PCR Counsel the document folder he had with him on the witness stand. Counsel noted for the record that the folder contained a condensed copy of Roberts’ deposition. The lower court noted on the record that Counsel for the Attorney General’s Office had informed the Court that he had seen Roberts looking at those

materials in the courtroom during the hearing, and that this disclosure prompted the Court to allow further questioning of Roberts since he had denied reviewing his deposition prior to his testimony. App p. 1061, l. 23- p. 1062, l. 15. Counsel for Petitioner asked that the record reflect that Respondent reported that he observed Roberts looking at a document in a red folder which may or may not have been the deposition in question. The lower court noted, at the request of counsel, that the copy of the deposition contained in a red folder could not be seen if it was inside the document folder carried in Court by Roberts. App. p. 1062, l. 16- p. 1063, l. 2. The lower court noted that the events which unfolded during this hearing concerning Roberts possession of a copy of the deposition in Court, the observations of Respondent and the Court regarding that deposition and his previous testimony denying he had looked at the deposition, were, "*a determination of credibility the Court needs to make.*" App. p. 1062, ll. 2-15.

Testimony of John Clark, Trial Counsel

John Clark's PCR testimony reflects that he could not recall how many strikes he utilized at Petitioner's trial, but he confirmed that he absolutely would have used a strike to remove Roberts from service had he known about his twenty-five (25) year background in law enforcement. He testified that there was "*no question at all*" that he would have struck Roberts from Petitioner's jury. He verified that he did not receive any additional information about Roberts from the Solicitor's Office, Roberts or any other source prior to the jury selection at this trial. App. p. 59, l. 19- p. 61, l. 17. The jury selection sheet submitted to the Clerk of Court in this case was attached to the PCR Application filed in this matter. Hearing Tr. p. 1064, ll. 6-12; PCR Application, Attachment A. This document confirms that only three peremptory strikes were utilized by the defense at Petitioner's jury trial. See also, App.p. 897.

Relevant *Voir Dire* Questions asked at Trial

The transcript of the jury selection proceeding in this case held on June 2, 2003, reflects that the petite jury panel was asked the following questions by the Court and that Roberts responded to none of them.

Is any member of the petit jury panel related by blood or connected by marriage or have any special relationship with any of the potential witnesses for the State of South Carolina? App. p. 814-815. Thereafter, the State's list of potential witnesses was read to the panel; which list included the name of *Captain Barry Faile*. App.p. 815-816. Although numerous potential witnesses responded to this question, Roberts was not among them. App. p. 817-818.

Are any members of the petit jury panel conscious of any interest or any bias or any prejudice for or against the State of South Carolina or the Defendant, Mr. Vernard Jerome Mathis? If so, please stand. (NO RESPONSE). No member of the panel responded to this question. App. p. 818.

Do any members of the petit jury panel have any relationship or contact with Solicitor John Reid Justice or any member of the Sixth Judicial Circuit Solicitor's Office? If so, please stand? (NO RESPONSE). No member of the panel responded to this question. App. p. 819.

Testimony of Shareka Jones

Jones testified that she had previously been represented by Thomas Holland, Esquire. (Holland). Holland gave her a ride to Court in September, 2012. During that ride, she brought up the fact that she believed he was one of the prosecutor's in Petitioner's case. At that time she was already a friend of Petitioner's family. She had looked Holland up on the internet and saw references to Petitioner's case. This was how she became aware that he had been a prosecutor in Petitioner's case. App. p. 1067, ll. 3-11. She said Holland confirmed that he had been and stated

that he handled the DNA part of the case. App. p. 1066, l. 5- p. 1067, l. 18. Ms. Jones went on to state, *“And that he did not believe that Mathis was guilty of the charge and that the prosecution knew that Mr. Roberts was a former police officer and they assigned him to be the foreman on the case and they absolutely knew what they were doing as to give him an unfair trial.”* App. p. 1067, ll. 19-23. Later that day she had a cell phone conversation with Petitioner and was able to put him on the phone with Holland. She heard their entire conversation and heard Holland convey to Petitioner the information concerning one of the jurors in his case having been a career law enforcement person. Holland was not exploring the possibility of representing Petitioner, but rather was just telling Petitioner the information concerning his jury. App. p. 1069, l. 4-7. Jones testified that she had neither been given, nor promised, any form of compensation for testifying in this matter. App. p. 1070, ll. 8-14.

Testimony of Douglas A. Barfield

Douglas A. Barfield, Assistant Solicitor for the Sixth Judicial Circuit at the time of Petitioner’s trial, also testified at the evidentiary hearing held in this matter. The records before the Court verify that he, along with the late Solicitor Justice and former Assistant Solicitor Holland, prosecuted Petitioner. Barfield testified that he *“had no recollection”* of being contacted by Roberts concerning his receipt of a jury summons prior to this trial. App. p. 1080, ll. 1-3. (Emphasis added) Neither did he recall receiving a message from anyone in the Solicitor’s Office concerning Roberts having called. App. p. 1080, ll. 4-7. He testified that he had, *“no recollection of any communication between Roberts and [him] or anybody in [his] office concerning his jury service.”* App. p. 1080, ll. 8-14. (Emphasis added). When asked if during the course of this trial he had been made aware by Holland that various members of court personnel and law enforcement were talking about the fact that a former Chief of Police was on

the jury, and had been made jury foreman, Barfield testified that he did not “*recall that it was but I would not be surprised that it was.*” App. p. 1080, ll. 15-21. He asserted that he had no independent recollection of discussing that matter with Holland. App. p. 1080, ll. 2-24. Barfield did acknowledge that he knew who Roberts was, and was aware that he “*was retired law enforcement officer when he was selected for this jury.*” App. p. 1080, l. 25- p. 1081, l. 5. He testified that he felt no duty to notify the defense of that fact. App. p.1081, ll. 6-8. The balance of his hearing testimony clearly establishes that he saw no problem with the manner in which Roberts answered the *voir dire* questions during this jury selection. He testified to his belief that those questions were all couched in the present tense, and therefore, did not require disclosure of any past connections or relationships. App. p. 1084, l. 24- p. 1087, l. 20.

Barfield’s testimony establishes that regardless of Roberts twenty-five year career in law enforcement, and his service under the umbrella of the Sixth Circuit Solicitor’s Office, he felt no obligation to disclose this information to the Court, or the defense, unless a *voir dire* question had been asked about past employment in law enforcement. App. p. 1084, ll. 15-23.

Testimony of Thomas J. Holland

Holland, testified at Petitioner’s PCR hearing. He confirmed that he was part of the prosecution team in this case, but did not believe he was present for all of the jury selection. App. p. 1094, ll. 1-22. Holland testified that, after the jury was selected, he came back into the court room and one of the deputies told him that we had a good jury and that “*we got a real good foreman*” and I said, “*why is that, and they told me he used to be the former Chief of Police of Kershaw.*” App.p. 1095, ll. 1-4. (Emphasis added) When asked who had given him this information, Holland testified that it was a courtroom deputy, but he could not recall which one. App.p. 1095, 5-7. Holland’s testimony confirms that he was surprised that Roberts had not been

struck by defense counsel and that he had been made the foreman of the jury. App. p. 1095, ll.8-15. He testified that at some point after the jury was selected he discussed this issue with either one of the senior prosecutors on the case, or possibly, both together. He did recall asking whether this was something that needed to be disclosed and being told no that Roberts, "*answered the questions the way they were asked, so he didn't say anything untruthful so no, we don't need to say anything.*" App. p. 1095, 16-25.

Holland left the Solicitor's Office in 2006 and went into private practice in 2011. He verified that he had represented Sharika Jones. App. p. 1096, ll. 18-25. On the day he drove Ms. Jones to Spartanburg, *for her guilty plea*, he was telling her that, "*if it was a trial in Spartanburg he would want to know who the jurors were.*" App. p. 1097, ll.3-7. He went on to recall how he told Ms. Jones that in the case of a jury trial he would have wanted a local lawyer to help him pick the jury. He said he mentioned this case to her by way of example; telling her that the foreman of the jury in Petitioner's case was a former police officer and the defense attorney was from out of town and "*would not have had that knowledge.*" App. p. 1097, ll.7-11. He stated either referenced Petitioner's case by his name or the name of the victim. App. p. 1097, ll.14-20. He gave no explanation for why he would have been randomly using this case as an example for jury selection issues when Jones's case *was not* going to trial. His version of how this conversation unfolded, versus the version testified to by Jones, requires the belief that he just happened to randomly pick Petitioner's case to discuss with an individual who would coincidentally turn out to be a friend of his family. According to Holland, at some point, Ms. Jones made him aware that she knew Petitioner and sometime later she just walked into his office and handed him a cell phone to talk to Petitioner. App. p. 1097, ll. 23-25. Holland denied telling Jones that he felt this information about Roberts was something Petitioner needed to

know, but he acknowledged that at the time it happened, *"if I was the defense attorney I would like to have known."* App. p. 1098, ll. 1-6. Holland admitted that in his telephone conversation with Petitioner he shared the information he knew about the foreman on his jury having been the former Chief of Police of Kershaw. App. p. 1098, ll. 9-19. He testified he felt sure the entire prosecution team knew this information from the beginning. App. p. 1098, ll. 20-23 Holland's testimony acknowledged that he had a discussion with Petitioner concerning what steps he might take to bring this information to the attention of the court. He stated that, *"basically I referred him to get a lawyer."* App p. 1098, l. 24-p. 1099, l. 14. (Emphasis added) Holland offered no explanation for why he felt the need to inform Petitioner of the information concerning this juror if he believed everything had been *"above board"*, nor did he explain why he would have advised Petitioner how to bring this information to the attention of the Court, and to *"get a lawyer"*, if that was indeed his opinion.

In his deposition, Holland recalled that one of the other lawyers on the prosecution team, and he assumed it would have been Assistant Solicitor Barfield, had told him that defense counsel *"he had some strikes left."* He recalled asking whether the defense attorney knew that this person was a former law enforcement [officer] and remembered being told, *"I don't know what he knew' kind of thing."* App. p. 1173, ll. 1-12. Holland ultimately admitted that he would expect a peremptory strike to be used to excuse any law-enforcement officer from jury service. He stated that *"if I was a defense attorney and I had a former law-enforcement officer I would strike him if I had a strike."* App. p. 1104, l. 22-p. 1105, l. 2.

ARGUMENT

Question I Timeliness of Application

Petitioner respectfully submits that he has thoroughly presented his position concerning

the timeliness of his current PCR action in the Memorandum in Support of Timeliness presented to this Honorable Court as his Rule 243(c), SCACR, explanation for why the lower court erred in ruling that this PCR action was time barred by the PCR statute of Limitations found at S.C. Code Ann. §17-27-45(A). In light of the page limitation for certiorari petitions found in Rule 243(e)(3), Petitioner asks that he be permitted to incorporate the facts and arguments presented therein on this issue. In support of this request, Petitioner asks this Court to note that the Order of Dismissal in this case was thirty (30) pages long despite containing comparatively sparse summaries of the facts and evidence adduced both in the depositions and the PCR testimony.

In summary of his position, Petitioner asks this Honorable Court to note that Respondent has conceded that the current application was filed within a year after Petitioner became aware of the issues concerning the foreman of his jury. Respondent's position that Petitioner could and should have been able to discover these problems through the exercise of due diligence is simply neither reasonable nor practical. App.p.1009, l. 18-p. 1011, l. 13. As argued in more detail in Petitioner's memorandum previously submitted to this Honorable Court¹, such a finding would ultimately result in a terrible burden on the available resources for indigent defense by requiring any court-appointed PCR attorney to petition the Court for funding to do a full scale background investigation of every juror in any case involving a jury trial regardless of whether there was any basis to suspect that there was a problem with any juror that served in that case. Furthermore, it would no doubt instantly have the effect of virtually eliminating private representation of PCR Petitioners due to the cost of such fishing expeditions. While a significant percentage of PCR cases are beginning to be handled by private counsel, that trend would no doubt reverse itself if the friends and family who might be able to scrape together the funds to pay attorney fees for an Petitioner, had to also pay for the costs of a background investigation of twelve jurors. If the

¹ App.pp. 1332-1357.

expenses of a PCR action would potentially far outweigh the legal fees, the result would predictably be that the burden for PCR litigation would once again be born entirely by the indigent defense system. Furthermore, there is no guarantee that all such juror problems could even be discovered through such an investigation., leaving the likelihood the matter would still have to litigated after discovery of the undisclosed information. In addition, there remains the question of how a court-appointed lawyer could make an adequate showing to justify an order granting such funding where he had no factual belief that material information had been withheld by a juror. For these reasons, as well as those set forth in his Memorandum submitted pursuant to Rule 243(c), Petitioner submits his application is timely and prays for this Court's ruling on the merits of the important issues presented in his case.

Question II Juror Misconduct

Our Courts have long recognized that a juror who intentionally conceals information inquired into is not impartial. *State v. Stone*, 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002); *State v. Woods*, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001). Utilizing the analysis applied in *Woods, supra*, the initial inquiry is whether the identified concealment was intentional or unintentional. Once the intentional concealment of information is found, the second prong of the *Woods* standard is the question of whether the information at issue would have supported a challenge for cause *or would have been a material factor in the use of peremptory challenges*. Where both factors are present, a new trial should be granted. *Woods*, 345 S. C. at 587, 550 S.E.2d at 284. The evidence before the lower court supported a finding that Roberts intentionally withheld the information in question and further, that the information would have been a deciding factor in defense counsel's use of a peremptory strike to prevent Roberts from serving on Petitioner's jury. The evidence introduced by Petitioner establishes that Roberts was

not a credible witness. Petitioner has highlighted the numerous ways in which Roberts's testimony was totally inconsistent and lacking in credibility. Petitioner asserts that the testimony in question leaves no doubt that Roberts deliberately consulted the solicitor's office concerning his presence in this jury pool and hid that information from the Court and Petitioner.

It should also be noted that long time Solicitor John Justice is not available to testify concerning this issue inasmuch as he is now deceased. However, the second most senior prosecutor on the State's team at Petitioner's trial, former Assistant Solicitor Barfield, did not deny having either spoken with this individual on the telephone when he called the Solicitor's Office or having been given a message concerning that call to the Solicitor's Office. His testimony reflects only his assertion that he has no present recollection of these matters. What we do know without question, is that former Barfield has admitted that the prosecution knew who Roberts was and felt no duty to disclose any information concerning his lengthy law enforcement career to defense counsel. Furthermore, he felt no responsibility to disclose this information even after this individual neglected to respond to questions concerning his relationship or contact with the Solicitor's Office and his failure to respond to the Court's question concerning whether any member of the petit jury panel was conscious of any *"interest or any bias or any prejudice for or against the State of South Carolina or the defendant, Mr. Vernard Jerome Mathis?"* Likewise, he apparently was not concerned by the failure of this individual to respond to the Court's question concerning whether any of the panel knew any of the State's witnesses which included many law enforcement officers from the area.

As noted above, it is Petitioner's position that he is not required to demonstrate prejudice arising from the failure of both Roberts, and the State, to disclose this crucial information to the defense. Assuming, for the sake of argument, that prejudice is required,

Petitioner would submit that the prejudice to his ability to receive a fair trial and due process of law under the United States Constitution, as well as our own State Constitution, arising from the actions of both Roberts and the prosecution is obvious. The fact that Roberts had a lengthy law enforcement career, in and of itself, created an inherent danger of bias in favor of the prosecution. He did not disclose this information to the Court before his jury service, nor did he do so once he arrived at the courthouse the day he was ordered to appear. The record in this case demonstrates that Roberts intentionally concealed information from the defense, and the trial court, which would have prompted either his removal from jury service for cause or the use of a preemptory challenge by the defense. Where both these factors are present, a new trial should be granted. *Woods, supra*.

Questions III and IV Prosecutorial Misconduct

Lawyers connected with a case are prohibited from communicating with, or causing another to communicate with, a member of the *venire* from which the jury will be drawn. Sup. Ct. Rules, Rule 32, Code of Prof. Resp., DR07-108(A). The case law involving this rule has generally dealt with contacts initiated by lawyers, prosecutors and/or their agents in an effort to “investigate” the position potential jurors would likely take on a given issue or issues. *In the matter of Two Anonymous Members of the South Carolina Bar*, 278 S.C. 477, 298 S.E.2d 450 (1982); *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (S.Ct. 2003). This case addresses a different form of abuse of Rule 7-108(A) than is most frequently seen by this Honorable Court. Here, former Deputy Solicitor Barfield admitted under oath that his office *routinely* fielded calls from *venire* members calling the Solicitor’s Office after receiving a summons for jury duty. PCR Tr. p. 84, ll. 10-22. His testimony failed to explain why jurors calling about a jury summons would be transferred to a prosecutor or investigator to talk to rather than being immediately

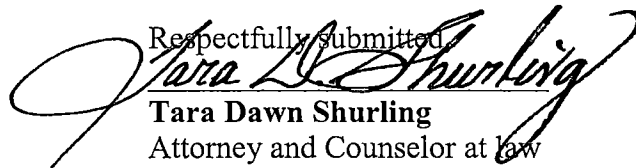
screened out and redirected to the Office of the Clerk of Court. The dangers of improper contact with potential jurors are obvious. It gives one side an advantage in the use of preemptory strikes, and creates the opportunity for one side to improperly influence a potential juror. It creates an opportunity for the side communicating with the juror to advise them, however subtly, on how to best *avoid getting struck*, or selected, for jury service.

Petitioner would respectfully submit that the manner in which calls from jurors in the *venire* panel for an upcoming term were handled by the Lancaster Solicitor's Office during this time period was clearly improper and violated DR 7-108(A). Petitioner submits that it was incumbent upon the Respondent to disclose the prosecution's telephone conference with Roberts, as well as the Respondent's knowledge of his lengthy law enforcement. For this reason, as well as the actions of Roberts in deliberately concealing this critical information, Petitioner should be granted a new trial.

CONCLUSION

Based upon all the arguments and authorities addressed herein, those presented in Petitioner's Memorandum on Timeliness and his Memorandum in Support of PCR Petitioner most respectfully asks that this Honorable Court grant the writ, dispense with further briefing, and vacate his judgments and sentences. In the alternative, he asks that the writ be granted in order to afford him the opportunity to fully brief the issues summarized herein.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

ATTORNEY FOR PETITIONER

This 24th day of June, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

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

RECEIVED
JUN 27 2019
S.C. SUPREME COURT

VERNARD JEROME MATHIS, #297034,

PETITIONER,

v.

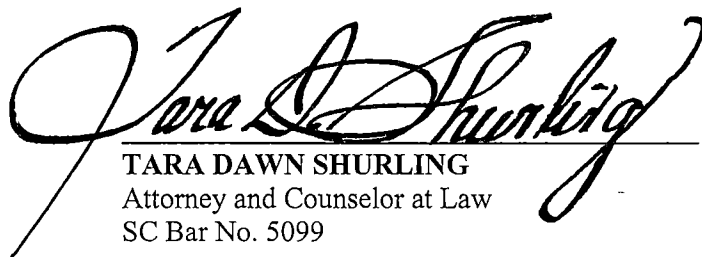
STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Amended Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Samuel L. Key, Assistant Attorney General, this the 24th day of June, 2019, by U.S. mail and email. The Appendix was previously served upon opposing counsel by hand delivery.

Samuel L. Key
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211
skey@scag.gov


TARA DAWN SHURLING
Attorney and Counselor at Law
SC Bar No. 5099

ATTORNEY FOR PETITIONER.

June 24, 2019

LAW OFFICE OF



RECEIVED

JUN 27 2019

S.C. SUPREME COURT

TARA DAWN SHURLING, PA

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

(803) 738-8622

(Fax) (803) 738-1600

E-Mail: tdslaw@shurlinglaw.com

June 24, 2019

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

RE: Vernard Jerome Mathis, #297034 v. State of South Carolina
Appellate Case No. 2018-000779,
Lower Case No. 2013-CP-29-00951

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of my Amended Petition for Writ of Certiorari and Certificate of Service in the above captioned case. The Appendix for this PCR Appeal was served on opposing counsel by hand delivery on the date the original Certiorari Petition was filed with the Court. One bound and one unbound copy of the Appendix were filed with the Court on that date as well. I have provided two extra copies of the Amended Petition for Writ of Certiorari which I would appreciate having clocked and returned to me in the enclosed self-addressed envelope. Thank you for your assistance in this matter. As always, I remain,

Sincerely yours,

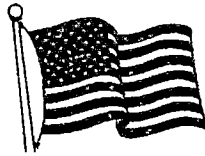
A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is fluid and cursive, with a large initial "T".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/rk

Enclosures

cc: Samuel L. Key, Attorney General (w/enclosure)
Vernard J. Mathis, #297034 (w/enclosure)



UNITED STATES POSTAGE
PITNEY BOWES
02 1P \$001.75⁰
0000615243 JUN 24 2019
MAILED FROM ZIP CODE 29204

Law Offices of
TARA DAWN SHURLING
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204

TO: *The Honorable*
Daniel E. Shearouse
Clerk, Supreme Court of S.C.
P.O. Box 11330
Columbia, SC 29211