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Subject: Vernard Mathis v. State; Appellate Case No: 2018-000779
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Computer issues have prevented me from accessing my saved Petition for Rehearing which is due for filing today. Rather than risk filing this important pleading in time, I am submitting the body of the Petition for Rehearing En Banc from another device. I will ask for leave of Court to submit a properly formatted version tomorrow after I get my computer fixed and will provide the Court proof of this network problem.

In the South Carolina Court of Appeals

Vernard Jerome Mathis, Petitioner,

v.

State of South Carolina, Respondent

Appellate Case No. 2018-000779

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Oct 14 2021
SC Court of Appeals

PETITION FOR REHEARING
AND
REHEARING EN BANC

Now comes the Petitioner, acting by and through undersigned counsel, petitioning this Honorable Court for rehearing pursuant to rule 221, SCACR. Petitioner seeks rehearing en banc pursuant to rule 219 (a), SCACR, and as much as the questions involved in this post-conviction relief appeal are of exceptional importance. Rule 219 (a). Petitioner asserts that the issues involved in this particular Post-Conviction Appeal directly impact the integrity of our jury system and that the evidence adduced in the lower court established a violation of Petitioner's fundamental right to a fair trial by jury and due process of law as protected by the Sixth and Fourteenth Amendments to the United States Constitution. This case was decided by this Honorable Court by way of its Order dated September 29, 2021. In said Order, this Honorable Court stated simply that, based on the vote of the panel, the Petition for Writ of Certiorari was denied. That ruling makes it very difficult for Petitioner to outline what particular points may have been overlooked or misapprehension by the Court in its decision to deny certiorari in this matter. What follows is Petitioner's attempt to articulate the issues which he respectfully submits may have been overlooked or misapprehended by this Honorable Court in denying Petitioner's Certiorari Petition and thereby denying him the opportunity to brief the important issues addressed in his case.

Counsel would submit that in her forty-two years as a practicing appellate lawyer in South Carolina she has seen few cases of the significance of the one before the Court in this case as it regards the right to trial by an unbiased and untainted jury.

In beseeching this Honorable Court to grant Rehearing En Banc, Petitioner asks the Court to Reconsider its decision in light of the following.

This case was decided by the lower court on the basis of a finding that Petitioner's claim was not timely filed. His arguments with regard to that position are addressed in great detail in the petition for writ of certiorari filed in this

matter. Prior to the evidentiary hearing held in this matter, before the Honorable Brian M. Gibbons, presiding circuit judge, counsel for Respondent had conceded the issue of the timeliness of this Application. Following a change of counsel within the Office of the Attorney General, before the evidentiary hearing was held in this matter, the Respondent asserted that while the claim would be timely if based on the date the Petitioner discovered the issues addressed in his current post-conviction relief action, they could have been raised in petitioner's original post conviction relief action. As addressed at length in the petition for writ of certiorari in this matter, petitioner has respectfully inserted the mile trial counsel's failure to request a voir dire question concerning whether any member of the jury panel had previously been employed in the field of law-enforcement, he could not have met the prejudice prong of the Strickland v. Washington, 466 U.S. 668 (1984), standard without conducting a full background check on all the members of his jury. Petitioner noted, that placing the burden on the Petitioner in a post-conviction relief action to conduct such background searches on all the members of their jury would place an undue burden on the resources of a Post-Conviction Relief applicant. Moreover, since the vast majority of post-conviction relief cases are handled by court-appointed attorneys, such a requirement would place an enormous burden on the resources allocated for indigent applicants for collateral review through the uniform Post-Conviction Relief Procedure Act, S. C. Code Section 17-27-10, et seq. Petition argues that the cases where an applicant becomes aware of such an issue are relatively rare and present a need for review and should be considered timely upon the discovery of evidence of juror misconduct and/or prosecutorial misconduct.

Petitioner would note that the juror in question in this case not only had a history of more than two decades employed in the field of law-enforcement, but as outlined at length in his petition for writ of certiorari, he had spent his career in law-enforcement in the region where this case was tried. He had at various stages in his career worked for a law enforcement agencies whose cases were in fact prosecuted by the very Solicitor's office that prosecuted the Petitioner.

Petitioner wishes the Court to take particular note of the fact that the testimony of the juror in question during the evidentiary hearing held in this matter demonstrated his lack of credibility and veracity with the court. The inconsistencies between his sworn statements in the depositions taken in this matter, as compared with his testimony at the evidentiary hearing held in this PCR case, leave no doubt that his testimony was not credible and that he was not forthcoming, to say the very least, with the lower court. He denied hearing crucial voir dire questions issued by the court during the jury selection process. He initially misrepresented how many witnesses he knew who testified in this case. Finally, it should be noted that this juror, the foreman in Petitioner's case, lied to the PCR judge in this case when he denied having reviewed his earlier deposition in preparation for his testimony. Once again, The circumstances surrounding that issue are detailed in the Petition for Writ of Certiorari filed in this matter.

Perhaps most disturbing about this case, is the fact that the juror in question admitted calling the Solicitor's Office to discuss his upcoming jury service. Petitioner has proven that although this juror would not admit recalling exactly who he spoke with, he asked to speak to the head Solicitor. He consistently referenced the person with whom he spoke as a man. Petition proved, as the record below confirms, that the only men employed in that office at the time were male attorneys and a male investigator. He referenced Solicitor Justice as the person in charge at that office and testified that at the time he called, he needed to get out of jury service because of his new employment. As outlined in detail in the petition for writ of certiorari, in his deposition, he had previously denied calling for the purpose of getting out of jury service and indicated that he simply thought no defense attorney would want him on their jury once they found out about his law-enforcement career. He then, after that conversation, to avoid using every opportunity given to him to reveal his knowledge of law enforcement officers involved in this case and his own lengthy law enforcement career. Despite his claim at the PCR hearing that he really needed to get out of jury service if possible because he had just started a new job, he avoided answering questions which clearly would have gotten him out of jury service. The fact that he knew that fact is highlighted by his admission that he called the Solicitor's Office because he knew no [defense] lawyer would want him on their jury once they knew his background in law enforcement. He admitted that he didn't make any attempt to talk to anyone in the Clerk Of Court's office, nor did he make any attempt to call defense counsel in the cases on the roster for that term of court.

Perhaps the single most alarming thing about this matter has far broader implications than just the Petitioner's individual case. The former Deputy Solicitor for that circuit, Doug Barfield, testified at this post-conviction relief hearing and admitted, almost casually, that it was a common thing for people who were called for jury duty to call their office and discuss their jury service notice and any problems they had concerning serving. A fair reading of his testimony indicates that he was oblivious to the fact that counsel for the parties is strictly

prohibited from having any contact with potential jurors concerning their upcoming jury service. He denied any recollection of having spoken with this particular juror, but he essentially defended the fact that solicitors in that office routinely talked to jurors summoned for service at an upcoming term of court. Petitioner respectfully submits that if any defense attorney had engaged in such a conversation with someone called for jury service during a term when they had cases likely to be heard that term, it would be considered a very grave matter indeed.

Lastly, although this case was ultimately decided on the question of timeliness, Petitioner feels it important to note that in his previous post-conviction relief action, perfected before he had knowledge of the improper juror conduct in this case, one of the key prosecution witnesses admitted that he had not been truthful in his trial testimony. Although Petitioner acknowledged that he lost his prayer for post-conviction relief in that PCR action, he would note that the ruling was based on the PCR judge's perception of the credibility of this recantation. Were this case to be retried, it would clearly be the function of the jury to determine the credibility of that witness and any other witnesses.

Petitioner is mindful of the fact that Section 14-7-1140, S.C. Code, requires allegations of irregularities in the impaneling of a jury, after a verdict, involve injury by the irregularity. Petitioner would most respectfully submit that he has come as close to proving injury in this case as a criminal defendant is ever likely to be able to come. He submits that he has clearly proven that the juror in question has acted willfully in failing to disclose information to the Petitioner's defense counsel and the Court.

For all the foregoing reasons, Petitioner now most respectfully prays for this Honorable Court to grant reconsideration of its order dated September 29, 2021, denying his petition for writ of certiorari. He beseeches this Court to note, that given the manner in which this case was disposed of, he will be denied access to review of the important issues involved in his case by the Supreme Court of South Carolina. For that reason, he asks at Court to reconsider its decision as reflected in that order and grant him the opportunity for Rehearing En Banc.

Respectfully submitted,

/ Tara D. Shurling
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Sent from my iPhone