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**Oct 19 2020**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Richland County

The Honorable R. Scott Sprouse, Post-Conviction Relief Judge  
The Honorable J.C. Nicholson, Trial Judge

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Appellate Case No. 2019-001408

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Christopher Heller, #332997,

Petitioner,

v.

State of South Carolina,

Respondent,

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **ISSUES PRESENTED ON CERTIORARI**

### **PETITIONER'S ISSUE PRESENTED**

Whether the PCR court erred where it found Petitioner was not prejudiced in his trial for murder and ABIK where witness Kevin Nails testified that Petitioner was on parole when the crimes occurred, and where counsel moved for a mistrial based on this highly prejudicial evidence but the Court of Appeals found counsel's mistrial motion was not contemporaneous and thus the issue was not preserved, since counsel's performance was deficient and the improper testimony was prejudicial since it left the jury with the impression Petitioner was an irredeemable criminal?

### **RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED**

The PCR court correctly found Counsel was not constitutionally ineffective for failing to preserve for appellate review the denial of a mistrial following a witness's testimony revealing Petitioner was on parole because Petitioner cannot establish any resulting prejudice where there is no reasonable likelihood Petitioner would have prevailed on appeal had this issue been preserved, as his criminal history was already properly before the jury and other substantial evidence conclusively established Petitioner's guilt, including his confession and an identification of Petitioner as the perpetrator by the surviving victim and an earwitness.

## STATEMENT OF THE CASE

Petitioner is incarcerated within the South Carolina Department of Corrections. The Richland County Grand Jury indicted Petitioner during its the November 2006 term for murder (2006-GS-40-7464) and assault and battery with intent to kill (ABWIK) (-7466). Assistant Public Defender Gregory Collins represented Petitioner. Assistant Solicitors Margaret Fent [Bodman] and Dolly Justice Garfield of the Fifth Circuit Solicitor's Office prosecuted the case.

Petitioner's case was called for trial on January 26-30, 2009, before the Honorable J.C. Nicholson, Jr. and a jury. The jury convicted Petitioner guilty as indicted. On January 30, 2009, Judge Nicholson sentenced Petitioner to life imprisonment for the murder conviction and twenty years' imprisonment on the ABWIK conviction, to be served concurrently.

Petitioner filed a timely notice of appeal and was represented on appeal by Chief Appellate Defender Robert M. Dudek of the South Carolina Office of Appellate Defense. Appellate Counsel raised three issues in Petitioner's brief: (1) whether the trial court erred in allowing impeachment of Petitioner with his prior drug convictions pursuant to Rule 609(a)(1), SCRE; (2) whether the trial court erred in denying Petitioner's motion for a mistrial based on the testimony of Kevin Nails; (3) whether the trial court erred in refusing to hold an *in camera* hearing on the admissibility of voice identification testimony. The Court of Appeals affirmed Petitioner's convictions and sentences in a published opinion filed June 13, 2012. State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012). Petitioner's filed a petition for rehearing on June 28, 2012, which was subsequently denied by order dated August 27, 2012.

Petitioner then filed a petition for writ of certiorari in this Court on November 26, 2012. By order filed May 23, 2014, this Court granted certiorari as to question two,<sup>1</sup> whether the trial court erred in allowing impeachment of Petitioner with his prior drug convictions pursuant to Rule 609(a)(1), SCRE. After briefing and oral argument, this Court dismissed the writ of certiorari as improvidently granted. State v. Heller, Op. No. 27461. The remittitur returned to the circuit court on October 29, 2014.

Petitioner then filed an application for post-conviction relief on January 30, 2015. Respondent made its Return and Motion for a More Definite Statement on June 28, 2016, requesting the application be amended with more specific facts and allegations. Petitioner amended the application on December 12, 2017. On August 30, 2018, Respondent filed a Second Amended Return, Partial Motion to Dismiss, and Motion for a More Definite Statement.

An evidentiary hearing into the matter was convened on December 18, 2018, at the Richland County Courthouse before the Honorable R. Scott Sprouse. Aimee J. Zmroczek, Esquire, represented Applicant. By written order filed May 6, 2019, Judge Sprouse denied relief on all grounds. Petitioner appealed.

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<sup>1</sup> Petitioner raised the same three issues in his certiorari petition; however, he changed the order. In his petition for writ of certiorari, question two was the issue of whether Petitioner's prior convictions were properly admitted. This Court declined to grant certiorari on the other issues, including the trial court's decision not to grant a mistrial.

## STATEMENT OF THE FACTS

During the early morning hours of August 25, 2006, while still dark, Neil Schmitz, an ambulance driver and EMT, received a call to go to a mobile home park on Brookhurst Road off Percival Road, in reference to an unknown body. App. pp. 322-31. When Schmitz arrived at the location, he found the first victim, Gustavo Hernandez Guzman (Chino), lying in the roadway outside the mobile home park. After determining Chino was deceased, Schmitz notified the Sheriff's Office and backed away from the body so as not to disturb the crime scene. App. pp. 322-31.

Deputy Joe Clark of the Richland County Sheriff's Office responded to the scene within minutes and confirmed the dead body. Clark then entered a mobile home in the trailer park near where Chino's body was found. Clark could see the door was open to this home from where the body was located, and Deputy Clark heard someone moaning and calling for help from inside. Once inside the home, Clark found a second victim, Mary Chavis (Mary), lying on the living room floor suffering from numerous stab wounds. App. pp. 332-34.

Mary had been grievously wounded and was trying to hold her intestines in her body. App. p. 334. Schmitz, the EMT, was immediately called inside the mobile home where he began treating Mary. App. pp. 326-28. Mary was transported by ambulance to the hospital, where after emergency treatment by several doctors, she survived her wounds. App. pp. 327-31, 423, 426-28, 459-63.

The autopsy on Chino's body determined he died from a direct stab wound to his heart. App. pp. 711-721. Chino also had four stab wounds to the face, an incised wound to the shoulder, and two defensive wounds to his left hand. App. pp. 713-14. The pathologist opined

at trial that the most likely murder weapon was a pocket knife with a three- to four-inch blade. App. pp. 716-18.

Police located a witness who was actually inside Mary's home when Petitioner assaulted Mary and Chino with his knife. App. pp. 436-37. This witness, Billie Joe Risinger, known as Tracy, hid under a bed in a bedroom when Petitioner entered the trailer and stabbed the two victims. During the assault, Tracy heard Mary's screams and calls for help, but Tracy remained under the bed until the assaults were over. App. pp. 439, 479-511. Police also identified another witness, Kevin Nails, who had been present at the crime scene and had brought Petitioner to the mobile home earlier in the night. App. pp. 439-42, 521-49.

Tracy testified she had been smoking crack cocaine with Petitioner, Mary, and Chino before the assaults occurred. App. p. 485. Tracy testified that later, early in the morning of August 25, 2006, Mary asked Petitioner to leave the trailer because he was "acting weird."<sup>2</sup> App. p. 485. Tracy testified Petitioner left, but he came right back and knocked on the door. App. pp. 482- 89. Tracy testified it was Petitioner's voice at the door. App. pp. 486-88. Tracy, anticipating something was going to happen, told Mary not to open the door, fled to a bedroom and locked the door. App. pp. 486-88.

The assaults occurred when Mary opened the front door, and Petitioner tried to come back into the home. App. pp. 486-88, 567. Mary placed her hand on his chest, but she could

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<sup>2</sup>Tracy testified Petitioner gave her "the creeps," was acting like he was "up to something," and tried to follow her out of the trailer on one occasion. App. pp. 485, 488. She also testified Petitioner was taking his clothes off and putting them back on. App. p. 485. When he did this, she saw several tattoos on him, one of which said "made man" and another that had dollar signs. App. p. 498-99. Petitioner admitted he had these tattoos. App. p. 928.

not prevent his re-entry into the home. App. p. 567. Petitioner stabbed Mary numerous times, and he stabbed Chino after Chino tried to come to Mary's aid. App. pp. 479-511, 555-92.

Petitioner then fled the crime scene on foot. App. p. 778. After the assaults were over and Petitioner was gone, Tracy left the home and flagged down Nails who was returning to the home in his car. Nails had left the home earlier, before the assaults, with another friend, Devon Harris (Devon), and these two men had gone to the Oasis nightclub, leaving Petitioner at Mary's home. Nails was returning to the mobile home park to pick up Petitioner when Tracy flagged him down. Tracy jumped in Nails' car and told Nails "his boy [Petitioner] had snapped." App. pp. 494, 532. As a result of Tracy's and others' information, police were able to locate and interview Nails. App. pp. 439-42. Nails confirmed the person he brought to the trailer earlier that night and left there while he and Devon went to the Oasis, was in fact Petitioner, who is his cousin. App. pp. 439-42, 749-50.

Nails testified he and Devon left the mobile home park to go to the Oasis nightclub, but Petitioner wanted to remain at the mobile home to have sex with Tracy. Nails testified when he returned to the mobile home park in an attempt to find his cousin, Tracy jumped in his car and made the excited utterance. Nails also testified that late in the evening following attack, Petitioner called him and told him he needed a ride back home.<sup>3</sup> Nails testified he went and picked Petitioner up, at a location not far from the crime scene, and took him to another location where Petitioner got out of the car and got into another car driven by Nails' mother. Nails did not see Petitioner again. App. pp. 521-49.

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<sup>3</sup>Petitioner is from Georgia. App. pp. 757, 918. He was in Columbia because he and Nails were supposed to take a trip to Harrah's Casino in Cherokee, North Carolina. App. p. 779.

On August 30, 2006, police placed Petitioner's photograph in a line up, and Mary positively identified him as the person who stabbed her. Mary made the identification in her hospital room while still recuperating from her injuries. App. pp. 574-75, 755-57. Mary also testified that after she was stabbed, Chino ran in, she saw some type of movement, then Chino ran out again, and Petitioner ran after him. App. pp. 570, 577. Also on August 30, 2006, Tracy was also shown a photographic line-up by police. She positively identified Petitioner as the man Nails brought to the trailer and the man who Mary asked to leave. App. pp. 279-80, 752-53.

After the attacks, Petitioner fled to his home in Georgia. Investigators traveled to Baxley, Georgia, located in Appling County, on August 31, 2006. Petitioner was arrested later that day in the town of Baxley. App. pp. 757, 764-66.

Before returning to South Carolina, investigators read Petitioner his Miranda rights, and he executed a Voluntary Waiver of Rights Form. He was questioned in Baxley by two investigators from the Richland County Sheriff's Office. After executing the Voluntary Waiver of Rights Form, Petitioner gave a written confession to the murder of Chino and to the attempted murder of Mary. App. pp. 776-80. In his confession, consistent with the other witnesses' statements, Petitioner admitted he went to Mary's mobile home with Nails and another black male [Devon].<sup>4</sup> App. p. 776. Petitioner explained they were with a white girl [Tracy], and they entered a home where there was a white lady [Mary] and a Mexican man [Chino]. App. p. 776. Petitioner stated he, Nails, and Tracy started smoking crack, and after

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<sup>4</sup> Petitioner's DNA was matched to a cigarette butt found in an ashtray collected from the trailer. App. p. 693.

he smoked, the lady [Mary] asked him to leave. App. p. 776. Petitioner said he told Mary he was just waiting on Nails to come back and pick him up. App. pp. 776-77.

Petitioner then admitted he started stabbing people. App. p. 777. Petitioner told the investigators the knife he used was a fold-up knife with a brown handle and approximately a two- or three-inch long blade. App. p. 777. Petitioner stated he stabbed the lady [Mary] first, and the man [Chino] jumped on his back inside the trailer. App. p. 777.

Petitioner stated after the attacks, he ran, found an old empty trailer, and hid there until around dark.<sup>5</sup> App. p. 778. Petitioner explained he then asked another lady living nearby if he could use her phone to call someone to pick him up. She allowed him to use the phone, he called Nails, who then picked him up. App. p. 778. Petitioner stated Nails called Nails' mother, Carolyn Robinson, who met them on the interstate, and she took him home to Georgia. App. p. 778. Petitioner said he threw the knife away somewhere after leaving "the girl's" trailer. App. p. 778. When asked if there was anything else he would like to add to his statement, Petitioner responded, "No, sir. Everything I told you was the truth." App. p. 778. Petitioner then waived extradition to South Carolina. App. p. 780.

On the return trip to Columbia, investigators took Petitioner to the crime scene. Petitioner pointed out to investigators where he spent the remainder of the early morning and daylight hours of August 25, following the assault. App. p. 781. Petitioner also told police the general area where he threw the murder weapon. App. p. 781.

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<sup>5</sup> It was dark when the crimes were committed around 3 to 4 a.m. in the morning. Petitioner fled the crime scene and stayed in an abandoned trailer until the sun came up and all of the following day until it began to grow dark again, around 9:00 p.m. on August 25. App. pp. 778-79.

On September 4, 2006, an investigator took Petitioner back to the crime scene and surrounding area. App. p. 795. Petitioner was again read his Miranda rights, and he executed another Voluntary Waiver of Rights Form. App. pp. 797-98. Petitioner showed an investigator the path he took from the crime scene to where he hid during the early morning hours of August 25, 2006, and during the following day. Petitioner also attempted to show the investigator where he threw the murder weapon and how he threw it. App. pp. 796-803. Police searched for the weapon, but were unable to locate it. App. pp. 803-04.

## 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 defer 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. Id. at 180, 810 S.E.2d at 839 (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. Id. 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 PCR court correctly found Counsel was not constitutionally ineffective for failing to preserve for appellate review the denial of a mistrial following a witness's testimony revealing Petitioner was on parole because Petitioner cannot establish any resulting prejudice where there is no reasonable likelihood Petitioner would have prevailed on appeal had this issue been preserved, as his criminal history was already properly before the jury and other substantial evidence conclusively established Petitioner's guilt, including his confession and an identification of Petitioner as the perpetrator by the surviving victim and an earwitness.**

Petitioner contends Counsel was deficient in failing to preserve his motion for a mistrial after his objection to prior bad act testimony given by a State's witness was sustained and a curative instruction given. The PCR court correctly denied relief, however, where Petitioner's criminal history was before the jury anyway because Petitioner chose to testify, and where, even if the issue had been preserved, Petitioner was not prejudiced because there is no reasonable probability Petitioner would have prevailed on this issue on appeal given Petitioner's confession and the strong identification of Petitioner as the perpetrator by the surviving victim and an earwitness. This Court should therefore deny certiorari.

During Kevin Nails' direct testimony at trial, Nails volunteered Petitioner was on parole in Georgia at the time he came to South Carolina and committed these crimes. Counsel immediately objected and moved to strike the testimony from the record. App. p. 537. The trial court sustained the objection and instructed the jury to disregard the mention of parole. App. p. 537. The State continued its direct examination before the court directed a fifteen-minute recess before Counsel's cross-examination. App. p. 540. At that time, with the jury out of the room, Counsel moved for a mistrial on the ground the curative instruction to disregard the testimony was insufficient. App. pp. 540-41. The trial court denied the motion. App. p. 542. Counsel renewed the motion prior to closing arguments. App. p. 944. In its jury charge, the trial court instructed the jurors not to

consider as evidence any testimony it had previously stricken from the record. App. p. 985. Appellate Counsel raised the issue on appeal, but the Court of Appeals found it was not preserved because the motion was not made contemporaneously with the instruction to disregard the testimony, which constituted an acceptance of the curative instruction. App. pp. 1023, 1107-24.

An issue that was raised on direct appeal but found to be unpreserved 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) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). 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. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 (“Since the Fourth Amendment 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 McHam’s PCR claim.”). Therefore, before a post-conviction relief court can grant relief on a claim of ineffective assistance of trial counsel for failing to preserve an issue for appellate review, the court must determine the underlying claim was meritorious and there was a reasonable probability that it would have resulted in reversal and a new trial.

In this case, the PCR court correctly found Petitioner had failed to meet his burden of proving prejudice because he was not reasonably likely to have prevailed on this issue on appeal.<sup>6</sup>

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<sup>6</sup> The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. 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.” Id. 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

Petitioner would have had to show on direct appeal the denial of the motion for a mistrial was an abuse of the trial court's discretion. "The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion." State v. Kelsey, 331 S.C. 50, 69, 502 S.E.2d 63, 73 (1998). "The power of the court to declare a mistrial ought to be used with the greatest caution and for plain and obvious causes...." State v. Prince, 279 S.C. 30, 32, 301 S.E.2d 471, 472 (1983). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "A trial court should declare a mistrial as a last resort, when all other alternatives have been exhausted. A mistrial is a drastic step, "an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." State v. Taylor, 427 S.C. 208, 212, 829 S.E.2d 723, 726 (Ct. App. 2019) (citing State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009)).

In Petitioner's case, the trial court sustained Counsel's objection, instructed the jury to disregard the testimony, and gave an instruction on stricken evidence during its charge to the jury. Therefore, it is not reasonably likely Petitioner would have prevailed on appeal. State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured.")

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is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner 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, 688 (1984).

Additionally, evidence of Petitioner's previous criminal history was admitted anyway when Petitioner took the stand in his own defense, substantially reducing any prejudice Petitioner suffered from Nails' testimony. App. pp. 936-37. Petitioner's main defense at trial was to argue his confession was involuntary and given under duress due to the Georgia investigators' threats to bring charges against Petitioner's mother and fiancée. The trial court granted the State's motion to admit Petitioner's prior criminal record since Petitioner's credibility was placed squarely in issue by his allegation his confession was coerced by law enforcement. App. pp. 870-74. Petitioner then testified about his record on both direct and cross-examination. App. pp. 888, 936-37.

Finally, Nails' testimony is inconsequential when read in the context of the entire trial record and weighed against the other substantial evidence against Petitioner. Most importantly, Petitioner confessed to murdering Chino and assaulting Mary after smoking crack with Mary and Tracy in the trailer, then hiding out and eventually fleeing the state. App. pp. 776-78. Petitioner's confession mirrored the version of events Mary, Tracy, and Nails reported to investigators, and Mary – the surviving victim – gave an unassailable identification of Petitioner as her attacker. Additionally, Tracy identified Petitioner by his voice as the person who knocked on the door of the trailer immediately before the attack on Mary began, and Nails' testified to Tracy's spontaneous statement Petitioner "went crazy and was trying to kill everyone" when he returned to the trailer to pick up Petitioner. App. pp. 486, 494, 499-500, 532.

None of this evidence was impacted by Counsel's failure to preserve his objection to Nails' testimony and the motion for a mistrial. Thus, the impact of Counsel's error on the strength of the State's case and the outcome at trial is negligible, as there was substantial evidence against Petitioner. See Smalls, 422 S.C. at 188, 810 S.E.2d at 843 ("In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the

outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.”).

Accordingly, because it is unlikely Petitioner would have prevailed on this issue on appeal even if it had been found to be preserved, the PCR court correctly found Petitioner was not prejudiced by Counsel's failure to preserve his motion for a mistrial and denied relief. This Court should likewise deny certiorari.

## CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari and affirm the PCR court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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