STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

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.

REVISED PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER.

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* to 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

Procedural History

The history of this case, including the precise allegations raised in the pleadings, is accurately set forth in the Order of Dismissal. After entry of that Order, Petitioner filed a timely Motion to Alter or Amend, pursuant to Rule 59(e), SCRCP, which was also denied. Petitioner's filed a timely Notice of Appeal from both orders. Petitioner also filed an explanation as to why the lower court erred in holding that this application was time barred as required by Rule 243 (c), SCACR. Petitioner was allowed 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

Roberts initially stated that prior to that he retired as Police Chief for the City of York, on April 7, 2000. He admitted that he took the position as Chief of Police in the Town of Kershaw from about June, 2000 to December, 2000. App. p. 1133, l. 15- p. 1134, l. 25. Roberts's history with law enforcement is documented in his deposition which fully confirmed the employment timeline set forth in this Application for PCR and provided the additional information that from November 17, 1975 – February, 1982, he was with the Lancaster Police Department. App. 1133, l. 15 – p. 1137, l. 22; PCR Application, Question 11 (a). Roberts served as foreman on Petitioner's jury. App. p. 1137, l. 25- p. 1138, l. 6. He denied recalling being asked during *voir dire* whether he had any relationship with the Sixth Circuit Solicitor's Office, and added, "*Of course I have no relationship with them.*" App. p. 1139, ll. 5-11. The only person he knew in that office was Solicitor John R. Justice. App. p. 1142, ll. 12-18.

Roberts called 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 could not recall who he spoke with. 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 did not know who the witnesses were going to be at the time he was seated and stated that the list of potential witnesses *was not read during* jury selection. App. p. 1143, ll. 15-22. The record of the *voir dire* reflects that this is not true. App. p. 814- p. 816. 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. He claimed he *did not* discuss his law enforcement background with the members of Petitioner's jury. App. p. 1145, ll. 18-20. But, then he stated, *"I don't remember doing that."* He admitted however, 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 admitted that he knew Doug Barfield. App. p. 1148, l. 14- p. 1149, l. 3. He admitted that he called Barfield and spoke with him after getting letter about his deposition being taken. App. p. 1149, ll. 17-23. Barfield knew some of his family members. App. p. 1150, ll. 9-14. . When he called the Solicitor's Office about his jury summons he spoke with *"whoever answered the phone."* App. p. 1150, ll. 23-25. *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). He would have answered the question concerning knowing or having contact with the Solicitor's Office *if he had heard it* and 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. He knew the Defense would not want a police officer on any jury. App. p. 1157, ll. 2-5. 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.

He first disclosed 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. 1158, l. 15-16. 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). He called and 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. He did nothing to bring his long history as a law enforcement officer to the attention of the Court. He did nothing to try and be excused from jury service. App. p. 1158, l 5- p. 32, l. 9. During jury selection 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. Either *"a court person"* or law enforcement told him 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 also 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.

He was shocked that Roberts was on the jury, and didn't understand why he wasn't struck. He heard multiple people, law enforcement and court personnel, discussing it. App. p. 1171, l. 3- p. 1172, l. 12. 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 "*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. 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. He was told, *"No, he answered all the questions."* App. p. 1173, ll. 12-19. Since this was a murder case, there would have been 2-3 alternate jurors selected. App. p. 117511, 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 himself, Holland stated no, adding, *"it was their case..."* App. p. 1175, l. 23- p. 1176, l. 6. He downplayed how pleased the law enforcement officers involved in this case were about getting a former Chief of Police on this jury, but admitted they were all happy about it. App. p. 1177, l. 13- p. 1178, l. 18. 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 he 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. ***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 look into 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

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 said yes. App. p. 1019, ll. 14-15. When 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. Next he 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, he qualified his response, saying, "*to the best of my knowledge.*" App. p. 1020, l. 12.

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. He 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. 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.

Once they got to Court, he thought, "*Mr. Justice was in charge then.*" App. p. 1022, ll. 9-13. Respondent stipulated to Roberts' law enforcement background as reflected in the

pleadings. App. p. 1023, ll. 11-20. 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. He 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 claimed he did listen to the questions put to him during the *voir dire.* App. p. 1028, ll. 23-25. He could not recall being asked whether he had any special relationships with any of the potential witnesses. App. p. 1027, ll. 1-5. He reiterated his claim that he did not hear a list of witnesses being read. App.. p. 1027, ll. 6- p. 1028, l. 15. He admitted 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 acknowledged that in his deposition he stated he did not recall being asked the question about having any connection to or contact with the Solicitor's Office. App. p. 1029, ll. 6-22. Unlike in his deposition, he claimed that if he had heard the question about 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.

Roberts had admitted knowing both Solicitor John Justice and Deputy Solicitor Doug Barfield. He admitted 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 refused to admit that in his deposition he indicated that certain members of his family were acquainted with Barfield. App. p. 1026, ll. 16. 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 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*", he did not directly 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).

Roberts ultimately answered negatively when asked if he had 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. He then acknowledged 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. 11-14When 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. he admitted, however, 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 establishes 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 admitted 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. He 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.* In deposition, he 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 renewed 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). He 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.

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.

The deposition was taken on April 22, 2014 and the PCR hearing was held on November 22, 2016. He admitted receiving a copy of his deposition from the Court Reporter to "*read and sign.*" 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 next required by the Court to hand PCR Counsel the document folder he had with him. Counsel noted for the record that the red folder contained a condensed (small print size) copy of Roberts' deposition. The lower court noted on the record that Counsel for Respondent had informed the Court that he had seen Roberts looking at those materials in the courtroom during the hearing, and seeing him looking a something in a red cover that day in the courtroom. 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 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 background in law enforcement. 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 three relevant questions by the Court during jury selection and that Roberts responded to none of them. They were,

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. ***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? 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?*** App. p. 819.

Testimony of Shareka Jones

Jones testified that she had previously been represented by Thomas Holland, Esquire. (Holland). He 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. She was already a friend of Petitioner's family. App. p. 1067, ll. 3-11. Holland told her 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 tell Petitioner 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 did tell 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

Barfield, Assistant Solicitor for the Sixth Judicial Circuit at the time of Petitioner's trial, also testified at Petitioner's evidentiary hearing. He, along with Solicitor Justice and former

Assistant Solicitor Holland, prosecuted Petitioner. Barfield "*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) He did not recall receiving a message from anyone in the Solicitor's Office concerning Roberts having called. App. p. 1080, ll. 4-7. 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). He had no independent recollection of discussing that matter with Holland. App. p. 1080, ll. 2-24. Barfield 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 felt no duty to notify the defense of that fact. App. p.1081, ll. 6-8. Barfield felt no obligation to disclose information about Roberts 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 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. After the jury was selected, 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). 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 recalled discussing this issue with at least one of the senior prosecutors on the case. He recalled asking whether this was something that needed to be disclosed and being told no. App. p. 1095, 16-25.

Holland that after he left the Solicitor's Office, 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 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. Jones subsequently 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. In that telephone conversation 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 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.

ARGUMENT

Timeliness of Application

Prior to the second 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 first 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 argued that while the current PCR action is timely from when Petitioner *found out* about the problems with this juror, it was not timely from when they believe he could and should have found out. 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 that argument stating, "[i]t 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. PCR. Counsel went on to argue the reasons why discovery of the information in question was not reasonably possible through exercise of due diligence prior to the revelations provided to him by Jones and confirmed by former Assistant Solicitor Tom Holland. *See*, PCR Tr. p. 10, l. 13- p. 13, l. 8.

The lower 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, ***"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. The lower court inquired as to whether Trial Counsel's failure to request such a *voir dire* question was raised in the initial PCR action. PCR Counsel stated that allegation was not raised and summarized Trial Counsel's earlier testimony at the current hearing on that issue. 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.

Respondent's argument with regard to the timeliness of the application before this Honorable Court ignores crucial factors. Petitioner could have raised an 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.

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 that omission. 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 a 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. 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 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.

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 practice. Where such a *voir dire* question is not requested by trial counsel, it is one thing to raise an allegation addressing that omission 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.

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 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

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

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. 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. 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 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. 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. 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.

After Holland's estimate concerning when his conversation with Investigator Dave McDougal, he was specifically questioned further by Counsel concerning the order in which the events occurred. *This portion of the deposition expressly acknowledges that Holland spoke with his client, Shareka Jones, about the matter first, then he talked with Petitioner by phone and that the conversation with Petitioner <u>came before</u> he spoke with Dave McDougal.* Holland Depo p. 22, l. 17 – p. 24, l. 9. (Emphasis added). 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. Even the language in the Order of Dismissal acknowledges that, "Holland testified that ***subsequent to his conversation with Petitioner***, at some point he was contacted by Petitioner's private investigator, Dave McDougal. *See*, Order, p. 25, ll.16-17.

Petitioner respectfully asserts that his most current application was timely filed.

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 for 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 typically has involved 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). 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.

Petitioner respectfully submits 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,

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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

VERNARD JEROME MATHIS, #297034,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of Petitioner's Revised Petition for Writ of Certiorari, has been served upon opposing counsel, Samuel L. Key, Assistant Attorney General, this the 23rd day of January, 2020 by U.S. mail to the address listed below.

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January 23rd, 2020