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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein

Appellate Case Number: 2018-000970

Antwan McMillan,.....Petitioner

v.

State of South Carolina,.....Respondent

BRIEF OF PETITIONER

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STATEMENT OF THE ISSUE ON APPEAL

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

STATEMENT OF THE CASE AND THE FACTS

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

During voir dire and jury selection, no juror indicated a relationship by either blood or marriage to a member of the Colleton County Sheriffs Office (CCSO), the agency which investigated this case. Appendix, p. 53-104. Nonetheless, after the fourth witness, Juror 102 (Juror) informed the trial judge that she had a concern about serving, indicating in a note: "I need to make sure that I'm a suitable juror for this trial due to the status of my husband." Appendix, p. 231, l. 15-16. Thereafter, the trial court individually examined the juror[1] and, finding no bias, allowed her to remain over the objections of Petitioner's trial counsel. Appendix, p. 231, l. 2- p. 243 , l. 17.

During this trial, the State elicited testimony from 18 witnesses of whom 12 were law

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

enforcement officers or other government agents. Appendix, p. 46-49. A second co-defendant, James Davis, testified as a state 's witness along with his father and a female acquaintance of the three accused. Three persons testified as victims of the crimes.

At trial, co-defendant James Davis, Jr. testified that he, Petitioner and co-defendant David Jakes blocked the exit ramp near Interstate 95 at dusk in an attempt to rob two women who were standing beside their stranded vehicle. Appendix, p. 259. 1. 14- p. 261, 1. 14. When a third member of the stranded travelers, an active duty solider in the US Army, made his presence known, the evidence indicated the soldier and Jakes engaged in prolonged gun fire. Jakes was struck and during the break in shooting, the male victim reloaded his gun. Appendix, p. 204-225.

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

Petitioner's defense theory was mis-identification of him as a perpetrator. None of the three victims could identity any of their assailants and no law enforcement officer witnessed any criminal conduct. None of the forensic evidence presented through more than 100 exhibits directly implicated the Petitioner. Appendix, p. 45- p. 769.

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

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

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

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

Petitioner filed a direct appeal arguing that the trial court should have struck Juror 102 for cause. As framed on appeal, the Court of Appeals opinion "determine[d] solely whether Juror was impartial." Appendix, p. 779. After analysis, the Court of Appeals determined that no constitutionally prohibited bias was revealed during the trial court's inquiry. Appendix, p. 781.

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

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

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

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

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

The PCR court requested proposed orders. She signed the Order of Dismissal finding that trial counsel was neither deficient nor was any prejudice shown. Appendix, p. 856- p. 870. This Order was signed on April 23, 2018. Petitioner's counsel received a copy of this Order on May 7, 2018.

Petitioner filed a Notice of Appeal and Proof of Service on or about May 23, 2018. A Petition for Writ of Certiorari was filed with the South Carolina Supreme Court on October 29, 2018 and subsequently transferred to the South Carolina Court of Appeals. On January 14, 2021,

the Court of Appeals granted the petition for a writ of certiorari and this Brief follows.[2] Appendix, p. 872-873.

STANDARD OF REVIEW

An appellate court reviews judgments issued in collateral challenges under an any evidence standard as to factual findings. *Milledge v. State*, 811 S.E.2d 796, 800 (SC 2018). However, the appellate court conducts a *de novo* review of errors of law in such cases. *Id*. An appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 726 S.E.2d 1, 3 (SC 2012).

ARGUMENT

This Court should grant the relief requested by Petitioner because his lawyer rendered deficient performance in the conduct of the voir dire during his trial. This deficiency prejudiced Petitioner. The record developed during the PCR hearing demonstrates prejudice especially in light of legal developments occurring prior to the issuance of the Order of Dismissal (Order).

As to the issue of deficient performance, the Order failed to discuss the South Carolina Supreme Court's opinion addressing the use of information concerning "a potential - and material - source of bias" unintentionally concealed during voir dire or federal case law regarding constitutional requirements for voir dire. See *State v Coaxum*, 764 SE2d 242, at 246 (SC 2014). The Order failed to acknowledge the impact of the *Weaver* decision indicating that prejudice may be established when a structural error affects fundamental fairness. See *Weaver v MA*, — US —, 137 S Ct. 1899 (2017). The Order improperly applies the "overwhelming evidence of guilt"

[2]Undersigned counsel was retained to argue Petitioner's case in the appellate courts and did not serve as PCR counsel at the circuit court level.

doctrine to a structural error and in violation of *Smalls v State*, 810 SE2d 836 (SC 2018).

Because the Order was controlled by an erroneous application of law and in light of this Court's *de novo* review, the Order of Dismissal should be reversed.

Law Concerning Claims of Ineffective Assistance of Counsel

There are two components for a court to analyze in a claim of ineffective assistance of counsel (IAC). *Strickland v. Washington*, 466 U.S. 668 (1984). First, the reviewing court must determine if the acts and omissions of counsel fell below an objective standard of performance. Second, the reviewing court must determine if it is reasonably likely that the outcome of the trial would have been different had counsel not performed deficiently. However, the US Supreme Court has also indicated that prejudice may be established when a structural error is "so serious as to render his or her trial fundamentally unfair" regardless as to the likelihood that the outcome would be different. See *Weaver v MA*, — US —, 137 S Ct. 1899, at 1911 (2017).

Deficient Performance

Trial Counsel rendered deficient performance when he failed to *voir dire* the jury venire as to the relationship between members of the venire and the Colleton County Sheriff's Office (CCSO). This deficiency is best recognized when considered in relation to the use of peremptory challenges. In case at bar, the deficient voir dire hindered Petitioner's ability to reasonably exercise his peremptory challenges.

The primary function of *voir dire* is to provide sufficient information to allow counsel to intelligently use peremptory challenges. Error generally occurs when restrictions on *voir dire* hinder the opportunity to reasonably exercise these challenges. Further, error occurs when concealment of material information hinders the use of peremptory strikes.

Law Concerning *Voir Dire* and Jury Selection

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

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

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

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

Apart from statutory procedure concerning *voir dire* in criminal cases, federal law provides guidance as to the interplay between *voir dire* and the exercise of peremptory strikes. See *US v Brown,* 799 F2d 134 (4th Cir. 1986) & *US v Rucker*, 557 F.2d 1046 (4th Cir. 1977). The "essential function of *voir dire* is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel." *US v Brown*, at 135-136 (multiple quotations and citations omitted). The federal courts have opined that it is not the probing nature of any particular *voir dire* that gives meaning to a defendant's use of peremptory challenges, but instead indicate that the reason *voir dire* exists: "would largely be vitiated if peremptory challenges were required to be exercised without the benefit of adequate information upon which rational challenges may be predicated, irrespective of whether such information is actually utilized, or whether the crucial factor to a particular defendant is 'those with blue eyes.'" *US v Rucker*, at 1048.

The *Rucker* Court noted that "[w]hile it is the nature of a peremptory challenge that it may be exercised capriciously or whimsically, (internal citation omitted), at least the opportunity to exercise it meaningfully must be present." *Rucker*, at 1048-1049. Without asking probing questions, "salient information about prospective jurors might never be revealed, and the entire process would do nothing to advance the cause of selecting a competent, disinterested jury." *Rucker*, at 1048- 1049 (internal quotation omitted). Even though the conduct of a *voir dire* examination is a matter within the broad discretion of the trial judge, the exercise of that discretion is limited by "the essential demands of fairness." *Rucker*, at 1048-1049 (internal quotation omitted).

Voir dire which impairs a defendant's ability to intelligently exercise his peremptory

challenges is ground for reversal, irrespective of prejudice. *Rucker, at 1048-1049* (internal citation omitted). In the direct appeal setting, the federal courts have held that the "[f]ailure to question potential jurors about biases toward law enforcement officers is not, standing alone, reversible error." *US v Wu*, 52 F.3d 323 (table only), 1995 WL 215440, p. 3, unpublished (4th Cir. 1995) citing *US v Muldoon*, 931 F.2d 282, 286–87 (4th Cir.1990). But while abandoning a *per se* reversible rule in the direct appeal setting, the Fourth Circuit has indicated that a "district court may find that such an inquiry [as to potential bias towards a law enforcement official's testimony] is the most efficient means of assuring the defendant's right to an impartial jury." *US v Lancaster*, 96 F.3d 734, 742 (4th Cir. 1996).

South Carolina law also recognizes that certain information about a prospective juror might be considered "material" to the use of these peremptory strikes if there is a potential of bias. *State v Coaxum*, 764 SE2d 242, at 246 (SC 2014). In fact, the South Carolina courts have recognized that the concealment of material information from the accused may improperly impair the exercise of peremptory strikes regardless of the nature of the concealment. In *State v. Coaxum*, the South Carolina Supreme Court held that the unintentional nature of the concealment of information about a juror is not a determinative factor in the analysis of error. 764 SE2d 242 (SC 2014).

The Court in *Coaxum* found that a juror was properly removed mid-trial despite the unintentional nature of the concealment. The *Coaxum* court found the operate question to be whether "the information concealed .. would have been a material factor in a party's exercise of its peremptory challenges." *Coaxum*, at 246. In a direct appeal setting, the concealment of this information from the accused may also require the reversal of a guilty verdict and remand for a

new trial. See *State v Tucker*, 815 SE2d 467 (SC Ct App 2018) citing *Coaxum*.

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

In *Montana v Lamere*, the Montana Supreme Court reviewed an accused 's convictions for aggravated assault and assault with a weapon. *Montana v Lamere*, 112 P3d 1005 (MT 2005) abrogated as to the prejudice analysis by *Weaver v MA*, — US —, 137 S Ct. 1899 (2017). The juror at question in *Lamere* was the mother of an employee of the prosecuting attorney's office. *Lamere*, at 108. The defense counsel did not become aware of this relationship until a lunch break after the commencement of the trial and his objection to this juror's service was overruled by the trial court. *Lamere*, at 109.

In reversing this conviction, the Montana Court held that defense counsel was deficient[3] when he failed "to take notice of the pertinent information in Whirry's questionnaire result[ing] in inadequate questioning during *voir dire* which in turn led counsel to make uninformed decisions ..." *Lamere*, at 1012. The *Lamere* Court noted that the juror indicated this relationship on a juror questionnaire but that accused's indigent defense counsel failed to take notice of the answers. The *Lamere* Court then noted that trial counsel failed to ask this juror more than one question during voir dire.

The *Lamere* opinion references trial counsel's admission that his failure was not part of

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

trial strategy and was a "mistake." The Court also noted the "natural inclinations of one whose life is committed to law enforcement" when discussing the importance of adequate voir dire. *Id*, at 1011 (internal citations ommitted).

The *Lamere* opinion recognized a duty of trial counsel to adequately question during voir dire so as to enable the intelligent exercise of peremptory challenges. *Id*, at 1011. Specifically, the Court stated that counsel had an "obligation to read the juror questionnaire forms" and to "develop information in the record" but that counsel's failure to do so "led counsel to make uninformed decisions regarding challenges. *Lamere*, at 1012. The *Lamere* Court addressed the prejudice prong of the claim by reference to structural error analysis but the application of this presumption of prejudice as to a structural error has been abrogated after the US Supreme Court decision in *Weaver v. Massachusetts*, - US - , 137 S Ct 1899 (2017). See discussion below concerning IAC prejudice and structural errors.

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

voir dire permeate the trial from beginning to end. *Goodspeed*, at 413.

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

Similarly, in *Ramirez v Maryland*, the Maryland Court of Appeals reviewed the denial of post conviction relief concerning an ineffective assistance claim premised on the failure to trial counsel to sufficiently *voir dire*, move for cause, or exercise a peremptory challenge as to a crime victim. *Ramirez v Maryland*, 212 A3d 363 (MD Ct App 2019). Ultimately, the court found that prejudice had not been proven under the facts presented in that case but the *Ramirez* Court reversed the lower courts, finding that trial counsel rendered deficient performance. Specifically, the *Ramirez* Court held that "Ramirez's trial counsel's conduct fell below an objective standard of reasonableness because, during *voir dire*, she failed to ask any follow-up questions, move to strike for cause, or use a peremptory challenge against a juror" who was a victim of a crime and believed this would be a source of bias. *Ramirez*, at 368-369. Later, the court again stated that "[n]o reasonable lawyer in Ramirez's trial counsel's position would have, as she did, refrain[ ]

from asking or requesting any follow-up questions of Juror 27, refrain[ ] from moving to strike him for cause based on his response to the 'crime victim' question, and refrain[] from exercising a peremptory challenge as to Juror 27." *Id*, at 385.

The analyses in *Lemere*, *Goodspeed* and *Ramirez* are consistent with SC law and federal law and demonstrate that competency standards for attorney performance apply to the conduct of voir dire.

Weakest Voir Dire in the Nation

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

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

According to this study, *voir dire* in "[n]on-capital felony trials and civil trials required 2 hours, and misdemeanor trials only 1.5 hours in state courts and 1 hour in federal courts. These figures mask a great deal of variation, however. For example, South Carolina consistently reported the shortest average *voir dire* time (30 minutes) in both felony and civil trials, with

Delaware and Virginia closely following (1 hour or less). South Carolina relies heavily on the use of written questionnaires that are distributed to attorneys before *voir dire*, rather than oral questioning in court." Survey, p. 29.

Application to the Case at Bar

In the case at bar, Petitioner's trial counsel was deficient in his exercise of *voir dire*. Trial counsel did not request that the jurors be questioned regarding their relationships with law enforcement, or specifically, the CCSO.[4] Appendix, p. 238, l. 22-24 & p. 809, l. 4-8. Trial counsel testified that he sometimes asks such a question and he "should do" so all the time but that he failed to do so here without reason. Appendix, p. 809, l. 9-16. The trial court even chastised trial counsel for his failure to ask this question when counsel objected to the continued service of Juror 102 despite the fact the information about her husband was not revealed during trial prep, *voir dire*, or jury selection. Appendix, p. 238, l. 22-24.

In fact, when trial counsel informed the trial judge that he might have exercised a peremptory strike had he known about Juror 102's potential source of bias, the trial judge blamed trial counsel indicating: "[w]ell, you didn't ask a voir dire question for that." Appendix, p. 238, l. 22-24.[5] Had trial counsel requested that the trial court question the jury venire as to any

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[4]While the trial judge did inquire as to the relationship between any prospective juror and the prosecutors, defense attorneys, and the accused, he did not ask if any juror was related in some way to the "State of South Carolina." See SC Code Section 14-7-1020 ("The court shall...examine .. . a juror to know whether he is related to either party ..."). While not an issue in this case, there is some chance that such a question would have required Juror 102 to indicate she was related by marriage to an agent of the State of South Carolina.

[5] Counsel also did not obtain the juror questionnaires which would have revealed this information but it appears the trial judge also failed to review the questionnaires even though this knowledge was within his constructive possession as the office of the clerk of court who possessed these items is a part of the judicial branch. This issue is not before this court.

member's relationship to law enforcement by blood or marriage, counsel would have learned of Juror 102's marriage to a member of the CCSO. This is the same office which investigated Petitioner and who employed witnesses who testified against Petitioner.

With such knowledge, trial counsel would have exercised a peremptory strike. Appendix, p. 809, l. 25- p. 810, l. 10. He stated as much at the PCR merits hearing. He had peremptory strikes remaining at the time he decided to allow Juror 102 to serve. Appendix, p. 91- p. 96.

Finally, trial counsel's deficiency is highlighted by the fact 12 of the 18 witnesses were law enforcement. Appendix, p. 46-49. The record does not indicate that more than three voir dire questions were requested by trial counsel for either Petitioner, co-defendant Jakes, or the State combined. Appendix, p. 237, l. 6-12. No trial strategy was involved in this omission.

The Court of Appeals issued a merit opinion in the Petitioner's direct appeal addressing Juror 102's partiality. Appendix, p. 777-781. In this opinion, the Court of Appeals narrowed the issue on appeal to avoid any discussion about the use of peremptory strikes. Appendix, p. 779. The Court of Appeals expressly noted trial counsel's failure regarding voir dire. Appendix, p. 781.

Thus, trial counsel rendered deficient performance by failing to request *voir dire* as to any potential juror's relationship with law enforcement or at least the law enforcement agency involved in the investigation of Petitioner. The failure to exercise a peremptory strike against Juror 102 directly resulted from the deficient *voir dire*.

Prejudice

Petitioner established IAC prejudice during the presentation of his collateral challenge. He demonstrated that trial counsel's deficient performance during voir dire prevented him from

learning of a potential and material source of bias as to Juror 102 and prevented the intelligent use of peremptory strikes. Further, despite the Order's conclusion that the trial record contained overwhelming evidence of guilt, the evidence implicating Petitioner was conflicting at best. Finally, the deficient *voir dire* is the type of structural error which would render the proceedings fundamentally unfair.

The PCR court's Order rested upon errors of law concerning the prejudice prong of Petitioner's claim.

Once a petitioner presenting an IAC claim establishes deficient conduct by his trial counsel, a showing of prejudice must be made before relief can be granted under a Sixth Amendment claim. Generally, such a showing requires proof that there is a "reasonable likelihood that but for the deficient performance, the outcome of the proceedings would be different." *Strickland*, at 694. However, as discussed below, a 2017 decision from the US Supreme Court indicates that proof that a structural error undermined the fundamental fairness of the trial proceedings is sufficient to establish *Strickland* prejudice even if prejudice is not presumed. See *Weaver v MA*, — US —, 137 S Ct. 1899 (2017).

In portion of the Order of Dismissal discussing prejudice, the PCR court cited case law concerning juror concealment and presumptions of bias. Appendix, p. 867-869. However, the court only made passing reference to one case involving an IAC claim concerning *voir dire* and the exercise of peremptory challenges. The Order omitted reference to the recent developments in the area of IAC claims and structural errors as discussed in *Weaver*.

While the Order did make passing reference to one IAC case concerning the intersection of *voir dire* and peremptory challenges, the only reference was a one sentence quoted conclusion.

See Appendix, p. 869 citing *Smith v State*, 654 SE2d 523 (SC 2007). Not one bit of analysis applying the rules of the *Smith* case to Petitioner's was made. In contrast, the Order omitted reference to a decision citing the *Smith* case IAC prejudice analysis even though this later decision was issued just two months before the signing of the Order. See *Smalls v State*, 810 S.E.2d 836 (SC 2018).

This omission is particularly significant because the *Smalls* case restricted the use of the "overwhelming evidence of guilt" doctrine during the prejudice analysis of an IAC claim. *Smalls*, at 839- 845. Instead of citing *Smalls*, the Order referenced *Harris v State*, 659 SE2d 140 (SC 2008), for the proposition that "(applicant cannot prove prejudice where there is overwhelming evidence of guilt)." Appendix, p. 869. Reliance upon this statement of law is incorrect as *Smalls* narrowed *Harris* on this very point less than 70 days before the signing of the Order of Dismissal.[6]

As argued below, this Court should vacate the Order because of these errors of law and the facts of Petitioner's case.

IAC Prejudice and Structural Error After *Weaver*

The US Supreme Court has noted that some errors should not be subject to harmless error analysis. *Weave*r, citing *Chapman v California*, 386 US 18, (1967). These errors are considered structural. This nomenclature derives from the fact that this type of error "affects the framework in which a trial proceeds" as opposed to being "simply an error within the trial process itself." *Weaver*, at 1907 (internal citation omitted).

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[6]As a sign of the swiftly shifting sands upon which IAC analysis rests, *Smalls* also overrules *Smith* and *Harris* concerning the standard of review in PCR cases as to errors of law. See *Smalls*, at 839- 840, n. 2.

In *Weaver*, the US Supreme Court addressed the intersection between the structural error doctrine and claims of ineffective assistance of counsel. *Weaver*, at 1907. The *Weaver* Court noted that these two doctrines are "intertwined." *Id*. The *Weaver* Court specifically noted that the "reasons that an error is deemed structural may influence the proper standard used to evaluate the ineffective-assistance claim." *Id*.

While a structural error "def[ies] analysis by harmless error standards", there are three basic rationales as to why a particular error may be deemed structural. *Weaver*, at 1907-1908 (internal citations omitted). First, an error may be considered structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, at 1908. Second, an error may be considered structural if "the effects of the error are simply too hard to measure." *Id*. Third, an error is structural "if the error always results in fundamental unfairness." *Id*.

An error may be deemed structural based upon any one of these concerns or "more than one of these rationales may be part of the explanation." *Weaver*, at 1908. For purposes of the analysis of the interplay between IAC claims and structural errors, the *Weaver* Court found critical that an error may be deemed structural but not "lead to fundamental unfairness in every case." *Weaver*, at 1908.

When applied to an IAC claim, the *Weaver* Court noted that proof of prejudice pursuant to *Strickland v Washington* involves "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Weaver*, at 1911, quoting *Strickland v Washington*, 466 U.S. 668, at 694 (1984). However, *Weaver* noted that *Strickland* expressly "cautioned" against a "mechanical" application of the prejudice standard.

Id. Instead, "the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Weaver*, quoting *Strickland*.

Thus, without deciding whether or not the proper inquiry for all IAC claims involving structural error is a showing of fundamental unfairness, the *Weaver* Court assumed this to be the proper showing for the purposes of reviewing the IAC claim raised in *Weaver*; that counsel was defective for failing to object to a violation of the public trial right and that this error was structural. *Weaver*, at 1911. But the *Weaver* Court specifically limited its ruling to the specific facts of that case. *Id*, at 1913. Thus, in the public trial violation context, *Weaver* suggested without deciding that a petitioner pursuing an IAC claim may establish prejudice by either showing a likelihood that the outcome of the proceedings would be different or fundamental unfairness. *Weaver*, at 1913.

While *Weaver* specifically cited *Montana v. Lamere* for the split in decisions regarding a presumption of prejudice, Weaver's ruling would not necessarily dictate a different outcome as to the deficiency at issue in *Lamere*. *Weaver*, at 1907, citing *Montana v. Lamere*, 112 P.3d 1005, 1013 (MT 2005), abrogated by *Weaver v. Massachusetts*, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017). While the *Lamere* Court reversed the conviction finding that prejudice was presumed, this outcome might still be correct following *Weaver*. This is due to the fact that the *Lamere* Court found the deficient performance concerned errors in the *voir dire* process implicating a defendant's constitutional right to be tried by an impartial jury and "calling into question the *fundamental fairness* of the entire proceeding." *Lamere*, 112 P3d 1005, at 1013 (emphasis added).

As suggested by *Weaver*, an error deemed structural because it is shown to be

fundamentally unfair suffices to establish prejudice under *Strickland*. *Weaver*, at 1913. No South Carolina case has addressed the intersection between structural error and claims of ineffective assistance of counsel either before or after *Weaver*. The Order of Dismissal in Petitioner's case fails to discuss the structural nature of the deficiency or the fundamental unfairness caused by the potential and material source of bias concealed by the deficiency and unchecked during peremptory strikes.

The Overwhelming Evidence of Guilt Doctrine after *Smalls*

The Order of Dismissal in Petitioner's case should have discussed the restriction against use of the "overwhelming evidence of guilt" doctrine. Instead, the PCR court incorrectly relied upon this doctrine to deny Petitioner relief.

In *Smalls v State*, the South Carolina Supreme Court narrowed the use of "overwhelming evidence of guilt" as a categorical bar to finding prejudice in an IAC claim. *Smalls v State*, 810 S.E.2d 836 (SC 2018). The Supreme Court in *Smalls* indicated that a prejudice analysis should balance the specific impact of the deficiency against the strength or weakness of the government's case. In fact, the *Smalls* Court found that neither the pcr court nor the Court of Appeals properly weighed the specific impact of the error in light of the evidence against Smalls.

The *Smalls* Opinion stated that for a court to find "overwhelming evidence" as a categorical bar, the state's "evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong" that a *Strickland* standard could not be met in any way. *Smalls v. State*, 810 S.E.2d 836, 845 (SC 2018).

In the Order of Dismissal before this Court, the PCR court failed to cite *Smalls* but

instead cited a case, *Harris v State*, 659 SE2d 140 (SC 2008), even though the holding in that case was narrowed by *Smalls*. Appendix, p. 869. Following the string cite to *Harris*, the PCR court provided a three sentence summary of the state's case without noting any "conclusive" evidence against Petitioner.

Application to the Case at Bar

Petitioner has demonstrated prejudice because he has demonstrated a structural error in the form of deficient *voir dire*. Further, Petitioner has shown that this structural error created fundamental unfairness especially in light of other juror concerns such as the presence of a statutorily disqualified juror. Finally, Petitioner's showing of prejudice is not categorically barred by "overwhelming evidence of guilt" because that doctrine is inappropriately applied to his case and the state's evidence was not overwhelming.

In the case at bar, the entire *voir dire* and jury selection comprised a mere 42 pages of the transcript while the actual trial itself totaled nearly 600 pages. Appendix, p. 57-99 & p. 166 - 732. Given the vast difference in resources between State of South Carolina and Petitioner, who was represented at trial by indigent defense counsel, the seating of Juror 102 alongside another disqualified juror evidences a reasonable likelihood that the outcome of the proceedings would have been different but for trial counsel's deficient performance. It is telling that trial counsel only requested minimal *voir dire* even though his case involved victims both young and old and male and female, cross-racial eye witness identification, cooperating witness testimony, law enforcement testimony, DNA, fingerprints, and third party guilt.

As noted above, 12 of the 18 witnesses were affiliated with law enforcement or related agencies such as emergency dispatch. Six of the law enforcement witnesses were employed by

CCSO at the time of trial and a seventh was employed there during the investigation. Two other law enforcement officers testified and were employed by agencies in neighboring counties.

The juror issue caused such concern for the trial judge that he held a special hearing in which more detailed *voir dire* was conducted of Juror 102 than any other juror. Appendix, p. 234 - p. 237. The trial judge even pulled the complete juror response forms from the clerk to ascertain how this information was not revealed during counsel's review of the responses. Appendix, p. 23 8, l. 18- p. 242, l. 5. The trial court then noted that trial counsel also failed, in addition to the deficient *voir dire*, to obtain the complete set of juror responses but instead only relied upon an incomplete summary. Appendix, p. 241, l. 2 - p. 242, l. 5.

While Juror 102 claimed not to harbor constitutional bias, the prospect that Juror 102 harbored unexpressed bias is hard to ignore. While such bias in this case might not have risen to the level of constitutionally recognized impairment, such lingering bias would impact trial counsel's ability to persuade the juror to acquit Petitioner. In fact, it was Juror 102 herself that raised the very question of her propriety on the jury after she heard testimony from her husband's coworker.

Such lingering bias has been recognized by the Supreme Court of the United States in a case involving voir dire and jury selection. In *Irvin v Dowd*, the Supreme Court reversed a murder conviction despite an elaborate process indicating: "[no doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v Dowd*, 366 US 717, 727-728 (1961).

As to any factual disputes, Juror 102 necessarily had to evaluate the credibility of law

enforcement's testimony and the integrity of CCSO's investigation. See *Kyles v Whitley*, 514 US 419, 445-449 (1995)(noting a common defense tactic is to discredit the integrity of the police investigation).

The error here is structural and, unlike the error in *Weaver*, the structural error here suffices to establish prejudice because the error affects all three subtypes of structural errors.

Trial counsel's deficient use of voir dire is a structural error because the right to voir dire protects another interest: the right to exercise peremptory challenges. Courts have noted that improperly limited voir dire is problematic because it impairs "the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice. See *US v. Rucker*, 557 F.2d 1046, 1048–49 (4th Cir. 1977)

Trial counsel's deficient use of voir dire is a structural error because it renders the proceedings fundamentally unfair. In fact, courts have explicitly indicated that improperly limited voir dire affects the "essential demands of fairness." See *Rucker*, at 1049 (citing Aldridge).

Further, the deficient voir dire is a structural error because the impact is so difficult to ascertain. In fact, the stronger the state's argument that no specific prejudice can be shown, the more Petitioner's argument sounds the call for relief.

Thus, the structural nature of the error alone sufficiently demonstrates prejudice because it rendered the trial fundamentally unfair.

Moreover, the evidence of prejudice presented by Petitioner was not subject to the categorical bar referenced in the Order of Dismissal because there was no conclusive evidence of guilt. In Petitioner's trial, one main piece of evidence was presented against Petitioner - the

testimony of a cooperating co-defendant, James Davis. In contrast, no victim identified Petitioner and a second co-defendant, David Jakes, exculpated Petitioner.

The Order of Dismissal incorrectly implied that the three victims "were ... witnesses" when they did not identify Petitioner. Appendix, p. 869. The Order of Dismissal incorrectly implied that co-defendant Jakes' DNA "corroborated his testimony against [Petitioner]" when Jakes actually told law enforcement that Petitioner was not involved and instead implicated a third party named J-Sneez. Appendix, p. 619, l. 15 - 19; p. 623, l. 11 - p. 633, l. 24; & p. 869. Finally, the Order omitted the fact that the cooperating co-defendant, Davis, actually first denied being at the crime scene at all. Appendix, p. 287, l. 3 - 11.

No DNA or fingerprint evidence placed Petitioner at the crime scene. Petitioner made no admission of wrongdoing. In light of the testimony of 18 witnesses and the introduction of scientific evidence, the evidence can not be considered conclusive such as to bar proof of prejudice. In fact, the jury returned a lesser verdict as to the lead charges, acquitting Petitioner of Attempted Murder. Thus, the Order of Dismissal's statement that "applicant cannot prove prejudice where there is overwhelming evidence of guilt" is a statement of law erroneously applied to an incorrect summary of the state's evidence against Petitioner.

Finally, Petitioner demonstrated prejudice from Juror 102's consideration of his case in light of other perplexing events related to *voir dire*, jury selection and service.

Of no small significance, after the jury reached a verdict but immediately before the verdict was returned, it was revealed that another juror who served in this case, Juror 191, was disqualified by statute from serving. Appendix, p. 741 , 1. 14- p. 744, 1. 12. Juror 191 was disqualified because he was convicted of a crime carrying a potential penalty of more than one

year. He was on probation and supervised by an agent of the State of South Carolina-the very party adverse to Petitioner.

The trial judge indicated that Juror 191's attorney was counsel for Petitioner's co-defendant, David Jakes. But the evidence also indicates that Juror 191 was represented by Petitioner's own trial counsel at the time Juror 191 suffered the conviction for his felony charge. Appendix, p. 65, l. 14- p. 66, l. 14. Further, Juror 191 admitted to being a victim of a crime during *voir dire* but was still seated despite all of these concerns, conflicts or disqualifications. Appendix, p. 85, l. 23- p. 87, l. 25.

While any error in that situation is not an explicit issue in this Petition, two separate incidents of concealed information material to the jury selection process brings the integrity of the verdict squarely into question.

Thus, the Order of Dismissal relied upon erroneous, incorrect and incomplete statements of law and omissions concerning relevant law. When viewed correctly, Petitioner has established prejudice and is entitled to relief. Petitioner established a deficiency which rendered a fundamental flaw in the jury composition of his trial. Petitioner established that the evidence against him was not conclusive and the PCR court incorrectly construed this evidence as a categorical bar to the establishment of prejudice.

CONCLUSION

Therefore, this Court should reverse the PCR court's Order of Dismissal, vacate Petitioner's convictions and sentences and remand this matter for a new trial.

Respectfully submitted by,

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