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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Aiken County
Court of General Sessions
The Honorable Jocelyn Newman, Circuit Court Judge

THE STATE,

Respondent,

v.

TIMOTHY F. GREEN,

Petitioner.

Appellate Case No. 2026-000461

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Did the state's failure to preserve potentially exculpatory evidence combined with its failure to maintain proper records constitute a violation of due process under the South Carolina Constitution?

2. Did the court of appeals err in holding that the issue was not preserved for appellate review?

(Pet. 1).

STATEMENT OF THE CASE

Petitioner, Timothy F. Green, was convicted by a jury in March of 1986 for the murder of his girlfriend's three-year-old child. The appeal stems from the denial of a motion for a new trial heard in June of 2023. The Court of Appeals found the one issue presented in the appeal was procedurally barred from merits review. Petitioner now seeks review of the Court of Appeals opinion.

The Murder Conviction

An Aiken County grand jury indicted Petitioner at a December 1985 term for the child's murder. (1985-GS-02-847). Jerry M. Screen, represented Petitioner on the charge. A jury trial on the charge was held on March 5, 1986.[1] The Honorable Rodney A. Peeples presided. The jury found Petitioner guilty of murder, and Judge Peeples sentenced him to imprisonment for the balance of his natural life. (*See* App. 309-310).

DNA Testing Motion

On November 29, 2012, Petitioner filed a motion seeking DNA testing. (App. 56). Petitioner's blue shirt and trousers were admitted at trial. (App. 207, 255). Trial testimony showed that the clothes were taken directly from Petitioner, two days after the murder, with Petitioner having confirmed that he was wearing the blue shirt on the day of the murder. (App. 208). A SLED forensic serologist testified that there was "Group O" blood found on the shirt and on the pants. (App. 211-213). However, given the time period at issue, DNA was not an available testing avenue. (*See* App. 106).[2] In September 2014, the Honorable Doyet A. Early, III, issued an order granting

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[1] According to the assertions in the 2017 PCR action return, Petitioner was initially tried by a jury on January 20, 1986, but the jury was unable to reach a verdict and a mistrial was declared. (*See* C/A 2017-CP-02-0064, Return and Motion to Dismiss, p. 1).

[2] In discussing the factual context during the new trial motion, Judge Newman made these observations: "No one would have known in 1985 to utter the acronym DNA" and reasoning that the new

DNA testing. On January 15, 2016, SLED issued a report finding no DNA was available for analysis. (App. 144-145). A second order was issued in October of 2015 to examine the clothes for "vomit stains" and possible testing for DNA. Again, the results were that nothing to test detected. (App. 81-84; 144-145). Appointed counsel, P. Andrew Anderson, Esquire, took no further action.

2017 PCR Action

On January 17, 2017, Applicant filed a *pro se* application for post-conviction relief (PCR) and made a number of claims, including that Mr. Anderson was ineffective in failing to file a PCR action concerning the testing, and alleging innocence based on the results. (*See* C/A 2017-CP-02-00064).[3] By consent order filed on March 30, 2021, the 2017 PCR action was stayed pending the outcome of the 2018 general sessions new trial motion.

The New Trial Motion

On April 8, 2018, while the PCR was pending, Petitioner filed his new trial motion. (App. 56-59). The basis for the motion rested on the inability to conduct DNA testing that had been ordered. *Id.*

On June 14, 2023, a hearing was held on the new trial motion. The Honorable Jocelyn Newman presided. Applicant was represented by J. Falkner Wilkes, Esq. Judge Newman heard testimony, then also heard arguments by counsel for Petitioner and counsel for the State. At the

testing was attempted to determine if there was previously unavailable evidence, *i.e.,* "it's not about presenting the wrong evidence" during the trial. (App. 106).

[3] The return to the 2017 application lists a number of prior challenges, including a direct appeal, *see State v. Green*, Op. No. 87-MO-114 (S.C.Sup.Ct. filed March 16, 1987); a 1988 PCR action; a 1989 federal habeas corpus action; a 1992 PCR action; a 1993 PCR action; and, a 2004 state petition for writ of habeas corpus. (*See C/A* 2017-CP-02-0064, Return and Motion to Dismiss, pp. 1-3). Applicant agrees with this history in his brief to this Court. (App. 9-10).

conclusion of the hearing, Judge Newman found denied relief on the record. (App. 127). No formal, written order followed. Petitioner timely appealed the denial of his motion.

The Direct Appeal Action in the Court of Appeals

In his briefing to the Court of Appeals, Petitioner raised the following issue:

> Does the State's failure to preserve potentially exculpatory evidence combined with its failure to maintain proper records constitute a violation of due process under the South Carolina Constitution?

(App. 8).

The State framed the issue, however, as follows:

> Is a state constitutional due process issue preserved for appeal by general reference to a defendant's inability to conduct new DNA testing of cuttings from clothing where the circa 1985 cuttings were not located? Alternatively, does inability to conduct post-trial DNA testing allow a defendant to shift the burden of proof in a motion for a new trial?

(App. 29).

After briefing, but without oral argument, the Court of Appeals affirmed the lower court by unpublished decision on December 10, 2025. (App. 2-3). The Court of Appeals found the issue was not preserved for merits review on appeal. (App. 3). Green's timely petition for rehearing was denied on February 18, 2026. (App. 1). Green filed a petition for writ of certiorari in this Court on February 25, 2026. This return follows.

STATEMENT OF FACTS

As noted above, an Aiken County jury convicted Petitioner of murder. The jury heard the following in finding Petitioner guilty:

The victim's mother, Phyllis Price, testified that she had three children in September of 1985, one was three-year old Caronica and one was four-year old Ebony. (App. 214-215). Her son was so small he was not yet walking. (App. 186). Ms. Price testified that on the morning of the murder, Caronica had no bruises, nor did she express any "distress" or "appear to be ill." (App. 216). Caronica and Ebony together went to Elizabeth Green's home, a neighbor in the apartment complex. (App. 215). Elizabeth is Petitioner's sister. At the time, Petitioner was Ms. Price's boyfriend and stayed with her. (App. 203, 85). Elizabeth's daughter, Erica, was in Elizabeth's home, and Elizabeth testified Caronica ("Ronica") and Ebony ("Poo") came over. Carolyn Johnson was also present, and Elizabeth testified that Carolyn asked the children to go to the back when Carolyn "had to get into some of her drugs." (App. 257-258). Elizabeth also testified that she saw Petitioner that morning and asked him to come over. She wanted to tell him that her mother was ill, and he should "call home." (App. 257).

Ms. Johnson testified she was at Elizabeth's home, drinking with Elizabeth when Petitioner came over and also drank with them, talked, and even looked in the refrigerator and the stove. (App. 187-188, 200). Then, Petitioner went toward the back of the apartment where the children were. Somewhere around fifteen or twenty minutes later, he returned and "had Coronica laying on his shoulder and he told Liz that she was back on her bed asleep." (App. 190). Petitioner left with the child to go to Ms. Price's home. Ms. Johnson heard Ms. Price scream shortly thereafter. (App. 190). Ms. Johnson and Elizabeth went outside and saw Petitioner had laid her down on the back porch" and asked for Ms. Johnson to "go get a cold compress to put on her head." (App. 192).

He was "rubbing her face and shaking her and calling out to her" and even tried chest compressions to revive her. (App. 192-193). She testified that she later saw blood in Elizabeth's home. (App. 192). While she could not say whether Petitioner "did anything" to the victim, she testified that he and the children were the only ones in the back. (App. 201-202).

Ms. Price testified that Petitioner came to her with Ronica and expressed he thought she was sleeping. (App. 216). When Ms. Price looked at the child, she "saw blood coming out of her nose and mouth" and that was when she screamed. (App. 216-217). She asked what was wrong with the child, and Petitioner "said maybe she had took some poison." (App. 217). He later said "maybe she took some worm medicine" such as that given to dogs. (App. 217). That was, actually, what he later called the hospital to suggest. (App. 217). However, Ms. Price testified that the worm medicine had been taken out of her house approximately a week before the victim died. (App. 218-219). Ms. Price confirmed the blue shirt (the one tested) was the shirt Petitioner had on when carrying her child who was bleeding. (App. 221).

While only four-years old, Erica Green, testified. (App. 223-224). Erica stated that she and "Poo and Ronica" were jumping on a bed, and that Petitioner was with them. However, Petitioner left to go into the bathroom. "Ronica walked in on Timmy and Timmy said, "get out of here, Ronica" though she did not, then Petitioner kicked the victim in the stomach area. Victim began to cry. (App. 226, 228). She also recalled Petitioner said to the victim he was "going to beat your butt, Ronica." (App. 228). Erica testified there was blood on the wall, and that victim began throwing up in the yard. (App. 227).

The afternoon that Coronica died, Emma Simpkins was in an area close by the apartments, near a flagpole in the park. Petitioner approached her and stated that he felt as though he was

being punished by God and if Caronica lived he wouldn't do anything wrong anymore." (App. 205).

An investigator obtained Petitioner's shirt and trousers for testing. Petitioner confirmed the shirt was the one he was wearing on the day of the murder. (App. 206-209). SLED forensic serologist Patsy Habben testified that she tested the shirt, right sleeve, and two other samples from the shoulder area, two revealed type O blood diluted by silva, but one shoulder-area sample was blood, but the testing was inconclusive on type. (App. 211-212). Three other samples were negative. (App. 212). Testing of the pants similarly showed type O, but not diluted, from the knee area. (App. 213). On cross-examination, Petitioner's attorney asked the percentage of individuals with type O, and Ms. Habben answered, "Approximately forty percent of the population." (App. 214).

Forensic pathologist Dr. Joel Sexton, M.D., testified to the fatal injuries sustained, in addition to some minor injuries, "there was also some large bruises or contusions of the face. Both lips were swollen, the left eye was swollen and there was a large contusion on the right forehead. The internal examination revealed that in addition to these external injuries, there were multiple internal injuries … bruises or contusions … about three or four on the right side and three or four on the left side of the abdominal region plus one deep one here on the upper left chest. Internally, the organs, meaning the liver, the kidneys and other structures of that sort, also had injuries. Notably, a large laceration in the liver … it was split in the middle and was bleeding from the large split … In addition, there was injury to the small intestines … Something had struck the child hard enough to press that portion of the body of the internal anatomy up against the interior and by pushing against the spine, had actually lacerated that portion of the small intestine. There was also injury to the pancreas … All of this led to acute inflammation inside the abdomen… So, in general

the child had in the abdominal and chest region, primarily the abdominal region, contusions on the external surfaces, contusions in the muscle and tissue and injuries to the internal organs" and further "contusions of the scalp. Bruises where multiple injuries had occurred on top of the head, on the front of the head and on the back of the head" and "hemorrhage on the surface of the brain." (App. p. 241-243). He opined that "[t]he abdominal and head injuries caused her death. The abdominal injuries caused internal hemorrhage, which in spite of the surgery that was performed, she went into shock and did not come out of the shock and died during surgery. So, the abdominal injuries primarily, but the head injuries certainly, contributed to the cause of death." (App. 243). He further opined the injuries indicated they most likely were the result of "blows to this region of the body" and the injuries were inflicted "[o]n or about the day of death." (App. 244). When asked whether worming medication, Piperazine, would cause the injuries, he indicated it would not, and it does not even enter the body's system but stays in the GI tract. (App. 246, 253). Additionally, no Piperazine was found in the child's tissue samples taken at autopsy. (App. 253).

Elizabeth Green testified for the defense. She indicated first no one was in the back area of the house with the children then recalled a friend of hers, "Fred Bailey," was in the house, though he did not go in the back where the children were. (App. 261, 268, 270). She testified Petitioner went to the back to use the bathroom but returned within "five to six minutes." (App. 262). According to Elizabeth, Petitioner left and returned, but on one return, the "children" called him. He went back and came out almost immediately, carrying the victim. (App. 264). Elizabeth testified Erica told Petitioner the victim had fallen out of bed. (App. 264). She saw no blood on the child, but saw some blood on Petitioner "because he had a cut on his arm." (App. 265). She later saw Petitioner trying to revive the child. (App. 266).

Petitioner also testified. He generally followed Elizabeth's testimony, and testified that the children told him the victim was "on the floor asleep," that he picked her up, and during the trip home, "she threw some kind of fling … and her eyes were rolling back in her head…." (App. 275). She threw up on his shirt, but he denied seeing any blood. (App. 275-276).

Petitioner's niece, Doris Green, testified she had seen Ms. Price hit "Poo" before. (App. 285-286).

The jury rejected the defense and convicted Petitioner of murder.

STANDARD OF REVIEW

Certiorari Review

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR.

New Trial Motions

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and" an appellate "[c]ourt will not disturb the trial court's decision absent an abuse of discretion." *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citing *State v. Johnson,* 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); *State v. Simmons,* 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983)). "The deferential standard of review constrains" the reviewing court "to affirm the trial court if reasonably supported by the evidence." *Mercer*, 381 S.C. at 167, 672 S.E.2d at 565.

ARGUMENT

Petitioner has failed to present an issue warranting certiorari review as the Court of Appeals correctly found the one issue presented was procedurally barred from merits review.

Petitioner's argument in the Court of Appeals rested on an alleged violation of due process under the South Carolina Constitution. (App. p. 8). However, Petitioner did not argue that due process was violated, nor did he cite the South Carolina Constitution, in his argument before Judge Newman. (*See* App. p. 125-127). On this record, the Court of Appeals found that the issue was not persevered for merits review. (App. 3). Petitioner can show no error in the Court of Appeals' opinion.

The Court of Appeals was guided by this Court's precedent underscoring the necessity to raise an issue in the lower court: "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge" and if not raised and ruled upon, "will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). (*See* App. 3). "Constitutional questions must be preserved like any other issue on appeal." *State v. Langford*, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012); *State v. McWee*, 322 S.C. 387, 391, 472 S.E.2d 235, 238 (1996) (issue "not preserved for review because at trial, appellant never cited any constitutional basis"); *State v. Varvil*, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000) ("[c]onstitutional arguments are no exception to the rule, and if not raised to the trial court are deemed waived on appeal") (citing *State v. Powers,* 331 S.C. 37, 501 S.E.2d 116 (1998)). The issue is procedurally barred under well-established precedent. Again, Petitioner fails to show an issue that warrants certiorari review. Moreover, even if available for review, the issue would not afford relief as the record shows that Judge Newman did not abuse her discretion in denying the motion for a new trial.

Alternative Merits Argument

The application and subsequent order for post-conviction DNA testing was based on an "overbroad" belief that all material was available.[4] (*See* App. 67). While the pants and shirt as admitted in trial were preserved and available, the specific, small cuttings originally tested for blood typing were not admitted exhibits and have not been located. (App. 67, 174). The review of the clothes pursuant to the DNA testing order showed no available DNA for testing. (App. 68, 75-79, 94-96). Testimony at the motion hearing also demonstrated that the clerk's office did not have any cuttings associated with original trial, nor did the sheriff's department have evidence or any records related to the evidence from 1985. (App. 107-116). Lt. Clay Adams noted in this testimony that "back then, SLED typically worked [Aiken] crime scenes." (App. 116, lines 15-17).

Applicant argued there was an absence of evidence and posited, "is Mr. Green entitled to relief if the State can't show what it did with the samples?' (App. 120). Applicant argued that if "the State loses it … that would be grounds to support a new trial." (App. 120). He argued that since the State could not show what had happened to the cuttings, he was "entitled to relief and a new trial based on the presumption that it very well could have exculpatory value…." (App. 121).

"To prevail on a motion for a new trial based on after-discovered evidence, the moving party must show the evidence: (1) is such that it would probably change the result if a new trial

[4] Notably, the burden is on the applicant for the testing to show the material is accessible to accomplish the testing: "(B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence: (1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing; …." S.C. Code Ann. § 17-28-90. Further, the applicant is required to show the "material sought to be tested would be material to the issue of the applicant's identity as the perpetrator" and should the testing be "exculpatory" would "probably change the result of the applicant's conviction…." § 17-28-90 (B)(4) and (5). As seen by the development of the record, Petitioner does not meet any of these. However, since the motion at hand was made under Rule 29(b), SCRCrimP, the test remains that for a new trial.

were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching." *State v. Wakefield*, 443 S.C. 123, 126, 903 S.E.2d 489, 490 (2024) (citing *State v. Spann,* 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999)). Here, Petitioner misses the first necessary step – showing that new evidence exists. He similarly fails to recognize that the burden is squarely on him, the defendant, and not the State. *Id.* However, Petitioner argues that *State v. Reaves*, 414 S.C. 118, 777 S.E.2d 213 (2015), supports his position that state constitutional guarantees were violated. (Pet. 8; *see also* App. p. 18-19). Petitioner's reliance on *Reaves* is misplaced.

In *Reaves*, this Court conducted a due process analysis under federal precedent based on destruction of evidence for trial. 414 S.C. at 125, 777 S.E.2d at 217. It is not after-discovered evidence, new trial evaluation, and is inapposite as are those out-of-state cases cited in *Reaves* and in the petition here as to a possible state constitutional due process violation. (App. 9). *See, for example, State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999) (focus on the trial not after-discovered evidence and a new trial motion). Indeed, in *Ferguson*, the Tennessee Supreme Court cited to *California v. Trombetta*, 467 U.S. 479 (1984) and the caution that necessary preservation is limited to that evidence that shows "exculpatory value that was apparent before the evidence was destroyed…." 2 S.W.3d at 917 (citing *Trombetta,* at 488-489). This is not easily connected to "new" testing sought years after the trial, by a method not even available at the time, with an at most unknown value. And, as asserted above, though Judge Newman was not asked to consider our state constitutional provision, she did consider the evidence and potential for exculpatory value in context of the trial – the precise test outlined for new trial motions. *See Wakefield, supra.*

Specifically, Judge Newman considered the arguments for relief offered were based in large measure on the fact that DNA testing was ordered, but, upon drilling down to specifics, it would appear that the materials (the cuttings) were not actually available and Petitioner (as the applicant in the DNA testing motion) could not have shown the material was actually available. As a result, Petitioner would not have been entitled to an order for testing of those cuttings had that been known. (App. p. 128).[5] Judge Newman then reasoned, "I don't think the - - the benefit of the doubt as to missing evidence or inconclusive testing 38 years later…. Entitles Mr. Green to relief." (App. 128). Notably, Judge Newman considered another portion of the Access to Justice Post-Conviction DNA Testing Act, the Preservation of Evidence Act, S.C. Code § 17-28-360, that addresses obligations to maintain certain evidence in certain cases. The legislative purpose was to secure material for later testing under the Post-Conviction DNA Testing Act. Notably, these Acts did not become law until January 1, 2009, long after Petitioner's 1986 trial. Even so, S.C. Code Ann. § 17-28-360 provides that a "[f]ailure of a custodian of evidence to preserve physical evidence or biological material pursuant to this article does not entitle a person to any relief from conviction…." As Judge Newman found, that provision would not allow Petitioner relief, which is a point she considered. (App. 127). Judge Newman denied relief. (App. 128). Essentially, Petitioner showed no basis for the presumption that evidence would be exculpatory, thus, he could not carry his burden under the new trial standard. There is no abuse of discretion in that ruling.

[5] The State also correctly noted that Petitioner could not show any potential value as several witnesses placed him with the victim at the time her massive injuries were sustained, and he admitted carrying her to her mother. (*See* App. 192, 216, 226, 228, 264, and 275-276). Further, it was powerful testimony that Petitioner concocted a "poison" story and admitted to feeling "punished" and promised he "wouldn't do anything wrong anymore," if the child lived. (*See* App. 205, 217-219 and 253).

That said, though, the State maintains Petitioner's argument is procedurally barred and Petitioner was not entitled to have the issue heard for the first time on appeal. *Dunbar, supra*. Therefore, there is no error in the Court of Appeals disposition for this Court to correct.

CONCLUSION

Based on the foregoing, the petition should be denied.

Respectfully submitted,

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