STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Colleton County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2018-000970

ANTWAN D. McMILLAN,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In June of 2010, Petitioner Antwan D. McMillan was arrested following an investigation into a shooting and attempted robbery. Subsequent to his arrest, the Colleton County Grand Jury indicted McMillan for three count of attempted armed robbery, three counts of attempted murder, and one count of possession of a weapon during the commission of a violent crime. On August 29, 2011, a jury trial was commenced in the Colleton County Court of General Sessions with the Honorable Perry M. Buckner, circuit court judge, presiding. At the conclusion of trial, the jury convicted McMillan of three counts of attempted armed robbery, three counts of first-degree assault and battery, and one count of possession of a weapon during the commission of a violent crime. Following the verdict, the trial judge sentenced McMillan to an aggregate term of imprisonment of thirty years. McMillan then timely filed and perfected an appeal.

On appeal, the Court of Appeals affirmed McMillan's convictions in an unpublished decision. State v. McMillan, Op. No. 2013-UP-317 (S.C. Ct. App. filed July 10, 2013). McMillan then petitioned the Court of Appeals for rehearing, and the Court of Appeals granted McMillan's petition, withdrew its previous opinion, and filed a substituted opinion again affirming McMillan's convictions. State v. McMillan, Op. No. 2013-UP-317 (S.C. Ct. App. re-filed Sept. 25, 2013). Following some procedural issues, McMillan petitioned the Court of Appeals for rehearing for a second time, and the petition was denied. McMillan then filed a petition for a writ of certiorari in the Supreme Court, and the petition was granted. However, following briefing and oral argument, the Supreme Court dismissed certiorari as improvidently granted.

Subsequently, on October 16, 2015, McMillan filed an application for post-conviction relief, and, in response, the State filed a return requesting an evidentiary hearing. On June 6,

2017, an evidentiary hearing was conducted in the Colleton County Court of Common Pleas with the Honorable Diane Schafer Goodstein, circuit court judge, presiding. At the conclusion of the hearing, the post-conviction relief judge took the matter under advisement. Thereafter, through an order filed on May 4, 2018, the post-conviction relief judge denied and dismissed McMillan's post-conviction relief application. McMillan then timely filed a notice of appeal.

After initiating his appeal, McMillan filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to the Court of Appeals. Subsequently, on January 14, 2021, the Court of Appeals granted the petition.

STATEMENT OF FACTS

Summary of McMillan's Crimes and the Evidence Discovered During the Ensuing Law Enforcement Investigation of Those Crimes

Shortly before midnight on the night of June 3, 2010, Jesse King, an explosive disposal specialist in the United States Army, was driving along I-95 in Colleton County with his wife on the way to a military base in Pensacola, Florida, while his mother-in-law followed behind them towing a U-Haul trailer with her truck. (App'x pp. 177-178; p. 182; pp. 196-197; pp. 205-207). As they passed through Colleton County, King's mother-in-law began to experience mechanical problems with her truck, and they all pulled off at an exit and stopped on a deserted road next to the highway. (App'x pp. 182-183; p. 196; p. 207-208). King then called a tow truck operator, arranged for him to come to their location, and began transferring the U-Haul trailer from his mother-in-law's truck to his own. (App'x p. 183; p. 196; p. 207). While he was crouched down behind his truck connecting the trailer, a light-colored sedan screeched to a halt at a nearby intersection, and a man with something wrapped around his face jumped out of the back of the sedan, pointed a large pistol at King's mother-in-law, and yelled for her to put "em" up. (App'x pp. 184-187; p. 198; pp. 208-210). In response, King sprang up, drew his own firearm, pointed it at the man, and ordered him to get back into his car and drive away. (App'x p. 186; p. 193; p. 198; p. 209). However, the man turned his gun in King's direction, so King shot at the man until the man fell to the ground. (App'x p. 186; p. 209). At that moment, the man's confederates inside the sedan began yelling, and one of the men fired several shots at King and the others, striking both of their trucks with bullets. (App'x pp. 186-187; p. 200; pp. 216-217). The man who had been shot by King then dropped his gun and crawled into the sedan, and the sedan rapidly sped away from the scene. (App'x pp. 187-188; pp. 209-210).

Once the would-be robbers were gone, King and the others called 911 to report the shooting and attempted robbery, and law enforcement officers were quickly dispatched to their location. (App'x pp. 176-177; p. 198; p. 210). Shortly thereafter, Detective Jeff Scott of the Colleton County Sheriff's Office arrived at the scene, interviewed the victims, and began searching for evidence. (App'x pp. 401-402). During his search, he located blood stains, a .50-caliber pistol that had been stolen from a California police department in 2002, and several spent shell casings fired from both a nine-millimeter pistol and a .357-caliber weapon. (App'x pp. 412-414). He then collected that evidence and took swabs of the blood stains, and the evidence was subsequently submitted to the South Carolina State Law Enforcement Division ("SLED") for analysis. (App'x pp. 433-434).

Meanwhile, David Jakes was brought to the emergency room at the Colleton Medical Center suffering from multiple gunshots wounds, and staff members at the hospital reported his arrival to law enforcement officers. (App'x p. 179; pp. 327-332). In response, Sergeant Jackie Lawson of the Colleton County Sheriff's Office went to the hospital and spoke with the individuals who brought Jakes there, including Shaquita Bryant. (App'x pp. 514-518). However, those individuals were all uncooperative and provided Sergeant Lawson with inconsistent stories about Jakes.[1] (App'x pp. 518-520).

Shortly thereafter, law enforcement officers located the sedan involved in the incident at Jakes's grandmother's home. (App'x p. 273; p. 354; p. 383). The officers then secured it, and a subsequent search of the vehicle led to the discovery and collection of fingerprints, palm prints,

[1] Although initially uncooperative, Bryant later provided more information to an investigator about how Jakes ended up at the hospital. (App'x pp. 320-321). Specifically, she told the investigator she saw "Chippy," "Dinky," and "Rat" together, "Chippy" helped load Jakes into her vehicle, and she and her friends brought Jakes to the hospital. (App'x pp. 315-316; p. 318; pp. 320-322). Notably, James Davis's nickname was "Chippy," Jakes's nickname was "Dinky," and McMillan's nickname was "Rat." (App'x pp. 245-247; p. 309; p. 315; p. 334).

bloods stains, nine-millimeter shell casings, gloves, various items of clothing, and an open bottle of gin.[2] (App'x pp. 354-356; p. 386; p. 391; p. 393; pp. 433-434; p. 450; p. 536). Upon further investigation, the officers discovered the sedan was registered to someone named David Jenkins while the vehicle's license plate was actually associated with a different vehicle registered to Brenda McMillan, who was the mother of the petitioner. (App'x p. 465; p. 467; p. 497).

Later that day, James Davis and his family contacted officers with the Colleton County Sheriff's Office to discuss Davis's role in the shooting and attempted robbery. (App'x pp. 338-341). During Davis's conversation with the officers, he initially denied any involvement in the crimes. (App'x p. 341). However, after he spoke with his family, Davis told the officers the truth about what happened and was placed under arrest.[3] (App'x pp. 277-278; pp. 300-302; p.

[2] Upon analysis, a forensic DNA expert determined the blood found both at the crime scene and inside the sedan involved in the incident belonged to Jakes. (App'x p. 531; pp. 538-539). Furthermore, the expert determined Jakes's DNA, Davis's DNA, and DNA similar to McMillan's were present on several of the items recovered from the sedan. (App'x pp. 541-542; p. 547). Likewise, an expert in latent fingerprint examination conducted testing of the prints recovered from the sedan and determined many of the prints were left by McMillan and Davis. (App'x pp. 578-584).

[3] Later on during trial, Davis recounted the details of the incident. (App'x pp. 249-250). Specifically, he stated he headed to Walterboro, South Carolina, in a gray sedan with Jakes and McMillan on the night of June 3, 2010. (App'x pp. 249-258). As McMillan drove them towards their destination, Davis indicated they passed three people on the side of the road who appeared to be having car trouble. (App'x pp. 257-259). When they saw those people, Davis stated McMillan and Jakes decided to rob them. (App'x pp. 259-261). Davis testified they then turned around, drove back towards the stranded motorists, and stopped their vehicle in a manner that blocked a nearby exit ramp. (App'x p. 261). After that, Davis stated Jakes jumped out, ran towards the people, and demanded they "give it up" at gunpoint. (App'x pp. 261-262). Davis testified he then heard gunshots, McMillan began firing at the motorists, and he helped Jakes—who had been "shot all over"—back into the sedan. (App'x pp. 262-267). Once Jakes was back inside the sedan, Davis indicated they sped back towards their homes despite Jakes's requests to be taken to a hospital until they passed a car driven by Bryant. (App'x p. 266). At that point, Davis stated they got Bryant to stop and convinced her and her companions to take Jakes to the hospital. (App'x pp. 266-272). Davis indicated he and McMillan then went back to their homes and he remained there until deciding to turn himself in. (App'x pp. 273-274; pp. 277-278).

344). Then, on the following day, McMillan surrendered to authorities and was arrested for his role in the incident, and Jakes was also placed under arrest.[4] (App'x p. 497; p. 617).

Circumstances of the Juror Issue that Arose during McMillan's Trial

At the outset of McMillan's joint trial with Jakes in connection to the crimes, the trial judge conducted voir dire of the prospective jurors. (App'x pp. 53-54). During voir dire, the trial judge asked the prospective jurors if any of them: (1) were related by blood or marriage or close personal friends with Jakes, McMillan, the solicitor, the defense attorneys, or any of the witnesses that would be testifying during trial; (2) had ever been represented by any of the attorneys involved in the case in the past; (3) were aware of the allegations against either Jakes or McMillan; (4) had formed opinions about the facts of the case or about the guilt or innocence of either Jakes or McMillan; (5) were members of or employed by a law enforcement agency; (6) were members of the grand jury that issued the indictments involved in the case; (7) were members of or contributors to groups affiliated with law enforcement or victims' rights; (8) had been victims of a violent crime; or (9) knew of any reasons why they might be biased, might be prejudiced, or could not give either the State or the defendants a fair trial. (App'x p. 54; pp. 63-67; p. 71; p. 75; p. 81; p. 85; pp. 88-89). At the conclusion of voir dire, the trial judge asked the solicitor and defense counsel whether they wished him to ask any additional questions of the prospective jurors, and defense counsel for both Jakes and McMillan asserted they did not. (App'x pp. 88-89).

Thereafter, the trial judge began the jury selection process, and the parties selected a jury for trial. (App'x pp. 88-89). During the selection process, defense counsel for Jakes exercised

[4] Shortly after McMillan was arrested, officers discovered numerous .50-caliber shell casings on a parcel of property located directly across the street from McMillan's home. (App'x p. 503; pp. 508-509; p. 511).

three peremptory strikes, defense counsel for McMillan exercised four peremptory strikes, and Juror # 102 was seated on the jury without objection.[5] (App'x pp. 91-98). After a jury was selected, the trial judge asked the parties whether there were any issues with the jury selection process, and no one raised any objections. (App'x pp. 98-99). The jury was then sworn, and the trial proceeded into the evidentiary phase. (App'x p. 144; p. 174).

Subsequently, after several witnesses—including the three victims—testified during the State's case, the trial judge informed the parties there was a matter that needed to be placed on the record. (App'x pp. 230-231). Specifically, the trial judge stated Juror # 102 sent him a note indicating she needed to make sure she was a suitable juror for the trial in light of her husband's employment status as a reserve deputy with the Colleton County Sheriff's Office. (App'x pp. 231-232). Based on the note, the trial judge informed the parties he intended to question Juror # 102 to determine if her husband's job status would impact her ability to be fair and impartial while noting the prospective jurors were not questioned about their spouses during voir dire. (App'x p. 232). The trial judge then brought Juror # 102 into the courtroom and questioned her about her note. (App'x pp. 233-236). During the questioning, Juror # 102 confirmed her husband was a reserve deputy with the Colleton County Sheriff's Office at that time, had been a

[5] Based on the alternating manner in which the trial judge—without objection—conducted the jury selection process following an in-chambers discussion with the parties, only Jakes's defense counsel was afforded a direct opportunity to exercise a peremptory strike on Juror # 102. (App'x pp. 89-91; p. 96; pp. 98-99). Importantly though, McMillan did *not* raise any claims related to the manner in which the jury selection process itself was conducted in his application for post-conviction relief and, instead, solely focused on defense counsel's purported failure to request adequate voir dire. (App'x pp. 786-794). Similarly, McMillan has *not* raised any claims related to the method of jury selection on certiorari. (Pet. Br. pp. 1-26). Therefore, no issues related to the alternating manner in which the jury selection process was carried out are currently before this Court. Cf. Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) ("[Hyman] asserts representation was ineffective because her trial counsel did not object that the sentences constituted cruel and unusual punishment. This point was not raised in her application or at the hearing and is not properly before us.").

reserve deputy for approximately two-and-a-half years, and had previously worked as a full-time deputy in Colleton County. (App'x pp. 235-236). She further confirmed she had not had any discussions with her husband about the case and her husband's employment status would not impact her ability to be fair and impartial in any way. (App'x pp. 235-236). The trial judge then sent Juror # 102 back to the jury room. (App'x p. 236).

After Juror # 102 retired from the courtroom, the trial judge noted he received several voir dire requests from the parties and asked questions in regard to whether the jurors were employed by a law enforcement agency, had been granted the power to arrest, and had been victimized in a violent crime. (App'x p. 237). However, he further noted he did not ask any questions related to whether any of the jurors had spouses involved in law enforcement and Juror # 102 voluntarily elected to disclose that information on her own. (App'x p. 237). He then asked the parties whether they were ready to proceed with trial, and defense counsel for both Jakes and McMillan indicated they were not. (App'x pp. 238-239). Specifically, defense counsel for McMillan stated he *might* object to Juror # 102 remaining on the jury because he "may" have used his peremptory strikes differently had he been aware of her husband's employment status, and defense counsel for Jakes asserted he objected to Juror # 102 remaining on the jury because she allegedly only disclosed her husband worked in environmental health management on the clerk of court's juror questionnaire form. (App'x pp. 238-240).

In response to defense counsel's contentions, the trial judge reviewed the original juror questionnaire form filled out by Juror # 102 and verified she stated her husband worked both in environmental health management and as a reserve deputy on that form. (App'x p. 239). He then reviewed the list of information compiled by the clerk of court from the juror questionnaire forms and determined the clerk of court mistakenly failed to include Juror # 102's response

about her husband's work as a reserve deputy on that list. (App'x pp. 240-241). After the trial judge discovered the scrivener's error, defense counsel for Jakes reasserted he wanted Juror # 102 to be excused based on her husband's status as a reserve deputy. (App'x p. 240). However, the trial judge declined to do so since the juror disclosed her husband's employment status on the juror questionnaire form and the information was only not discovered prior to her being seated on the jury due to a scrivener's error coupled with defense counsel's failure to ask him to question the jurors about their spouses' employment.[6] (App'x pp. 241-242).

Thereafter, the trial proceeded forward, and, after approximately four hours of deliberations, the jury ultimately convicted McMillan of three counts of attempted armed robbery, three counts of first-degree assault and battery, and one count of possession of a weapon during the commission of a violent crime.[7] (App'x p. 243; p. 733; pp. 741-742; pp. 745-748). The trial judge then sentenced McMillan to an aggregate thirty-year term of imprisonment. (App'x pp. 764-767).

Details of McMillan's Direct Appeal Related to the Juror Issue

After he was convicted, McMillan appealed, arguing the trial judge erred by refusing to excuse Juror # 102 and replace her with an alternate juror after discovering the juror's husband

[6] Defense counsel for McMillan subsequently joined in Jakes's defense counsel's objection. (App'x p. 242).

[7] Just before the jury announced a verdict had been reached, the trial judge discovered one of the jurors had been convicted of a habitual traffic offender offense and, based on that, was disqualified from serving on the jury. (App'x pp. 741-743). The trial judge further discovered that particular juror had been represented on his criminal charge by Jakes's defense counsel. (App'x p. 742). In response, the trial judge promptly discussed his discovery with the parties, and defense counsel for both McMillan and Jakes *objected* to that juror being removed from the jury. (App'x p. 743). As a result, the trial judge conferred with McMillan and Jakes personally to ensure they were willing to waive any issues they may have regarding the disqualified juror remaining on the jury, and both men appeared to agree to such a waiver before the jury's verdict was received. (App'x pp. 743-744).

was a reserve deputy.[8] (App'x p. 779). McMillan further alleged he would have exercised his peremptory strikes differently had he known that information during the jury selection process. (App'x p. 779). On appeal, the Court of Appeals affirmed. (App'x p. 781). In affirming, the Court of Appeals found the trial judge committed no error by finding Juror # 102 was impartial in light of the fact the juror confirmed she could be fair and impartial upon questioning from the trial judge, was not related to the defendants or any of the potential witnesses, and had not concealed any information from the parties or the trial judge. (App'x pp. 779-780). Based on those findings, the Court of Appeals concluded the trial judge did not err by refusing to dismiss Juror # 102 and replace her with an alternate juror. (App'x pp. 780-781).

Summary of the Post-Conviction Relief Proceedings

Following his unsuccessful appeal, McMillan filed an application for post-conviction relief alleging defense counsel was ineffective solely for failing "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." (App'x p. 790; p. 792). During the ensuing evidentiary hearing, defense counsel discussed the issue that was discovered during trial in regard to Juror # 102 and noted he reviewed and relied upon the list of information compiled by the clerk of court's office that did *not* suggest any of the juror's spouses were employed in law enforcement. (App'x pp. 808-809; p. 819). Defense counsel further indicated he did not ask the trial judge to question the prospective jurors during voir dire about their family members' potential connections to law enforcement, asserted he did make such a request on some occasions, and alleged he probably should do so in all trials. (App'x p. 809). Had he done so in McMillan's case, defense counsel

[8] More specifically, McMillan alleged on appeal "the trial judge erred in refusing to excuse Juror [# 102] and replace her with an alternate because, had he known Juror's husband was a reserve deputy, he would have exercised his peremptory challenges differently." (App'x p. 779).

opined he would have discovered Juror # 102's law enforcement connection and would have exercised a peremptory challenge on her. (App'x p. 810; pp. 817-818). However, defense counsel acknowledged he took steps to have the juror removed as soon as the information was disclosed, and he confirmed the matter was directly addressed by the Court of Appeals on appeal. (App'x p. 809; p. 818). Furthermore, defense counsel conceded there would *always* be additional questions that could be asked during voir dire that could potentially be helpful in every single case but it nonetheless would "probably" not be possible to fully understand a juror's mind even with such questioning. (App'x p. 822).

After that testimony was presented, post-conviction relief counsel argued Juror # 102 was biased and alleged her presence would have affected the other jurors during the trial. (App'x pp. 825-826). In rebuttal, the State contended post-conviction relief counsel's argument was wholly speculative, asserted defense counsel reasonably relied upon the juror information supplied by the clerk of court's office, and noted defense counsel did all he could to address the issue by raising an objection to Juror # 102 when the information about her husband was discovered during trial. (App'x pp. 826-828). Furthermore, the State argued McMillan suffered no prejudice as a result of the juror serving on the jury as McMillan received a fair trial by a fair and impartial jury. (App'x p. 827; p. 830). At that point, post-conviction relief counsel alleged the issue in McMillan's case did not hinge on whether Juror # 102 was qualified to serve and conceded she "did everything that she was supposed to do" without engaging in any misconduct. (App'x p. 831; p. 835). Nonetheless, post-conviction relief counsel asserted McMillan suffered unknown prejudice based on the juror's service on the jury based on the fact the defense theory revolved around flaws in the sheriff's office's investigation. (App'x p. 836; p. 840).

Following the hearing, the post-conviction relief judge issued an order denying and dismissing McMillan's application. (App'x pp. 864-865; p. 870). In declining to grant relief, the post-conviction relief judge found defense counsel was not deficient for failing to request additional voir dire concerning information he reasonably believed was available through the list of juror information provided by the clerk of court's office, which would have rendered additional questioning regarding the jurors' spouses' occupations entirely redundant. (App'x pp. 865-866). Similarly, the post-conviction relief judge noted an unending number of questions could hypothetically be requested during the voir dire process, but she further noted extended voir dire were disfavored while trial judges are under no absolute obligation to ask additional voir dire questions proposed by the parties. (App'x pp. 865-866). As a result, the post-conviction relief judge found defense counsel's performance did not fall below the standard of prevailing professional norms. (App'x p. 866). Furthermore, the post-conviction relief judge found McMillan failed to establish any prejudice occurred as he had not shown Juror # 102 was not fair and impartial and he had not demonstrated there was a reasonable probability the result of the trial would have been different but for defense counsel's conduct. (App'x p. 867; p. 869). In reaching that conclusion, the post-conviction relief judge noted the juror's responses established she could be fair and impartial, the trial judge determined she was fair and impartial, and the Court of Appeals found no error on direct appeal in regard to the trial judge's impartiality finding. (App'x pp. 867-868). Moreover, the post-conviction relief judge concluded the evidence of McMillan's guilt was overwhelming. (App'x p. 869). Accordingly, the post-conviction relief determined McMillan could not meet his burden of establishing prejudice and further found McMillan's speculation regarding prejudice was insufficient to warrant a grant of relief. (App'x p. 864; pp. 868-869).

STANDARD OF REVIEW

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the post-conviction relief judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the post-conviction relief judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief judge correctly determined McMillan failed to establish his ineffective assistance of counsel claim because defense counsel did not provide objectively unreasonable representation by failing to propose questioning on a peripheral matter during the voir dire process and because McMillan suffered no actual prejudice as a result of defense counsel's purported deficiency in light of the fact the case was decided by a fair and impartial jury, which was all McMillan was entitled to under the law.

McMillan contends the post-conviction relief judge erred by failing to find defense counsel provided constitutionally ineffective assistance of counsel during trial. In support of that contention, McMillan maintains defense counsel was deficient for failing to request the trial judge conduct voir dire of the prospective jurors concerning their relationships with law enforcement in general and the Colleton County Sheriff's Office specifically, which he—with the infallible aid of hindsight—alleges would have revealed a "potential and material source of bias" as to Juror # 102. McMillan further asserts he was prejudiced by the deficiency because defense counsel's failure to learn about Juror # 102's possible bias through voir dire hindered his ability to reasonably and intelligently exercise his peremptory strikes, which he claims constituted a structural error that rendered his trial fundamentally unfair.[9] To the contrary, the post-conviction relief judge committed no error by concluding McMillan failed to meet his burden of establishing either deficiency or prejudice. Regarding deficiency, defense counsel—

[9] Throughout his brief, McMillan repeatedly identifies the error that allegedly occurred in his case as a structural one that purportedly "alone" warranted a grant of post-conviction relief regardless of whether the outcome of the trial would have been different but for counsel's supposedly deficient performance. (Pet. Br. pp. 5-6; p. 16; p. 21; p. 25). Notably though, McMillan did *not* raise that particular contention during the post-conviction relief proceedings. (App'x pp. 823-826; 830-840; pp. 850-855). As a result, McMillan's structural error argument was not properly preserved for appellate review as it was neither presented to nor ruled upon by the post-conviction relief judge. See Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) ("On certiorari to this Court, Plyler raises the issue of whether trial counsel was ineffective for failing to object to an erroneous malice charge. Since this issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred."), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

along with defense counsel for McMillan's co-defendant—did not fail to provide reasonably competent representation by declining to propose questioning on the peripheral matter of the prospective jurors' *spouses'* employment during the voir dire process, which was particularly true in light of the fact defense counsel had already received and reviewed information regarding that particular matter from the clerk of court's office prior to trial. Similarly, regarding prejudice, nothing was presented to establish Juror # 102 was not fair and impartial, which meant McMillan failed to establish there was a reasonable likelihood the outcome of his trial would have been different but for defense counsel's allegedly deficient performance. Under such circumstances, McMillan failed to meet his burden of proving his ineffective assistance of counsel claim, and the post-conviction relief judge correctly denied and dismissed his application for post-conviction relief. The post-conviction relief judge's order denying McMillan's application for post-conviction relief should be affirmed.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation

omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing

court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 137 S. Ct. at 1912 (explaining "the rules governing ineffective-assistance claims must be applied with *scrupulous care*" (emphasis added and citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the *objective* reasonableness of counsel's performance, not counsel's subjective state of mind" (emphasis added)). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not*

when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105; see State v. Woullard, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) ("Defense counsel's strategy must have been outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff' before a conviction will be reversed on the basis of ineffective assistance." (citations omitted)).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[10] Strickland, 466 U.S. at 691. In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors.[11] Cherry v. State, 300 S.C. 115, 117-118, 386

[10] Notably, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective assistance of counsel claim on the grounds of lack of sufficient prejudice "[i]f it is easier" to do so. Id.

[11] Significantly, when arguing for relief to the post-conviction relief judge, McMillan agreed Strickland's "reasonable probability of a different result" test was the appropriate standard for determining whether prejudice sufficient to warrant a grant of a new trial had been established, and he even included and relied upon that very standard in his proposed order granting relief. (App'x pp. 853-854). Similarly, in his petition for writ of certiorari, McMillan asserted a court reviewing a claim of ineffective assistance of counsel "must determine if it is reasonably likely that the outcome of the trial would have been different had counsel not performed deficiently." (Pet. for Cert. p. 6). Meanwhile, in that same petition, McMillan further acknowledged the United States Supreme Court's decision in Weaver called into doubt the application of a presumption of prejudice to structural errors in the setting of post-conviction relief before attempting to distinguish Weaver from his own case due to the limited nature of its holding. (Pet. for Cert. pp. 8-9; pp. 14-15). Conversely, now that certiorari has been granted, McMillan currently appears to suggest the United States Supreme Court altered the Strickland analysis through its decision in Weaver and indicated "proof that a structural error undermined the fundamental fairness of the trial proceedings is sufficient to establish Strickland prejudice even if

S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just

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prejudice is not presumed." (App. Br. p. 16; pp. 19-20). Beyond that, McMillan also now heavily faults the post-conviction relief judge for failing to "acknowledge the impact of the Weaver decision" in her order denying relief despite never actually presenting any Weaver-based arguments at the circuit court level. (App. p. 5; p. 16). Notwithstanding the fact the shifting nature of McMillan's arguments raises fundamental issue preservation concerns, the United States Supreme Court did *not* actually alter the Strickland analysis through its decision in Weaver. See Plyler, 309 S.C. at 413, 424 S.E.2d at 480 (affirming on procedural grounds when an issue was raised for the first time on certiorari); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."). Instead, in Weaver, the United States Supreme Court directly confirmed it was doing the *exact opposite* and explicitly stated it was only *assuming* a different standard was applicable for purposes of its analysis in Weaver's individual case. See Weaver, 137 S. Ct. at 1911 ("[Weaver] . . . argues that under a proper interpretation of Strickland, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair. *For the analytical purposes of this cas*e, the Court will *assume* that [Weaver]'s interpretation of Strickland is the correct one. In light of the Court's ultimate holding, however, the Court *need not decide that question here*." (emphasis added)). Accordingly, the standard applicable in McMillan's case remains—just as the post-conviction relief judge recognized and McMillan previously acknowledged—the Strickland standard that has traditionally been applied in South Carolina and elsewhere throughout the nation. See Richter, 562 U.S. at 111 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the result would have been different." (citations and internal quotations omitted)); Williams, 363 S.C. at 343, 611 S.E.2d at 233 ("A PCR applicant claiming trial counsel rendered ineffective assistance must demonstrate that (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different."); cf. Ramirez v. State, 212 A.3d 363, 390 (Md. 2019) (concluding Ramirez—"like most petitioners who allege ineffective assistance of counsel"—had the burden of proving his counsel's deficient performance, which resulted in a juror being seated who directly indicated his past experience as a crime victim would affect his ability to fairly and impartially decide Ramirez's case, resulted in prejudice and finding Ramirez failed to meet that burden because he failed to show a significant possibility the verdict was affected by his counsel's conduct).

conceivable." Richter, 562 U.S. at 112 (emphasis added); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In the case at bar, McMillan failed to meet his burden of establishing defense counsel's performance during the voir dire process fell below the prevailing standard of professional norms. Critically, looking to the trial record, defense counsel *did* request the trial judge ask some additional questions during voir dire beyond the statutorily-mandated questions, and, thus, defense counsel took strategic steps to elicit information about the prospective jurors beyond the information that would have otherwise been elicited through the trial judge's required standard questioning.[12] See S.C. Code Ann. § 14-7-1020 (requiring a trial judge—upon request by either party—to question prospective jurors to determine whether any of them: (1) is related to either party; (2) has any interest in the cause; (3) has expressed or formed any opinions; and (4) is sensible of any bias or prejudice therein); see also Richter, 562 U.S. at 106 ("Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach."); Strickland, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."). Furthermore, although defense counsel did not specifically ask the trial judge to additionally question the prospective jurors about their spouses' potential connections to law

[12] Although McMillan's defense counsel did, in fact, seek for the trial judge to ask some additional questions of the prospective jurors during voir dire, the failure to do so is *not* something that invariably or automatically establishes deficient performance. See Goodspeed v. State, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) ("Despite the court of appeals's characterization of counsel's conduct as 'no assistance,' we cannot conclude that the failure to ask any questions in voir dire constitutes conduct so outrageous that no competent attorney would have engaged in it." (emphasis added)).

enforcement, defense counsel did not have a compelling reason to do so *at that time* in light of the fact he had already reviewed information compiled by the clerk of court's office covering that particular topic and—by his own admission—had not seen anything in the compiled information suggesting any of the jurors were married to law enforcement officers.[13] See State v. Koon, 278 S.C. 528, 532, 298 S.E.2d 769, 771 (1982) (explaining lengthy and superfluous voir dire should be avoided), overruled on other grounds by Skipper v. South Carolina, 476 U.S. 1 (1986); see also State v. Gulledge, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982) ("Solely because a juror is related by blood or marriage to a police officer or deputy sheriff does not automatically disqualify the juror[.]"); cf. Rompilla v. Beard, 545 U.S. 374, 389 (2005) ("Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, *when a lawyer truly has reason to doubt there is any needle there*." (emphasis added)). Accordingly, as defense counsel had already received and reviewed what appeared to be reliable information about the occupations of the prospective jurors' spouses, defense counsel's failure to propose an additional voir dire question on that peripheral subject to a trial judge with no absolute obligation whatsoever to ask such a question was simply not evidence of unreasonable representation falling below the objective standard of professional norms.[14] See Richter, 562 U.S. at 110 ("Just as there is no expectation that competent counsel

[13] Notably, during the post-conviction relief proceedings, defense counsel explained it was the "norm" at the time of McMillan's trial for attorneys to do just as he did and obtain the compiled list of juror information from the clerk of court's office. (R. p. 819).

[14] Importantly, McMillan's defense counsel *did* actually review the juror information, which was incomplete solely due to a mistake on the part of a clerk of court's office employee, and, therefore, the situation in McMillan's case was very different from one in which counsel simply failed to adequately review available juror information containing pertinent details. Cf. State v. Lamere, 112 P.3d 1005, 1011-1012 (Mont. 2005) (finding counsel to be deficient because counsel failed to take notice of information actually contained in a juror questionnaire indicating one of the prospective juror's daughter was working for the prosecuting agency at the time of

will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or *for failing to prepare for what appear to be remote possibilities*." (emphasis added)); see also State v. Britt, 237 S.C. 293, 305, 117 S.E.2d 379, 385 (1960) ("[A]fter the statutory questions have been asked and answered, any further examination of a juror on voir dire must be left to the discretion of the trial Judge, which is subject to review only for abuse thereof. . . . [T]he scope and limit of the interrogation of a juror on voir dire is within the sound discretion of the trial Judge, and it is for him to determine the character of the questions proposed, and when the examination shall end."), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); cf. Mu'Min v. Virginia, 500 U.S. 415, 425-426 (1991) ("Questions about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial. To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."). Moreover, when the information about the juror's husband's employment was later discovered during trial, defense counsel immediately took steps that *could* have resulted in the juror being removed from the jury, and, through those steps, defense counsel was able to preserve McMillan's objection to the juror for appellate review.[15] See State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 246 (2014) ("[I]f a juror's nondisclosure is unintentional, the trial court may exercise its discretion in

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trial and, based on that oversight, failed to effectively examine that juror about potential bias), abrogated on other grounds by Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899 (2017).

[15] Significantly, McMillan's convictions were affirmed on appeal due to the fact Juror # 102 did not intentionally fail to disclose any information related to her husband and, therefore, nothing suggested she was not fair and impartial. See State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002) (recognizing a new trial is only warranted when the trial judge finds a juror intentionally concealed material information); see also Coaxum, 410 S.C. at 330, 764 S.E.2d at 247 ("[A]s we have previously stated, a new trial is *required* only when the court finds the juror *intentionally* concealed the information[.]" (citations and internal quotations omitted)).

determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial."). As a result, McMillan failed to meet his burden of establishing defense counsel's representation was constitutionally deficient and fell below a level of reasonable competence. See Commonwealth v. Slocum, 559 A.2d 50, 56 (Pa. Super. Ct. 1989) ("Like cross-examination, the conduct of voir dire is primarily a matter of individual style and highly subjective tactics; counsel's decisions regarding either will rarely give rise to a legitimate claim of ineffective assistance of counsel."); see also Richter, 562 U.S. at 105 ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' *not whether it deviated from best practices or most common custom*." (emphasis added and citation omitted)); Bell v. Cone, 535 U.S. 685, 702 (2002) ("[A] court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable *in the harsh light of hindsight*." (emphasis added)).

Likewise, notwithstanding McMillan's failure to establish deficiency on the part of defense counsel, McMillan additionally failed to establish he suffered any actual prejudice as a result of defense counsel's performance during trial. Initially, McMillan did not present any evidence establishing the trial judge—who was under no specific obligation to directly question the prospective jurors about their family member's occupations during the voir dire process—would, in fact, have asked the question McMillan now contends should have been asked if it had been proposed by defense counsel, and, thus, McMillan failed to show defense counsel's failure to propose the additional questioning during voir dire would have altered the manner in which voir dire was actually conducted. See Wall v. Keels, 331 S.C. 310, 318, 501 S.E.2d 754, 757 (Ct. App. 1998) ("[A]s a general rule, the trial court is not required to ask all voir dire questions

submitted by the attorneys."); see also State v. Neeley, 271 S.C. 33, 37, 244 S.E.2d 522, 525 (1978) ("Having asked the statutory questions, any further examination was in the trial judge's discretion."); cf. United States v. Muldoon, 931 F.2d 282, 286-287 (4th Cir. 1991) (concluding the district court judge's *refusal* of defense counsel's request to conduct voir dire concerning "whether any member of the panel or their close relatives worked for the FBI, IRS, United States Attorney, Commonwealth's Attorney, or any other investigative agency" did not constitute an abuse of discretion because it did not hinder Muldoon's opportunity to make reasonable use of his peremptory challenges in light of the other voir dire questioning conducted, which included "the usual questions about knowledge of the case, acquaintance with counsel, and bias or prejudice"). Additionally, outside of rank speculation, McMillan did not present anything to establish Juror # 102 was *not* fair and impartial, and, as a result, McMillan did not—and could not—show his right to a fair trial by a fair and impartial jury was adversely impacted by defense counsel's representation during voir dire. See State v. Stanko, 376 S.C. 571, 576, 658 S.E.2d 94, 96-97 (2008) ("While . . . a defendant [has] the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury."); State v. Evins, 373 S.C. 404, 416, 645 S.E.2d 904, 910 (2007) ("[A] defendant has no right to trial by a particular jury."); cf. White v. Dingle, 757 F.3d 750, 755 (8th Cir. 2014) ("White asserts that he was 'prejudiced by counsel's errors' because there 'is a strong possibility that the jury foreperson was biased because of her relationship to the surviving victim's roommate.' As the district court found, there is no direct evidence of bias. His speculation of prejudice is without evidentiary support."); State v. Rose, 202 P.3d 749, 767 (Mont. 2009) ("There is nothing in the record that indicates this juror held any bias or prejudice. She had, years before, worked as a temporary employee in the county attorney's office and was also acquainted with the defendant's family. These facts do not

indicate a bias or a prejudice. When there is nothing in the record to indicate a potential juror is biased, this Court does not presume she harbors a bias or prejudice. . . . As there is no record this particular juror had any bias or prejudice, we conclude counsel's assistance did not fall below an objective standard of reasonableness measured under prevailing professional norms under the surrounding circumstances." (citation omitted)). In fact, instead of presenting actual evidence of bias, McMillan *conceded* during the post-conviction relief proceedings Juror # 102 did everything she was supposed to do without engaging in any misconduct, which meant—just as the trial judge, this Court, and the post-conviction relief judge have found at different points—there was no legitimate basis upon which to infer she was biased or partial.[16] See State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, 378 (2004) ("Because [the juror]'s concealment was unintentional our inquiry is over[.]"); Woods, 345 S.C. at 589, 550 S.E.2d at 285 ("[W]here the failure to disclose is innocent, no inference of bias can be drawn."); see also Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) ("In determining whether a PCR applicant has established prejudice, the PCR court does not act as a finder of fact and substitute its judgment for that of the trial court."); cf. Hanna v. Ishee, 694 F.3d 596, 617 (6th Cir. 2012) (concluding the petitioner could not meet his burden of establishing the prejudice needed to support a valid claim of constitutional ineffective assistance of counsel because—even assuming the petitioner's counsel was deficient for allowing a convicted felon to be seated on the jury by

[16] Critically, since both the trial judge and this Court have already found nothing suggested Juror # 102 was not fair and impartial, the issue of Juror # 102's competency to fairly serve on the jury could not properly be relitigated through a subsequent post-conviction relief claim absent some new evidence demonstrating bias or partiality on the part of the juror. See Arizona v. California, 460 U.S. 605, 618 (1983) (explaining the law-of-the-case doctrine is a doctrine based on the idea a court's decision upon a rule of law reached in a case "should continue to govern the same issues in subsequent stages in the same case"); cf. McLaughlin v. State, 352 S.C. 476, 485, 575 S.E.2d 841, 845 (2003) ("[T]he merits of these issues have already been determined in respondent's direct appeal and the PCR court erred by granting respondent relief on these grounds.").

failing to request sufficient voir dire—the petitioner failed to establish the juror harbored any actual bias in light of the juror's statements and responses indicating he could be fair and impartial); State v. Ivey, 331 S.C. 118, 122-123, 502 S.E.2d 92, 94 (1998) ("The trial judge properly inquired into the effect Juror Young's knowledge of 'Fletch' would have on her ability to be fair and impartial. Juror Young unequivocally stated her knowledge of 'Fletch' would have no effect on her ability to render an impartial verdict. The trial judge did not abuse his discretion in allowing Juror Young to remain on the jury."); State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) ("We find no error in the judge's decision not to remove the juror. First, the fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror. Second, the juror did not conceal any information requested during voir dire. Finally, the judge acted within his discretion in finding the juror could be fair and impartial." (citations and footnote omitted)). Accordingly, McMillan did not satisfy his burden of establishing there was a substantial likelihood the outcome of his trial would have been different had one of the fair and impartial jurors who collectively decided his case been replaced with a different fair and impartial juror, which meant his claim of ineffective assistance of counsel necessarily had to fail.[17] See Strickland, 466 U.S. at 700 ("Failure to make the

[17] In seeking a reversal of the post-conviction relief judge's ruling, McMillan appears to suggest the relevant inquiry should involve an independent analysis of whether the fundamental fairness of the trial was undermined by defense counsel's actions during voir dire while maintaining the deficiency that supposedly occurred in his case was one that rendered the proceedings fundamentally unfair. (Pet. Br. pp. 15-16; p. 21; p. 23). Importantly though, the availability of peremptory challenges is not something that is constitutionally required in order for a jury to be considered impartial or a trial to be considered fair. See Rivera v. Illinois, 556 U.S. 148, 153 (2009) (explaining "[s]tates may withhold peremptory challenges altogether without impairing the constitutional guarantee of an impartial jury and a fair trial"); United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000) ("[Peremptory] challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension."); Georgia v. McCollum, 505 U.S. 42, 57 (1992) ("[P]eremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-

required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); cf. Gardner v. Ozmint, 511 F.3d 420, 426 (4th Cir. 2007) ("The PCR court . . . determined that removal of this juror would not have changed the outcome of the case. The record provides equally strong support for this finding. The trial transcript offers *no* evidence that counsel's actions resulted in the seating of a juror biased or otherwise prejudiced against Gardner. The juror in question unequivocally told the trial judge at voir dire that she could decide the case based solely on the evidence presented in court, that she held no bias for or against either party, and that she would give both sides a fair and impartial trial. Moreover, in the post-conviction hearing, Gardner failed to offer any evidence of asserted prejudice resulting from the juror's service. He simply averred then, as he does before us now, that the participation of a biased juror is presumptively prejudicial. Because we hold that the state court did not err in

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created means to the constitutional end of an impartial jury and a fair trial. This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."); Green v. Maynard, 349 S.C. 535, 542, 564 S.E.2d 83, 86 (2002) ("We have repeatedly stated that peremptory strikes implicate no constitutional right."). In light of that, our Supreme Court has concluded a criminal defendant being erroneously forced to use a peremptory strike was not something that constituted a violation of any constitutional rights or resulted in a denial of fundamental fairness. Green, 349 S.C. at 543, 564 S.E.2d at 87. Similarly and more recently, the United States Supreme Court *unanimously* concluded a trial judge's erroneous refusal to permit Rivera's defense counsel to exercise a peremptory challenge on one of the jurors who ended up serving on the jury neither mandated reversal nor deprived Rivera of his constitutional right to a fair trial. Rivera, 556 U.S. at 153. Accordingly, since nothing suggested the jurors who actually decided McMillan's case were anything other than fair and impartial, the fundamental fairness of McMillan's trial was not jeopardized by defense counsel's decisions regarding what supplemental questioning to propose during the voir dire process even assuming those decisions—with the benefit of hindsight—may have altered the manner in which the parties might have exercised their peremptory strikes. Cf. Smith v. State, 375 S.C. 507, 520, 654 S.E.2d 523, 530 (2007) (concluding Smith's due process right to a fair and impartial jury was not violated even though his defense counsel's purported failure to propose proper questioning during voir dire resulted in an individual being seated on the jury who had previously been incarcerated with Smith at a detention center, alerted the other jurors of being incarcerated with Smith, and may have had urine thrown onto him by Smith during that period of incarceration), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

concluding that the juror was not biased, Gardner's presumptive prejudice argument must fail." (footnote omitted)).

Because defense counsel's failure to propose additional questioning during voir dire on a peripheral matter that only proved to be pertinent based on information later discovered during trial did not constitute objectively unreasonable representation falling below a standard of professional norms and because McMillan did not suffer any prejudice as a result of the challenged—but nonetheless fair and impartial—juror's service on the jury, the post-conviction relief judge correctly concluded McMillan failed to meet his required burden of establishing both deficiency and prejudice, and her ruling was neither unsupported by the evidence appearing in the record nor clearly erroneous. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (instructing a post-conviction relief judge's factual finding will be upheld if supported by any evidence and a post-conviction relief's judge's decisions will only be reversed where controlled by an error of law); cf. Fields v. Brown, 503 F.3d 755, 776 (9th Cir. 2007) ("Fields alleges that his counsel was ineffective in failing to question [a juror] during voir dire about the attack on his wife or about his ability to serve impartially. . . . Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Here there is no such reasonable probability, because [the juror] was not biased. The impartiality of the jury was not undermined by his being seated as a juror. Replacement of one unbiased juror with another unbiased juror should not alter the outcome." (citations and internal quotations omitted)); Smith v. State, 375 S.C. 507, 520, 654 S.E.2d 523, 530 (2007) (affirming the post-conviction relief judge's conclusion Smith failed to establish he was prejudiced by his counsel's allegedly deficient act of "not requesting appropriate voir dire questions" because any purported error in that regard "did not result in a violation of [Smith]'s right to a fair and impartial jury"),

abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Accordingly, McMillan's application for post-conviction relief was properly denied and dismissed. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (explaining a petitioner must prove defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability the result at trial would have been different but for counsel's conduct in order to be entitled to post-conviction relief). The post-conviction relief judge's order denying McMillan's application for post-conviction relief should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

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May 18, 2021