STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO LANCASTER COUNTY
Paul E. Short, Jr., Trial Judge
Brian M. Gibbons, PCR Judge

Appellate Case No. 2018-000779

VERNARD JEROME MATHIS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES PRESENTED

Petitioner's Statement of Issues 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?

Respondent's Counter-Statement of Issues Presented

I. Did the PCR court correctly find Petitioner's action was untimely and successive because the alleged newly discovered evidence was discoverable at the time of trial and should have been raised in his first PCR action after having a full evidentiary hearing on the issues in accordance with *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013)?

II. Did the PCR court correctly deny relief on Petitioner's juror misconduct allegation where Roberts, the juror, credibly testified he did not intentionally conceal any information during *voir dire*; he did not disclose his law enforcement background because he was never asked about his employment history; and he would have answered truthfully if he had been asked of his law enforcement background?

III. Did Petitioner abandon his argument the prosecution committed misconduct by failing to disclose its knowledge that Roberts' was retired law enforcement by only making a conclusory statement and failing to cite to any supporting authority, and where the prosecution was under no duty to disclose this information?

IV. Whether the prosecution should have disclosed Roberts' phone call to the Solicitor's Office is unpreserved where this issue was not raised until after the PCR hearing; and, on the merits, did Petitioner show the prosecution had any knowledge of Roberts' call to the Solicitor's Office, and the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction?

STATEMENT OF THE CASE

In December 2000, Vernard Mathis (Petitioner) was indicted for murder. App. 1248. Petitioner was subsequently indicted in February 2001 for armed robbery. App. 1252. Finally, in June 2003, Petitioner was indicted for one count of first-degree burglary, and two counts of kidnapping. App. 1256; 1259; 1263. John D. Clark, Esquire (Counsel), represented Petitioner. App. 1. Solicitor John R. Justice, and Assistant Solicitors Douglas A. Barfield and Thomas W. Holland all of the Sixth Circuit Solicitor's Office prosecuted the case. App. 1.

On May 20, 2003, the State served Petitioner with intent to seek life without parole (LWOP) pursuant to section 17-25-45 of the South Carolina Code. App. 801. On June 2–6, 2003, Petitioner proceeded to a jury trial before Judge Paul E. Short, Jr. The jury convicted Petitioner as indicted on all charges. App. 797–98. The trial court sentenced Petitioner to LWOP. App. 1249; 1255; 1258; 1262; 1265. Petitioner appealed.

Appellate Defender Robert M. Dudek perfected Petitioner's appeal by filing an *Anders*[1] brief to the Court of Appeals. Thereafter, Petitioner filed a *pro se* brief to the Court of Appeals. The Court of Appeal's dismissed the appeal and granted appellate counsel's request to be relieved. *State v. Mathis,* Op. No. 2005-UP-375 (S.C. Ct. App. filed June 13, 2015). Petitioner then filed a *pro se* petition for rehearing and petition for rehearing *en banc* on June 28, 2005, and the Court of Appeals denied both petitions. *State v. Mathis,* S.C. Ct. App. Orders dated Sept. 20, 2005 (Shearouse Adv. Sh. No. 37 at 6). Thereafter, Petitioner petitioned for a writ of certiorari on October 17, 2005; however, the Supreme Court denied certiorari. *State v. Mathis,* S.C. Sup. Ct. Order dated Nov. 2, 2006. The case was remitted back to the circuit court on November 6, 2006. App. 989–90; 1278.

[1] *Anders v. California*, 386 U.S. 738 (1967).

First PCR Action

Petitioner commenced his first PCR action on March 8, 2007. On August 25, 2008, an evidentiary hearing convened before Judge Kenneth G. Goode. Petitioner was present and represented by Tricia Blanchette, Esquire. The State was represented by Assistant Attorney General Michelle J. Parsons. At the hearing, Petitioner testified on his own behalf and also presented testimony from his codefendant, Elton Wiggins. Counsel testified for the State. Petitioner alleged ineffective assistance of Counsel in his initial PCR action. On October 14, 2008, after a full review of the record and testimony presented, Judge Goode denied relief. Petitioner appealed. App. 990; 1278–79.

Petitioner petitioned for a writ of certiorari of his initial PCR action on July 23, 2009. The State submitted it return to the petition for a writ of certiorari on November 23, 2009. The Supreme Court denied certiorari. *Mathis v. State*, Sup. Ct. Order dated Dec. 2, 2010. The case was remitted back to the circuit court on January 7, 2011. App. 990; 1279.

Federal Habeas action

Petitioner petitioned for a writ of habeas corpus with the District Court of South Carolina on September 6, 2011. On July 12, 2012, United States Magistrate Judge Shiva V. Hodges filed her report and recommendation, recommending summary dismissal of Petitioner's habeas petition on the merits of two of his allegations, and recommended summary dismissal of the two other allegations as procedurally bared. Petitioner timely objected to summary dismissal; however, United States District Judge Richard M. Gergel issued an order which largely adopted the report and recommendation and granted the State's motion for summary judgment on August 23, 2012. App. 1279.

Current PCR action

Petitioner, through current counsel Tara Dawn Shurling, commenced the underlying PCR action on July 9, 2013. App. 898. In the underlying PCR action, Petitioner alleged juror misconduct by Ronnie Roberts, and prosecutorial misconduct. App. 900–01. Petitioner, through current PCR counsel, moved for discovery on October 7, 2013, and the State consented to Petitioner's discovery request with stipulations. App. 913; 917. Thereafter, the State made its return and motion to dismiss on January 30, 2014. App. 920. On April 22, 2014, Roberts, the jury foreperson, and Holland, one of the prosecutors, were deposed. App. 1127; 1198. Thereafter, the State filed an amended return and motion to dismiss on July 1, 2014. App 928. On October 29, 2014, Chief Administrative Judge Brian M. Gibbons denied the State's motion for summary dismissal and ordered an evidentiary hearing be held on the issues of whether the action was timely and/or successive; and, if timely and not successive, whether Petitioner was entitled to a new trial because of juror misconduct, and/or prosecutorial misconduct pursuant to *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013). App. 989–1004.

An evidentiary hearing into the matter convened before Judge Gibbons (PCR court) on November 22, 2016. App. 1005–26. Petitioner was present and represented by current PCR counsel, Tara Dawn Shurling. App. 1005. The State was represented by Assistant Attorney General Patrick Schmeckpeper. App. 1005. Ronnie Roberts, Counsel, Shareka Jones, and two of the solicitors who prosecuted the case, Douglas Barfield and Thomas Holland, testified at the evidentiary hearing. Petitioner did not testify at this hearing. On February 22, 2018, after reviewing the entire record and testimony presented, the PCR court found the current PCR action was untimely filed and successive. The PCR court also denied Petitioner's juror and prosecutorial misconduct allegations on the merits, denied relief, and dismissed the action with prejudice. App. 1277–1306. On March 12, 2018, Petitioner moved to alter or amend under Rule 59(e), SCRCP.

App. 1307. The PCR court denied the Rule 59(e) motion on March 26, 2018. App. 1328. Petitioner appealed.

STATEMENT OF THE FACTS

Petitioner's charges stem from an elaborate scheme to kidnap a manager of the McDonald Amusement Company, a video poker company. The plan was to abduct Melvin Steele from his house, then force him to give the robbers the combination to the safe so they could obtain the proceeds of the video poker parlor. Steele and his wife, Rita Steele (Rita), were supposed to be abandoned once the robbers obtained the safe's combination; however, one of the robbers shot Steel on the way to the video poker parlor. Steele died.

Elton Wiggins admitted his involvement and cooperated with law enforcement. App. 540–41. Wiggins implicated Petitioner, claiming Petitioner shot Steele because Steele was unable to provide the correct combination to the safe. App. 556.

Rita Steele identified Petitioner as one of her kidnappers in court. Rita's face had been duct-taped so she could not see her abductors; however, she testified she saw Petitioner's face when she was knocked to the floor inside her house. App. 626–36. Rita also claimed Petitioner was the person who tricked her into opening the door to her house. App. 636–40.

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts give great deference to a PCR court's credibility findings because appellate court's lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

I. The PCR court correctly found Petitioner's action was untimely and successive because the alleged newly discovered evidence was discoverable at the time of trial and should have been raised in his first PCR action after having a full evidentiary hearing on the issues in accordance with *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013)

The PCR court correctly found the juror and prosecutorial misconduct allegations were untimely filed and successive because the PCR court made its findings on these issues after a full evidentiary hearing pursuant to *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013), and the PCR court's findings are supported by the record and do not constitute an error of law.

The Uniform Post-Conviction Procedure Act[2] states a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). The discovery rule provides that if a PCR applicant discovers "material facts not previously presented and heard that requires vacation of the conviction or sentence," a new PCR application "must be filed . . . within one year after the date of actual discovery of the facts by the applicant or after the

[2] S.C. Code Ann. §§ 17-27-10 to -160 (2014).

date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. § 17-27-45(C).

Alleged juror misconduct discovered post-trial is a basis for a new trial separate from an ordinary claim of newly discovered evidence. *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013). "Because juror misconduct is a separate basis for a new trial, it is governed by a separate standard." *Id.* "Provided a claim ***is timely raised***, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *Id.* (citing *State v. Woods*, 345 S.C 583, 587-89, 550 S.E.2d 282, 284 (2001)) (emphasis added). "Further, evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing." *Id.* at 371, 373 S.E.2d at 628. Juror misconduct allegations are "governed by the analysis set forth in *Woods*, and such case-by-case determinations are most appropriately made after a hearing." *Id.* at 372, 737 S.E.2d at 628.

Here, the PCR court correctly held a full hearing before determining whether Petitioner's juror and prosecutorial misconduct allegations were timely. The PCR court found that Roberts' law enforcement background was discoverable at the time of Petitioner's trial; therefore the action was untimely. Further, the PCR court found this PCR action was successive because the issue could have and should have been raised in Petitioner's first PCR action. The PCR court did not err.

Petitioner argues the State previously conceded the timeliness of the application. However, no such concession appears in the record. The State did stipulate that Petitioner filed this PCR action within one year of learning about the alleged misconduct. However, that stipulation is not

dispositive of this issue because the statute provides "or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. § 17-27-45(C).

The PCR court made a finding of fact that Petitioner could have learned of Roberts' law enforcement background at the time of Petitioner's trial or first PCR action. Roberts made no attempts to hide his employment background. The PCR court concluded, "Just because no one thought to ask [Roberts] what his background was does not mean the information was not discoverable." App. 1301. The PCR court found Roberts' background could have easily been discovered by the exercise of due diligence. The PCR court's factual findings are supported by the record. Specifically, Roberts testified the question of whether there were any prior law enforcement officers on the jury was never asked, and, if it had been, he would have answered fairly and honestly. App. 1053. The PCR court found Roberts' testimony credible. Therefore, the PCR court did not err in finding Petitioner's PCR action was untimely filed. As such, the Court should deny certiorari and affirm the PCR court.

II. The PCR court correctly found Petitioner did not meet his burden of proof to establish juror misconduct where Roberts, the juror, credibly testified he did not intentionally conceal his prior employment history during *voir dire*; he did not disclose his law enforcement background because he was never asked about his prior employment history; and he would have answered honestly if he had been asked of his law enforcement background

Roberts did not commit juror misconduct because credibly testified he did not intentionally conceal any information during *voir dire*, he was never asked if he was previously employed in law enforcement, and would have answered truthfully had he been asked about his law enforcement background. Therefore, certiorari should be denied as to this issue.

PCR Testimony

Ronnie Roberts, the foreman of the jury testified at the evidentiary hearing. Roberts testified he was sixty-nine years old and that it had been a long time since this trial took place,

almost thirteen years. App. 1050–51. Roberts then testified it had been a long time since he was deposed. App. 1051. Roberts testified he did not have a perfect memory of every line of his testimony in the trial or the deposition. App. 1051.

Roberts testified he had been called for jury service for Petitioner's trial. App. 1019. Roberts testified that upon receiving notification he had been called for jury service, he telephoned the Solicitor's Office and asked to be dismissed because he figured they would not let him serve anyway being a former police officer. App. 1019. He testified he asked to be dismissed. App. 1019. Roberts explained it was not his intent to try to get out of jury duty, but he figured they would not allow him to serve. App. 1020. Roberts testified he could not remember who he spoke to when he called the Solicitor's Office, and he could not recall if the person already knew he was former law enforcement. App. 1020–21. He testified he told the person he spoke to he had previously been in law enforcement but could not remember if he told them how many years. App. 1020. Roberts testified the person told him he still had to report for jury duty, and if there were issues with his background, he would be dismissed or struck. App. 1021.

Roberts testified he did not know who he spoke to, but when he arrived for jury duty, the Solicitor, Mr. Justice was in charge. App. 1022. He testified he did not know whether Solicitor Justice knew about his prior phone call to the Solicitor's Office. App. 1022. Roberts testified he learned Solicitor Justice along with Assistant Solicitor's Barfield and Holland prosecuted the case after his deposition. App.1022. Roberts testified that he had one previous case in general sessions, when he was a young officer, with Solicitor Justice. App. 1023. The State stipulated to Roberts' law enforcement background. App. 1023.

Roberts testified he retired after twenty-five years and was retired for a couple of years before Petitioner's trial. App. 1024. Roberts testified he worked for six-and-a-half years with

Lancaster County, and six months for the City of Kershaw. App. 1024. Roberts testified as a juror, he did not have any interaction with the trial court concerning his law enforcement background. App. 1024. Roberts testified that during jury selection, there were numerous questions asked, and jurors were asked to stand if they were pertinent to them, and if they stood they were then addressed individually by the trial court. App. 1024. He testified he answered every question the trial court asked him. App. 1025. Roberts testified he did not stand when asked on *voir dire* if he had any connection to the Solicitor's Office because he did not have any connection with the Solicitor's Office at that time. App. 1025. Roberts testified he remembered being asked on *voir dire* about whether or not he had any connection with the Solicitor's Office during his deposition, but he did not have any independent memory of it. App. 1029. Roberts then testified that if he had heard the question about having any connection with the Solicitor's Office, he would not have stood because he had no connection with the Solicitor's Office at the time. App. 1030. Roberts acknowledged he believed at the time of his phone call to the Solicitor's Office that no defense attorney would want him on their jury if they knew his background. App. 1030. Roberts then testified he was never asked about his background. App. 1030. Roberts testified he had not contacted the Solicitor's Office about Petitioner's case. App. 1033.

Roberts testified he knew there was a distinct possibility no defense lawyer wanted him on the jury panel if they knew he was a former law enforcement officer. App. 1036. When asked if he called the Public Defender's office, Roberts testified "I didn't know how to get in touch with them. I didn't know who the defense attorneys were. Did not know which jury I would be called to serve on. I made that call specifically because I was called to a jury pool. There was no specific trial mentioned or I had no idea what trial would be coming up." App. 1037. Roberts testified he

notified the only person he knew would have control over jury duty when asked if he did anything to advise the court about his concerns about his law enforcement background. App. 1038.

Roberts testified he had no connection with any law enforcement agency at that time as he had retired in 2000. App. 1025. Roberts then testified during the *voir dire* he knew Solicitor Justice and Assistant Solicitor Barfield by sight. App. 1026. Roberts testified he recognized Barfield by sight because of his long, different type mustache. App. 1026. Roberts speculated he had older siblings who knew or were acquainted with Barfield because they were older than him. App. 1026. Roberts did not recall being asked on *voir dire* whether he had any special relationship with any of the witnesses after Solicitor Justice read a list of the potential witnesses. App. 1027.

Roberts testified he was not concerned he was unqualified to serve as a juror when he was summoned to jury duty, but knew most of the time a policeman was called, they were not seated. Roberts thought it was really wasting time to be there as juror because law enforcement officers are never utilized on the jury. App. 1027. Roberts then testified that in his deposition he stated the only witness he knew was the one who was now the Sheriff and his name was Barry Faile. App. 1034. Roberts testified he did not hear the question during *voir dire* which asked whether or not he had any relationship to any of the witnesses. App. 1034. Roberts then testified he knew Barry Faile by name but had no relation with him. App. 1034. Roberts further testified he had no connections to anyone involved in the case as far as he was concerned. App. 1036.

Roberts testified he got a letter in the mail concerning jury duty. App. 1051. Roberts testified once he got the letter in the mail he looked up the phone number for the Solicitor's Office and he called the office. App. 1052. Roberts testified he did not know of any cases that were coming up and that he could give the defendant a fairer trial than most people. App. 1052. Roberts testified he thought law enforcement in general should be able to serve on juries. App. 1053.

Roberts testified he did not know why the judge asked each of the question he did during *voir dire* and he did not stop and ask. App. 1053. Roberts testified the question of whether there were any prior law enforcement officers on the jury was never asked, and, if it had been, he would have answered fairly and honestly. App. 1053.

Roberts testified he had a good general working knowledge of the judicial system and the court process. App. 1039. Roberts testified he admitted in his previous deposition he was familiar with jury strikes and it was very possible a defense attorney would have struck him from the jury if they had known his background. App. 1039. Roberts testified that when he was Chief of Police for the City Kershaw, this area was under the umbrella of the Sixth Circuit Solicitor's Office as well as the time he spent working for Lancaster County. App. 1040. Roberts testified he had one case in general sessions with Solicitor Justice, but his captain presented all cases and he never came as a witness. App. 1040. Roberts testified that by 1982 he knew John Justice was the Solicitor for the circuit. App. 1041.

Roberts testified he did not know how he came to be selected as the jury foreman. App. 1045. Roberts recalled the judge told him you are now the foreman and he was appointed. App. 1045. Roberts testified other than Mr. Lewis, no one on the jury panel knew he had a law enforcement background. App. 1046. Roberts testified he could not remember if he told any jury members about his law enforcement background. App. 1046. Roberts testified he worked for Assurant Group as a training department manager in insurance during this time. App. 1046.

Roberts testified he did not know any members of the Steele family or Jimmy Taylor prior to trial. App. 1048–49. Roberts testified in his job in law enforcement he interacted with people in the probation office. App. 1049. Roberts testified he did not know if Jimmy Taylor was the same person he knew by the nickname "Bull." App. 1050.

Roberts testified he did not stand when asked during voir dire if he had any special relationship by blood or marriage or otherwise any special relationship with any of the witnesses called to trial. App. 1053. Roberts testified if someone asked him today if he had any relation or contact with the Sixth Circuit Solicitor's Office he would say he has none. App. 1053. Roberts testified he had contact with John Justice once for a case when he interviewed him for five minutes before trial and then he testified which was twenty five years before this trial. App. 1054. Roberts testified he worked as the chief of police for the town of Kershaw for six months during which time he did not have any cases go to the Sixth Circuit Solicitor's Office. App. 1056 Roberts testified he was not trying to get on the jury. PCR tr. 52. Roberts then testified he answered all the questions from the *voir dire* as honestly as he could. App. 1056.

Discussion

Petitioner argues "[t]he evidence introduced by Petitioner establishes that Roberts was not a credible witness," and "the testimony in question leaves no doubt that Roberts deliberately consulted the Solicitor's Office concerning his presence in this jury pool and his that information for [*sic*] the Court and Petitioner." Pet. 23. Petitioner's argument fails because the PCR court disagreed and found Roberts was a credible witness. *See Foye*, 335 S.C. at 589, 518 S.E.2d at 267 ("Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses."). Further, the PCR court's finding that Roberts did not conceal information on *voir dire* is supported by the record. *See Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 ("This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them."). Therefore, based on the standard of review, certiorari should be denied.

"[A] new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *McCoy*, 401 S.C. at 371, 737 S.E.2d at 627.

The PCR court made a finding of fact that Roberts did not intentionally conceal information on *voir dire*. This finding is supported by the record. As noted above, Roberts recalled being called to jury service for Petitioner's trial. Roberts then called the Solicitor's Office and asked to be dismissed because he thought he would not be able to serve as a juror because he was a former police officer. Roberts clarified he asked whether or not he would be allowed to serve as a juror. Roberts did not know who he spoke to at the Solicitor's Office. Roberts testified he was told to show up to the jury summons. App. 1019–21. Roberts testified he had one case in which Solicitor Justice was involved when he was a young officer. Roberts testified he retired after twenty-five years of law enforcement service. App. 1023–24. Roberts testified he answered every question asked on *voir dire*. App. 1025. Roberts testified he did stand when asked if he had a relationship, or connection to the Sixth Circuit Solicitor's Office because he "did not have any connection to them at that time." App. 1025. Roberts testified he retired in 2000 and had no connection with anyone involved at that time. App. 1025. Roberts testified he was never asked his background, and that is why he did not notify the trial court or defense counsel. App. 1030.

Further, the PCR court found credible Roberts' testimony that he did not have any type of relationship or contact with the Sixth Circuit Solicitor's Office, or with any employee thereof. It is clear from Roberts' testimony that he called the Solicitor's Office only to ask if he needed to show up to jury duty because of his background. Roberts showed up to jury duty and answered the questions truthfully regarding any special relationship with the Solicitor's Office. Therefore, the

PCR court correctly concluded Roberts did not intentionally conceal information on *voir dire*. As such, certiorari should be denied as to this issue.

III. Petitioner abandoned his argument the prosecution committed misconduct by failing to disclose its knowledge that Roberts' was retired law enforcement, and the prosecution was under no duty to disclose this information

Petitioner's argument that the prosecution committed misconduct because it failed to disclose its knowledge of Roberts' law enforcement background is, at best, conclusory. Petitioner devotes half a sentence to this argument, "Petitioner submits that it was incumbent upon [the State] to disclose . . . [its] knowledge of [Roberts'] lengthy law enforcement [background]." Pet. 25. Petitioner fails to cite any case law supporting this assertion, nor does Petitioner cite to anywhere in the record in support of this argument. *See* Rule 243(e)(3), SCACR ("The argument on each question shall include citation of authority and specific reference to pertinent portions of the lower court record."); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal); *Eaddy v. Smurfit–Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App.2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."). Certiorari should be denied because Petitioner has abandoned this argument by only asserting a conclusory statement with no citation to supporting authority.

Petitioner's claim fails on the merits because the prosecution had no duty to disclose its knowledge that Roberts was retired law enforcement.

"The responsibility for obtaining [juror background information] falls on the attorneys to request precise *voir dire* questions that are reasonably comprehensible to the average juror." *Lynch v. Carolina Self Storage Centers, Inc*., 409 S.C. 146, 156, 760 S.E. 2d 111, 117 (2014). The non-

disclosure did not amount to a *Brady* violation. The holding in *Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S. 83, 88 (1963). "[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109–10.

Rule 5(a)(1), SCRCrimP, provides what the prosecution must disclose to the defendant upon the defendant's request. Information subject to disclosure includes: (A) statements by the defendant; (B) the defendant's prior record; (C) documents and tangible objects under control of the prosecution and are material to the preparation of the defense or the prosecution intends to use such material as evidence in chief at trial, or were obtained from or belonged to the defendant; and (D) reports of examinations and tests which are material to the preparation of the defense or the prosecution intends to use such evidence as evidence in chief at trial. Rule 5(a)(1)(A–D), SCRCrimP. Rule 5(a)(2), SCRCrimP, provides what information is not subject to disclosure. Specifically, "reports, memoranda, or other internal prosecution documents made by the [solicitor] or other prosecution agents in connection with the investigation or prosecution of the case" are not subject to disclosure. Rule 5(a)(2), SCRCrimP.

In *State v. Matthews*, our Supreme Court was asked if former Rule 8, Criminal Practice Rules,[3] required the prosecution "to disclose any information, other than criminal records checks,

[3] Rule 5, SCRCrimP, replaced Rule 8, Criminal Practice Rules, on September 1, 1988. *See* Rule 39, SCRCrimP.

it had gathered on prospective jurors." 296 S.C. 379, 384, 373 S.E.2d 587, 590 (1988). The Court held background information on potential jurors, other than criminal records checks, held by the prosecution qualified as an "'internal prosecution' matter connected with the prosecution of the case. As such it was not subject to disclosure." *Id.* at 384, 373 S.E.2d at 591.

Here, it was Counsel's duty to obtain Roberts' background information by requesting precise *voir dire* questions. Counsel failed to request an unambiguous question as to whether any of the potential jurors had background in law enforcement. Because this PCR action is successive and untimely, Petitioner cannot raise a claim of ineffective assistance of Counsel for failure to request such *voir dire*. Petitioner is attempting to back door an ineffective assistance of counsel claim through a prosecutorial misconduct allegation. However, the prosecution did nothing wrong in this case. Clearly, Roberts' law enforcement background had nothing to do with Petitioner's guilt or punishment. Further, the State was under no duty to disclose such information even if Counsel had requested it from the State. *See Matthews*, 296 S.C. at 384, 373 S.E.2d at 591 (holding that information obtained by the prosecution on potential jurors was an "internal prosecution matter" not subject to disclosure). As such, certiorari should be denied on this issue because the prosecution was under no duty to disclose its knowledge of Roberts' law enforcement background.

IV. Whether the prosecution should have disclosed Roberts' phone call to the Solicitor's Office is not preserved where this issue was not raised until after the PCR hearing; additionally, Petitioner failed to show the prosecution had any knowledge of Roberts' call to the Solicitor's Office, and the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction

Petitioner argues the State committed prosecutorial misconduct by failing to disclose Roberts's phone call to the Solicitor's Office. Pet. 25. Certiorari should be denied because whether the State should have disclosed Roberts' phone call to the Solicitor's Office is not preserved because it was raised for the first time to the PCR court in Petitioner's post-trial memorandum in

support of PCR. (App. 1202–03). Certiorari should also be denied because Petitioner failed to prove anyone involved in the prosecution was aware of Roberts' phone call, and the State did not actively contact Roberts to investigate him.

First, whether the State should have disclosed that Roberts called its office to ask if he needed to show up to jury duty was not raised as until after the PCR hearing. "It is axiomatic that an issue cannot be raised for the first time in a post-trial motion." *Bank of New York v. Sumter County*, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010). Here, the PCR application did not allege the State failed to disclose Roberts' phone call. App. 900. The motion for discovery did not allege the State failed to disclose Roberts' phone call. App. x. Petitioner's Reply to the State's Amended Return did not allege the State failed to disclose Roberts' phone call. App. 948–89. Petitioner's reply to the State's motion to reconvene deposition did not allege the State failed to disclose Roberts' phone call. App. 982–84. And, there was no mention of this allegation in the PCR hearing. App. 1105–15; 1120–22. Finally, Petitioner did not move to conform his allegations to the testimony presented at the PCR hearing, nor did he move to amend to include this allegation. This allegation first arose in Petitioner's post-trial memorandum in support of PCR. App. 1202–03. This allegation was raised for the second time in Petitioner's Rule 59(e), SCRCP, motion to alter or amend. Petitioner's attempts to raise this issue after the PCR hearing does not preserve this issue for appeal. *See Bank of New York*, 387 S.C. at 159, 691 S.E.2d at 479 ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion."); *Sevens & Wilkinson of S.C., Inc. v. Cty. Of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review."). This question was never properly raised to the PCR court; therefore the PCR court did not err in failing to address it in its order of dismissal. *See*

Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) (stating a PCR court errs when it fails to make adequate finding of fact and conclusions of law regarding ***duly raised*** issues).

Petitioner's claim fails on the merits because Petitioner relies on former rule DR7-108(A) of the Supreme Court Rules of Disciplinary Procedure. However, the Rules of Professional Conduct "have no bearing on the constitutionality of a criminal conviction." *State v. Bryant*, 354 S.C. 390, 395 n.2, 581 S.E.2d 157, 160 n.2 (2003). Former rule DR7-108(A) provided:

> Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

In re: Two Anonymous Members of the South Carolina Bar, 278 S.C. 477, 298 S.E.2d 450 (1985).

Petitioner's case in unlike both *State v. Bryant*, and *In re Two Anonymous Members of the South Carolina Bar*. In *Bryant*, a capital case, our Supreme Court was asked if Bryant was entitled to a new trial where law enforcement proactively contacted qualified jurors' family members and asked if the jurors could impose the death penalty. 354 S.C. at 396, 581 S.E.2d at 160–61. Our Supreme Court found law enforcement's actions compromised Bryant's right to a fair trial. *Id.* at 396–97, 581 S.E.2d at 160. The Court stated, "While we do not as a rule disapprove of juror background investigations, we can not condone the activity which admittedly occurred in this case." *Id.* (footnotes omitted).

In re Two Anonymous Members of the South Carolina Bar, was an attorney disciplinary matter where two attorneys made prohibited contact with the sister of a prospective juror in violation of former rule DR7-108(A&F) of the Supreme Court Rules of Disciplinary Procedure. 278 S.C. at 477, 298 S.E.2d at 450. In this matter, the attorneys asked a client, whose sister was a prospective juror in a capital case in which one of the attorney's was appointed to represent the defendant, asked the client of her sister's views on capital punishment. *Id.* at 478, 298 S.E.2d at

451. On *voir dire*, the potential juror disclosed the attorney's contact with her family member, the client. *Id.* The attorneys received a private reprimand for their actions. *Id.* at 480, 298 S.E.2d at 452.

Here, the prosecution, or any State agent, did not actively seek out Roberts or attempt to contact him. Rather, Roberts contacted the State and only asked if he had to show up for jury duty because he was retired law enforcement. The State's minimal contact with Roberts was inconsequential and had no bearing on his views of any case that may have been called for trial. Further, Petitioner failed to show any evidence that one of the prosecutors involved in the case even had knowledge of Robert's phone call. Petitioner's argument that it probably was one of the prosecutors is speculative at best. Because the State did not attempt to inquire into Roberts views as a potential juror, and because its contact with Roberts was minimal, the prosecution was under no duty to disclose this phone call. Certiorari should be denied because this issue was not preserved because it was never raised until after the PCR hearing, Petitioner failed to show the prosecution had any knowledge of Roberts' phone call, and a violation of the Rules of Professional Responsibility have no bearing on the constitutionality of a criminal conviction.

CONCLUSION

Based on the foregoing argument, Petitioner's action was untimely and successive, Roberts did not commit juror misconduct, and the State did not commit prosecutorial misconduct. Certiorari should be denied as to all issues.

Respectfully submitted,

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