No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JONATHAN BURNETT,

PETITIONER,

vs.

STATE OF GEORGIA.

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF GEORGIA

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QUESTION PRESENTED

I. WHETHER TRIAL COUNSEL'S FAILURE DURING *VOIR DIRE* IN A CHILD MOLESTATION CASE TO EXPLORE AND INVESTIGATE WHETHER JURORS HAD BEEN CRIME VICTIMS (DIRECTLY OR INDIRECTLY THROUGH FAMILY AND CLOSE FRIENDS) DENIED PETITIONER EFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION WHERE TRIAL COUNSEL NEITHER INQUIRED NOR FOLLOWED UP UPON INFORMATION LEARNED DURING VOIR DIRE.

LIST OF PARTIES

Jonathan Burnett
Petitioner

State of Georgia,
Respondent

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UNITED STATES CONSTITUTION, SIXTH AMENDMENT:

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 defence**.

CITATION OF OPINION BELOW

On February 28, 2023, the Court of Appeals of Georgia affirmed the judgment of the Superior Court of Glynn County in a decision published at 367 Ga. App. 285 (2023). A copy of the opinion is included as Appendix A. On September 19, 2023, the Supreme Court of Georgia denied certiorari. A copy of said order is also included under Appendix B.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1257.

STATEMENT OF CASE, AND FACTS, AND COURSE OF PROCEEDINGS

The evidence adduced at trial established that in June of 2015, Investigator the Glynn County Police Department became involved in an investigation regarding allegations of sexual abuse made by then eight-year-old Z'Quayshia Nixon. The investigation stalled, however, and the case was eventually closed without an arrest. Nixon's case was reopened in September 2016, however, when Oliver received new information regarding similar allegations of sexual abuse made by Burnett's daughter, Janiyah Wright.

The two children did not know each other well but their mothers did. Their mothers and Defendant were all friends from childhood. All three lived in the same trailer park and went to the same schools. Defendant engaged in sexual relationships with both women – and at times he was sexually involved with both at the same time. [Trial Transcript, Vol II at 305-313 & 331-332]. Although other issues were raised as well with respect to the minors, the love triangle and relationships between Defendant and the mothers (and its aftermath) – provided a plausible explanation as to why both children would make false accusations against him.

Notwithstanding the convoluted history between the adults, however, Defendant was arrested for having committed sexual offense against both children.

On December 1, 2016, the Glynn County Grand Jury indicted Burnett in a thirteen-count indictment on charges of various sexual offenses against the two minors, Z'Quayshia Nixon and Janiyah Wright. The case was tried before a Glynn County jury from October 17, 2017 to October 19, 2017.

During jury selection, trial counsel omitted what many defense lawyers would consider perhaps the most important question to be asked in any criminal case, and especially in a child molestation case: "Have you, a close friend or family member, ever been the victim of a crime?" Trial counsel states that he relied on the unsworn written response to the following question on the juror information card: "Have YOU ever been the victim of a crime?" The question, as posed, was far too narrow. If a juror's child, niece or nephew, sibling or close friend had been robbed, raped or murdered as an adult (or molested or sexually assaulted as a child), then the juror could truthfully answer "no".

It is known, in this case as discussed further below, that several potential jurors failed to disclose such information because such information actually came out in response to other, unrelated questions posed by the prosecutor.

Other potential jurors did not answer the question on the card or, as in the case of juror Linda Randall (Juror No. 33 for jury selection), the answer to the crime victim question was illegible on the defense copy of the juror card. Defense counsel did not inquire or follow up with juror Randall as to this question – nor as to any other juror as to incomplete, illegible or missing responses on any other juror information cards. Despite his protestation to the contrary, it would appear that trial counsel did not even review the juror information cards prior to or during jury selection.

To compound the failure to properly ask the "crime victim" question, trial counsel did not meaningfully follow up on the unsworn affirmative responses written down by the jurors on their juror information cards.

Juror Tony Robinson (Juror No. 2 for jury selection), stated he was a robbery victim.

Juror Danielle Keefe (Juror No. 8 for jury selection), responded in writing on her juror information card she was the victim of false imprisonment a few years earlier. [NTM at 72-74].

In response to an unrelated question by the prosecutor, Juror Mark Stabile (Juror No. 16 for jury selection) stated that his wife was sexually abused as a child but trial counsel did not follow up – even after juror Stabile raised his hand AGAIN to a more direct question by the prosecutor. It appears that the prosecutor, defense attorney and presiding judge at the trial simply lost track of his response as there was never any follow up.

Juror Sandra Johnson (Juror No. 13 for jury selection), in response to an unrelated prosecution question, volunteered that her mother went missing in 1985, her body was found in the Turtle River, and that "nobody was ever arrested for the murder."[1] The only follow up question, asked by the prosecution rather than defense counsel, asked: "would that experience cause you to give [law enforcement officer] testimony any less weight?"

In sum, at least four "crime victim" jurors were not even examined by trial counsel to ascertain the impact that this knowledge and experience as a crime victim might have upon their verdict. Nor is there is no way to know, at this point, how many more jurors selected by defense counsel were indirect crime victims – individuals whose close friends and family members had been the victim of violent and other crimes – or what impact those experiences had on their deliberations. There are other jurors, notably juror Randall, for which the trial counsel's perfunctory voir dire elicited insufficient crime victim information from which to assess bias or prejudice.

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[1]Reinforcing the point made earlier, Sandra Johnson's juror information card truthfully stated that SHE had never been the victim of crime – the victim was her mother.

After several days of trial, the jury acquitted Burnett of all charges involving Janiyah Wright (Counts 1 through 10). Burnett was found guilty, however, on all charges involving Z'Quayshia Nixon (Counts 11 through 13). That same day, the Court sentenced to life in prison plus twenty years.

A motion for new trial was timely filed on November 6, 2017. An evidentiary hearing was held on January 9, 2020.

Trial counsel's testimony with respect to jury selection, and specifically with respect to juror experience as crime victims, was conflicting and contradictory. At one point, trial counsel suggested that he strategically relied on the unsworn statements of jurors written on their juror information cards and the limited voir dire of the prosecutor on the subject rather then inquire directly. Subsequently, he suggested that not inquiring about juror experience as crime victims was a strategy that he had successfully employed in another case. Trial counsel also blamed Petitioner for distracting him during jury selection. However, trial counsel did not seek a recess to calm him nor additional time to confer with Mr. Burnett prior to striking the jury, nor does the transcript otherwise reflect that Mr. Burnett was disruptive during the jury selection process.

Trial counsel did eventually admit with respect to several jurors, including jurors Robinson and Keefe. that he should have followed up on the limited victim information that was available to him. He concluded: "In hindsight, looking back at this, I would have done a lot of things differently." [NTM T. at 63-75 & 82-83].

The trial court entered an order denying the motion for new trial on March 21, 2022. A notice of appeal was filed on April 20, 2022. This appeal was docketed on June 17, 2022. The Court of Appeals denied the appeal on February 28, 2023. The motion for reconsideration was denied on

March 16, 2023. The Supreme Court of Georgia denied the petition for certiorari to that court on September 19, 2023. Petitioner Burnett is incarcerated at Calhoun State Prison, P.O. Box 249, 27823 Main Street, Morgan, GA 39866.

REASONS FOR GRANTING THE WRIT

I. TRIAL COUNSEL'S FAILURE DURING *VOIR DIRE* IN A CHILD MOLESTATION CASE TO EXPLORE AND INVESTIGATE WHETHER JURORS HAD BEEN CRIME VICTIMS (DIRECTLY OR INDIRECTLY THROUGH FAMILY AND CLOSE FRIENDS) DENIED PETITIONER EFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION WHERE TRIAL COUNSEL NEITHER INQUIRED NOR FOLLOWED UP UPON INFORMATION LEARNED DURING VOIR DIRE.

Voir dire is a critical component of a criminal jury trial. "The presence of a biased juror is no less a fundamental structural defect than the presence of a biased judge." Johnson v. Armentrout, 961 F.2d 748, 756 (8th Cir. 1992) (citing Arizona v. Fulminante, 499 U.S. 279 (1991). Without an adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (citation omitted). Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule. Id.

Failure to further investigate where grounds reasonably appear to suggest potential juror bias may give rise to an effective assistance of counsel claim. See Virgil v. Dretke, 446 F.3d 558 (5th Cir. 2006).

To prevail on a claim of ineffective assistance of counsel, Appellant must show that trial counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. Strickland v. United States, 466 U.S. 668 (1984).

As to the first prong of Strickland, however one characterizes the conflicting and contradictory statements of trial counsel at the motion for new trial, his conduct of voir dire with respect to whether jurors may have been biased on account of their personal experiences as a crime victim or the experiences of family members and close friends as crime victims clearly was deficient. No reasonably competent criminal defense attorney would have failed to inquire. No reasonably competent criminal defense attorney would have failed to follow up on the crime victim information actually made known by the four jurors during voir dire. Trial counsel selected at least four "crime victim" jurors without even exploring their experiences and potential bias. Trial counsel's conduct of voir dire is indefensible by any objective standard.

The issue of prejudice is admittedly a more complicated question. However, as the Supreme Court recognized in United States v. Cronic, 466 U.S. 648 (1984), a case decided contemporaneously with Strickland, there are "circumstances so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Id. at 658.

The U.S. Supreme Court has at least implicitly held that prejudice may be presumed from structural errors that take place during voir dire. See, e.g., Batson v. Kentucky, 476 U.S. 79, 100 (1986). Deficient performance by trial counsel during jury selection with respect to the issues of bias and prejudice would be such a structural defect. Although decisions as to which jurors to strike during voir dire may be a matter of trial strategy, such decisions are meaningless in the absence of "thorough investigation" of the jurors during voir dire. That did not happen in this case. In fact, where voir dire raised legitimate concerns with respect to bias or prejudice of multiple jurors – concerns that trial counsel did not meaningfully much less thoroughly investigate – there can be no "strategic" decision. This was a structural defect in the proceedings.

The issue here is not whether the jurors had actual prejudice against Petitioner. Nor is the issue whether trial counsel was ineffective for having failed to secure their disqualification for cause or whether trial counsel was ineffective for failure to exercise peremptory challenges to remove them. Trial counsel was ineffective for failing to sufficiently investigate and explore juror bias so that he could make challenges for cause or intelligently exercise peremptory challenges. Aside from presuming prejudice based on the structural defect in the jury selection process, there is no other practical way to address the issue of prejudice. Calling jurors as witnesses to impeach their own verdicts is not necessarily even possible in some jurisdictions. And as a practical matter, putting aside the pandora's box such a procedure could open, inquiring of individual jurors years later, after they have served, cannot reasonably establish what their feelings and biases as crime victims were at the time of jury selection and trial. This is a very different kind of inquiry than with respect to other biases – such as knowledge of attorneys, parties or witnesses or even knowledge of the case. The former issue is inherently subjective and inevitably impacted by hindsight and passage of time. The latter sources of bias are relatively objective, and fixed, and therefore more readily addressed by inquiring of jurors post-conviction.

CONCLUSION

For the foregoing reasons, Petitioner Jonathan Burnett respectfully submits that his Petition for Writ of Certiorari should be granted, that the decision of the Court of Appeals should be reversed, that the judgment of conviction vacated, and that Petitioner be granted a new trial.

RESPECTFULLY SUBMITTED this 18th day of December, 2023.

/s/ Kevin Gough
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A. Unpublished decision of the Court of Appeals of Georgia

B. Unpublished decision of the Supreme Court of Georgia denying certiorari.