

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals  
Appeal from Clarendon County  
Honorable George C. James, Jr., Circuit Court Judge

RECEIVED

JUN - 7 2012

THE STATE,

S.C. Supreme Court  
Respondent,

vs.

BRIAN GARRIS,

Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF ISSUES ON CERTIORARI

### I.

Any issue with the trial judge's denial of Garris' mistrial motion was not properly preserved for appellate review. Regardless, the trial judge properly denied Garris' mistrial motion because the untimely disclosure of the challenged evidence resulted in no meaningful prejudice to Garris, did not render his trial fundamentally unfair, and had no impact on the verdict.

### II.

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### III.

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### IV.

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## STATEMENT OF THE CASE

### Procedural History

In April of 2006, Petitioner Brian Garris was arrested and was subsequently linked to an earlier shooting and armed robbery. In October of 2006, the Clarendon County grand jury indicted Garris for one count each of armed robbery, assault and battery with intent to kill, and possession of a firearm during the commission of a violent crime. On September 2, 2008, a jury trial was commenced in the Clarendon County court of general sessions with the Honorable George C. James, Jr., circuit court judge, presiding. At the conclusion of trial, Garris was convicted as indicted. The trial judge sentenced Garris to consecutive terms of imprisonment of twenty years for the armed robbery and assault and battery with intent to kill convictions along with a concurrent term of imprisonment of five years for the possession of a firearm during the commission of a violent crime conviction. Garris then timely filed and perfected an appeal.

Subsequently, the Court of Appeals unanimously affirmed Garris' convictions. State v. Garris, 394 S.C. 336, 714 S.E.2d 888 (Ct. App. 2011). Garris petitioned the Court for rehearing, and the petition was denied. Garris then filed a petition for a writ of certiorari in the Supreme Court.

### Factual History

On the evening of April 15, 2006, Laura B. ("Laura"), who was seventeen years old at the time of trial, went to work at Chinese Cuisine, a restaurant in Manning, South Carolina. (R. pp. 178-180). Laura completed her shift around 10:00 p.m., received two \$20 bills as payment for the night's work, and went outside to meet her mother, Martha Santiago, who had driven to the restaurant to pick her up. (R. p. 147; pp. 181-182). Santiago parked her van behind the restaurant and brought her sons, Antonio B.

("Antonio") and Samuel B., with her because they spoke English while she did not. (R. pp. 146-148). Laura got into the van and began speaking with her mother. (R. p. 148; p. 182). Suddenly, a man yanked open the driver's side door of the van, pointed a gun at Santiago, and demanded money. (R. pp. 148-149; p. 170; p. 183). The gunman then shot Santiago in the face just below her eye. (R. pp. 149-150; p. 170; p. 183; p. 407). In response, Santiago frantically attempted to close and lock the van's door. (R. p. 149; pp. 170-171; p. 183). However, the man reopened the door and shot Santiago in the arm. (R. p. 149; p. 151; pp. 170-171; p. 183). The gunman then pointed his weapon at Laura and her brothers, and Laura handed over the two \$20 bills she received from her employer that night. (R. p. 171; p. 183). The gunman took Laura's money and ran away. (R. p. 171; p. 183).

After the robber fled, Laura and Antonio jumped out of the van and ran to the restaurant for help, and a woman inside Chinese Cuisine reported the incident to law enforcement. (R. p. 171; p. 176; p. 184). Officers arrived shortly thereafter and secured the scene while Santiago was treated by paramedics and transported to the hospital. (R. pp. 152-153; p. 396). Investigator Rick Elms, an investigator with the Manning Police Department, also arrived at the crime scene and obtained a description of the suspect from Laura. (R. p. 190; pp. 394-397). He then went to the hospital, photographed Santiago's injuries, obtained another description of the shooter, and used that description to have a composite sketch of the suspect prepared. (R. pp. 72-73; pp. 155-156; p. 414).

Meanwhile, Officer Donnie Drose, a sergeant with the Manning Police Department, encountered Quentin Garris ("Quentin"), the brother of Petitioner Brian Garris, near the crime scene around 11:00 p.m. and briefly spoke with him. (R. p. 210; pp. 212-213; p. 215; p. 226). He then saw Garris walk up in a blue striped shirt with

horizontal stripes. (R. p. 213; p. 228). However, Officer Drose did not detain Garris because he did not believe Garris matched the description of the suspect, but he notified another officer that Garris and Quentin were heading in the other officer's direction.<sup>1</sup> (R. pp. 213-214). Garris and Quentin then stopped walking towards the other officer, turned around, and entered their home, which was located three blocks away from Chinese Cuisine. (R. pp. 211-212; p. 214; p. 227).

Subsequently, after learning Garris was in the area on the night of the shooting, Investigator Elms prepared a photographic line-up containing Garris' photograph. (R. p. 407). He showed the line-up to Laura on April 22, 2006, and she identified Garris as a former customer.<sup>2</sup> (R. p. 186; p. 410). However, Laura was not certain Garris was the shooter, was still frightened about the incident, and did not identify Garris as the gunman at that time. (R. p. 79; p. 81; pp. 84-85; p. 87; p. 187; p. 206; p. 410).

Thereafter, on April 28, 2006, Garris was arrested in connection to an unrelated burglary.<sup>3</sup> (R. p. 46; p. 281; p. 664). Officer William McCoy of the Clarendon County Sheriff's Office performed an over-the-clothes pat-down search of Garris after his arrest, but Officer McCoy did not locate any weapons. (R. pp. 664-666). Garris was then transported to the Clarendon County Detention Center, and Officer Darryl McCants, a correctional officer at the facility, patted down the outside of Garris' body. (R. pp. 280-282). During the pat-down search, Garris asked to use the restroom and was allowed to use a private bathroom in a holding cell. (R. pp. 282-283). Garris remained in the

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<sup>1</sup> Officer Drose did not believe Garris matched the suspect's description because the suspect was initially described as wearing a shirt with vertical stripes. (R. p. 217). However, the officer who initially relayed the description only inferred the suspect was wearing a shirt with vertical stripes even though no witness expressly described the suspect's shirt in that fashion. (R. p. 397).

<sup>2</sup> During the incident, Laura recognized the shooter as a former customer. (R. pp. 91-92; pp. 183-184).

<sup>3</sup> Garris was ultimately acquitted of the unrelated charges, and the trial judge noted that fact to the jury during trial. (R. pp. 281-282).

bathroom behind a closed door for five to six minutes. (R. p. 283; p. 291). Officer McCants then completed the booking process and returned Garris to the same holding cell containing the bathroom Garris used earlier. (R. pp. 283-284). Garris was subsequently transported to another cell where he was housed alone. (R. p. 293).

On the next day, Johnnie McCrea, a trustee and cook at the Clarendon County Detention Center, collected a lunch tray from Garris' cell.<sup>4</sup> (R. pp. 295-296; p. 298). McCrea noticed the tray was heavier than usual, and the food on the tray was piled in a mound. (R. p. 299). McCrea dumped Garris' tray into a dumpster, and a silver gun with a white taped handle fell off the tray from underneath the mound of food. (R. pp. 299-301; p. 317). McCrea notified prison personnel, and the gun was recovered from the dumpster and secured.<sup>5</sup> (R. pp. 300-301; p. 339; p. 349).

Subsequently, the gun was turned over to law enforcement, and Investigator Elms retrieved it on May 15, 2006. (R. p. 350; pp. 385-386; p. 410). He then went to Santiago's residence to try to find a bullet from the shooting in Santiago's van in order to compare it to the gun recovered from Garris' cell. (R. p. 412). He did not find a bullet in the van, but a bullet was discovered still lodged in Santiago's arm. (R. pp. 412). The bullet was subsequently removed, and Investigator Elms submitted the bullet and firearm for testing. (R. pp. 413-414). Ira Parnell, an expert in firearm identifications with SLED, examined the items and concluded the bullet was fired from the recovered gun. (R. pp. 462-463; pp. 482-486).

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<sup>4</sup> Garris was standing at the cell door flap when McCrea collected the tray. (R. p. 300).

<sup>5</sup> The Clarendon County Detention Center did not use metal detectors during the booking process at the time of Garris' arrest. (R. p. 285). However, the facility changed its policy and obtained metal detectors following the discovery of the gun. (R. p. 286).

Thereafter, on May 24, 2006, Investigator Elms again showed the photographic line-up to Laura. (R. p. 423). Upon a second viewing of the line-up, Laura quickly identified Garris as the shooter and stated she was certain of her identification.<sup>6</sup> (R. pp. 70-71; p. 76; p. 95; pp. 188-189; p. 207; p. 423). Investigator Elms also showed the photographic line-up to Santiago, but she was unable to make a positive identification.<sup>7</sup> (R. pp. 448-449). Following Laura's positive identification, Investigator Elms arrested Garris in connection with the robbery and shooting.<sup>8</sup> (R. p. 455).

Garris was subsequently indicted for armed robbery, assault and battery with intent to kill, and possession of a firearm during the commission of a violent crime, and he proceeded to trial. (R. p. 2; pp. 808-809). At the conclusion of trial, Garris was convicted as indicted, and the trial judge sentenced him to an aggregate forty-year term of imprisonment. (R. pp. 810-812).

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<sup>6</sup> Laura also identified Garris in the courtroom during trial as the shooter, and she testified she was entirely certain of the identification. (R. p. 189; p. 191).

<sup>7</sup> During trial, Santiago testified she did not get a good look at the shooter during the incident. (R. p. 151).

<sup>8</sup> As part of his investigation, Investigator Elms also interviewed several people Garris interacted with before and after the crimes. (R. p. 484). Andrew McBride told the investigator that Garris had a gun on the night of the shooting and accurately described it to the officer prior to being shown a picture of the recovered gun. (R. pp. 244-245; p. 270; pp. 424-425). Additionally, Freddie White told the officer that Garris had a gun on the night of the incident before Garris separated from the group. (R. pp. 253-254; pp. 425-426). White further informed Investigator Elms that he spoke with Garris around 10:30 p.m. or 11:00 p.m. on the night of the incident and Garris was out of breath and looked like he had been running. (R. pp. 426-427). Additionally, White encountered Garris on the day after the incident, and Garris was in possession of two \$20 bills that he did not have on the preceding day. (R. pp. 259-260).

I.

**Any issue with the trial judge's denial of Garris' mistrial motion was not properly preserved for appellate review. Regardless, the trial judge properly denied Garris' mistrial motion because the untimely disclosure of the challenged evidence resulted in no meaningful prejudice to Garris, did not render his trial fundamentally unfair, and had no impact on the verdict.**

Garris contends the Court of Appeals erred in affirming the trial judge's denial of Garris' motion for a mistrial. Garris maintains a mistrial should have been granted because he was prejudiced by the State's nondisclosure of evidence related to Santiago's injuries, Santiago's inability to identify him from a photographic lineup, and a partial hand print not belonging to Garris recovered from Santiago's van. Initially, any issue with the trial judge's denial of Garris' mistrial motion was not properly preserved for appellate review because Garris failed to contemporaneously object to the challenged evidence during trial and failed to raise the same arguments he raised on appeal in support of his mistrial motion. Regardless, the trial judge properly denied Garris' request for a mistrial because the untimely disclosure of the challenged evidence resulted in no meaningful prejudice to Garris, did not render his trial fundamentally unfair, and had no impact on the verdict in light of the fact the challenged evidence favorable to Garris was fully presented to the jury during trial. Accordingly, the Court of Appeals properly affirmed Garris' convictions. Garris' petition for a writ of certiorari should be denied.

**FACTS RELEVANT TO ISSUE**

During Investigator Elms' trial testimony, the State moved to introduce two photographs depicting the gunshot wounds Santiago suffered to her face and arm during the shooting. (R. pp. 401-402). Garris objected to the admission of the photographs, argued they were not provided to him during the discovery process, and specifically stated his objection was based on relevance and the allegedly unduly prejudicial effect of

the photographs. (R. p. 402). Following a bench conference, the trial judge denied Garris' objections, and the photographs were introduced into evidence. (R. pp. 402-403; p. 406). Thereafter, on cross-examination, Investigator Elms testified a partial hand print was discovered on Santiago's van, was compared to Garris' fingerprints, and did not match those prints. (R. pp. 429-431). Investigator Elms further noted the evidence regarding the partial hand print was contained in his file related to Garris' case.<sup>9</sup> (R. p. 431). However, Garris raised no objection to the testimony at that time. (R. p. 431). Additionally, Investigator Elms testified he showed Santiago a photographic line-up on May 24, 2006, which was the same day the officer showed the photographic line-up to Laura. (R. p. 423; pp. 448-449). He noted Santiago did not identify Garris from the photographic line-up even though Garris' picture was included in the line-up.<sup>10</sup> (R. p. 449). However, Garris did not raise any objection to Investigator Elms' testimony concerning the photographic line-up shown to Santiago at that time. (R. p. 449).

Subsequently, after the State rested its case, Garris moved for a directed verdict and moved for a mistrial or the dismissal of his case based on alleged discovery violations. (R. p. 495; p. 499; pp. 501-502). Specifically, Garris contended he was not provided with the photographs of Santiago's injuries, he was unaware a photographic line-up was shown to Santiago, and he was not provided with the results of the comparison of the partial hand print discovered on Santiago's van to his own fingerprints. (R. pp. 501-502). The trial judge denied Garris' directed verdict motion and took Garris'

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<sup>9</sup> Investigator Elms later testified the partial hand print found on the van was not left by the assailant, and he stated he was informed the suspect never touched Santiago's van. (R. p. 434; p. 475).

<sup>10</sup> During her trial testimony, Santiago noted she did not get a good look at the shooter because it was dark at the time of the incident, and she further testified she was unable to identify the person who shot her before he was apprehended. (R. p. 155). Significantly, Santiago did not identify Garris as the shooter during trial. (R. pp. 145-167).

mistrial motion under advisement. (R. pp. 502-503). Thereafter, Garris renewed his mistrial motion, and the trial judge denied the request. (R. pp. 680-681; pp. 740-741).

## ANALYSIS

### A. Issue Preservation

In order to properly preserve an issue for appellate review, a defendant must make a **contemporaneous** objection to a perceived error during trial. State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Likewise, a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). An appellant is limited on appeal solely to the grounds raised during trial. State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). The appellate court will not consider any issues that were not presented to or passed upon by the trial judge. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970).

In the case sub judice, the Court of Appeals correctly found Garris' appellate arguments in support of his mistrial motion were not properly preserved for appellate review. Regarding the nondisclosure of the photographs of Santiago's injuries, Garris specifically argued during trial that he was objecting to the photographs on the grounds they were irrelevant and unduly prejudicial. Because Garris did not contemporaneously object to the photographs on the basis they were not disclosed in compliance with the requirements of Brady or Rule 5, SCRCrimP, Garris was precluded from raising that argument in support of his mistrial motion for the first time on appeal. See 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.”); see also Patterson, 324 S.C. at 19, 482 S.E.2d at 767 (1997) (“Appellant is limited to the grounds raised at trial.”). Regarding the nondisclosure of the evidence related to the partial hand print and the photographic lineup shown to Santiago, Garris did not contemporaneously object to the evidence when it was introduced during trial and, instead, waited until after the State rested its case before he moved for a mistrial based on the nondisclosure of that evidence. Because Garris failed to contemporaneously object to the evidence, he was precluded from later raising an objection to the evidence through a mistrial motion.<sup>11</sup> See State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (“No objection was made to the introduction of the testimony, but appellant's counsel moved for a mistrial after the State completed its case. Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial.”); see also State v. Burton, 326 S.C. 605, 608, 486 S.E.2d 762, 764 (Ct. App. 1997) (“Failure to object when the evidence is offered constitutes a waiver of the right to object.”). Accordingly, Garris failed to properly preserve any issue with the trial judge’s denial of his mistrial motion, and the Court of Appeals correctly affirmed Garris’ convictions. Garris’ petition for a writ of certiorari should be denied.

### **B. Proper Denial of the Mistrial Motion**

The grant or denial of a mistrial lies within the sound discretion of the trial court, and the trial judge’s ruling will not be disturbed on appeal absent an abuse of discretion

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<sup>11</sup> In support of his argument on appeal, Garris contends the nondisclosure of the evidence related to the partial hand print prevented him from hiring his own expert to develop the issue. (Pet. for Cert. p. 9). Additionally, Garris maintains the nondisclosure of Santiago’s failure to identify Garris from the photographic lineup prevented him from using that evidence in the pre-trial hearing on the admissibility of Laura’s identification of Garris from the photographic lineup. (Pet. for Cert. p. 10). However, neither of those arguments was raised in support of the mistrial motion during trial, which precluded those arguments from being raised for the first time on appeal. See State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (“[A] defendant may not argue one ground below and another on appeal.”)

or an error of law. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000). A mistrial should not be granted unless absolutely necessary, and instead, all other methods to cure any possible prejudice should be exhausted before a mistrial is granted. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). In determining whether to grant a mistrial, the trial judge should determine whether or not the mistrial is dictated by manifest necessity or the ends of public justice. State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). The burden is on the moving party to establish both error **and** prejudice. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). Appellate courts favor the exercise of the wide discretion of the trial judge in determining the merits of a mistrial request. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

In a criminal trial, the prosecution is required to disclose, upon motion by the defendant, evidence which would be favorable to the accused and which is material to guilt or punishment. State v. Kirkpatrick, 320 S.C. 38, 47, 462 S.E.2d 884, 890 (Ct. App. 1995). Pursuant to that requirement, “favorable” evidence includes both exculpatory evidence and impeachment evidence. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court instructed: “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” Thus, a Brady violation occurs when “the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.” Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999).

Significantly, evidence is material for Brady purposes “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” United States v. Bagley, 473 U.S. 667, 682 (1985). In Kyles v. Whitley, 514 U.S. 419, 434 (1995), the United States Supreme Court instructed:

Bagley’s touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.”

(citations omitted). To establish a Brady violation, the aggrieved party must show “that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Id. Reversal for an alleged Brady violation is not warranted “unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” Strickler v. Green, 527 U.S. 263, 281 (1999).

Similarly, “Rule 5, SCRCrimP, governs the disclosure of evidence in criminal cases.” State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). Under that rule, the State is required to permit a defendant, upon request, to inspect and copy any written statement provided by the defendant, any oral statement made by the defendant in response to interrogation, the defendant’s prior criminal record, any documents or tangible objects material to the defense or intended for use by the prosecution in its case in chief, and any results or reports of any physical or mental examinations or scientific tests or experiments material to the defense or intended for use by the prosecution. Rule

5(a), SCRCrimP. “The definition of ‘material’ for purposes of Rule 5 is the same as the definition used in the Brady context.” Kennerly, 331 S.C. at 453, 503 S.E.2d at 220.

Reversal of a conviction based on a Rule 5 violation is only required where the defendant suffered prejudice as a result of the violation. Id. at 453-454, 503 S.E.2d at 220.

In Garris’ case, notwithstanding any issue preservation concerns, the trial judge properly denied Garris’ motion for a mistrial because there was not a reasonable probability the timely disclosure of the challenged evidence would have resulted in a different verdict in Garris’ case. Regarding the photographs of Santiago’s injuries, the photographs were consistent with the testimony presented during trial in regards to those injuries and resulted in no unfair surprise to Garris in light of the fact the extent of Santiago’s injuries was not an issue in dispute. See State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) (“If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.”). Thus, the timing of the disclosure of the challenged photographs could not have impacted the verdict in Garris’ case. Regarding the evidence related to the partial hand print, the nondisclosure of the evidence prior to trial could not have impacted Garris’ case because the jury was presented with testimony confirming Garris’ fingerprints did not match the partial hand print recovered from Santiago’s van. See United States v. Agurs, 427 U.S. 97, 109-110 (1976) (“The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not established ‘materiality’ in the constitutional sense.”). Therefore, despite the untimely disclosure of the evidence, Garris was able to fully present the favorable evidence related to the partial hand print to the jury during trial, which prevented the late disclosure from having any impact on the verdict. Regarding Santiago’s failure to identify Garris from a photographic lineup, the

nondisclosure of the evidence prior to trial could not have impacted Garris' case in light of the fact Santiago's inability to identify Garris from the lineup was presented to the jury and Santiago did not identify Garris as the shooter during trial. Therefore, the jury was fully apprised of the favorable nature of the photographic lineup evidence to Garris' case, which eliminated any prejudice that could have resulted from the untimely disclosure. See State v. Frazier, 394 S.C. 213, 224, 715 S.E.2d 650, 655 (Ct. App. 2011) (finding no prejudice resulted from the solicitor's failure to disclose that a witness was unable to identify Frazier from a photographic lineup because the witness confirmed she was unable to identify Frazier from a photographic lineup during her trial testimony).

Viewing the challenged evidence in the proper context and in light of the other evidence presented during trial, the belated disclosure of that evidence resulted in no meaningful prejudice to Garris, did not render his trial fundamentally unfair, and had no impact on the outcome of the case. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) ("Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). Even if the issue regarding the denial of Garris' mistrial motion was properly preserved for appellate review, the trial judge did not abuse his broad discretion in denying the Garris' request for the grant of the extreme measure of a mistrial. See State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of the court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes."). Accordingly, the Court of Appeals properly affirmed Garris' convictions. Garris' petition for a writ of certiorari should be denied.

## II.

**The Court of Appeals properly affirmed the trial judge's denial of Garris' motion to suppress the gun recovered from the detention center following his arrest on unrelated charges because the evidence was highly probative to establishing Garris' identity as the perpetrator of the armed robbery and shooting and was not unduly prejudicial in light of the trial judge's curative measures.**

Garris asserts the Court of Appeals erred in affirming the trial judge's denial of Garris' motion to suppress the gun discovered at the Clarendon County Detention Center following his arrest on unrelated charges. Garris maintains the gun was unduly prejudicial because there was a reasonable probability that someone on the jury would believe Garris had a propensity to commit crimes after hearing about his arrest on unrelated charges. To the contrary, the gun, along with the testimony related to its discovery, was highly probative as to the identity of shooter and was critical evidence linking Garris to the crimes. In light of the high probative value of the evidence coupled with the curative measures taken by the trial judge to prevent any improper inferences from being drawn from the evidence, its admission was not unduly prejudicial. The trial judge properly denied Garris' suppression motion, and the Court of Appeals correctly affirmed the trial judge's ruling. Garris' petition for a writ of certiorari should be denied.

### **FACTS RELEVANT TO ISSUE**

Prior to trial, Garris moved to suppress the gun discovered in the dumpster at the detention center after his food tray was dumped. (R. pp. 45-46; pp. 123-124). Garris argued any reference to his other arrest or the chain of events leading to the discovery of the gun would be prejudicial because the jury might infer he had a propensity for crime based on his other arrest. (R. p. 51; p. 53; pp. 59-60). The trial judge initially ruled the gun was admissible after finding its probative value was not outweighed by its prejudicial effect. (R. pp. 67-68). Subsequently, after hearing McCrea's testimony about the

discovery of the gun, the trial judge reaffirmed his earlier ruling and denied Garris' suppression motion. (R. pp. 139-140). Thereafter, the witnesses testified about Garris' arrest on the unrelated charges and the discovery of the gun, and the trial judge instructed the jury not to consider Garris' other arrest in deciding the case.<sup>12</sup> (R. pp. 280-281).

### ANALYSIS

The decision to admit or exclude evidence rests in the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995).

Only relevant evidence should be admitted at trial. Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ' "). Evidence which could assist the jury in arriving at the truth of an issue is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

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<sup>12</sup> In order to minimize any potential prejudice that might have resulted from the jury's exposure to the testimony about Garris' arrest on unrelated charges, the trial judge prohibited the parties from specifically referencing the other charges for which Garris was arrested. (R. p. 140). During trial, Garris' arrest on the unrelated charges was only referenced in general terms and was not explored in detail. (R. p. 281; p. 664).

However, even where evidence is otherwise relevant, the trial court must weigh the probative value of the evidence against its prejudicial effect. State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004). Relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). “The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.” State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). The judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

In the case at bar, the trial judge properly denied Garris’ motion to suppress the gun recovered from the dumpster at the Clarendon County Detention Center. The gun was used in the robbery and shooting of Santiago and was highly probative to Garris’ case because it linked Garris to the crimes by virtue of the fact it was recovered in the detention center after it fell off a food tray taken from Garris’ cell. The gun was essential to establishing Garris’ identity as the shooter, was logically relevant to Garris’ case, and was capable of assisting the jury in deciding issues in dispute. Thus, the gun was admissible during Garris’ trial. See State v. Stokes, 381 S.C. 390, 405, 673 S.E.2d 434, 441 (2009) (finding evidence related to a subsequent shooting was logically relevant and admissible in Stokes’ trial because a gun that was linked to Stokes and used in the

subsequent shooting was the same gun used in the crime for which Stokes was on trial); see, e.g., People v. Ward, 160 A.D.2d 473, 474, 554 N.Y.S.2d 32, 33 (N.Y. App. Div. 1990) (holding the trial judge properly allowed a gun found in Ward's cell to be admitted during trial where there was a sufficient connection between Ward and the gun and the gun matched the description of the weapon used during the crime).

Furthermore, even though the circumstances surrounding the gun's discovery led to the introduction of testimony indicating Garris had been arrested in an unrelated case, that testimony was not unduly prejudicial in light of the highly probative nature of the gun. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (“[E]vidence which is ‘logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime.’ ” (citations omitted)); see also Stokes, 381 S.C. at 406, 673 S.E.2d at 442 (finding that evidence related to a subsequent shooting was not offered to show Stokes' bad character but, instead, was introduced to connect Stokes to the weapon that was used in the crime for which he was on trial while also holding the evidence was not unduly prejudicial). Additionally, any prejudice that potentially could have resulted from the introduction of the testimony and evidence was greatly minimized by the trial judge's curative instruction to the jury emphasizing that Garris' unrelated arrest should not be held against him during trial. See Foye v. State, 335 S.C. 586, 590, n.1, 518 S.E.2d 265, 267 (1999) (“A jury is presumed to follow instructions.”). The trial judge did not abuse his broad discretion in denying Garris' motion to suppress of the gun, and the Court of Appeals properly affirmed the trial judge's ruling. Garris' petition for a writ of certiorari should be denied.

### III.

**The Court of Appeals correctly determined the trial judge did not abuse his discretion in denying Garris' request to present surrebuttal evidence in response to the testimony of an expert witness who testified in reply to Garris' trial claims that he did not hold or fire a gun on the day of his arrest for unrelated charges and that he only fired a rifle the day before his arrest.**

Garris contends the Court of Appeals erred in affirming the trial judge's denial of Garris' request to present the testimony of his own expert witness to rebut the testimony of the State's expert offered in reply to Garris' trial claims. Garris maintains the trial judge's ruling prevented him from presenting a complete defense. To the contrary, the State's expert only testified in regards to an issue already raised by Garris as part of his defense and did not raise any new issues not earlier addressed by Garris. Accordingly, the decision as to whether to permit Garris to offer surrebuttal testimony on an issue he raised rested entirely in the trial judge's discretion, and the trial judge did not abuse his discretion in refusing Garris' request to present surrebuttal evidence on an issue Garris himself raised as part of his defense. The Court of Appeals properly affirmed the trial judge's discretionary decision. Garris' petition for a writ of certiorari should be denied.

#### **FACTS RELEVANT TO ISSUE**

During trial, Garris testified in his own defense, denied committing the robbery and shooting, and asserted he never saw the gun recovered from the Clarendon County Detention Center before it was introduced during trial.<sup>13</sup> (R. p. 543; p. 561; pp. 563-564). Additionally, Garris denied having a gun in his possession on the night of the incident

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<sup>13</sup> Notably, Garris also denied ever wearing doo-rags because he claimed they irritated his head, but he later recanted that testimony and admitted he wore doo-rags "about once a week" after a photograph of him wearing a stocking cap was introduced. (R. pp. 581-582; pp. 620-621; pp. 631-632). Additionally, Garris claimed he played football for Manning High School and was allowed on the team by Coach Griggs. (R. p. 572; pp. 574-576; p. 643). However, following Garris' testimony, Robbie Griggs, the athletic director and head football coach of Manning High for the preceding eight years, testified he did not know Garris and Garris had never playing junior varsity or varsity football for Manning High School. (R. pp. 736-737).

and claimed he did not own a firearm. (R. pp. 576-577). Furthermore, Garris testified he did not handle, hold, or fire a gun on the day of his arrest for the unrelated charges. (R. p. 591; pp. 639-640). However, Garris claimed he recalled shooting a rifle the day before he was arrested, and he testified he did not bathe after doing so. (R. pp. 641-642).

Subsequently, after Garris rested his case, the State proffered the testimony of several witnesses in reply. (R. p. 681). Outside of the jury's presence, Investigator Lin Ham of the Clarendon County Sheriff's Office testified he performed a gunshot residue test on Garris' hands following Garris' arrest on the unrelated charges. (R. pp. 682-683; p. 705). Additionally, John Roberts, a S.L.E.D. analyst, stated he analyzed the gunshot residue test samples taken from Garris and concluded Garris was either near a gun when it was fired or fired a gun within six hours of when the gunshot residue test was performed. (R. pp. 688-690). Furthermore, Roberts testified Garris most probably fired a pistol as opposed to a rifle based on Roberts' findings. (R. p. 696).

Following Roberts' in camera testimony, Garris objected on the grounds the testimony was not relevant, was prejudicial, was not mentioned in Garris' prior trial on the unrelated charges, and was not included in Roberts' report. (R. pp. 699-702). Garris further argued he did not have an opportunity to rebut the testimony with his own expert. (R. p. 702). However, the trial judge ruled the testimony was admissible. (R. p. 703).

Subsequently, Roberts testified before the jury and stated he determined Garris fired or handled a firearm within six hours of the gunshot residue test. (R. pp. 725-726). Roberts further opined the residue found on Garris' hands was produced by a pistol based on the amount and location of the gunshot residue. (R. p. 727). Garris objected to the testimony on the basis Roberts' opinion was not included in his report, and the objection was overruled. (R. p. 727). Thereafter, at the conclusion of the State's reply testimony,

Garris asked for an opportunity to rebut Roberts' testimony with an expert of his own, and the trial judge denied Garris' request. (R. p. 740).

### ANALYSIS

The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bryant, 322 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). Ordinarily, a decision as to whether to admit reply testimony or surrebuttal testimony rests in the sound discretion of the trial judge. State v. Farrow, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998); see Goethe v. Browing, 146 S.C. 7, 18, 143 S.E. 362, 366 (1928) ("Admission of evidence in surrebuttal is very much in the discretion of the trial judge."). A trial judge's decision regarding reply testimony or surrebuttal testimony will not serve as a basis for reversal unless it constitutes an abuse of discretion and is found to be prejudicial. Farrow, 332 S.C. at 194, 504 S.E.2d at 133; see State v. Watson, 353 S.C. 620, 624, 579 S.E.2d 148, 151 (Ct. App. 2003) (affirming Watson's conviction after the trial judge declined to permit the introduction of surrebuttal testimony because Watson suffered no prejudice as a result of the trial judge's ruling).

In the case sub judice, the trial judge did not abuse his broad discretion in denying Garris' request to present the testimony of an expert to rebut testimony offered by the State in reply to Garris' trial assertions. After Garris denied any connection to the firearm used in the shooting and claimed he did not hold or fire a firearm on the day of his arrest on the unrelated charges, the testimony of Roberts was presented in reply to establish Garris did, in fact, hold or fire a gun within six hours of his arrest. Although Roberts' testimony was not initially admissible during Garris' trial because the gunshot residue test was performed in connection to an arrest unrelated to the shooting and

robbery for which Garris was on trial, Roberts' testimony became relevant in light of Garris' assertions during trial and was properly admitted in reply by the trial judge. See State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) ("The admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony."). Thereafter, the decision regarding whether to permit Garris to procure and introduce the testimony of an expert to rebut Roberts' testimony rested entirely in the trial judge's discretion, and the trial judge properly declined to do so in Garris' case.

Unlike the testimony offered by the State in reply to Garris' testimony, the testimony Garris sought to introduce in surrebuttal was not inadmissible or irrelevant prior to the testimony of the State's reply witness. Instead, Garris could have introduced expert testimony to support his claims that he did not hold or fire a gun on the day of his arrest and that he fired a rifle the day before his arrest as part of his defense prior to the introduction of the reply testimony of the State's expert.<sup>14</sup> The fact he elected not to do so at that time did not eliminate the trial judge's discretionary authority to limit Garris' ability to subsequently do so in surrebuttal. See, e.g., United States v. Burgess, 691 F.2d 1146, 1149 (4th Cir. 1982) ("Evidence which should have been put in as part of the case in chief, or which, being merely repetitive of other evidence already before the jury, would not be proper surrebuttal testimony, could not have its status changed merely by application of the label 'Surrebuttal.' "). For this reason, the trial judge did not abuse his discretion in denying Garris' request to present testimony he could have presented earlier during trial.

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<sup>14</sup> To the extent Garris is contending on appeal he had no knowledge of Roberts prior to Roberts' reply testimony, Garris acknowledged during trial that Roberts testified in Garris' earlier trial on the unrelated charges and only contended Roberts' opinion that Garris most probably fired a pistol had not previously been revealed. (R. p. 701).

Garris had an opportunity to introduce any expert testimony he wished to support his claim he did not hold or fire a gun immediately before his arrest on the unrelated charges as part of his defense, but he did not avail himself of that opportunity. See Goethe, 146 S.C. at 18, 143 S.E. at 366 (“Admission of evidence in surrebuttal is very much in the discretion of the trial judge.”). Additionally, Garris was fully able challenge the State’s evidence by cross-examining Roberts about his opinion, which was only offered in reply to Garris’ trial claims. See, e.g., Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm’n, 282 S.C. 430, 438, 319 S.E.2d 695, 700 (1984) (“The limited nature of the rebuttal evidence does not substantiate Palmetto's claim that it was without an adequate opportunity to contest such evidence. The issues addressed in rebuttal were the identical issues identified and pursued by Palmetto's own witness.”). Accordingly, under the circumstances of Garris’ case, the trial judge did not abuse his discretion in prohibiting Garris from introducing surrebuttal testimony in response to the State’s reply testimony, and the Court of Appeals properly affirmed the trial judge’s discretionary ruling.<sup>15</sup> Garris’ petition for a writ of certiorari should be denied.

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<sup>15</sup> Notwithstanding the Court of Appeals’ decision affirming the trial judge’s ruling on the merits, Garris’ issue with the trial judge’s denial of his request to introduce the testimony of a defense expert in surrebuttal was not properly preserved for appellate review because Garris did not proffer the testimony of the expert he wished to introduce. See State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) (“[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been.”). Likewise, the issue was also not properly preserved for appellate review because Garris did not identify what testimony he believed his expert would give if the expert were present for trial. See State v. White, 311 S.C. 289, 293, 428 S.E.2d 740, 742 (Ct. App. 1993) (finding the trial judge did not abuse his discretion in denying a continuance motion where White did not identify the facts he believed the absent witness would testify to and did not offer his oath to the trial judge that the absent witness was material to his defense, that he was not seeking the continuance for purposes of delay, and that he used due diligence in trying to obtain the witness’ testimony). Furthermore, Garris did not contend during trial he was denied a right to present a complete defense by the trial judge’s ruling. See Patterson, 324 S.C. at 19, 482 S.E.2d at 767 (“Appellant is limited to the grounds raised at trial.”). Therefore, Garris’ appellate challenge to the trial judge’s ruling was not properly preserved and should not have been addressed on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“An issue that was not preserved for review should not be addressed by the Court of Appeals[.]”).

#### IV.

**The Court of Appeals properly affirmed the trial judge's denial of Garris' motion to set aside the jury panel based on the alleged use of discriminatory peremptory strikes during the jury selection process because the solicitor offered racially-neutral explanations for striking the challenged jurors and Garris failed to meet his burden of establishing those reasons were merely pretextual.**

Garris contends the Court of Appeals erred in affirming the trial judge's decision to deny his motion to set aside the jury panel. Garris maintains the solicitor's asserted reasons for striking the two challenged jurors were superficial and were a mere pretext for removing the only African-American males from the jury panel. To the contrary, after Garris objected to the solicitor's strikes, the solicitor offered valid racially-neutral explanations for the strikes. Thereafter, Garris failed to meet his burden of showing those asserted reasons were merely pretextual and failed to show similarly-situated members of another race were seated on the jury. Accordingly, because Garris failed to meet his burden of persuading the trial judge that the solicitor's strikes were impermissible, the trial judge properly denied Garris' motion to strike the jury panel. The trial judge's ruling was not clearly erroneous, and the Court of Appeals correctly affirmed the trial judge's ruling. Garris' petition for a writ of certiorari should be denied.

#### **FACTS RELEVANT TO ISSUE**

At the outset of trial, the jury selection process was conducted, and a jury was selected. (R. p. 33; pp. 814-815). The selected jury was comprised of six white male jurors, two white female jurors, and four African-American female jurors. (R. pp. 814-815). Additionally, a white male juror and an African-American female juror were selected as alternate jurors. (R. p. 815). Following jury selection, Garris moved to strike the jury, asserting the solicitor used all four of her strikes in a discriminatory manner on

African-American jurors. (R. p. 34). The trial judge then proceeded to individually analyze each of the strikes exercised by the solicitor. (R. p. 34).

Regarding the first strike, the solicitor asserted she struck Juror # 116, who was an African-American male, because the juror stated he could not read or write well and sometimes experienced difficulty understanding things. (R. pp. 34-35). The solicitor stated the juror's admissions were troubling to her because the case was complex and involved numerous witnesses. (R. p. 35). In response, Garris merely contended the solicitor's asserted basis for the strike was pretextual without further explanation while conceding no similarly-situated jurors were seated on the jury. (R. pp. 35-36).

Regarding the second strike, the solicitor stated she struck Juror # 50, who was an African-American male, because he was only five years older than Garris and lived in Manning like Garris did. (R. p. 36). Based on those factors, the solicitor indicated she assumed the juror probably went to the same school as Garris or his brother. (R. p. 36). In response, Garris asserted the strike was pretextual because the fact the juror was young and from Manning did not necessarily mean he knew Garris. (R. p. 37). The solicitor responded that the strike was based on the fact the juror was close in age to and resided near Garris. (R. p. 37). She indicated she looked up the age of each juror along with the area each juror lived in and decided who she was going to strike prior to trial on that basis. (R. pp. 37-38). She stated a seated alternate juror was close in age to Garris but resided in Summerton instead of Manning. (R. p. 37). Garris noted Juror # 122, who was a white male, was close in age to Garris and was not stricken. (R. p. 38). Similar to the seated alternate juror, the solicitor responded that Juror # 122 lived in Turbeville instead of Manning. (R. p. 38).

At the conclusion of the hearing, the trial judge noted the solicitor's exercise of the strike on Juror # 50 gave him "pause" but the burden was on Garris to prove the strike was used in a racially-biased manner. (R. p. 39). Garris again asserted the strike was pretextual and argued a similarly-situated juror who was close in age to him was seated on the panel. (R. p. 40). However, Garris conceded the seated juror was not from the same town as him. (R. p. 40). Thereafter, the trial judge denied Garris' motion to strike the jury panel. (R. pp. 40-41). The trial judge ruled the solicitor's strike used on Juror # 116 was not unconstitutional and also noted Garris did not appear to have an objection to the strike after the solicitor offered her explanation for it. (R. pp. 40-41). The trial judge further ruled the solicitor's strike of Juror # 50 was not unconstitutional after finding the solicitor's explanation was not fundamentally implausible and the seated juror who was close in age to Garris was not similarly-situated to the stricken juror because he was from a different town, community, and school system.<sup>16</sup> (R. p. 41).

### ANALYSIS

All criminal defendants have a right to a trial by an impartial, indifferent jury. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). However, a criminal defendant has no right to a trial by any particular jury, but only to a competent and impartial jury panel. Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007).

In addition to a defendant's right to a fair trial, prospective jurors have a right to serve on a jury and not be discriminated against based on race or gender. See Payton v. Kearse, 329 S.C. 51, 56, 495 S.E.2d 205, 208 (1998) ("[T]he right to serve on a jury and

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<sup>16</sup> During the hearing, the trial judge also analyzed the solicitor's other two strikes. (R. pp. 38-39). The solicitor indicated she struck Juror # 88, an African-American female, because the solicitor personally prosecuted the juror's son and struck Juror # 130, an African-American female, because she was previously convicted of shoplifting. (R. pp. 38-39). The trial judge found each of those strikes to be valid, and Garris has not challenged the trial judge's ruling on appeal. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (finding unchallenged and unappealed rulings are the law of the case).

not to be discriminated against because of race or gender belongs to the potential juror, not the party.”). In order to protect this right, “[t]he Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender.” State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). “Thus, during jury selection, either the defendant or the State may oppose the peremptory challenge of a juror who is a member of a cognizable racial group.” State v. Cochran, 369 S.C. 308, 314, 631 S.E.2d 294, 297 (Ct. App. 2006).

Once a member of a cognizable racial group or gender is struck from the jury and one of the parties objects to the strike and requests a hearing, the trial judge must conduct a hearing to determine the validity of the exercised strike. State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). During the hearing, the proponent of the strike must offer a facially race-neutral explanation for the strike. Id. However, the “explanation is not required to be persuasive or even plausible.” State v. Rayfield, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006). Unless a discriminatory intent is inherent in the offered explanation, it will be deemed race-neutral. Sumpter v. State, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994). Once a racially-neutral explanation for a strike is offered, the opponent to the strike must show that explanation was merely pretextual. Adams, 322 S.C. at 124, 470 S.E.2d at 372. “[U]nless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext.” Cochran, 369 S.C. at 315, 361 S.E.2d at 289. The burden of persuading the trial court that the strike was based on an impermissible ground remains at all times on the opponent of the strike. State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999).

In cases in which a defendant challenges an exercised peremptory strike, “the decisive question becomes whether the State’s race-neutral explanation for a peremptory challenge should be believed.” State v. Guess, 318 S.C. 269, 273, 457 S.E.2d 6, 8 (Ct. App. 1995). The trial judge must conduct a sensitive inquiry into whether the defendant has met his burden of persuasion and must examine the challenged strike in light of the circumstances under which it was exercised. State v. Oglesby, 298 S.C. 279, 280, 379 S.E.2d 891, 892 (1989). The trial judge’s determinations regarding purposeful discrimination necessarily will rest largely on an evaluation of the demeanor and credibility of counsel. State v. Evins, 373 S.C. 404, 416, 645 S.E.2d 904, 909 (2007); see Hernandez v. New York, 500 U.S. 352, 365 (1991) (“As with the state of mind of a juror, evaluation of the prosecutor’s state of mind based on demeanor and credibility lies ‘peculiarly within a trial judge’s province.’ ” (citations omitted)). Therefore, the trial judge’s ruling must be accorded great deference on appeal and should only be set aside if clearly erroneous. Haigler, 324 S.C. at 630, 515 S.E.2d at 91.

In Garris’ case, Garris failed to meet his burden of proving to the trial judge that the solicitor struck the two challenged jurors for an impermissible discriminatory reason. The solicitor’s asserted grounds for striking the two challenged jurors were objectively race-neutral. The solicitor indicated she struck one of the jurors because he candidly admitted he had difficulty understanding things. She indicated she struck the other challenged juror because he lived near Garris, was close in age to Garris, and likely attended the same school as Garris and his brother. The solicitor’s asserted grounds for the strikes were not inherently discriminatory and, instead, were objectively reasonable.

Because the solicitor offered racially-neutral reasons for the strikes, Garris was required to prove the asserted reasons for the strikes were merely pretextual. Garris

failed to meet that burden. Regarding Juror # 116, Garris did not identify any similarly-situated juror on the jury panel and did not contend the strike was fundamentally implausible. Thus, there was no basis to overturn the strike. Regarding Juror # 50, Garris attempted to identify two similarly-situated jurors but conceded those jurors were not similarly-situated in that they did not live in the same community as the stricken juror. Just as the trial judge recognized, the fact that those seated jurors belonged to different communities, towns, and school districts differentiated them from Juror # 50. Thus, the stricken juror was not similarly situated to the seated jurors, and the solicitor's reason for the strike was not fundamentally implausible. Therefore, Garris failed to show the solicitor exercised a strike on Juror # 50 in a racially-discriminatory manner.

Under the totality of the circumstances, the solicitor offered racially-neutral explanations for the exercised peremptory challenges, and the fact five African-American jurors were selected as either primary jurors or alternates strongly supported a finding that the jury selection process was free from improper discrimination on the part of the solicitor. Cf. Id. at 631, 515 S.E.2d at 92 (finding no evidence of purposeful discrimination where the solicitor struck four African-American prospective jurors but seated four African-American jurors and two African-American alternate jurors on the jury panel). Garris failed to meet his burden of establishing discriminatory intent on the part of the solicitor, and the trial judge's finding of a lack of purposeful discrimination was not clearly erroneous. See State v. Tucker, 334 S.C. 1, 9, 512 S.E.2d 99, 103 (1999) ("Because the trial judge's findings regarding purposeful discrimination rest largely upon his evaluation of the solicitor's credibility, we will give those findings great deference."). The Court of Appeals properly affirmed the trial judge's ruling. Garris' petition for a writ of certiorari should be denied.

**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 7, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals  
Appeal from Clarendon County  
Honorable George C. James, Jr., Circuit Court Judge

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THE STATE,

Respondent,

vs.

BRIAN GARRIS,

Petitioner.

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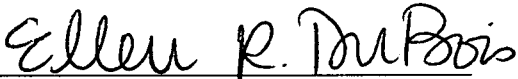
**PROOF OF SERVICE**

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I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 7th day of June, 2012.

  
ELLEN R. DuBOIS  
Legal Assistant

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Post Office Box 11549  
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ALAN WILSON  
ATTORNEY GENERAL

RECEIVED

June 7, 2012

JUN - 7 2012

S.C. Supreme Court

LaNelle Cantey DuRant, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

RE: State v. Brian Garris

Dear Ms. DuRant:

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari, along with proof of service, in the above-referenced case.

Please note the Record on Appeal contains personal identifiers in the form of minor witnesses' full last names on pages 6, 7, 68, 71, 72, 75, 76, 78, 79, 80, 83, 85, 92, 93, 110, 146, 167, 168, 173, 177, 178, 192, 197, 199, 204, 330, 396, 398, 400, 408, 409, 412, 423, 424, 434, 435, 446, 454, 455, 464, 465, 475, 477, 479, 480, 499, 501, 563, 589, 598, 601, 625, 629, 648, 650, 762, 763, 765, 778, 779, and 781; Garris' home address on page 574; the victim's home address on page 145; and a witness' home address on page 232. Pursuant to the Order of the South Carolina Supreme Court, dated August 13, 2007, entitled RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, these personal data identifiers and any others must be redacted from the Record on Appeal in a manner consistent with the order.

Sincerely,

Mark R. Farthing  
Assistant Attorney General

MRF/erd

cc: Honorable Daniel E. Shearouse (original and six copies enclosed)  
Honorable Jenny A. Kitchings (one copy enclosed)  
Victim Services