STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 25 2019

S.C. SUPREME COURT

---

CERTIORARI TO CHARLESTON COUNTY
Kristi L. Harrington, Trial Judge
Maite Murphy, Post-Conviction Relief Judge

---

Appellate Case No. 2018-001051

---

JAMES L. MOORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

---

# RETURN TO PETITION FOR WRIT OF CERTIORARI

---

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

STATEMENT OF ISSUE.......................................................................................ii

STATEMENT OF THE CASE.......................................................................................1

STANDARD OF REVIEW.......................................................................................6

ARGUMENT.......................................................................................7

The post-conviction relief court properly determined Petitioner failed to establish trial counsel was constitutionally ineffective in his handling of unresponsive commentary from the confidential informant while testifying as a State's witness where counsel immediately objected, the trial court sustained his objection, the court struck the testimony and instructed the jurors not to consider it during deliberations, counsel moved for a mistrial, and there is no reasonable likelihood a mistrial would have been granted by the trial court or reversed by the appellate court had it been made immediately following the witness's commentary. ..........................................7

CONCLUSION.......................................................................................15

## STATEMENT OF ISSUE ON CERTIORARI

### Petitioner's Issue Presented

Whether the PCR court erred as matter of law by ruling defense counsel provided effective representation by objecting and moving for a mistrial where the state's confidential informant gave highly prejudicial testimony that he knew petitioner was guilty and implied petitioner's defense counsel knew that petitioner was guilty too, since the Court of Appeals procedurally barred the mistrial issue because defense counsel failed to timely move for a mistrial when he asked for a curative instruction instead?

### Respondent's Counter-statement of Issue Presented

Did the post-conviction relief court properly determined Petitioner failed to establish trial counsel was constitutionally ineffective in his handling of unresponsive commentary from the confidential informant while testifying as a State's witness where counsel immediately objected, the trial court sustained his objection, the court struck the testimony and instructed the jurors not to consider it during deliberations, counsel moved for a mistrial, and there is no reasonable likelihood a mistrial would have been granted by the trial court or reversed by the appellate court had it been made immediately following the witness's commentary?

## STATEMENT OF THE CASE

### Procedural History

Petitioner James L. Moore is presently confined in the South Carolina Department of Corrections serving a seventeen-year sentence following his conviction in Charleston County.

During its November 2009 term, the Charleston County Grand Jury indicted Petitioner for distribution of cocaine base-third or subsequent offense (2009-GS-10-8446) stemming from a controlled buy of crack cocaine from a confidential informant. He was represented by Assistant Public Defender Jason King of the Charleston County Public Defender's Office. Assistant Solicitor Stephanie Linder of the Ninth Circuit Solicitor's Office prosecuted the case.

On October 18, 2012, Petitioner was tried in his absence in the Charleston County Court of General Sessions before the Honorable Kristi L. Harrington, circuit court judge. At the conclusion of the trial, the jury convicted Petitioner as indicted and Judge Harrington sealed her sentence.

On November 16, 2012, Petitioner appeared before Judge Harrington, who unsealed her sentence of seventeen years' imprisonment. Petitioner, through counsel, filed a motion to reconsider his sentence, and a hearing on this motion was held on November 16, 2012, before Judge Harrington. Petitioner was present at this hearing and was represented by counsel. Following the hearing, Judge Harrington denied his motion to reconsider the sentence.

Petitioner filed a timely notice of appeal and an appeal was perfected on his behalf by Brandon Smith, Esquire. On appeal, Petitioner argued he was entitled to a new trial on the following grounds: (1) the trial court abused its discretion in denying his motion *in limine* to redact statements made in video of the drug transactions based on alleged impermissible bad acts pursuant to Rule 404(b), SCRE; (2) the trial court abused its discretion in failing to grant a

mistrial following Petitioner's objection to testimony from a State's witness that Petitioner was guilty; and (3) the trial court improperly tried Petitioner in his absence. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion:

> 1. As to whether the trial court erred in denying Moore's motion to redact statements in a video exhibit: Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009) (stating "[t]he trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion" in reviewing the admissibility of evidence under Rule 404(b)); Rule 403, SCRE (stating "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"); State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) (providing an appellate court reviews a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and is obligated to give great deference to the trial court's judgment); id. ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances."); State v. Huggins, 336 S.C. 200, 204, 519 S.E.2d 574, 576 (1999) ("Error without prejudice does not warrant reversal.").
>
> 2. As to whether the trial court erred in denying Moore's motion for a mistrial: State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured."); id. ("No issue is preserved for appellate 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. Heller, 399 S.C. 157, 174, 731 S.E.2d 312, 321 (Ct. App. 2012) (concluding a motion for a mistrial was not preserved for appellate review when the court sustained an objection and gave a curative instruction and Heller did not contemporaneously move for a mistrial but waited until after the State completed examination of the witness and the court took a fifteen minute recess).
>
> 3. As to whether the trial court erred by not making specific findings of fact on the record that Moore received notice of his right to be present and was warned the trial would proceed in his absence: Rule 16, SCRCrimP ("[A] person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the

> trial would proceed in his absence upon a failure to attend the court."); State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987) (finding error in complying with requirement to make specific findings is subject to a harmless error analysis); Huggins, 336 S.C. at 204, 519 S.E.2d at 576 ("Error without prejudice does not warrant reversal.").

State v. James L. Moore, Op No. 2015-UP-098 (Ct. App. filed March 4, 2015).

Thereafter, Petitioner filed a petition for rehearing, and following the State's return to the petition, the Court of Appeals denied Petitioner's petition for rehearing. Petitioner then filed a *pro se* petition for a writ of certiorari to the South Carolina Supreme Court, which was denied by the Supreme Court on May 19, 2015, for failure to comply with Rule 242, SCACR. Thereafter, Petitioner filed a petition to reinstate his appeal, which was denied by the Supreme Court on July 23, 2015. The Remittitur was issued on August 27, 2015.

On December 29, 2015, Petitioner filed a *pro se* application for post-conviction relief (2017-GS-45-00184). On May 9, 2016, Respondent filed its return to the application and requested an evidentiary hearing on the application. Thereafter, on December 12, 2017, Petitioner, through counsel James K. Falk, filed an amended application raising additional grounds of ineffective assistance of counsel. An evidentiary hearing was convened February 1, 2018, before the Honorable Maite Murphy, circuit court judge. Petitioner was present alongside counsel Falk. Respondent was represented by Senior Assistant Deputy Attorney Megan Harrigan Jameson of the South Carolina Attorney General's Office. Petitioner testified on his own behalf and presented testimony from trial counsel. Respondent presented testimony from the prosecutor. By written order filed May 7, 2018, Judge Murphy denied and dismissed the application with prejudice.

## Summary of Pertinent Facts Adduced at Trial

Petitioner's case was called for trial on Wednesday, October 17, 2012. Petitioner was not present, and after lengthy pre-trial discussions about Petitioner's whereabouts and prior notifications of his trial date, the trial proceeded in his absence. The State called four witnesses, and the testimony and evidence presented established the following facts: A male was captured on video engaging in a drug transaction with the confidential informant. The confidential informant, who had been used in hundreds of successful operations over the years and who had been thoroughly searched before and after this particular drug transaction, described the appearance of the male to officers, including the fact that the male was wearing a blue cast on his right arm. (App. 112-13; 128-29; 132; 175-77). One of the detectives, who had known Petitioner for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Petitioner as the male wearing the cast. (App. 117; p. 154-55). Two other officers then obtained Petitioner's driver's license photograph, compared it to the drug dealer's face in the video, and concluded that Petitioner was the drug dealer. (App. 118, lines 10-16; 187, line 20 – 188, line 4).

During cross-examination, defense counsel extensively questioned the confidential informant regarding an affidavit he signed relating to a previous case involving a different defendant wherein the confidential informant indicated that he lied on the witness stand about the defendant selling him drugs. (App. 141-45). On re-direct, the assistant solicitor asked the confidential informant to explain the circumstances surrounding his signing of this affidavit. (App. 145-50). In a lengthy response, the confidential informant explained that he signed the affidavit because his life was threatened by the unrelated defendant's family and that the

statements in the affidavit were written by someone else and were not true. (App. 147-50). In concluding his explanation, he stated as follows:

> Yeah, I did the wrong thing when I signed that paper but [the previous defendant] know[s] he guilty, and his lawyer know[s] he guilty. Just like the guy who supposed to be on trial here, he guilty --

(App. 150, lines 7-10).

The assistant solicitor cut him off at that point, and the confidential informant stated "[t]hat's all I got to say." (App. 150, lines 11-12).

Defense counsel immediately objected and asked for a curative instruction. (App. 150, lines 13-14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way" during deliberations. (App. 150, lines 15-20). Later in trial, defense counsel made a motion for mistrial, stating that he did not believe the curative instruction was "enough to cure any prejudice caused to [Petitioner]." (App. 161, lines 15-21). The State asserted the curative instruction given by the judge was sufficient, and the judge denied the mistrial motion but stated that over the break she would review her curative instruction to make sure it was appropriate and would give a further instruction in her charge to the jury if she felt the need to do so. (App. 161-62).

Following closing arguments and the final jury charge, the jury returned a guilty verdict after twenty-five minutes of deliberations. (App. 223-24). Based on his prior record and the fact that this was Petitioner's third or subsequent drug offense, the trial judge sentenced Petitioner to seventeen years. (App. 225-26; 239-40).

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. 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).

## ARGUMENT

**The post-conviction relief court properly determined Petitioner failed to establish trial counsel was constitutionally ineffective in his handling of unresponsive commentary from the confidential informant while testifying as a State's witness where counsel immediately objected, the trial court sustained his objection, the court struck the testimony and instructed the jurors not to consider it during deliberations, counsel moved for a mistrial, and there is no reasonable likelihood a mistrial would have been granted by the trial court or reversed by the appellate court had it been made immediately following the witness's commentary.**

On appeal, Petitioner argues the post-conviction relief court erred as a matter of law in rejecting his claim that he was entitled to a new trial based on counsel's failure to timely move for a mistrial following unresponsive utterances from the confidential informant and the trial court's sustaining of an objection and issuance of a curative instruction because the Court of Appeals "procedurally barred the mistrial issue." Petitioner asserts he was prejudiced by trial counsel's failure to timely move for a mistrial because the confidential informant's credibility was crucial to the jury's verdict. Petitioner argues trial counsel's failure to timely make a mistrial motion following the sustained objection and curative instruction rises to the level of constitutional ineffectiveness and warrant the reversal of his conviction and a remand for retrial. The post-conviction relief court properly found Petitioner did not meet his requisite burden of proof as to this allegation and denied relief where counsel immediately objected, the trial court sustained his objection, the court struck the testimony and instructed the jurors not to consider it during deliberations, counsel moved for a mistrial a short time later, and there is no reasonable likelihood a mistrial would have been granted by the trial court or reversed by the appellate court had it been made immediately following the witness's commentary. This Court should similarly deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI;

Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner 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.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Petitioner complains trial counsel failed to timely move for a mistrial following the confidential informant's unresponsive utterance that Petitioner was guilty. This non-responsive commentary was after defense counsel had extensively questioned the confidential informant regarding an affidavit he signed relating to a previous case involving a different defendant wherein the confidential informant indicated that he lied on the witness stand about the defendant selling him drugs. (App. 141-45). On re-direct, the assistant solicitor asked the confidential informant to explain the circumstances surrounding his signing of this affidavit in the unrelated case. (App. 145-50). In a lengthy response, the confidential informant explained that he signed the affidavit because his life was threatened by the unrelated defendant's family and that the statements in the affidavit were written by someone else and were not true. (App. 147-50). In concluding his explanation, he stated as follows:

> Yeah, I did the wrong thing when I signed that paper but [the previous defendant] know[s] he guilty, and his lawyer know[s] he guilty. Just like the guy who supposed to be on trial here, he guilty –

(App. 150, lines 7-10). The assistant solicitor cut him off at that point, and the confidential informant stated "[t]hat's all I got to say." (App. 150, lines 11-12). Defense counsel immediately objected and asked for a curative instruction. (App. 150, lines 13-14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way" during deliberations. (App. 150, lines 15-20). Shortly thereafter, following brief testimony from another witness and a stipulation read into the record, the jury retired from the courtroom for a recess. Defense counsel then made a motion for mistrial, stating that he did not believe the curative instruction was "enough to cure any prejudice caused to [Petitioner]." (App. 161, lines 15-21). The State asserted the curative instruction given by the judge was sufficient. (App. 161). The judge denied the mistrial motion but stated that over the break she would review her curative instruction to make sure it was appropriate and would give a further instruction in her charge to the jury if she felt the need to do so. (App. 161-62). During the jury charge, the judge again reminded the jury that any stricken testimony was not to be considered at all during deliberations. (App. 212-13).

On during his direct appeal, Petitioner raised this issue, arguing the trial court abused its discretion in denying his mistrial motion, arguing the curative instruction was insufficient to cure the prejudice created when the informant spontaneously stated Petitioner was guilty. The Court of Appeals heard oral argument, and thereafter, issued an unpublished, per curiam opinion affirming Petitioner's convictions and sentences pursuant to Rule 220(b), SCACR. Regarding the mistrial issue, the Court of Appeals affirmed based on the following authorities:

> 2. As to whether the trial court erred in denying Moore's motion for a mistrial: State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, **the error is deemed to be cured**."); id. ("No issue is preserved for appellate 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. Heller, 399 S.C. 157, 174, 731 S.E.2d 312, 321 (Ct. App. 2012) (concluding a motion for a mistrial was not preserved for appellate review when the court sustained an objection and gave a curative instruction and Heller did not contemporaneously move for a mistrial but waited until after the State completed examination of the witness and the court took a fifteen minute recess).

State v. Moore, Unpub. Op. No. 2015-UP-098 (filed March 4, 2015) (emphasis added).

Now, Petitioner argues the post-conviction relief court erred in denying relief because trial counsel's mistrial motion was untimely, leaving the issue unpreserved for appellate review. However, the post-conviction relief court properly denied relied and determined counsel acted within professional norms in handling the unresponsive utterance from the confidential informant. Counsel immediately objected to the informant's commentary and the trial court struck the testimony and instructed the jurors not to consider it during deliberations. Shortly thereafter during the next available opportunity with the jury out of the courtroom, counsel moved for a mistrial and the trial court denied the motion, citing the sufficient of her curative instruction given to the jury. During her jury charge, the trial court again reminded the jury to wholly disregard all stricken testimony. Counsel performed effectively in responding to the informant's nonresponsive utterances.

Petitioner's contention that he is entitled to a new trial because counsel failed to timely make his mistrial motion is without merit, as there is no reasonable likelihood a mistrial would have been granted by the trial court if made immediately after the curative instruction or that an appellate court would have reversed the trial court's denial of the mistrial motion had it been made immediately following the witness's commentary.

During the course of a criminal trial, the occurrence of an error in some form or fashion is "virtually inevitable[,]" which is why a defendant is only guaranteed a fair trial as opposed to a perfect one. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); see State v. Black, 400 S.C. 10,

29, 732 S.E.2d 880, 891 (2012) ("[A] defendant is entitled to a fair trial, not a perfect one."). When an error occurs, one remedy available to a trial judge is to grant a mistrial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). However, the granting of a mistrial is an extreme remedy that should only be imposed when an incident occurs during trial that is so grievous its prejudicial impact cannot be removed through any other means. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). "The power of the court to declare a mistrial should be used with the greatest caution and for plain and obvious causes." Earley v. State, 418 S.C. 255, 267, 792 S.E.2d 226, 232–33 (2016) (internal citations omitted). In determining whether to grant a mistrial, the trial court should consider whether the mistrial is dictated by manifest necessity and must exhaust all other methods to cure any possible prejudice that occurred prior to stopping the trial. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002); see Council, 335 S.C. at 13, 515 S.E.2d at 514 ("[T]he trial judge should exhaust other methods to cure possible prejudice before aborting a trial."); State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment."). Significantly, a mistrial should **not** be granted unless "absolutely necessary." Harris, 340 S.C. at 63, 530 S.E.2d at 627-628; see State v. Brown, 389 S.C. 84, 94, 697 S.E.2d 622, 627 (Ct. App. 2010) ("A manifest necessity must exist for the trial court to discharge the jury and declare a mistrial.").

In Petitioner's case, there is no reasonable likelihood a mistrial would have been granted. There was no manifest necessity requiring the grant of a mistrial, as the trial court's curative instruction cured any error resulting from the informant's commentary. "A curative instruction to

disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct.App.1996). There is nothing in the record to indicate that the jury did not disregard the informant's comments as instructed by the trial court, and accordingly, Petitioner cannot establish that any manifest necessity existed to require the granting of a mistrial or warranting the appellate court to reverse the trial court's denial of his mistrial motion. Indeed, the Court of Appeals appears to have agreed any error was cured by the trial court's curative instruction. See State v. Moore, Unpub. Op. No. 2015-UP-098 (filed March 4, 2015) ("As to whether the trial court erred in denying Moore's motion for a mistrial: State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, **the error is deemed to be cured.**") (emphasis added).[1] Accordingly, Petitioner has not and cannot establish that the result of the proceeding would have been different (i.e., that he would have prevailed on appeal) had counsel moved for a mistrial immediately following the informant's non-responsive utterance and the trial court's curative instruction. See Milledge v. State, 422 S.C. 366, 375, 811 S.E.2d 796, 801 (2018) (noting the appropriate inquiry for determining if an applicant has establish prejudice from trial counsel's failure to preserve an issue for appellate review is whether applicant would have prevailed on that issue on appeal); McHam v. State, 404 S.C. 465, 475–76, 746 S.E.2d 41, 47 (2013), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (same).

---

[1] Although Petitioner focuses his argument on his interpretation of the Court of Appeals per curium opinion as finding the issue "procedurally barred," an equally correct interpretation of the opinion is that the Court found the error cured by the trial court's curative instruction.

In conclusion, Petitioner failed to establish that trial counsel was constitutionally ineffective in his response to the unresponsive utterance of the informant where counsel immediately objected, the trial court struck the testimony and issued a curate instruction, counsel moved for a mistrial shortly thereafter, the court reminder the juror's not to consider any stricken testimony in the jury charge, and there was no reasonable likelihood Petitioner would have prevailed on appeal on this issue had counsel immediately moved for a mistrial following the curative instruction. Accordingly, the post-conviction relief court properly denied relief. This Court should deny certiorari.

## CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

By:
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

april 25, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Kristi L. Harrington, Trial Judge
Maite Murphy, Post-Conviction Relief Judge

Appellate Case No. 2018-001051

JAMES L. MOORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

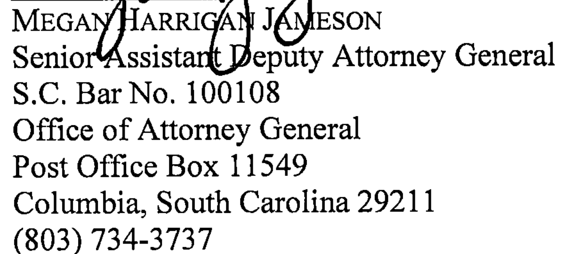
**PROOF OF SERVICE**

I, Megan Harrigan Jameson, 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 interagency mail to be delivered to Petitioner at the address below:

Appellate Defender Joanna K. Delany
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 25th day of april, 2019.



MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

RECEIVED
APR 25 2019
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

April 25, 2019

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **James Moore v. State of South Carolina**
**Appellate Case No.: 2018-001051**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar # 100108

MHJ/jj
Enclosures

cc: Joanna K. Delany, Esquire
Victim Advocacy Division