STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein, Trial Judge
The Honorable R. Scott Sprouse, PCR Judge

Jabari M. Linnen ..... Respondent,

v.

State of South Carolina, ... Petitioner.

Appellate Case No. 2017-000970

PETITION FOR WRIT OF CERTIORARI

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INDEX

PETITIONER'S ISSUE PRESENTED

Did the PCR court err when it found Counsel was deficient and Linnen was prejudiced by Counsel's decision not to request a mistrial after the trial judge's curative instruction was given regarding Linnen's inadmissible testimony on the victim's pending charges?

STANDARD OF REVIEW

The post-conviction relief (PCR) court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF CASE

Procedural History

Respondent was indicted by the May 2011 term of the Beaufort County Grand Jury for one count of attempted murder and one count of possession of a weapon during the commission of a violent crime (2011-GS-07-0946, -0947). James Brown, Esquire (Counsel), represented Respondent at trial. On September 17, 2012, Respondent started a jury trial before The Honorable Stephanie McDonald. On September 18-21, 2012, the trial judge changed and Respondent's trial was continued before The Honorable Diane S. Goodstein. At the conclusion of the evidence, the jury found Respondent guilty of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) and as indicted for the count of possession of a weapon during the commission of a violent crime. Judge Goodstein sentenced Respondent to confinement for twenty years for the count of assault and battery of a high and aggravated nature and five years for the count of possession of a weapon during the commission of a violent crime. The sentences run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v. California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Linnen, Op. No. 2015-UP-212 (filed on April 22, 2015). The Remittitur was issued on December 3, 2015.

On March 4, 2016, Respondent filed a post-conviction relief (PCR) application. On February 13 and 15, 2017, The Honorable R. Scott Sprouse convened an evidentiary hearing on Respondent's allegations. On February 13, 2017, Jared Newman, Respondent's PCR counsel, provided the State with an amended application. Judge Sprouse issued an order signed March 9, 2017, and filed March 17, 2017, granting Respondent's PCR application. Petitioner filed a timely notice of appeal. This petition for certiorari follows:

Statement of Facts

On April 21, 2011, King David Williams was driving Respondent's car down Luther Warren Drive on St. Helena Island in Beaufort County, with Respondent in the passenger seat. App. 300. When they stopped at the corner of Seaside Road and Luther Warren Drive, they encountered the victim, Trey Nichols, standing next to an oak tree and cursing at Respondent. App. 334. Nichols threw an empty Coke can at the car. Respondent then retrieved a pistol, exited the passenger's side of the car, walked around to the driver's side and fired multiple shots at the victim. App. 572 - 573. Nichols was struck at least six times in the arms, legs and chest, and suffered at least three life-threatening wounds; however, he survived the attack. App. 127.

Prior to the jury being sworn, Counsel sought a pretrial ruling on the admissibility of evidence of specific instances of violence on the part of Nichols App. 42 – 58. Counsel proffered testimony in an attempt to introduce this evidence in support of his theory of justifiable homicide by showing he had a reasonable apprehension of fear from Nichols at the time of the shooting. App. 151 – 163. The trial court ruled it would allow testimony about three specific prior instances of violence committed by Nichols within three months of the shooting but would exclude evidence of two other prior instances which were significantly older in time. App. 57. The court also ruled Respondent would be allowed to elicit opinion or reputation evidence about Nichols if Respondent laid the proper foundation.

Later, while cross-examining Investigator Jeremiah Fraser of the Beaufort County Sheriff's Office, Counsel asked if there had been any investigation into whether the shooting was lawful or unlawful. App. 211 - 212. Fraser explained the police simply investigate the facts and present those facts to the solicitor's office in regard to whether a shooting might have been lawful. Counsel was then allowed to cross-examine Investigator Fraser about the three

previously admitted specific instances of violence committed by Nichols prior to the shooting. App. 233. On re-direct, Fraser noted that none of the three incidents had anything to do with Respondent. App. 268. On re-cross, Counsel attempted to elicit reputation or opinion testimony about Nichols as a result of Fraser's knowledge of police investigations of prior incidents, but Fraser said he had not formed any opinion about Nichols' reputation for violence. Counsel then advised the trial court he had a matter of law to argue before the court. App. 282.

The judge excused the jury to allow the proffer of testimony and arguments regarding whether Respondent would be allowed to impeach Fraser's claim with extrinsic evidence not previously admitted. App. 272 – 279. This evidence consisted of a DVD recording of the police interview of King David Williams, arrest warrants of Trey Nichols, and a Sheriff's Department summary of Trey Nichols. Respondent appeared to want to introduce this evidence to support his contention that Fraser actually does or should have an opinion about Nichols being a violent person. Respondent argued in part that he believed the questions were admissible to prove his defense of "justification" and argued self-defense was merely a subset of justification. App. 283 – 284. He claimed "justification" would include self-defense, "the right to stand your ground, statutorily," and the defense of others. App. 284. Ultimately, the trial court allowed Respondent to ask whether the incident reports from the previously admitted specific acts of violence led Fraser to form an opinion about Nichols but prohibited any attempts to ask Fraser about the other three pieces of extrinsic evidence. App. 289.

During his subsequent cross-examination of Williams, Respondent tried to show Nichols was a violent person who had an ongoing "beef" with Respondent. App. 384 – 385. He also tried to establish that Respondent was in a place he had a right to be when he fired on Nichols in self-defense. App. 358 – 384. After the State rested, Respondent moved for a directed verdict on the

attempted murder charge, arguing there was no evidence in the record of malice aforethought. He also noted the defense theory that his shooting of Nichols was justified. App. 390.

Respondent then presented evidence in his own defense. He further developed his theme that Nichols was a violent person by calling witnesses Regina Blanding, Paul Mitchell, Robert Blanding, and Desiree Blanding on his behalf. App. 396; 410; 416; 427. Respondent also testified in his own defense, claiming he was scared of Nichols and got out of the car only because he wanted to talk to Nichols about his behavior. App. 516. During Respondent's testimony, Respondent testified the victim had sexual assault charges. App. 531. It is uncontroverted that the mention of the sexual assault charges had been ruled inadmissible by Judge Goodstein in a pre-trial hearing. The State requested a mistrial based on the manifest necessity that the victim's credibility had been irreparably tarnished by being accused of inadmissible sexual assault charges from the witness stand. App. 535. Counsel requested the trial judge deny the State's motion for a mistrial and instead give a curative instruction. App. 538. The trial court debated granting the mistrial motion, but decided to give a curative instruction over the State's continued request for a mistrial. App. 544. Counsel did not object or request a mistrial after the trial judge's curative instruction was given.

In his closing argument, Respondent focused on the theory that he was justified in shooting Nichols in self-defense. App. 601. He argued he was without fault in bringing on the difficulty, that he believed he was in imminent danger of great bodily danger or death, that he was in fact in imminent danger of great bodily injury or death, and that even though he had a duty to retreat, he did not reasonably believe retreat was possible. App. 602. Respondent also focused on Nichols' violent nature and his allegedly aggressive approach towards Respondent once Respondent was outside the car. App. 600.

The jury found Respondent guilty of ABHAN as a lesser included offense of attempted murder and guilty of possession of a weapon during the commission of a violent crime. He was sentenced to twenty years' imprisonment for ABHAN and five years' concurrent imprisonment for the weapon charge. App. 685.

Relevant Post-conviction Relief Hearing Testimony

Counsel testified he believed at the hearing that a mistrial would have been in his client's best interest. App. 743 - 735. PCR Counsel asked Counsel if there was "some strategic reason for resisting a mistrial?" App. 743, ll. 21 – 22. Counsel replied "The only thing I can suggest is, I guess, the jury did hear the information about the rape." App. 744, ll. 2 – 3. Despite arguing against the judge's initial inclination for a mistrial, Counsel stated he might have just conceded the motion at trial because he was "beat down" by the trial judge. App. 750. On cross-examination, Counsel admitted the judge ruled multiple instances of prior violent conduct by the victim were admissible. App. 760 – 761.

Deputy Solicitor Sean Thornton, the State's representative at trial, testified Respondent's inadmissible testimony concerning the sexual assault charges incurably weakened his case. "I asked for the mistrial because I thought it was of manifest necessity... I based it on the fact that the defendant in the case had indicated, as you said, you know, credibility was important, as it is in every trial; that the alleged victim in the case was basically a rapist, because that's what your client indicated when he said that... if you were to ask me without any benefit of hindsight that having someone who is an alleged victim in a shooting case who is identified as a rape – rapist or a sexual assault predator, it would be difficult to get a jury, even with the judge's curative instruction, to get a jury to unring that bell. Once they have heard that, it's hard for them to unhear it sometimes." App. 802, ll. 8 – 25 – 803, ll. 6 – 13.

ARGUMENT

The PCR court erred when it found Counsel was deficient and Linnen was prejudiced by Counsel's decision not to request a mistrial after the trial judge's curative instruction was given regarding Linnen's inadmissible testimony on the victim's pending charges.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). An applicant must overcome this presumption to receive relief. State v. Cherry, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong,

attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

A. Counsel was not deficient for preferring a strongly-worded curative instruction to a mistrial at trial.

Respondent's inadmissible testimony regarding the victim's sexual assault charges spurned the trial judge's direct ruling that the charges were not to be referenced and was so prejudicial against the State's case that the bell could not be unrung. The State objected and requested a mistrial when Respondent testified the victim had sexual assault charges. During a pre-trial hearing, the trial judge had previously ruled the victim's pending sexual assault charges were not admissible and were not to be mentioned.

Q: Now, we talked about his reputation, but let me ask you this, had you ever heard of any other specific instances?
A: About Mr. Trey Nichols?
Q: Yes, sir.
A: When you say him, what was the word you used?
Q: Other specific acts or conduct?
A: Like before this?
Q: Before the shooting.
A: Yeah. About the sexual assault charges and the um
Dep. Sol. Thornton: Objection, Your Honor.

App. 531, ll. 8 – 17.

At trial, Counsel argued against a mistrial and requested a curative instruction in the alternative. App. 538. At the PCR hearing, PCR Counsel asked Counsel if there was "some strategic reason for resisting a mistrial?" App. 743, ll. 21 – 22. Counsel replied "The only thing I can suggest is, I guess, the jury did hear the information about the rape." App. 744, ll. 2 – 3. Counsel later qualified this answer, "It was not better to have that instruction and go forward than a mistrial would have been." App. 744, ll. 5 – 7. Of course, this statement was made with the benefit of the hindsight Respondent was convicted. At the PCR hearing, Deputy Solicitor Sean Thornton, the State's representative at trial, testified Respondent's inadmissible testimony concerning the sexual assault charges incurably weakened his case. "I asked for the mistrial because I thought it was of manifest necessity... I based it on the fact that the defendant in the case had indicated, as you said, you know, credibility was important, as it is in every trial; that the alleged victim in the case was basically a rapist, because that's what your client indicated when he said that... if you were to ask me without any benefit of hindsight that having someone who is an alleged victim in a shooting case who is identified as a rape – rapist or a sexual assault predator, it would be difficult to get a jury, even with the judge's curative instruction, to get a jury to unring that bell. Once they have heard that, it's hard for them to unhear it sometimes." App. 802, ll. 8 – 25 – 803, ll. 6 – 13.

Judge Goodstein granted Counsel's request and gave a curative instruction instead of granting the State's motion for a mistrial. App. 543 – 544. Counsel stated, with the benefit of hindsight, he should have objected to the curative instruction and requested a mistrial. App. 744. However, the State did not believe the curative instruction cured the prejudice inflicted on its case by Respondent's inadmissible statement. App. 804. Counsel suggested a potential trial

strategy was the jury did hear about the rape and, consequently, a mistrial might not have been in Respondent's best interest. App. 744. After the State presented undisputed evidence the victim was shot six times with two of those shots hitting the victim in the chest, Respondent was found not guilty of attempted murder and instead guilty of the lesser-included charge of ABHAN. App. 851. It is likely from the compromised verdict; the trial judge's curative instruction did not unring the bell for the jury.

Counsel's admission he should have requested a mistrial, in hindsight, matters little. "The relevant inquiry is not whether any one attorney believes he was ineffective, but whether his performance fell below an objective standard of reasonableness." Credell v. Bodison, 2011 WL 573425 (United States District Court, D. South Carolina, Anderson, J., 2011). "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000). Counsel's claim he should have objected was made with the retrospective knowledge that his client was found guilty. Counsel's decision, at trial, preferring a curative instruction over a mistrial on evidence extremely prejudicial to the State's case was not deficient performance because it was a valid strategy as Counsel articulated above. The State certainly believed its case was irredeemably harmed by Respondent's inadmissible testimony.

It is unreasonable to find Counsel's trial decision to not request a mistrial fell below the professional norm where the opposing side believed it was effective and the client received a compromised verdict. At trial, Counsel clearly believed, as the State argued at trial and the PCR hearing, the information regarding the sexual assault charges was ultimately beneficial to Respondent's case. In fact, Counsel argued if the trial court granted a mistrial it would be

improvidently granting a mistrial, which would result in jeopardy attaching to the charges. App. 535 – 536. Counsel's post-verdict regret does not change the fact that his strategy and argument at trial did not fall below the standard of reasonable performance. Counsel's failure to object to the curative instruction and request a mistrial did not fall below professional norms. Therefore, Counsel was not deficient under the Strickland standard.

B. Linnen was not prejudiced by the trial court's curative instruction because the Linnen's verdict would not have been reversed on appeal if Counsel had objected to the trial court's curative instruction.

In determining prejudice, this Court must determine whether an objection to the curative instruction was meritorious and if there was a reasonable probability a proper objection would have resulted in reversal and a new trial. The court has held an unpreserved issue may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. "Since the [issue] was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in [applicant's] PCR claim." Id. at 465, 746 S.E.2d at 47.

Counsel did not request a mistrial or object to the sufficiency of the charge after the trial court's curative instruction. Therefore, the curative instruction was not preserved for review. "[T]he issue is not preserved for review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial." State v. Ferguson, 376 S.C. 615, 621, 658 S.E.2d 101, 104 (Ct. App. 2008). Having denied the State's motion for a mistrial based on Respondent's malfeasance, it is axiomatic the trial court would have denied a mistrial motion by Counsel after the judge's

curative instruction. The only potential prejudice stems from Counsel's failure to preserve the allegedly improper curative instruction for appellate review.

The PCR court found "counsel was deficient for not objecting to the Trial Court's curative instruction as an unconstitutional charge on the facts and the overall prejudice of bolstering the victim's credibility and undermining the Applicant's credibility." App. 849. "Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict. Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous. When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial... Judges shall not charge juries in respect to matters of fact, but shall declare the law. State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016), reh'g denied (July 15, 2016) (internal citations omitted). The trial court's curative instruction was as follows:

> Ladies and gentlemen, I need to talk to you about what occurred before you left the courtroom, and in order for you and for me to do that, here is that we must do. I need you to listen very carefully to me and I need you to be able to do what I am going to ask you to do.
>
> This witness testified to something before we stopped. This gentleman back here, Mr. Nichols, has never been convicted of anything, and certainly has never been convicted of what this man said, and I need you to hear that. That should not have been testified to and I need you to absolutely be able to dismiss and to disavow that from your minds; otherwise, we are not doing what we must do here today. I need to be assured that you are able to do that. I am instructing you to do that.
>
> Now, if, over the course of the remainder of this trial, you have any concerns in your mind that you're somehow unable to do that, I need you to send me a note. I need to know that, because I'm telling you that in order for justice to be done here today, that testimony must be disregarded completely. If you find that that is cropping up in your mind as some kind of concern or thought, I'm going to ask you to let your presiding juror know or send me a note directly yourself, because this alleged victim in this case has not been convicted of any such matter. Thank you for that. All right.

Tr. 545, ll. 4 – 25 - 546, ll. 1 – 4.

Judge Goodstein's curative instruction was crafted to cure Respondent's improper unsolicited impeachment of the victim on unresolved inadmissible criminal charges. Respondent's testimony was clearly intended to benefit his case in brazen opposition to the trial judge's ruling that the pending criminal charges were inadmissible. Judge Goodstein's curative instruction accurately corrected Respondent's improper injection of inadmissible evidence. Judge Goodstein did not reference Respondent's credibility. The PCR court's found, "the Trial Court, in its instruction, referred to the victim as a "gentleman"...The instruction had the effect of bolstering the victim's credibility and was damaging to the Applicant's credibility." Firstly, Judge Goodstein referring to a victim as "gentleman" has no bearing on his credibility and certainly did not serve to bolster his testimony. Secondly, Gentleman is a common nomenclature and Judge Goodstein referred to Respondent and jurors as gentlemen on several occasions as well. App. 541; 13; 64.

Respondent impermissibly interjected evidence previously found inadmissible. The instruction was crafted to cure that prejudice, any resulting harm to Respondent's credibility was brought on himself by his own actions and was merely the result of negating the prejudice he caused to the State's case. Judge Goodstein's curative instruction merely attempted to reset the juror's mindset regarding the victim back to its original state. The jury had no reason to believe the victim had been convicted of a sexual assault charge before Respondent's testimony. Judge Goodstein's instruction informed them he had not been convicted of a sexual assault charge, which was true as the charges were still pending.

The PCR court found Judge Goodstein's charge contained 'erroneous factual information.' App. 847. It is uncontroverted none of the victim's criminal history was admissible as evidence. App. 831. Although, Judge Goodstein's statement was technically incorrect, in that

the victim criminal history contained magistrate-level offenses, it was absolutely true as far as the jury was concerned. The victim had no criminal history the jury would hear about or could consider. Therefore, there was certainly no prejudice from Judge Goodstein's statement and it was clearly intended to repair the improper damage done by Respondent's assertion the victim had multiple sexual assault charges.

Further, the strength of Judge Goodstein's charge was necessary to correct Respondent's improper assertion. The PCR court's finding requires a mistrial to be granted based on a defendant's actions. "There simply was no way to give a curative instruction in these circumstances without prejudicing the Applicant severely." App. 849. This cannot be the case. If a defendant's actions are allowed to unilaterally disrupt a court proceeding there will be no end to the introduction of inadmissible harmful evidence for the purpose of delay and disruption. Judge Goodstein's curative instruction properly prevented Respondent from taking the reins of the trial process into his own hands and for his own benefit. Therefore, the trial judge's decision to deny the State's request for a mistrial and give a curative instruction minimizing the prejudice caused by Respondent's malfeasance was appropriate. Accordingly, this Court should grant Petitioner's petition for certiorari and reverse the PCR court's granting of Respondent's PCR application.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court grant this petition for certiorari. If this Court sees fit to grant the petition for writ of certiorari, Petitioner would request permission the opportunity to fully brief the issues contained herein.

Respectfully submitted,

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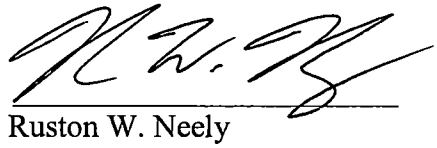
BY: 
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December 6, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Beaufort County

The Honorable Diane S. Goodstein Trial Judge
The Honorable R. Scott Sprouse, Post-Conviction Relief Judge

JABARI LINNEN, #352550 RESPONDENT,

v.

THE STATE OF SOUTH CAROLINA, PETITIONER,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and Appendix** has been served upon opposing counsel by mailing two copies in the United States mail, postage prepaid:

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This 6th day of December, 2017

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