

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

TERENCE PASSMORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: August 13, 2018

QUESTION PRESENTED

Whether the presence of a juror who has expressed a belief that the petitioner is guilty rendered his trial unfair and in violation of the Sixth Amendment.

Whether trial counsel were ineffective when they failed to strike Juror Jimison after they were informed that a juror expressed belief that the petitioner was guilty prior to his trial.

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Petitioner, Terence Passmore, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is unpublished but can be accessed at *Passmore v. Fallon*, 722 Fed.Appx. 703 (9th Cir. 2018). The district court's ruling is included in the appendix. (App., *infra*, 5a-35a).

JURISDICTION AND TIMELINESS OF THE PETITION

The judgment of the court of appeals was entered on May 15, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

PRELIMINARY STATEMENT

Petitioner Terence Passmore is serving a total sentence of 35 years imprisonment with five of those years suspended following his conviction on several counts of sexual assault and one count of sexual intercourse without consent. As discussed more fully below, Passmore's trial was infected by a biased juror who falsely stated during *voir dire* that she had not formed an opinion as to his guilt, when in fact she stated to two different persons that she had formulated a belief that he was guilty before she was chosen to serve on the jury in Passmore's criminal case. Passmore's lawyer, although informed during a break in the trial after *voir dire* of the juror's statements regarding his guilt, failed to raise the issue with the trial court.

In *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984), this Court held that a new trial may be granted when there is juror dishonesty during *voir dire* if a party can prove that a juror answered a material question dishonestly, and had that juror answered honestly, it would have warranted a challenge for cause. *McDonough*, 464 U.S. at 556. Prior to

McDonough, courts developed different frameworks to deal with discovery of juror non-disclosure at voir dire, which included an objective standard and an implied-bias standard. *See* Joshua S. Press, *Untruthful Jurors in the Federal Courts: Have We Become Comfortably Numb?*, 21 St. Thomas L. Rev. 253, 266-69 (2009) (explaining different ways federal courts dealt with post-verdict juror non-disclosure prior to *McDonough*). Although *McDonough* provided guidance for analyzing juror dishonesty claims, it did not set any bright-line test to recognize bias. As a result, the lower courts have taken seemingly different approaches to these types of claims.

This case presents an opportunity to resolve the confusion among lower courts. A clear holding requiring a new trial when it is shown that a juror has dishonestly denied bias in a criminal case will provide greater uniformity in the law and help ensure that criminal defendants receive trials that are free from actual or apparent bias.

STATEMENT OF THE CASE

A. Introduction

This is an appeal from the denial of a 28 U.S.C. § 2254 petition. The Petitioner, Terence Passmore, was convicted in the State of Montana of committing multiple sexual offenses against two minor females, C.R. and J.R., in 1998. Passmore pursued both a direct appeal and, without counsel, post-conviction relief. His claims were denied. *See generally, State v. Passmore*, 225 P.3d 1229 (Mont. 2010); *Passmore v. State*, 2013 WL 2644449 (Mont. 2013)(unpublished). In his § 2254 petition he challenged his convictions on several grounds, including juror misconduct/bias and ineffective assistance of counsel. He appeals the denial of his 28 U.S.C. § 2254 petition.

B. Factual Background

Passmore is a naturalized United States citizen who was born in Johannesburg, South Africa, in 1958. He was ordained in Tifton, Georgia, as a Church of God minister and, in March of 1997, he and his wife, Erika, and infant daughter, Natalie, moved to Livingston, Montana, where he became pastor of the New Beginning Church of God. C.R. and J.R., together with their parents, Edwin and D'Dea, began attending the New Beginning Church of God in the summer of 1998. At the time, C.R. was eleven years old. J.R. was thirteen years old.

Shortly after joining New Beginning, C.R. and, to a lesser extent, J.R. began spending time around the church doing odd chores. Assisted by members of the congregation, Passmore spent much of the summer repairing and constructing buildings on the church property. C.R., in particular, seemed to enjoy being around the Passmores and the church members who were working on the various projects. She frequently spent time at the church during July and August of 1998.

A number of church members worked with Passmore on the construction projects during the summer of 1998. Several church members were around on an almost daily basis assisting with the projects. C.R. helped paint some of the buildings. J.R. sometimes helped with the yard work.

Erika met C.R. for the first time on July 7, 1998, a day after she returned from visiting her family in Georgia. Several church members were working with Passmore that day and C.R. wanted to help. About ten days after Erika and Natalie returned from Georgia, the church youth group went to a water slide in Big Timber, Montana. Over a dozen church members attended the outing. Passmore, who led the youth group, attended with Erika and Natalie. The group also included C.R., J.R. and their parents.

In December of 1998, the church youth group went to Chico Hot Springs, a resort just north of Yellowstone National Park. A number of church members attended the outing. The group included, among others, Passmore and C.R., J.R. and their parents. The day after the Chico Hot Springs outing, C.R.'s and J.R.'s father, Edwin, contacted Ron Countryman, a minister of the Church of God, and reported that Passmore had sexually abused C.R. and J.R. Countryman contacted Jake Popejoy, the regional overseer of the Church of God in Montana. Popejoy reacted promptly by traveling to Montana from Cleveland, Tennessee, to meet with C.R. and J.R. at their home in Livingston. He was accompanied by Ray Alexander, a pastor of the Church of God in Minot, North Dakota.

When Popejoy and Alexander arrived in Montana, they met with C.R., J.R., Edwin, and D'Dea. D'Dea gave Popejoy a written statement describing the allegations made by her daughters. Popejoy and Alexander spoke with C.R., J.R. and D'Dea for over an hour. They also obtained written statements from C.R. and J.R.

During their interviews and in their written statements, C.R. and J.R. stated that Passmore had touched them inappropriately on a number of occasions. They stated that the abuse occurred on the church grounds, at the Big Sky Water Slide, and at Chico Hot Springs. Popejoy specifically asked both girls whether Passmore ever "touched their skin on their private parts?" Both responded that he did not touch them on the skin, only through the clothing. Before leaving Livingston, Popejoy and Alexander met with Passmore, who denied any sexual contact with the girls.

On December 22, 1998, Popejoy convened an ecclesiastical tribunal or trial to consider C.R.'s and J.R.'s allegations. The tribunal was held pursuant to the edicts and doctrine set forth in the Church of God "Minutes." It was presided over by Popejoy and two Church of God

ministers, Wayne Chant and Glen Sayler, collectively, the “Trial Board.” Glen Sayler acted as the recording secretary of the tribunal. In that capacity, he took detailed notes of the proceedings. A number of witnesses testified at the tribunal and/or were interviewed. They included C.R., J.R. and D’Dea, Passmore and Erika, and others who spent time around the church or had knowledge of the alleged instances of abuse.

Two weeks later, the Trial Board issued a written decision finding the evidence against Passmore “inconclusive.” It unanimously concluded that there was inadequate evidence “from an ecclesiastical point of view” to find him guilty of “unbecoming” conduct. After the Trial Board issued its decision, Passmore and his family relocated to Georgia. Although the Trial Board explicitly recommended that he continue in the ministry, Passmore eventually decided to leave the pulpit.

Several years later, C.R. and J.R., together with their parents, decided to file a lawsuit against the Church of God. Eventually, they found a lawyer, Mark Hartwig, who was willing to take their case. On April 12, 2005, Hartwig filed a complaint against, among others, Passmore, Popejoy, Sayler, Chant, and the Church of God seeking 3.7 million dollars in damages on behalf of C.R., J.R., Edwin, and D’Dea.

After the lawsuit was filed, Hartwig approached the Park County Attorney, Tara Depuy, and suggested that she file criminal charges against Passmore. As a result of this discussion, Edwin met with Michelle Morris, a detective from the Livingston police department. Edwin testified that Morris told him it was “too late” to file charges and refused to investigate the allegations against Passmore. Morris unequivocally denied that she told anyone that it was too late to file charges. She testified that charges were not pursued because C.R. and J.R. were unwilling to cooperate with law enforcement.

After Depuy left office, Hartwig approached Depuy's successor, Brett Linneweber. After charges were filed, Linneweber asked the Montana Attorney General to take over. Linneweber had previous contacts with C.R. – he had prosecuted her and sued her civilly in small claims court – that he believed would adversely affect his ability to prosecute the case against Passmore.

During the civil litigation, a number of witnesses were deposed. They included C.R., J.R., D'Dea and Edwin, Jake Popejoy, and Wayne Chant. The Church of God and its employees eventually settled for a relatively small sum and the lawsuit was dismissed. Passmore refused to join the settlement.

C. Petitioner's Trial and Direct Appeal

The State filed charges against Passmore in April of 2006. A year later, in April of 2007, it filed an amended information charging him with two counts of sexual intercourse without consent and six counts of sexual assault.

Counts I-III alleged offenses against C.R. during the summer and winter of 1998. Count I alleged that Passmore sexually assaulted C.R. between May 1 and December 9, 1998 in the parsonage and in a shed on the church grounds. Count II charged Passmore with sexual intercourse without consent on or about July 1, 1998. This offense allegedly occurred in the church sanctuary. Count III alleged that Passmore committed the offense of sexual assault on or about July 15, 1998, at the Big Timber Water Slide. The charges alleged in Counts IV and V involved J.R. Count IV alleged that Passmore assaulted J.R. on or about July 15, 1998, at the Big Timber Water Slide. Count V alleged that he sexually assaulted her at Chico Hot Springs on or about December 10,

1998. The remaining three charges alleged offenses against a separate female, A.M., who was a good friend of J.R.¹

Passmore's trial began on November 26, 2007. Following jury selection, one of Passmore's former congregants, George Denton informed Watson, that he knew one of the potential jurors, Dixie Jimison. Denton told Watson about a conversation he had with Jimison several years earlier, when he was in the checkout line at a local box store, where Jimison worked as a checker. Denton stated that during that conversation, Jimison said that "she just knew that [Passmore] was guilty." Passmore's attorney failed to notify the court of Denton's information or otherwise seek her removal from the jury. Jimison sat on the jury at Passmore's trial.

After a seven day trial, Passmore was convicted of the charges in Counts I, II, VII, and VIII. He was acquitted of all of the charges involving A.M. and of Count III, which alleged sexual assault against C.R. at the Big Timber Water Slide. On April 4, 2008, he was sentenced to a term of ten years with five suspended on each of the sexual assault counts and 35 years with five years suspended on the sexual intercourse without consent count. Each of the sentences were ordered to run concurrent with one another. Passmore filed a timely appeal but the Montana Supreme Court rejected his arguments and affirmed his convictions. *State v. Passmore*, 225 P.3d 1229 (Mont. 2010).

¹ Passmore was acquitted of all charges involving A.M.; therefore her allegations are not detailed in this petition.

D. State Post-Conviction Proceedings

Passmore filed a timely petition for post-conviction relief in the trial court.² He raised a number of issues, not all of which were presented for federal review. For present purposes, it is enough to say that Passmore raised the following claims – (a) juror misconduct in that Juror Dixie Jimison falsely stated that she did not have an opinion about his culpability during voir dire; and (b) ineffective assistance of trial counsel for failing to challenge Jimison after being informed about her statement to George Denton. The trial court denied Passmore’s petition a year and a half after it was filed without holding a hearing and without acknowledging or addressing his juror misconduct claims.

Passmore appealed the district court’s decision to deny his post-conviction petition. But the Montana Supreme Court affirmed in an unpublished opinion, holding:

Passmore argues on appeal the district court improperly failed to address all of the ineffective assistance of counsel claims through a full hearing when it summarily dismissed his petition. Passmore further argues that the court applied the incorrect legal standard when it addressed his claims of ineffective assistance of counsel. Passmore further contends that the district court disregarded his additional claims of juror misconduct . . .

We review for clear error findings made by the district court in the post-conviction relief proceeding. We review for correctness legal conclusions made by the district court when it dismisses a petition for post-conviction relief.

We have determined to decide this case pursuant to Section I, Paragraph 3(d), of our 1996 Internal Operating Rules, as amended in 2006, that provides for memorandum opinions. It is manifest on the face of the briefs and record before us that the district court correctly applied the law to the claims raised by Passmore.

Passmore v. State, 2013 WL 2644449 (Mont. 2013)(unpublished).

² Passmore was not represented by counsel during the post-conviction proceedings. He had been incarcerated since his sentencing in April of 2008, and did not have the funds to hire a lawyer. (Petition, doc. 1 at 3). He was not provided a public defender.

E. Federal Habeas Proceedings

Passmore filed a *pro se* 28 U.S.C. § 2254 petition on September 23, 2013. Following appointment of counsel, he filed an amended petition. After the State filed its answer, the district court authorized the parties to take the depositions of, among other witnesses, Passmore and his trial counsel, Chuck Watson and Gary Balaz, as well as Dixie Jimison, George Denton, and Tammy Haefs, who provided testimony on Passmore's juror misconduct claims.

After the depositions were taken and the parties were given a chance to brief their respective positions, the district court denied and dismissed Passmore's petition. With respect to his juror bias claims, it concluded that Passmore failed to provide any evidence to support a conclusion that "Jimison was unable to render an impartial verdict." (App., *infra*, 28a-31a).

F. Appeal of Federal Habeas Proceedings

The district court determined that the state courts' resolution of Passmore's claims regarding Juror Jimison was not governed by the review provisions of 28 U.S.C. § 2254(d) because the adjudication of those claims was based on an unreasonable determination of the facts. (App., *infra*, 7a). The Ninth Circuit disagreed with this assessment. In rejecting Passmore's juror bias claims, it held:

The state court's rejections of Passmore's claims that his due process and effective assistance of counsel rights were violated due to the presence of Dixie Jimison on the jury was not an unreasonable application of Supreme Court precedent. It is irrelevant that the state court did not expressly address these claims, given that there was a "reasonable basis for the state court to deny relief." *Reis-Campos v. Biter*, 832 F.3d 968, 974 (9th Cir. 2016)(quoting *Harrington v. Richter*, 562 U.S. 86, 98 (2011)). There is no evidence that Jimison was unable to put aside her initial impression and "render a verdict based on the evidence presented," and "the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is [not] sufficient to rebut the presumption of a prospective juror's impartiality." *Murphy v. Florida*, 421 U.S. 794, 800 (1975)(quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)); *see, Skilling v. United States*, 561 U.S. 358, 396 (2010). Therefore, the due process claim fails. Moreover, because the state court could reasonably conclude that Jimison's presence on the jury did not prejudice

Passmore, its rejection of Passmore’s claim for ineffective assistance of counsel based on counsel’s failure to strike Jimison was not an unreasonable application of Supreme Court precedent. *See, Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Contrary to the district court’s order, the state habeas court did not need to make a credibility finding in order to conclude that Jimison’s presence on the jury would not deprive Passmore of a fair trial. Because no evidentiary hearing is required when the factual allegations, even if proven, do not state a case for habeas relief, the state court’s rejection of Passmore’s juror bias claims was not based on an unreasonable determination of the facts. *See, Hibbler v. Benedetti*, 693 F.3d 1140, 1148 (9th Cir. 2012).

(App., *infra*, 2a-3a).

REASONS FOR GRANTING THE PETITION

The appeals court erred in dismissing Passmore’s juror bias claims because the evidence – which was not reviewed by the state courts – supports his assertion that Juror Jimison falsely stated during *voir dire* that she had not formed an opinion as to his guilt, when in fact she stated to two different persons that she had formulated a belief that he was guilty long before she was chosen to serve on the jury in Passmore’s criminal case. Passmore’s lawyer, although informed during a break in the trial of Jimison’s statements regarding his guilt, failed to bring the matter to the trial court’s attention or seek to remove her from the jury.

A. The presence of Juror Jimison on Passmore’s jury rendered his trial unfair and in violation of the Sixth Amendment.

1. Factual Basis for Passmore’s Juror Bias Claim

Passmore alleged that, during *voir dire*, Jimison falsely stated that she had no opinion about his guilt or innocence when she had, before trial, made statements to George Denton that she “just knew” he was guilty. In support of this allegation, Passmore recounted a conversation that Jimison had with another person, Tami Haefs, shortly after his trial. Jimison, he stated, told Haefs that she

was glad that she had been selected for the jury because she had always believed that he was guilty. (Second Amended Petition, doc. 18 at 55).

The State was granted leave to depose George Denton, Tami Haefs, and Dixie Jimison. During his deposition, Denton recounted the conversation he had with Jimison before Passmore's criminal trial. Denton knew Jimison from the Southern Baptist Church, where they had both been members. He testified that he ran into Jimison when he was shopping at Pamida, a local box store where Jimison worked. While she was helping him check out, Jimison asked Denton if he was "still going to that church where that pastor is accused of . . . child molestation." Denton told her that he was and Jimison responded by saying that she thought Passmore was "totally guilty." Denton could not remember exactly when this conversation occurred but he believed it may have happened sometime in 2005.³

Tammy Haefs testified that she is acquainted with, but is not very close to, both Passmore and Jimison. Haefs was a member of Passmore's church when the allegations of sex abuse first arose. She first met Jimison over twenty years ago, when she worked as a waitress at a local diner that Jimison frequented.

Haefs testified that she ran into Jimison immediately after the jury returned its verdict in Passmore's trial. At that time, Haefs was working for Wells Fargo Bank. She testified that she was approached by Jimison in the lobby of the bank. Jimison, according to Haefs, "was kind of excited to have news to share about the trial." She told Haefs that the jury had found Passmore guilty and intimated that she was "glad" because she "had always known that he was guilty."

³ Assuming that Denton's belief that this conversation occurred in 2005 is correct, it would have coincided with the institution of C.R.'s civil lawsuit. The complaint in that action was filed on April 12, 2005.

In her deposition, Jimison acknowledged that she knows George Denton. She testified that she and Denton attended the Southern Baptist Church together. She also testified that she saw him from time to time at Pamida and may have spoken to him in the customer service or checkout line. She denied, however, that she ever expressed an opinion to Denton about Passmore's guilt. Jimison also denied speaking with Haefs about Passmore. She testified that while the name sounded familiar, she did not know who Tami Haefs was.

Although she denied speaking with Denton and Haefs about Passmore, Jimison corroborated key aspects of their testimony. She acknowledged that she worked with and was friendly with C.R., who worked at Pamida from June of 2003 until January of 2004.⁴ She acknowledged that she knew George Denton, saw him around Pamida from time to time, and may have spoken to him in the cashier line. Jimison also confirmed that she was a customer of Wells Fargo Bank, the bank where Tami Haefs worked.⁵

2. Legal Analysis of Passmore's Juror Bias Claim

Enshrined in the Sixth Amendment and essential to the Seventh Amendment, impartial juries are a necessary precondition for due process. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1975); *Peters v. Kiff*, 407 U.S. 493, 501 (1972). Indeed, “[o]ne of the most fundamental rights in our system of criminal justice is the right to trial before an impartial jury.” *Godoy v. Spearman*, 861 F.3d 956, 958 (9th Cir. 2017). As this Court has stated:

⁴ When she was deposed in connection with her lawsuit against Passmore and the Church of God, C.R. testified that she worked at Pamida from June of 2003 until January of 2004.

⁵ Haefs testified that she spoke to Jimison about the verdict “right after trial”, before “the newspaper released anything”. In denying this conversation, Jimison testified that the jury returned its verdict late at night. She stated that the jury was not released until 11:00 p.m., well after banking hours. The trial transcript, however, shows that the jury returned its verdict during the daytime. And the file stamp on the verdict form indicates that it was filed at 12:03 p.m.

The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be obtained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants went into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning.

Clark v. United States, 289 U.S. 1, 10-11 (1933).

Because, “the guarantee to an impartial jury . . . is vital to the fair administration of justice,” *Dietz v. Bouldin*, 136 S.Ct. 1885, 1893 (2016), courts have recognized that the presence of even one biased juror creates a structural defect that is not subject to harmless error analysis. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998)(*en banc*).

As this Court has recognized, “[*voir dire*] examination serves to protect” the right to a fair and impartial jury “by exposing possible biases, both known and unknown, on the part of potential jurors.” *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984)(plurality). The ability of *voir dire* to effectively protect this right is dependent, however, on the candor of the individual jurors. When a party seeks a new trial on the ground that a juror failed to respond truthfully to questions on *voir dire*, he must show (1) that the juror failed to answer a material question honestly and (2) that a correct response would have provided a basis for a challenge for cause. *McDonough*, 464 U.S. at 556.

In denying Passmore’s juror bias claim, both the district and appellate court assumed that Denton and Haefs accurately testified about their conversations with Jimison. But they discounted the import of these conversations, finding that they provide “no reason to suppose Jimison was, at the time of Passmore’s trial, impervious to evidence or deaf to [her] obligation” as a juror. (App., *infra*, 31a). They concluded, in essence, that Jimison’s conversations with Denton and Haefs did not prove that she was unable to be an impartial juror because Passmore could not provide any

information about how she came upon her opinion that he was guilty or that her opinion was so deeply held that it could not be overcome by other evidence.

Denton, the district court noted, “did not say [Jimison] discussed the case with C.R.;” nor could he provide any proof that Jimison had read about the case in the local press. (App., *infra*, 30a). It noted that Haefs could not adequately explain what Jimison meant when she stated that she always knew that Passmore was guilty – that is whether she “meant ‘before I ever heard any evidence’ and ‘regardless of the evidence I heard or the instructions I was given about the burden of proof or the oath I took.’” (App., *infra*, 31a).

Denton and Haefs acknowledged that their conversations with Jimison were brief. Both conversations occurred during business hours at a place of work. Haefs was working when she ran into Jimison in the lobby of her bank. When asked whether Jimison explained “how she knew all along that [Passmore] was guilty,” Haefs testified that she did not go into those details as their conversation was “very short.” Denton spoke to Jimison as he was going through her check-out line at Pamida. He estimated that their conversation lasted for “two minutes or less.”

Despite the brevity of the conversations, both Denton and Haefs had a fairly clear memory of their conversation with Jimison. As Denton described it:

Q. So what happened when you saw Dixie?

A. I went in Pamida doing some shopping and as I was walking up to the check out I saw Dixie was the checkout. She was the clerk there or whatever, checkout lady. And I went up and I walked up to her line and there was nobody else in line – nobody else there at all, just her and I. And I walked up there and said, Hi to her – Hi Dixie. And she said, Hi

And then she asked me, are you still going to that church where that pastor is accused of – I think she used the words “child molestation,” I’m not quite sure. Anyway, I said, Yes, I am. She said, Well, I believe he’s totally guilty – or I can’t remember the exact words, but I remember the incident very well. Anyway, she said something to that effect. She believed he was guilty. And I just said, Oh, and walked out.

Q. You didn't engage her in any discussion about it?

A. No.

Q. And –

A. I was surprised what she said to me.

In describing her conversation with Jimison, Haefs testified:

Q. And so tell me about your conversation with Dixie.

A. It's like ten years ago. I was walking through the lobby of the bank where I worked at the time and spoke to Dixie. And she was kind of excited to have news to share about the trial. And she stated that he was guilty and that she had always known he was.

Haefs testified that she didn't engage in a longer conversation with Jimison or ask much in the way of questions because she was "called away." But when questioned about her interpretation of Jimison's statement that she "always knew" Passmore was guilty, Haefs testified that she took Jimison's statement to mean that she had known, even before the trial, that Passmore was guilty.

Q. So Dixie just told you that she had believed that, Passmore to be guilty. And, I mean, this is a person who had just served on the jury and she had heard days of testimony.

And so was she – it sounds like what she was saying was, after being a juror on this trial we made a determination, you know, the jurors, that he was guilty?

A. No, I didn't take it in that text. No, it was more that, I always knew he was guilty and I was glad to be there, type of thing.

Contrary to the lower courts' conclusion, there was evidence that Jimison had a solid, deeply entrenched belief that Passmore was guilty before she was chosen to serve on his jury.

The testimony of Denton and Haefs, moreover, was supported by other credible evidence. Jimison acknowledged that she spoke with Denton from time-to-time when he was a customer at Pamida. She acknowledged that she was a customer at Wells Fargo Bank, where Haefs worked.

She and C.R. knew one another and had worked together at Pamida. The civil suit filed by C.R. and her family was filed in April of 2005, around the time when Denton said their conversation occurred and when the allegations were likely reported in the press. The civil suit was widely covered in the local newspapers.

Passmore has, in short, provided strong, credible evidence that Jimson was biased. The evidence supports his claims that she (1) failed to answer a material question – *e.g.*, whether she could dispassionately weigh the evidence – honestly and (2) that an honest response to that question would have provided a basis for challenging her for cause. *McDonough*, 464 U.S. at 556. The lower courts erred in dismissing Passmore’s claims without, at the very least, holding a hearing to evaluate the credibility of Jimson, Denton, and Haef.

B. Trial counsel were ineffective because they failed to strike Juror Jimison after they were informed about her statement to George Denton.

1. Factual Basis for Passmore’s Claim

In his Second Amended § 2254 Petition, Passmore alleged that he and George Denton informed Watson that Jimison was biased and had expressed her belief that Passmore was guilty. Although their memory differs in some respects, both Passmore and Denton testified that Watson was told about, but disregarded, Denton’s conversation with Jimison at Pamida.

Denton testified in his deposition that he entered the courtroom after the jury was picked and as the judge was “tell[ing] the jurors what their responsibility was.” When he looked at the jury, he was “surprised, shocked” to see Jimison because he “knew that Dixie definitely knew a lot about the case” and that she had previously expressed a belief that Passmore was guilty.

Denton testified that he approached Passmore during a break in the trial and expressed his concern about Jimison. He told Passmore “that Dixie was definitely prejudiced and that she knew

a lot about his case and that she . . . had told [him] that he was guilty in her mind.” Passmore, he stated, asked him to convey this information to Watson. In response to Passmore’s request, Denton told Watson about his conversation with Jimison at Pamida:

I don’t remember the exact words, but I expressed to him that I was concerned about one of the jurors and I mentioned Dixie Jimison. And I think he asked me what was my concern and I said, basically that she knew a lot about the case and that she had made a statement to me prior to the case coming in that led me to believe that she was going to be very prejudiced.

Denton testified that he told Watson that he “would be willing to get on the stand and testify to what [he] knew” about Jimison, but Watson acted “very unconcerned” and “just dismissed” the matter.

Passmore recounted a similar memory. He testified that Denton told him during a break in the trial that he had “a chance encounter at Pamida” with Jimison several years earlier and that during that encounter Jimison expressed her belief that Passmore was guilty. Passmore stated that, after he spoke with Denton, he approached Watson and “notif[ied] him about the fact that Dixie Jimison believed that [he] was guilty.” But Watson, according to Passmore, acted like he “didn’t want to hear it”. Although he was unable to recount his actual words, Passmore testified that Watson indicated that it was “too late” and that he “couldn’t do anything about it.” Passmore stated that after he spoke with Watson, he “turned to George Denton and said, well, let’s just leave it, there’s nothing we can do now.”

Watson, for his part, denied that he was told by Denton, Passmore, or anyone else that Jimison was biased. During his deposition, Watson acknowledged that someone may have told

him after Passmore's trial was over that there was a problem with Jimison but he denied that anyone spoke to him about her "when [he] could of done anything about it."⁶

2. Legal Analysis of Passmore's Ineffective Assistance Claim

In analyzing Passmore's ineffective assistance claim, the lower courts assumed that Watson had been informed about Jimison's bias and that he performed ineffectively by failing to strike her from the jury. (App., *infra*, 2a-3a, 29a). Acting under this assumption, they denied his claim because they determined that Passmore had failed to establish *Strickland* prejudice. Because, in their view, Passmore would have been unsuccessful in a challenge for cause, they determined that he could not establish prejudice and denied his ineffective assistance claim.

Contrary to the lower courts' ruling, Passmore's allegations can establish both prongs of *Strickland*. As indicated above, Passmore has provided strong, credible evidence that Jimison harbored a fixed belief that he was guilty before she was chosen as a juror. She also believed that children do not deliberately lie about sexual abuse. A juror who expresses a preconceived notion that a defendant is guilty and that his accusers are incapable of deliberately conveying a falsehood is surely biased and an attorney who is informed of that bias, has a professional duty to remove her from the venire.

⁶ Making matters worse, counsel was also aware that Jimison harbored a belief that children do not deliberately lie about sexual abuse. When asked during voir dire if she believed children are capable of making false allegations of sexual abuse, Jimison stated, "No, I don't think they do, deliberately." Jimison's statement to this effect should have alerted Passmore's counsel that she was biased and unqualified to serve on the jury. With a fixed belief that "children do not deliberately lie," Jimison was incapable of analyzing Passmore's testimony and balancing it against that of his accusers – she would have viewed anything Passmore said in contradiction to their testimony as a lie.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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