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**May 28 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

The Honorable Diane S. Goodstein

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Appellate Case Number: 2018-000970

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Antwan McMillan,.....Petitioner

v.

State of South Carolina, ..... Respondent

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REPLY BRIEF OF PETITIONER

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### Constitutional Provisions and Statutes

None

### Other Authority

None

## 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, 1. 15-16. Thereafter, the trial court individually examined the juror<sup>1</sup> and, finding no bias, allowed her to remain over the objections of Petitioner's trial counsel. Appendix, p. 231, 1. 2- p. 243 , 1. 17.

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

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<sup>1</sup>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 soldier 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 identify 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. Appendix, p. 872-873.

Petitioner filed his Opening Brief on February 16, 2021. The State filed its Brief in response on May 18, 2021. This Reply Brief of Petitioner follows.<sup>2</sup>

### 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

Even though the State argues that the law concerning juror concealment applies to Petitioner’s argument and that peremptory challenges are not constitutionally required, Petitioner’s trial counsel was ineffective when his deficient *voir dire* prevented the meaningful exercise of his peremptory challenges.

In its brief, the State argues that an accused is only constitutionally entitled to a fair and impartial jury and that peremptory challenges are not constitutionally required. The State also argues that an accused must demonstrate impartiality to prove prejudice from trial counsel’s deficient *voir dire*. However, the State’s arguments misstate the law concerning ineffective assistance of counsel (IAC) claims during *voir dire*.

The analysis of the effectiveness of counsel’ performance in the *voir dire* process and the use of peremptory strikes is governed by the standard espoused in *Strickland v. Washington*, 466

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<sup>2</sup>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.

U.S. 668 (1984). As *Strickland* indicated, all claims of IAC must involve a discussion of deficiency of performance and resulting prejudice. The prejudice prong can be proven by evidence of the likelihood the deficiency affected the outcome or through presumed prejudice. *Strickland*, at 694.

Even though the availability of peremptory strikes and the procedure for *voir dire* are matters primarily determined by state law or statute, the effective assistance of counsel during this procedural step is of constitutional dimension. See *Montana v Lamere*, 112 P3d 1005 (MT 2005) abrogated as to the prejudice analysis by *Weaver v MA*, — US —, 137 S Ct. 1899 (2017) and *Goodspeed v Texas*, 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)).

The US Supreme Court, in *Weaver v Massachusetts*, explained that the *Strickland* prejudice analysis may also be impacted by the structural nature of the error caused by the deficient performance. *Weaver v Massachusetts*, - US - , 137 S Ct 1899 (2017). In such cases, *Weaver* indicated a presumption of prejudice would be improper. However, *Weaver* indicated that a structural error affecting fundamental fairness, standing alone, may suffice to demonstrate *Strickland* prejudice without further need to show the likelihood of a different outcome. *Weaver*, at 1913.

Because trial counsel's *voir dire* concealed material and salient information rendering his peremptory challenge decision during the selection of Juror 102 meaningless, his performance was deficient. Because Juror 102 was not disinterested but was still seated on the jury, the Petitioner was prejudiced by this deficiency. Because the ultimate impact of the deficiency,

beyond the seating of the juror who would have been struck, is difficult to determine, the error is a structural error affecting the fundamental fairness of the proceeding.

The PCR court erred in determining otherwise based upon the erroneous application of law.

### **Deficient Performance in the Conduct of *Voir Dire***

While the State argues that trial counsel's performance can not be deficient if an accused is tried by an impartial jury, courts recognize that trial counsel's meaningless *voir dire* which impairs the intelligent use of peremptory challenges falls below a reasonable standard of performance. While the State argues an accused is only entitled to an impartial jury, an accused is also entitled to a jury selected following the intelligent use of peremptory strikes based, in part, upon information gleaned through *voir dire*. Petitioner's trial counsel performance was deficient because he failed to learn information during *voir dire* that would have allowed his meaningful use of a peremptory challenge as to Juror 102.

The federal courts indicate that the "meaningful" exercise of whatever peremptory challenges are available is of constitutional dynamic. *US v Rucker*, 557 F.2d 1046 (4<sup>th</sup> Cir. 1977). The *Rucker* Court indicated that the "meaningful" exercise of peremptory challenges required *voir dire* which reveals "salient information." The *Rucker* opinion also indicated that the goal of counsel engaging in the "meaningful" exercise of peremptory challenges is the selection of "a competent and disinterested jury." In a direct appeal setting, *voir dire* which impaired a defendant's ability to intelligently exercise his peremptory challenges is grounds for reversal, irrespective of prejudice. *Rucker*, at 1048-1049 (internal citation omitted).

State courts have held that *voir dire* which impaired the intelligent use of peremptory

strikes constituted deficient performance when the seated juror was related to members of law enforcement or the prosecution.

In *Montana v Lemere*, the Montana Court found trial counsel's performance during *voir dire* was deficient because he failed to learn of a juror's relationship with a prosecution's employee. The *Lamere* opinion recognized a duty of trial counsel to adequately question during *voir dire* and to "develop information in the record" and an "obligation to read the juror questionnaire forms" to enable the intelligent exercise of peremptory challenges. *Lamere*, at 1011- 1012. While *Lamere's* holding concerning the prejudice prong analysis was abrogated by the *Weaver opinion*, the US Supreme Court expressed no criticism of the finding of deficiency in this setting or the finding that the error was structural. *Weaver*, at 1907.

In the lower appellate *Goodspeed* opinion, the Texas 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. The higher *Goodspeed* Court remanded the case to determine whether the failure was part of trial strategy but noted dicta from a previous case indicating that "defense counsel has an 'obligation' to ask questions." *Goodspeed*, at 393 (internal citations omitted).

In *Ramirez v Maryland*, the Maryland Court of Appeals 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. 212 A3d 363, at 368-369. Later, the *Ramirez* Court 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.

Petitioner’s trial counsel failed to ask a reasonable *voir dire* question or read the actual juror questionnaires<sup>3</sup>. He noted his own deficiency. Appendix, p. 809, l. 9-16. When trial counsel complained about the seating of the jury, the trial court noted this deficiency and when direct appeal counsel appealed this, the Court of Appeals also noted the deficiency. Appendix, p. 238, l. 22-24 and p. 781, respectively.

Thus, an attorney’s performance during *voir dire* may fall below an objectively reasonable level of performance and Petitioner’s trial counsel was deficient in this respect.

### **Prejudice from Deficient *Voir Dire***

While the State argues that a prejudice finding concerning deficient *voir dire* would require that a juror be found to be unconstitutionally biased, prejudice can be proven when the deficiency impaired the use of a peremptory challenge because salient information was concealed. This type of error is structural because of the difficulty assessing its impact. Because this type of structural error affects fundamental fairness, a court may consider the structural nature and fundamental unfairness sufficient to prove the prejudice prong even if not presumed.

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<sup>3</sup>Trial counsel only obtained and read a summary of the questionnaire responses; thus, delegating his duty to review the questionnaires to the clerk’s office.

An error is structural if it “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). Such errors defy harmless error review. *Weaver*, citing *Chapman v California*, 386 US 18, (1967). The structural error doctrine and claims of ineffective assistance of counsel are “intertwined.” *Weaver*, at 1907.

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.* *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*.

In Petitioner’s case, the deficient voir dire resulting in the failure to strike a juror based upon a material factor such as Juror 102's marriage to a coworker of nearly 40% of the State’s witnesses affected the entire framework of the trial. See the lower *Goodspeed* Opinion, at 413 (“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”). It stretches credulity to believe that a defense theory which impugns the integrity of the same agency for which a juror’s spouse works would not fall on deaf ears. See *Lamere*, at 1011 (Noting the “natural inclinations of one whose life is committed to law enforcement” when discussing the importance of adequate voir dire). A trial under such circumstances is fundamentally unfair. See *Lamere*, 112 P3d 1005, at 1013

(Deficient performance during voir dire calls “into question the *fundamental fairness* of the entire proceeding.”)(emphasis added).

Following the logic of *Weaver*, this type of showing could suffice to establish prejudice alone given the flexible nature of the *Strickland* test. However, the PCR court erred in her analysis by also invoking the “overwhelming evidence of guilt doctrine” despite the lack of any conclusive evidence offered by the State. This is further compounded by the fact another juror sat in judgment over Petitioner even though he was statutorily disqualified because of his conviction resulting from representation by the same attorneys pleading Petitioner’s case.

Thus, the prejudice analysis concerning deficient voir dire should be examined with a flexible instead of mechanical approach. This deficiency should be deemed structural. And because this type of structural error affects fundamental fairness, Petitioner has demonstrated 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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