STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-001617

DESMOND J. SAMS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES PRESENTED

I. Did the PCR judge err in refusing to find appellate counsel ineffective for not arguing on direct appeal that the trial judge erred in refusing to grant a mistrial based on the State's failure to timely disclose videotaped statements by two eye witnesses, failure to timely disclose a video interview of Petitioner and failure to timely disclose a written statement by another witness?

RESPONDENT'S STATEMENT OF ISSUES PRESENTED

I. The PCR court properly denied relief where Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to argue on direct appeal whether the trial court erred in denying Petitioner's motion for a mistrial based on the State's failure to "timely" disclose videotaped statements of two witnesses and a written statement by another witness.

   a. The PCR court properly denied relief where Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to argue on direct appeal whether the trial court erred in denying Petitioner's motion for a mistrial based on the State's failure to "timely" disclose Sharron Glover's written statement when the State had no duty to disclose the letter and trial counsel failed to preserve the issue for appellate review.

   b. The PCR court properly denied relief where Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to argue on direct appeal whether the trial court erred in denying Petitioner's motion for a mistrial based on the State's failure to timely disclose the videotaped statements of witnesses Stephanie Ballard and Lisa Strickland when the trial court cured any harm by allowing trial counsel time to review the tape and re-cross both witnesses.

II. The PCR court properly denied relief where Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to brief on direct appeal whether the trial court erred by denying Petitioner's request to admit a video 'interview' of Petitioner where trial counsel was attempting to bolster Petitioner's physical condition which had already been shown through an admitted photograph of Petitioner.

STATEMENT OF THE CASE

Petitioner Desmond J. Sams was arrested after officers responding to a 911 call from a residence found Petitioner lying on top of the deceased Victim with his arms wrapped around Victim's neck. In October of 2008, the Colleton County Grand Jury indicted Petitioner for murder and assault and battery of a high and aggravated nature, and he was represented on those charges by David Matthews, Esquire. Deputy Solicitor Sean Thornton of the Fourteenth Circuit Solicitor's Office prosecuted the case.

On January 28, 2009, Petitioner proceeded to a jury trial before the Honorable Perry M. Buckner. At the conclusion of trial, the jury convicted Petitioner of the lesser-included offense of voluntary manslaughter and acquitted Petitioner of assault and battery of a high and aggravated nature. Following the verdict, Judge Buckner sentenced Petitioner to a twenty-four-year term of imprisonment suspended upon the service of an eighteen-year term of imprisonment and five years of probation.

Petitioner filed a timely notice of appeal and an appeal was perfected on his behalf by Joseph L. Savitz, Esquire. On appeal, Petitioner argued he was entitled to a new trial on the ground that the trial court committed reversible error by refusing to instruct the jury on involuntary manslaughter. Subsequently, in an unpublished opinion, the Court of Appeals unanimously affirmed Petitioner's conviction and sentence. *State v. Sams*, Op. No. 2011-UP-205 (S.C. Ct. App. filed May 4, 2011). Subsequently, Tristan M. Shaffer, Esquire, and Susan B. Hackett of Appellate Defense, filed a petition for a writ of certiorari in the Supreme Court on Petitioner's behalf and the petition was granted on October 17, 2012. On February 4, 2014, the Supreme Court affirmed the decision of the Court of Appeals. *State v. Sams*, 410 S.C. 303, 764 S.E.2d 511 (2014). The Remittitur was issued on November 7, 2014.

On March 27, 2015, Petitioner filed an application for post-conviction relief (2015-CP-15-0444). On October 20, 2015, the State filed its return to the application and requested an evidentiary hearing on the application. An evidentiary hearing was convened on October 10, 2017, at the Beaufort County Courthouse before the Honorable Thomas A. Russo. Petitioner was present and represented by James K. Falk, Esquire. The State was represented by Assistant Attorney General Ruston Neely of the South Carolina Attorney General's Office. Petitioner testified on his own behalf at the evidentiary hearing, as well as trial counsel. Appellate counsel, Joseph L. Savitz, Esquire, testified by phone. By written order filed April 16, 2018, Judge Russo granted Petitioner's application for post-conviction relief. On May 2, 2018, the State filed a Rule 59(e) motion to amend and motion to reconsider. In an amended order filed August 17, 2018, Judge Russo denied and dismissed the application with prejudice.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.; Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. The PCR court properly denied relief where Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to argue on direct appeal whether the trial court erred in denying Petitioner's motion for a mistrial based on the State's failure to "timely" disclose videotaped statements of two witnesses and a written statement by another witness on direct appeal.

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 appellate counsel's failure to brief on direct appeal the trial court's refusal to grant a mistrial following the State's failure to "timely" disclose purported impeachment evidence to Petitioner. First, Petitioner contends appellate counsel was ineffective for failing to brief the trial court's refusal to grant a mistrial based on the State's disclosure of a written statement from Sharron Glover after Glover had testified and been cross-examined by Petitioner. Second, Petitioner contends appellate counsel was ineffective for failing to brief the trial court's refusal to grant a mistrial based on the State's disclosure of videotaped statements from eyewitnesses Stephanie Ballard and Lisa Strickland, after they had both testified and been cross-examined by Petitioner. Petitioner argues these errors by appellate counsel rise to the level of constitutional ineffectiveness and warrant the reversal of his conviction and a remand for retrial. To the contrary, the post-conviction relief court correctly found Petitioner did not meet his requisite burden of proof as to these allegations and denied relief.

Petitioner, like all other criminal defendants, was constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 398 (1985). Appellate counsel must be able to provide effective representation as to render the appellate proceedings fair, and "must play a role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of appellant's claim." *Id.*; *see also Anders v. California*, 386 U.S. 378 (1967).

In deciding a claim of ineffective assistance of counsel, courts must focus on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington,* at 685, 696. First, the burden of proof is on applicant to show that appellate counsel's performance was deficient under prevailing professional norms. Second, applicant must prove they were prejudiced by counsel's deficiency and show with a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (citing *Strickland v. Washington, supra).* The proper standard for evaluating an effective assistance of appellate counsel claim is that enunciated in *Strickland. Smith v. Robbins*, 528 U.S. 259, 263 (2000).

When an applicant contends appellate counsel rendered ineffective assistance for failing to argue a specific issue on appeal, they must show that failure to raise that issue was objectively unreasonable and that, but for this failure, applicant's conviction or sentence would have been reversed or remanded. *Southerland, supra. See also People v. Griffin*, 687 N.E.2d 820 (Ill. 1997) (defendant who contends appellate counsel rendered ineffective assistance, e.g., by failing to argue issue, must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed).

First, an applicant must show that a particular nonfrivolous issue was clearly stronger than issues presented by appellate counsel in a merits brief on appeal; if successful in such a showing, an applicant then has the burden of demonstrating prejudice; that is, they must show a reasonable probability that, but for counsel's failure to raise that particular claim in the merits brief, applicant would have prevailed on appeal. *Smith*, 528 U.S. at 288. *See e.g., Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). An applicant must satisfy both prongs of the *Strickland* test to prevail, because prejudice is not presumed by this claim. *Smith*, 528 U.S at 288-89. ("Generally, only when ignored

issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome"). However, appellate counsel who files a merits brief need not, and should not, raise every nonfrivolous issue presented by the record. *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990) (Appellant has no constitutional right to compel appointed counsel to press nonfrivolous points, if counsel, as a matter of professional judgment, decides not to present those points).

Great deference is given to Counsel's experience and professional judgment in winnowing out weaker arguments and focusing on one, or at most a few key issues in order to maximize the likelihood of success on appeal. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). "A brief that raises every colorable issue runs the risk of burying good arguments, and may have the tendency to project a lack of confidence in any one." *Id.* (citing Jackson, *Advocacy Before The Supreme Court*). In *Anders*, the United States Supreme Court recognized appellate counsel's role as advocate requires them to support their clients appeal to the best of their ability. *Id.* at 754 (citing *Anders*, 386 U.S., at 744). "For judges to second-guess reasonable professional judgments and impose an appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*." *Id.*

Petitioner failed to meet this high burden of proof required of him as to these allegations, and accordingly, the post-conviction relief court properly denied relief. This Court should affirm the post-conviction relief court's finding and deny Petitioner's request for certiorari.

a. The PCR court properly denied relief where Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to argue on direct appeal whether the trial court erred in denying Petitioner's motion for a mistrial based on the State's failure to "timely" disclose Sharron Glover's written statement when the State had no duty to disclose the letter and trial counsel failed to preserve the issue for appellate review.

First, Petitioner argues appellate counsel was ineffective for not challenging the trial court's denial of Petitioner's motion for a mistrial based on the State's failure to "timely" disclose a written statement from Sharron Glover. In arguing the motion for a mistrial on the basis of the State's failure to comply with *Brady*, trial counsel stated, "I was also surprised to see a written statement from Sharron Glover, which I did not have prior to today." (Tr. p. 196, ll. 19). Trial counsel made no other mention of Glover's statement, did not seek to introduce the statement into evidence, nor did he ask the trial court to allow him to re-cross Glover.

At the PCR evidentiary hearing, trial counsel testified that during Petitioner's trial, the State provided him a written witness statement, referring to Glover, who had already testified. (App'x p. 345). Trial counsel believed having Glover's statement prior to cross examining her would have been helpful, and proceeded to read Glover's written statement into the record:

> I am the sister and employer of J. Fred Frazier, III, and on April the 12th, 2008, at about 4:25 a.m. Stephanie Ballard called me on my cell phone, told me that she couldn't get Desmond off of Red, that he wouldn't turn him loose. They were arguing and fighting. I got her to put the phone on speakers and yelled for Desmond to get off of Red. He said, no. I told him to get the hell off him. I was sitting, I was getting dressed, and as I went down the steps, about halfway, Stephanie and the police were there. At the bottom of the steps she screamed, 'He's not breathing.' I hung up, and my brother and I rode to the, with my husband to the house on Glenn Street.

(App'x p. 346, ll. 12-24; p. 347).

Appellate counsel testified he did not recall the specifics of this case, nor did he remember writing the brief. (App'x p. 366-367) When asked if the timing of the statement's disclosure to Petitioner would have been an issue he would have raised on appeal, appellate counsel responded, "... [I]t depends. It depends on what the content of the interviews and stuff that weren't disclosed were." (App'x p. 370, ll. 10-12).

Here, Petitioner failed to meet his burden of establishing appellate counsel was constitutionally ineffective for not raising this issue on direct appeal, as Petitioner did not proffer a copy of the statement during trial, appellate counsel was unable to raise it on appeal, let alone consider it as a possible argument. *See State v. Mitchell*, 330 S.C. 189, 498 S.E.2d 642 (1998) (affirming trial court's decision to exclude a written eyewitness statement that was discovered after the jury began deliberating, where the statement was not proffered for appellate review); *see also State v. Williams*, 321 S.C. 455, 464 n. 4, 469 S.E.2d 49, 55 n. 4 (1996) (burden is on appellant to provide a sufficient record for review). Furthermore, even if Petitioner was able to show this issue had been preserved for appellate review, Petitioner has failed to show that the solicitor had a duty to even disclose the statement to him in compliance with Rule 5, South Carolina Rules of Criminal Procedure, or *Brady*.[1] Thus, Petitioner cannot establish appellate counsel was deficient by not raising the unpreserved claim on appeal, and therefore, cannot show prejudice. Accordingly, the PCR court correctly denied relief, and this Court should deny certiorari as to this issue.

b. The PCR court properly denied relief where Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to argue on direct appeal whether the trial court erred in denying Petitioner's motion for a mistrial based on the State's failure to "timely" disclose the videotaped statements of witnesses Stephanie Ballard and Lisa Strickland when the trial court cured any harm by allowing trial counsel time to review the tape and re-cross both witnesses.

Second, Petitioner argues the PCR court erred by finding appellate counsel was not constitutionally ineffective, because appellate counsel should have raised on direct appeal whether the trial court erred by denying Petitioner's motion for a mistrial based on the State's failure to disclose videotaped statements from eyewitnesses Stephanie Ballard and Lisa Strickland, after

[1]Pursuant to Rule 5(a)(2), SCRCrimP, the State does not have to disclose the statement of a prosecution witness until after that witness is questioned on direct examination and the defendant then moves for the statement. Likewise, the statement would only have to have been disclosed pursuant to *Brady* if the statement had impeachment or exculpatory value.

they had both testified and been cross-examined by Petitioner. Petitioner asserts he was prejudiced by appellate counsel's failure to raise this issue on appeal because the purported *Brady* violation central to his denied mistrial motion was a stronger argument than the one appellate counsel did raise.

Prior to trial, trial counsel filed all appropriate *Brady* and Rule 5 motions. (App'x p.202, ll. 3-5). However, trial counsel was not provided copies of, or made aware of, videotaped statements from Ballard and Strickland.[2] During his direct examination of Detective Allen Inabinett, trial counsel learned that in addition to their written statements, which trial counsel had received in discovery, there were videotaped statements from Ballard and Strickland that trial counsel was never made aware of. Trial counsel requested to approach the bench with the solicitor, and a bench conference took place, after which, trial counsel resumed questioning Det. Inabinett. When questioned on the contents of the videotaped statements, Det. Inabinett testified that, to his knowledge, there was nothing in the videotaped statements that was inconsistent with the contents of the written statements. (App'x p. 170, ll. 10-13). After the jury was dismissed for the evening, the trial court detailed the earlier bench conference that took place regarding Det. Inabinett's admission of the videotaped statements. (App'x p. 194). The solicitor conceded he had not provided the videotaped statements to the defense, in what he described was an apparent oversight, and further explained he was not aware of their existence and had no record of the videotaped statements[3]. (App'x p. 195, ll. 14-25; p. 196, ll. 1-3).

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[2]Both Ballard and Strickland's statements were recorded on one videotape that was later marked as Defendant's Exhibit Number Two. (App'x p. 220, ll. 1-7).

[3]The videotaped statements were made in conjunction with the written statements were made, which may account for the omission. (App'x p. 196; 2020-203).

Trial counsel proceeded to move for a mistrial based on the State's late disclosure of the videotaped statements[4]. (App'x p. 196, ll. 20). The trial court declined to rule on the motion until after trial counsel was able to view the videotaped statements overnight. (App'x p. 197, 11. 4-10). The next morning, after having reviewed the tapes, trial counsel renewed his motion citing prejudice to Petitioner by not having the tapes available at the time he cross-examined Ballard and Strickland. (App'x p. 200, ll. 12-24). Trial counsel asserted that had he been in possession of these videotaped statements earlier, he would have handled his questioning of Ballard and Strickland differently on cross-examination. *Id.* The trial court denied Petitioner's motion and Ballard and Strickland were recalled to the stand as State's witnesses, subject to cross examination by Petitioner. Trial counsel briefly cross examined both witnesses before publishing their recorded statements to the jury. (App'x p. 211-221).

Here, the State's "untimely" disclosure of the videotaped statements of Ballard and Strickland did not undermine confidence in the outcome of the trial. "Courts have held that when defense counsel is given the opportunity to review and use the inconsistent statement in cross-examination... there is no reasonable probability the outcome of the trial would have been different." *State v. Carlson*, 363 S.C. 586, 610, 611 S.E.2d 283, 295 (Ct.App. 2005); *See, e.g., Sheppard v. State*, 357 S.C. 646, 660, 594 S.E.2d 462, 470 (2004) (overruled on other grounds by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). Moreover, Petitioner has not established a *Brady* claim. Petitioner saddles the bulk of his argument on the State's failure to "timely" disclose the videotaped statements, alleging the solicitor had an outstanding duty to make known and produce the videotape to Petitioner in light of Rule 5, SCRCrimP and *Brady*.

[4]Both Ballard and Strickland had already been called as witnesses during the State's case in chief, and had been cross-examined by trial counsel. (App'x p. 169, ll. 18-23).

Here, the contents of the statements "do not create a reasonable probability that the outcome of the proceedings would have been different had the information been disclosed." *Sheppard*, at 660. *See also State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981) (State's failure to disclose does not warrant reversal unless defendant deprived of fair trial). Petitioner had the opportunity to review the videotaped statements, and use any possible inconsistent statements to impeach both Ballard and Strickland. As noted in the trial transcript, Ballard's statement was published to the jury starting at 10:22 AM, ending at 10:48 AM; Strickland's statement was published at 10:52 AM, ending at 11:00 AM. (App'x. p. 215; p. 220). Trial counsel's questioning for both witnesses ceased after their respective statements were played, and it is not ascertainable from the trial transcript nor trial counsel's testimony at the evidentiary hearing, whether or not the videotaped statements actually contained statements inconsistent from the written statements of Ballard and Strickland[5]. At the evidentiary hearing, trial counsel testified he was "irritated" with not having the tape sooner and added "it affects the way you prepare for trial. That's all." (App'x p. 347, ll. 19; p. 362, ll. 11). At no point did trial counsel describe how Petitioner was prejudiced by the untimely disclosure, outside of lamenting that the judicial remedy allowing Petitioner to re-cross Ballard and Strickland was not the same. (App'x p. 362, ll. 15-16).

Base on the limited description of the statements made by Ballard and Strickland in the videotape, as alluded to in the record, the solicitor had no duty to disclose the statements to Petitioner until after Ballard and Strickland had testified on direct examination, if the solicitor had a duty to disclose at all. Petitioner has misunderstood the scope of Rule 5, SCRCrimP and *Brady*, and their applicability here.

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[5]The videotape containing Ballard's and Strickland's statements was not provided to the PCR court, nor was a transcription of these statements produced.

Pursuant to Rule 5(a)(2), SCRCrimP, the State has no duty to disclose "statements made by prosecution witnesses ... provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified." Likewise, the videotaped statements would only have to have been disclosed pursuant to *Brady* if they were impeaching or exculpatory. Based on review of the available record, both Ballard and Strickland did not offer accounts that were exculpatory for Petitioner. Furthermore, even if Petitioner could show that there existed some impeachment value in the videotaped statements that value would not manifest until after Ballard and Strickland had testified on direct examination.

From the record, both Ballard's and Strickland's trial testimony appears to be largely consistent with their out-of-court statements. Therefore, the solicitor would have no reason to think the out-of-court statements were impeaching until they became inconsistent in some way with the testimony given at trial, and accordingly, had no duty to disclose the videotaped statements prior to trial. Moreover, because Petitioner did *not* present the videotaped statements or the written statements from Ballard and Strickland at the evidentiary hearing for the PCR court to consider, the PCR court was unable to discern whether they actually posed any impeachment or exculpatory value to Petitioner, as is claimed.

Additionally, the trial court took extensive measures to remedy any possible harm to Petitioner. In denying Petitioner's mistrial motion, the trial court stated:

> I think I have to find, for purposes of your motion, Mr. Mathews, that there is some manifest injustice here that requires the Court to grant a mistrial. I recognize that, sometimes, even though there's a good faith on both parts, that mistakes are made in discovery. I'm sure the Solicitor candidly admits that he has conceded you have a standing Rule 5 and *Brady* motion. Certainly, I would want you to have the benefit of having whatever you believe will benefit your client at the time. However, I am

> fortunate enough, number one, that we're still in your case, and I can require the Solicitor to bring the witnesses back to this courtroom, and allow you to cross-examine them, and confront with whatever information you feel was on the tapes, that you should have brought out during your earlier cross-examination. In other words, I'm not requiring you to call them, I'll put them back on the stand as State's witnesses and allow you to lead them and cross-examine them. For that reason, I do not believe that what has occurred here results in the type of injustice necessary, nor has any showing been made to me of that injustice, other than the fact that you've reviewed the tapes and would like to have had them earlier in your cross-examination, because you might have handled the witness differently. *But I'm going to give you, which is extraordinary in a criminal case, a second bite at the apple in cross-examination*, which I think cures any problem that may have occurred from what was obviously nothing intentional but a mistake. The State was not aware of the video, nor was defense counsel. The State gave you the written statements so you had those. You will believe that there may be some information on the video, in which I will allow you to explore with this jury so that you protect the interest of your client, which has now been provided to you. In fact, you have the videos in your possession at this time. I deny your motion for a mistrial on that basis, because I don't think there's a sufficient showing to grant a mistrial, and Solicitor, I'm going to require you in whatever order Mr. Mathews wants, we'll bring these witnesses back and they'll be subject to cross-examination. After cross, I will give you a redirect and then give him a re-cross, but they'll be subject to cross by Mr. Mathews, and he'll be able to bring out whatever he wants to bring out from the review of the tapes last night...

(App'x p. 203-205; emphasis added).

"The decision to grant or deny a motion for a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Patterson*, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (1999). Our courts favor "the exercise of wide discretion of the trial court in determining the merits of such motion in each individual case." *Patterson, supra.* 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); S*ee State v. Council*, 335 S.C. 1, 13, 515 S.E.2d

508, 514 (1999) 514 ("[T]he trial court 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." *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 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."). "The granting of the motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." *Patterson, supra*; *See also State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Petitioner has failed to show that the trial court's denial of his mistrial motion was clearly a stronger argument than the issue actually raised by appellate counsel on direct appeal. Here, there was no manifest necessity requiring the grant of a mistrial. There is nothing in the record to indicate that had Petitioner been given the videotaped statements earlier and been able to effectively cross-examined Ballard and Strickland the first time that the jury would have acquitted Petitioner, nor does the record establish that the videotaped statements contained impeachment or exculpatory evidence. Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). "For judges to second-guess reasonable professional

judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." *Jones*, 463 U.S. at 754. Here, appellate counsel did raise a meritorious issue on direct appeal to which the Supreme Court granted certiorari. *See State v. Sams*, 410 S.C. 303, 764 S.E.2d 511 (2014). Petitioner has failed to show that this issue was stronger than the one appellate counsel did raise, and therefore cannot demonstrate prejudice (i.e. that Petitioner would have prevailed on appeal had appellate counsel raised this issue). Accordingly, the post-conviction relief court properly denied relief, and this Court should deny certiorari as to this issue.

II. The PCR court properly denied relief where Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to argue on direct appeal whether the trial court erred by denying Petitioner's request to admit a video 'interview' of Petitioner where trial counsel was attempting to improperly bolster Petitioner's physical condition which had already been shown through an admitted photograph of Petitioner.

Third, Petitioner argues appellate counsel was ineffective for failing to raise on direct appeal whether the trial court erred by denying Petitioner's request to admit a video 'interview'[6] of Petitioner that was recorded after he was taken into custody. However, Petitioner mistakenly argues to this Court that the untimely disclosure of Petitioner's video statement was raised as a ground during his unsuccessful motion for a mistrial. It was only *after* the trial court denied his motion that Petitioner sought to admit the video statement into evidence to show his physical condition; that he was "beat up" and had "some difficulty talking." (App'x p. 206, ll. 20-25). After reviewing the tape, the trial court declined to admit that video into evidence, stating:

> Let the record reflect that I've reviewed the tape now, and I'd like to say that my review of the tape really does not show with the detail that Mr. Mathews has already been able to demonstrate to the jury, the extent of injuries to his client, like Defendant's Exhibit Number One. ... I also do not believe the tape is admissible to

[6]The trial court frequently interchanged the terms "interview" and "statement" when referring to the videotape of Petitioner.

> bolster his client's testimony. The jury got the chance to see his client testify. He was cross-examined, and he got the opportunity to do that. There is not any additional information on the tape. In fact, I'm conferenced about prejudice to the defendant admitting, because he exercises his constitutional right to have an attorney, and I, frankly, am worried about the fact that he chooses not to talk, and exercises his constitutional right, and in some way hurting him, if it were published to the jury.

(App'x p. 237, ll. 4-22).

During the evidentiary hearing, trial counsel explained that had he had the video of Petitioner at the start of trial, he would have admitted the video over the photograph. (App'x p. 351, ll. 13-20). Trial counsel believed that the video showed Petitioner's physical condition and injuries better than the photograph used at trial, and disagreed with the trial court's ruling. (App'x p. 357-358).

Here, the same argument as cited above in Section I. b. applies. Petitioner has failed to show that the trial court's decision not to admit the tape of petitioner was clearly a stronger argument than the issue actually raised by appellate counsel on direct appeal, and therefore, Petitioner cannot show prejudice.[7] Accordingly, the post-conviction relief court properly denied relief, and this Court should deny certiorari as to this issue.

[*Conclusion and signature page to follow*]

[7]Petitioner did *not* present this videotape at the evidentiary hearing, nor the photograph of Petitioner that was admitted into evidence at trial, for the PCR court to consider.

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,

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Nov. 20, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-001617

DESMOND J. SAMS, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Kathrine Haggard Hudgins
S.C. Commission on Indigent Defense
1330 Lady St., Ste.401
Columbia, SC 29201

This 20th day of November, 2019.

Sara E. Gunton, AAG
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