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**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

On Petition of Writ of Certiorari to Beaufort County

The Honorable William H. Seals, Post-Conviction Relief Judge  
The Honorable Carmen T. Mullen, Plea Judge

Appellate Case No. 2019-001660

ADRIAN JENKINS, #273602

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **ISSUE PRESENTED ON CERTIORARI**

### **Petitioner's Statement of Issue on Certiorari**

Whether trial counsel provided ineffective assistance of counsel where she failed to object to the admission of the indictments and sentencing sheets of Petitioner's prior burglary convictions to enhance his current charge to first-degree burglary where the redactions the trial court made on the indictments and sentencing sheets did not prevent the jury from learning unfairly prejudicial details of the prior crimes?

### **Respondent's Counterstatement of Issue on Certiorari**

Did post-conviction relief court correctly find trial counsel was not constitutionally ineffective where she properly objected to the admission of the indictments and sentencing sheets from Petitioner's prior burglary convictions to enhance his current charge to first-degree burglary and where the trial court specifically instructed the jury to consider the indictments and sentencing sheets for the sole purpose of enhancing the current charge?

## STATEMENT OF THE CASE

During the January 2016 term the Beaufort County Grand Jury indicted Petitioner for burglary in the first degree. App. 361-362.

On April 18-20, 2016, Petitioner proceeded to trial before the Honorable Carmen T. Mullen and a jury. App. 1. Trasi Campbell represented Petitioner. Id. Hunter Swanson represented the State. Id.

The jury found Petitioner guilty of first-degree burglary. App. 253, l. 24-255, l. 1. Judge Mullen sentenced Petitioner to twenty years' imprisonment. App. 266, l. 17-21. Petitioner filed a notice of appeal, and on January 27, 2017, Petitioner filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Petitioner argued on appeal the trial court erred in admitting appellant's indictments containing highly prejudicial information about his previous crimes as proof of prior convictions for burglary under section 16-11-311(A)(2) of the South Carolina Code. Supp. App. P. 2. Petitioner's appeal was dismissed by unpublished opinion No. 2017-UP-363, filed on October 4, 2017. Supp. App. P. 14-15.

On December 20, 2017, Petitioner filed an application for post-conviction relief. App. 272-278. On March 12, 2019, Petitioner filed an amended PCR application. He alleged trial counsel provided ineffective assistance for failure to object to the admission of indictments and sentencing sheets of Petitioner's prior burglary convictions where the redactions the court ordered were insufficient as they did not prevent the jury from learning highly prejudicial details of the prior crimes. App. 279-280. The state filed its return on May 1, 2018. App. 281-285.

On April 2, 2019, Petitioner's PCR hearing was held before the Honorable William H. Seals. App. 286. Ashley A. McMahan represented Petitioner. Id. Benjamin Limbaugh represented the State. Id.

On September 14, 2019, Judge Seals filed an order denying Petitioner relief. App. 349-360. Judge Seals found trial counsel did try to challenge the admission of the indictments and sentencing sheets when she “argued that any prejudicial information in the documents should be redacted” and found that the trial court did make redactions. App. 355-356.

## 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 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed de novo without deference to the lower court. Id. 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).

## RELEVANT FACTS

Petitioner's charge was enhanced to first-degree burglary using his prior convictions. App. 279. Trial counsel argued the convictions were only relevant to sentencing, but the trial court ultimately accepted the State's argument that the prior convictions were admissible pursuant to State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). App. 68, l. 21-82, l. 20. The Court in Benton held that prior burglary convictions were admissible for the limited purpose of proving the statutory elements of first-degree burglary. State v. Benton, 338 S.C. 151.

For proof of the convictions, the solicitor sought to admit Petitioner's sentencing sheets. App. 68, l. 21-74, l. 2. Trial counsel objected to the use of the sentencing sheets because of irrelevant and prejudicial material. App. 69, l. 18-25. Judge Mullen expressed her skepticism about using sentencing sheets, stating that she did not think she had ever given a jury a sentencing sheet. App. 70, l. 21-71, l. 20. Judge Mullen stated the sentencing sheets would need to be redacted. App. 70, l. 21-71, l. 10. The solicitor offered to stipulate to the two prior burglaries, but Petitioner refused. App. 71, l. 11-72, l. 20.

Judge Mullen then ordered the solicitor to heavily redact the sentencing sheets. App. 72, l. 21-73, l. 2. The solicitor asked if she should detach the indictments. App. 73, l. 3-6. Judge Mullen replied, "I think you'd want the indictment to go in." R. 73, l. 7. The solicitor stated she would "rather have everything in...." App. 73, l. 11-12. Judge Mullen remarked that "in the olden days, they'd have written guilty on it-on the indictment, I mean, it's been like in the old, old days." App. 73, l. 13-15. The court continued to review the documents and then took up another matter. App. 73, l. 16-24. Judge Mullen briefly returned to the issue and ordered further redactions. App. 81, l. 14-82, l. 20. Court then adjourned for the evening. App. 82, l. 21-24.

The next day, immediately after opening statements, the solicitor offered two sets of documents to prove Petitioner's prior convictions. App. 100, l. 12-16. R. 272-77. Trial counsel

stated she had reviewed them, and they were “just subject to my prior objections.” App. 100, l. 17-18. Judge Mullen asked whether she needed to review the exhibits and trial counsel replied, “They’re fine.” App. 100, l. 19-22. Judge Mullen then admitted State’s Exhibit 1 and 2. App. 100, l. 22-101, l. 9. App. 272-77. In her charge to the jury, Judge Mullen explicitly outlined the scope and purpose for which Petitioner’s prior convictions were admitted. Judge Mullen charged the jury the following: “Evidence of prior offenses committed by the defendant was not offered to prove the defendant has a bad character or to prove that the defendant committed the burglary on this occasion. The prior convictions may be considered by you only for the purpose of determining whether or not it satisfies that element of the offense that makes it first-degree burglary if you enter a dwelling without consent to commit a crime therein and you have two prior convictions for burglary and/or house breaking.” App. 249, l. 9-17.

## ARGUMENT

**The post-conviction relief court correctly found trial counsel was not constitutionally ineffective where the indictments and sentencing sheets were admitted over trial counsel's objection and where the trial court specifically instructed the jury to consider the indictments and sentencing sheets for the sole purpose of enhancing the current charge.**

Petitioner contends trial counsel provided ineffective assistance of counsel where she failed to object to the admission of the redacted indictments and sentencing sheets from Petitioner's prior burglary convictions to enhance his current charge to first-degree burglary. According to Petitioner, the redactions the trial court made on the indictments and sentencing sheets did not prevent the jury from learning unfairly prejudicial details of the prior crimes, and trial counsel should have objected on the basis the redactions were insufficient. However, the post-conviction relief court correctly denied relief and found trial counsel was not constitutionally ineffective where the redacted indictments and sentencing sheets were properly admitted over trial counsel's objection and where the trial court specifically instructed the jury to consider the indictments and sentencing sheets for the sole purpose of enhancing the current charge. This Court should therefore deny certiorari.

First, Petitioner improperly argues an issue that differs from the one presented and ruled upon by the lower court. The allegation in Petitioner's amended PCR application was that trial counsel was ineffective when she allowed Petitioner's indictments that contained highly prejudicial details about the previous crimes to be admitted as proof of prior convictions for burglary. App. 290. Petitioner's testimony concerning this allegation at the evidentiary hearing related to him potentially wanting to testify had he known the indictments were to be entered, the inclusion of the victim's names being prejudicial, just entering the indictments was prejudicial, and the solicitor should've just entered the sentencing sheets that indicated he was convicted of burglary second-degree and made no mention of originally being charged with burglary first-

degree. P. 303-306. Petitioner never once framed the issue to allege that trial counsel was ineffective for failing to object to the introduction of the indictments after the redactions were made. The allegation more accurately resembles a claim of trial court error in finding the indictments were admissible after the redactions were made. Trial court error is not a recognized claim for post-conviction relief. Further, Petitioner now raises a novel issue not presented to the lower court, and thus should not be considered by this Court. It is firmly established law that, ordinarily, an issue must be presented to the trial court or it is not preserved for appellate review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (“Issues not raised and ruled upon in the trial court will not be considered on appeal.”); State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) (“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court.”). State v. Dial, 429 S.C. 128, 838 S.E.2d 501(2020). Petitioner now argues on appeal that his allegation was in fact that trial counsel was ineffective for failing to object to the admission of the indictments and sentencing sheets from Petitioner’s prior burglary convictions to enhance his current charges to first-degree burglary where the redactions the trial court made were insufficient. PWC 4. Petitioner’s issue on appeal is wholly dissimilar to the issue raised below and this Court should deny certiorari on this procedural ground.

Petitioner contends trial counsel should have objected to the admission of the documents after redaction, as the documents still contained detailed information about Petitioner’s prior convictions, which was unfairly prejudicial because it improperly attacked his character and crossed the line from proving an element of the crime into impermissible propensity evidence. PWC p. 7; Rule 404, SCRE; State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003). However, trial counsel objected on the basis that she was “very concerned that we may be setting ourselves up

for a situation where we are impermissibly putting information in front of a jury that is not... if it's not properly in front of them.”, and the trial judge overruled her objection. App. 70. At the time the indictments were introduced at trial (after the redactions were made), counsel renewed her objections to their introduction on the record. App. 100. Trial counsel objected to the introduction of the indictments pre-trial on the basis that there may be details included that should not be before the jury and she renewed her objection on that ground when the indictments were introduced at trial. App. 100. Trial counsel properly preserved her objection to the introduction of the indictments, therefore, the PCR court correctly found trial counsel was not ineffective for properly objecting to the documents. Moreover, this issue was raised on appeal, and the Court of Appeals dismissed the appeal.

Petitioner cites to James, which relied on the United States Supreme Court's holding in Old Chief v. United States, 519 U.S. 172 (1997) that when a defendant's status was an element of an offense, the “issue was not whether the concrete details of the prior crime should come to the juror's attention, but whether the name or general character of that crime was to be disclosed.” Id. Petitioner's case is distinguishable from Old Chief. First, Petitioner was not willing to stipulate to the prior convictions being entered to prove the required element for first-degree burglary, where Old Chief was willing to stipulate that matter. Since Petitioner was not willing to stipulate to the records being admitted, entering the judgement documents was less prejudicial under Rule 403 than was strictly necessary. Second, unlike in Old Chief, admission of the particular burglary offenses was a statutorily necessary element to prove first-degree burglary. The Court in Old Chief held: The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun. Old Chief v. United States, 519 U.S. 172, 190–91, 117 S. Ct. 644, 655, 136 L. Ed. 2d 574 (1997). Here, the

State was required to enter the previous burglary offenses in order to prove a necessary element of first-degree burglary. Therefore, the factual scenario presented in Petitioner's case is distinguishable from that in Old Chief.

Additionally, Petitioner cites to State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002) and State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) in support of the argument that admission of prior burglary convictions is proper only if the State did not admit "detailed, particular information about the prior burglaries and/or house breaking convictions." Simmons, at 357, 573 S.E.2d at 864. Again, Petitioner has presumed deficiency by trial counsel and focuses primarily on prejudice. Trial counsel, as stated previously, properly preserved her objection to the introduction of the indictments and was therefore not deficient. However, neither of this Court's holdings in those cases were founded exclusively on the fact that particular information about the prior convictions were excluded. This Court in Simmons ultimately held:

It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first degree burglary does not constitute undue prejudice... Further, the trial judge specifically instructed the jury not to consider Cheatham's prior convictions as evidence of the Patel burglary and to limit their consideration of the prior convictions to whether an element of first degree burglary was proven.

Cheatham, 349 S.C. at 109–110, 561 S.E.2d at 623 (internal citation omitted). Therefore, even though the documents admitted contained particular information, overall the probative value outweighed the prejudicial value of the evidence. The State did not seek to admit more than the two required prior burglary convictions and other precautions were taken to ensure Petitioner was convicted on a proper basis. Further, the evidence against Petitioner at trial was objectively strong enough to alleviate concern that the jury's verdict was based on anything other than the evidence they were specifically instructed to consider. Trial counsel testified at the evidentiary hearing that the victim provided law enforcement with a videotape depicting the victim hopping over the fence,

moving items of property belonging to the victim over the fence, loading the items into a vehicle, and leaving the area. App. 327. Trial counsel also testified that the victim gave a statement indicating that he did not know Petitioner and there was no reason for him to be removing items from his home. App. 327. Trial counsel further testified that she felt the video evidence was very strong, but she tried to weave it into her defense strategy. App. 331.

Additionally, as discussed in Benton, propensity evidence is not prohibited in all circumstances. Propensity evidence is admissible if offered for some purpose other than to show the accused is a bad person or he acted in conformity with his prior convictions. Id. As in Benton, Petitioner's two prior burglary convictions were offered to prove a statutory element of the current first degree burglary charge, not to suggest Petitioner was a bad person or committed the present burglary because he had committed prior burglaries. Id.

Finally, the trial court took a significant precaution against the jury improperly considering the particular information pertaining to Petitioner's prior convictions, instructing the jury as to the scope and purpose of the admitted evidence. As discussed above, propensity evidence is admissible if offered for a purpose other than proving a person's character or conformity with prior actions. The trial court instructed the jury specifically as follows:

Evidence of prior offenses committed by the defendant was not offered to prove the defendant has a bad character or to prove that the defendant committed the burglary on this occasion. The prior convictions may be considered by you only for the purpose of determining whether or not it satisfies that element of the offense that makes it first degree burglary if you enter a dwelling without consent to commit a crime therein and you have two prior convictions for burglary and/or house breaking.

Therefore, the trial court properly followed the guidance in Benton to limit any potential prejudice by instructing the jury on the limited purpose for which the prior crime evidence can be considered.

Rule 105, SCRE (when evidence is admissible for one purpose but not for another, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly). Id.

### **CONCLUSION**

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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