STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Pickens County
The Honorable John C. Hayes, III, Trial Judge
The Honorable Edward W. Miller, PCR Judge

Appellate Case No. 2021-000057

JONATHAN MATTHEW HOLDER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF REPSONDENT

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PETITIONER'S QUESTION PRESENTED

Whether the PCR court erred where it found trial counsel provided effective representation where counsel moved for a mistrial because the solicitor asked Petitioner if he was gay and if he was "interested in young boys," since the Court of Appeals procedurally barred the mistrial issue because counsel did not object the trial court's curative instruction or renew his mistrial motion?

RESPONDENT'S QUESTION PRESENTED

Did the PCR court correctly find that Petitioner failed to prove that trial counsel was constitutionally ineffective for not preserving a mistrial issue for consideration on direct appeal when, even if the issue had been preserved, Petitioner's convictions would have been affirmed in light of the trial court's strong curative instruction?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. During its June of 2013 term, the Pickens County Grand Jury indicted him for second-degree criminal sexual conduct with a minor (2013-GS-39-00957) and third-degree criminal sexual conduct with a minor (2013-GS-39-000958), and the indictments were later amended so as to refer to different time frames. On May 20-21, 2015, Petitioner proceeded to a jury trial with the Honorable John C. Hayes, III ("trial court"), presiding. Petitioner was represented by David D. Cantrell, Jr. ("trial counsel"). Samuel Barton Tooker ("assistant solicitor") of the Thirteenth Circuit Solicitor's Office prosecuted the case. At the conclusion of the second day of trial, the jury found Petitioner guilty as indicted. The trial court sentenced Petitioner to imprisonment for ten years for each offense, with the sentences to be served concurrently.

Trial counsel filed a timely notice of appeal. Appellate Defender David Alexander ("appellate counsel") of the South Carolina Commission on Indigent Defense represented Petitioner on appeal, and argued that the trial court erred in denying trial counsel's motion for a mistrial after the assistant solicitor asked during his cross-examination of Petitioner if Petitioner was gay and sexually interested in "young boys." The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. *State v. Holder*, Op. No. 2017-UP-239 (S.C. Ct. App. filed June 7, 2017) (per curiam). The remittitur was issued on June 27, 2017.

An evidentiary hearing regarding Petitioner's application for post-conviction relief ("PCR") was held before the Honorable Edward W. Miller ("PCR court") at the Greenville County Courthouse on October 25, 2019. At the conclusion of that hearing, the PCR court took the matter under advisement and asked for proposed orders from both parties. On July 16, 2020, the PCR court issued an order granting PCR to Petitioner based on two of the claims raised by Petitioner,

and denying it as to the others. Respondent filed a timely motion to alter or amend the judgment, pursuant to Rule 59(e), SCRCP. The parties appeared before the PCR court by WebEx on November 30, 2020, for a hearing on Respondent's motion. After the conclusion of the hearing, each party submitted a post-hearing brief to the PCR court, and Petitioner filed a return to Respondent's motion to alter or amend the judgment. On January 5, 2021, the PCR court issued an order granting Respondent's motion to alter or amend, vacating its previous grant of relief to Petitioner, and making new findings of fact and conclusions of law with regard to the two claims at issue in the motion. Petitioner's appeal, and this Court's grant of a writ of certiorari to him, followed.

STATEMENT OF FACTS

On October 13, 2011, the victim, a fifteen-year-old ward of South Carolina,[1] was admitted to Hampton Psychiatric Residential Facility ("Hampton"), an inpatient treatment center for minors with psychological, behavioral, and other mental health concerns, to address his on-going behavioral problems. App. 60-63, 73, 98, 100, 132, 135, 137, 141-42. Hampton was designed to care for up to fifty-two boys at a time; the facility was operated by more than eighty employees called direct care staff. App. 73-74, 100, 141. Direct care staff was responsible for resident care, including preventing the residents from harming themselves or others, assisting with residents' basic needs, and rewarding or punishing the residents. App. 101-02, 136. Petitioner was such an employee at Hampton while the victim resided there. App. 76, 135-37, 225-27. Hampton provided the residents with the bare essentials, but well-performing residents were able to do chores and other tasks to earn "Avalons," an in-house currency that residents could use to purchase special items. App. 74-75, 137-38. 141.

Hampton was equipped with an extensive camera system throughout the facility, but there were several locations without cameras, including the library, the laundry room, and portions of the nurse's station. App. 104-05, 108, 140. Members of the direct care staff were advised to remain on camera at all times and to avoid being off camera with residents. App. 108, 129, 231. Additionally, Hampton protocol required that all doors remain open. App. 128. This protocol was for the protection of both residents and direct care staff. App. 108-09.

In late spring of 2012, the victim was progressing well in Hampton's program and was able to do extra chores to earn Avalons. App. 74, 132, 137, 290. On one particular evening, the victim

[1] The victim had been in the custody of the South Carolina Department of Social Services ("DSS") since his parents' rights were terminated when he was twelve. App. 98.

asked to do laundry to earn Avalons. App. 234-35. Pursuant to Hampton's policy, a direct care staff member was required to accompany the victim while he completed his chores, and Petitioner was tasked with assisting the victim in the laundry room, a small area that was not equipped with cameras. App. 77, 108, 122, 140, 235-37. While in the laundry room with the door shut, according to the victim's testimony, Petitioner made comments comparing the size of his genitalia to a box of laundry detergent. App. 77-78. Petitioner then showed his penis to the victim and asked the victim to reciprocate. App. 78. Petitioner and the victim touched each other's genitals for a few minutes. App. 78-79. The entire encounter lasted approximately thirty minutes. App. 79.

Later that same evening, Petitioner was monitoring the victim as the victim cleaned the nurse's station. App. 80-81. While the victim was cleaning a back room out of camera view, according to the victim, Petitioner touched the victim's genitals and asked the victim to put his mouth on Petitioner's penis. App. 80-81, 90-91. The victim declined and moved away from Petitioner. App. 80-81. The encounter lasted for approximately ten minutes and occurred when the on-duty nurse had left the station. App. 81, 91.

Another evening shortly thereafter, the victim asked for permission to retrieve a book from the library, and Petitioner was asked to accompany the victim. App. 81, 244-45. Petitioner, who had brought a large pizza into work that evening against Hampton policy, gave the victim a few slices to eat while they were on the way to the library. App. 84-85, 246-47. It took a few minutes for Petitioner and the victim to get to the library, which was a small room without any windows and one door that opened to a common area. App. 81-82, 86-89, 245, 249-50. Once inside the library, Petitioner left the door cracked and stood inside the library with the victim. App. 81-82. The victim testified that Petitioner instructed him to masturbate, and he complied while Petitioner watched him do so. App. 82-83. Petitioner then shut the door completely and performed fellatio

on the victim until the victim ejaculated. App. 83. Following the assault, the victim grabbed a book and went back to his room. App. 83.

After the acts of abuse, the victim began acting out aggressively, and destroyed property around the facility. App. 83-84. A few days later, the victim disclosed the abuse to Kevin Sowell, the director of Hampton. App. 83, 135, 138. The victim attributed the decline in his behavior to anger over the abuse and frustration over his perception that no one believed that he had been abused by Petitioner. App. 83-84. The victim remained at Hampton for a few months following the abuse. App. 84, 137.

Following the victim's disclosure, Sowell began an internal investigation into the victim's abuse allegations, during which he watched camera footage from the locations at which the victim alleged the incidents of abuse had taken place. App. 138-40. The various cameras showed that Petitioner and the victim had been alone and off camera during the periods that the victim had identified. App. 63, 102-04, 108-12, 121-24, 138-40. The allegations were eventually reported to DSS, and an employee there then informed the Pickens City Police Department of them. App. 59-60. The case was assigned to Detective Samuel Byers, who interviewed the victim on three occasions. App. 59-61. Detective Byers also watched video footage from Hampton and reviewed a statement made by Petitioner. App. 61-63. Following his investigation, Detective Byers sought and obtained warrants for Petitioner's arrest. App. 63.

During the State's case-in-chief at Petitioner's trial, the State presented testimony from Detective Byers, the victim, Sowell, the victim's DSS caseworker Johniece Wofford, and Hampton's Assistant Facility Director Meghann Harvey. The State also presented Shauna Galloway-Williams, who was admitted as an expert in the field of child abuse disclosure dynamics and who testified about delayed disclosure, risk factors for sexual abuse, and grooming of victims.

App. 147-94. Additionally, the State presented and published to the jury the video footage from Hampton showing Petitioner and the victim alone, often with the door shut, in the laundry room, nurse's station, and library. App. 102-04, 108-12, 121-24, 138-40.

Petitioner testified in his defense and denied abusing the victim. App. 223-64, 268-96, 301-08. Petitioner, who was thirty-three years old at the time of trial, testified he began working at Hampton as direct care staff in March of 2011. App. 224-25. He testified he had worked in the victim's unit previously and was familiar with him. App. 227, 232-33. He testified he would occasionally accompany the victim while the victim did chores to earn Avalons, something Petitioner also did with other residents. App. 233-34. Petitioner testified that although Hampton policy was to remain on camera at all times with residents, it was impossible to stay within the view of a camera at all times and staff members were allowed to go off camera if necessary to care for or supervise a resident. App. 231-32. Petitioner testified that he accompanied the victim one evening when the victim was doing laundry and that he was unable to leave the victim alone at any point due to risks associated with the chore, including electrical and chemical risks. App. 234-35. He testified that nothing inappropriate occurred while he assisted the victim with the laundry. App. 240.

Petitioner testified that he also took the victim to the library one evening to retrieve a book at the request of his supervisor. App. 244-45. He testified that he brought a pizza in to share with residents and fellow staff that evening, which he testified was a common practice despite formally being against Hampton policy, and he gave some pizza to the victim because he had asked for it. App. 246-49. He testified that the library door was heavy and automatically shut if he did not hold it open. App. 249-50. He testified that he tried to hold the door open the entire time, but allowed it to shut briefly when he was helping the victim select a book or keeping him separated from other

residents. App. 254-56. Petitioner insisted nothing inappropriate happened between himself and the victim in the library. App. 257. He similarly testified that nothing inappropriate happened when he assisted the victim in cleaning the nurse's station. App. 258-59.

During the cross-examination of Petitioner, the following exchange occurred between the assistant solicitor and Petitioner:

> Q. So are you gay?
> A. No.
> Q. Are you interested in young boys?
> A. No.

App. 296-97. Trial counsel objected and the trial court sustained his objection. App. 297. Trial counsel then asked to be heard outside the presence of the jury. App. 297. Once the jury cleared the courtroom, trial counsel moved for a mistrial, arguing the line of questioning was irrelevant, without foundation, and prejudicial. App. 297-98. The assistant solicitor responded that the line of questioning was in reply to trial counsel's questioning about Petitioner's marital status and number of children, which he theorized "revealed or developed that [Petitioner] is a heterosexual." App. 299-300. He was concerned that the jury would deliberate as follows: "There's this married guy with several kids. He couldn't do this. He's married. He's got kids. Clearly, this isn't something that's an issue. He's attracted to women." App. 300. He elaborated that his theory of the case was that Petitioner was a repressed homosexual, but admitted that he had not had his theory reviewed by someone with psychiatric or psychological expertise. App. 299-300. After hearing from both parties, the trial court denied trial counsel's motion for a mistrial. App. 300-01. The trial court stated:

> Well, I think—I think it was an inappropriate question, quite candidly, because there is nothing without foundation [sic] to throw that in. It is—it is just inappropriate. I'm not going to go any further than that.
>
> However, I do not feel that it manifests a necessity to grant a mistrial. I'm going to ask the jury to disregard that. If we—if we have another episode like that, then we

> will bring this two and a half day—or two day trial to a screeching halt. And I think I have said enough on that, too. I tend to ramble. I think I have rambled enough. So I'm not going to grant it. I don't think it manifests the necessity to grant a mistrial.
>
> I will give, even though the defense has not requested it, I want the record to be clear that I'm doing this *sua sponte,* to give the correct—curative instructions and we'll proceed.

App. 300-01. When the jury returned to the courtroom, the trial court issued the following instruction to the jury:

> Members of the jury panel, shortly before you went out, the—[the assistant solicitor] asked [Petitioner] whether or not he was gay. That was not an appropriate question. There is no evidence in this record to support that question. The question is not relevant—the question nor the answer.
>
> So please disregard the fact that the question was asked. [Petitioner] answered it no, so you can disregard that, too. But just disregard—that's not an issue in this case to any degree whatsoever. So disregard the fact that that question was asked. You may proceed.

App. 301-02. The assistant solicitor finished his cross-examination without incident and defense counsel re-examined Petitioner before resting his case.

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, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief court's factual findings, the appellate courts defer to 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*, at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed de novo without deference to a post-conviction relief court. *Smalls*, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of a 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

I. The PCR court was correct to find that Petitioner failed to prove that trial counsel was constitutionally ineffective for not preserving a mistrial issue for consideration on direct appeal because, even if the issue had been preserved, Petitioner's convictions would have been affirmed in light of the trial court's strong curative instruction.

Petitioner argues that homosexuals face bias from society generally, and from jurors in particular, and that the former assistant solicitor[2] who prosecuted the case attempted to exploit that bias by suggesting through his cross-examination of Petitioner that Petitioner's actions towards the minor victim in the case revealed that he was a repressed homosexual. Petitioner argues that, had trial counsel preserved the issue for direct appellate review, our appellate courts would have found that the trial court abused its discretion in denying trial counsel's motion for a mistrial due to the insufficiency of the trial court's curative instruction to the jury. Petitioner's arguments fails because the trial court's curative instruction was sufficient to cure any prejudice that the former solicitor's brief, two-question foray into the topic of Petitioner's sexuality caused to Petitioner.

Because the Court of Appeals found that the mistrial issue was not preserved for direct appellate review, the PCR was required to evaluate Petitioner's claim that trial counsel was constitutionally ineffective by considering whether Petitioner proved that the outcome of the appeal would have been different but for the lack of preservation. *See Milledge v. State*, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through the same lens that would be applied on appeal . . . "); *see also McHam v. State*, 404 S.C. 465, 474-82, 746 S.E.2d 41, 46-50 (2013) (holding the PCR court erred in finding counsel was not deficient in failing to preserve an issue for appellate review but

[2] The lawyer who tried Petitioner no longer works at the Thirteenth Circuit Solicitor's Office.

agreeing with the PCR court that McHam failed to establish prejudiced because the Fourth Amendment claim failed on the merits), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836.

First, Petitioner has not proven that the assistant solicitor's two questions and Petitioner's answers had any effect on the jury's verdict. The assistant solicitor's cross-examination of Petitioner focused almost exclusively on Petitioner's explanations for his being alone with the victim off camera at Hampton during the times during which the victim alleged the sexual abuse had occurred, Petitioner's conversations with his coworkers about the victim and the security video recordings of Petitioner's and the victim's movements at Hampton, and Petitioner's knowledge of the victim's behavioral or psychological progress while he was at Hampton. App. 260-63, 268-96. For the most part, the assistant solicitor's cross-examination of Petitioner ended with the two questions at issue in this appeal. App. 296-97. Petitioner argues that people commonly harbor some bias against homosexuals. Indeed, this Court stated over forty-three years ago that it was "common knowledge" that a "substantial portion" of the public had disdain for homosexuals. *State v. Hartfield*, 272 S.C. 407, 411, 252 S.E.2d 139, 141 (1979). Respondent agrees further that the assistant solicitor's questions were inappropriate and extraneous to the case against Petitioner. But Petitioner's argument does not take into account, and this Court's statement in *Hartfield* could not have foreseen, Americans' rapid acceptance of homosexuality. *See* Jacob Poushter and Nicholas Kent, The Global Divide on Homosexuality Persists, PEW RESEARCH CENTER (June 25, 2020, 11:12 AM), https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/ (reporting that, since Pew Research Center began collecting data on the acceptance of homosexuality in the United States since 1994, the percentage of Americans who say that homosexuality should be accepted by society increased from 49% to 72% in 2019). Petitioner

argues that the assistant solicitor's conflation between homosexuality and pedophilia "played well enough to the jury," but has not proven the link between his sweeping statements about public bias against homosexuals—however current or outdated Petitioner's generalizations about the public mood are—to the jury's verdicts.

Petitioner is correct that there was a reaction in the courtroom to the solicitor's two questions, but that fact hurts Petitioner's case now rather than helps it. At the hearing before the PCR court, Petitioner characterized the reaction in the courtroom to the assistant solicitor's two questions by testifying that "[trial counsel] even was floored, the whole court, people were like, ah, you know, gasping that [the assistant solicitor] said something this outlandish." App. 454. According to Petitioner, "literally, people in the courtroom screamed out, ah, I can't believe he . . . you know." App. 456. Petitioner testified that the incident was "a huge shock" and that "a couple of people kind of yelled out, [his] wife being one of them, you know. Everybody was, you know, the few onlookers that were there, they really couldn't believe it, you know, especially – it was just really shocking." App. 478-79. Petitioner testified that the reactions were due to the fact that people felt that the assistant solicitor's questions were "[e]xtremely inappropriate." App. 479. Petitioner's own testimony is that the shock and anger to the two questions were directed at the assistant solicitor himself. The PCR court correctly took this into consideration when finding that Petitioner failed to prove that the issue would have been meritorious for him on direct appeal had it been preserved. App. 617. Even if the assistant solicitor was attempting to exploit bias against homosexuals in his cross-examination of Petitioner, by Petitioner's own testimony, it appears that that attempt backfired and drew indignation against the assistant solicitor.

Lacking a proven link between the incident and the jury's verdicts, Petitioner's arguments fail because this Court cannot presume that Petitioner suffered prejudice merely from the fact that

the assistant solicitor asked the two questions because, even if a solicitor asks a question that he ought not to have done, there mere asking of the question does not establish prejudice to a defendant. *State v. McEachern*, 399 S.C. 125, 147, 731 S.E.2d 604, 615 (Ct. App. 2012) (finding that the issue of whether the solicitor improperly asked a witness if she had sold drugs to two other people without having a proper foundation for the question was unpreserved for appellate review, but noting anyway "that the mere asking of an improper question is not necessarily prejudicial, where no evidence is introduced as a result," and that the witness denied knowing either of the people to whom the solicitor's question referred); *State v. Benning*, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999) (while agreeing with the Benning that the solicitor's question of Benning was an attempt to pit him against the victim's mother, stating the principle that "[t]he mere asking of an improper question is not necessarily prejudicial, however, where no evidence is introduced as a result."); *Gainer v. Tyner*, 259 S.C. 629, 631-32, 193 S.E.2d 525, 526-27 (1972) (finding that, even if a question asked of a party on cross-examination was improper, the witness answered that she did not know the answer to the questioned posed, and rejecting the plaintiff's argument that "there mere asking of the question resulted in prejudice"). Neither should this Court presume that any prejudice resulted in light of Petitioner's answers to the two questions. Petitioner denied that he is a homosexual and that he likes boys, and the matter was not addressed further before the jury, except for the trial court's curative instruction. The only evidence before the jury, therefore, regarding Petitioner's sexual orientation were Petitioner's one-word denials.

Second, even if there was some prejudice to Petitioner from the solicitor's two questions, Petitioner has failed to prove that the trial court's curative instruction was insufficient to cure it. The PCR court appreciated the caution that the trial court was required to use when considering whether to grant trial counsel's motion for a mistrial. App. 616. "In order to receive a mistrial, the

defendant must show error and resulting prejudice." *State v. Coaxum*, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014). "The power of the court to declare a mistrial ought to be used with the greatest caution . . . ." *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 487, 479 (1997), *quoted in State v. Durant*, 430 S.C. 98, 111, 844 S.E.2d 49, 55, n.6 (2020). "Granting a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way." *State v. Makins*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (1998). "A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." *State v. Wasson*, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989).

In finding that Petitioner failed to prove that there was a reasonable likelihood that he would have been successful on direct appeal had the mistrial issue been preserved, the PCR court correctly considered the effect of the trial court's curative instruction. Had our appellate courts reviewed the issue on direct appeal, they would have been faced with the fact that the curative instruction was substantial and unequivocal. *See State v. Tillman*, 433 S.C. 58, 67, 856 S.E.2d 168, 173 (Ct. App. 2021) (finding that the trial court's curative instruction "was lengthy and unequivocal" and corrected any misunderstanding that the jury may have had about whether a law enforcement officer had been qualified as an expert witness in a legitimate scientific field). Even if the assistant solicitor's two questions were not proper, they were not impervious to effect of the trial court's curative instruction. *See Earley v. State*, 418 S.C. 255, 270-73, 792 S.E.2d 226, 234-36 (2016) (without deciding whether the solicitor's failure to disclose evidence to the defense constituted prosecutorial misconduct such that would justify a mistrial, finding that the PCR court erred in finding that a mistrial was the only remedy that could have cured any prejudice from the nondisclosure and erred in finding that the facts of the case would have compelled the trial court to declare a mistrial); *State v. Smith*, 425 S.C. 20, 38, 819 S.E.2d 187, 196-97 (Ct. App. 2018)

(finding that the assistant solicitor's plea in closing argument that the jury not "put [the defendant] back out on the street" was misleading and an improper "attempt to appeal to the jurors' sense of fear," but finding that the improper remark was nevertheless cured, in part, by the trial court's instruction that the jury was to disregard it) (citation omitted), *rev'd on other grounds*, *State v. Smith*, 430 S.C. 226, 845 S.E.2d 495 (2020). Petitioner cites *State v. Ferguson*, 376 S.C. 615, 658 S.E.2d 101 (Ct. App. 2008), to no avail. In *Ferguson*, the defendant shot and killed a female victim after they had a dispute after the father of the defendant's girlfriend shut off the water to both the defendant's and the victim's homes while attempting to repair a water leak in the victim's home. *Id.* at 617, 658 S.E.2d at 102. The solicitor intentionally elicited testimony from the defendant's girlfriend that the defendant, when the police were at his home to arrest him after the shooting, "looked at [her] and told [her] that [she] was next." *Id.* at 619, 658 S.E.2d at 103. The Court of Appeals approved of the trial court's decision to give a curative instruction to the jury instead of granting the defendant's motion for a mistrial. *Id.* at 620-21, 658 S.E.2d at 104.

The curative instruction, and the trial court's admonishment to the assistant solicitor, were effective in foreclosing any further attention to the two questions.[3] Trial counsel testified that the assistant solicitor's line of questioning about Petitioner's sexuality "was cut off quickly." App. 509-10. Petitioner characterized the trial court's admonishment as a "roast" of the assistant

[3] Petitioner argues that the assistant solicitor returned to his conflation of homosexuality and pedophilia during his closing argument when discussing the victim's testimony. The assistant solicitor's argument there did not concern in any respect a connection between homosexuality and pedophilia. Instead, the assistant solicitor's closing argument, which was responsive to Petitioner's defense that the victim was falsely accusing him in order to be released from Hampton, was that, if the victim truly had been making false allegations in order to secure his release, he would not have testified that he ejaculated when Petitioner performed oral sex on him. The inclusion of an understandably embarrassing detail, the argument went, lent credence to the victim's testimony. App. 332-33. That was a reasonable and proper argument for the assistant solicitor to make.

solicitor. App. 456-57. The brevity of the situation, which consisted of a scanty total of twelve words from the assistant solicitor and Petitioner, did not justify a mistrial. *See State v. Palmer*, 415 S.C. 502, 518, 783 S.E.2d 823, 831 (Ct. App. 2016) (finding that the defendant failed to establish that he was entitled to a mistrial because, among other things, the single reference at trial to the fact that a witness took a polygraph test "was an isolated comment"); *State v. Manning*, 400 S.C. 257, 270, 734 S.E.2d 314, 320-21 (Ct. App. 2012) (finding that a single reference to the schedule-three drug charge included in the indictments read to the jury at the beginning of trial, when that specific drug charge was subsequently severed, did not cause prejudice sufficient to justify a mistrial) (citation omitted); *State v. Thompson*, 352 S.C. 552, 561-62, 575 S.E.2d 77, 82-83 (Ct. App. 2003) (finding that a law enforcement officer's single, vague reference to the defendant's prior criminal record was insufficient to justify a mistrial because, in part, the solicitor did not attempt to introduce evidence that the defendant had been convicted of other crimes) (citations omitted).

Petitioner has not proven that the jury disregarded the trial court's curative instruction and has not overcome the presumption that the jury heeded it. *See Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267, n.1 (1999) (disagreeing with the petitioner's argument that prejudice should be presumed and stating, "The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice.").

CONCLUSION

Petitioner has not proven that he suffered any prejudice from the assistant solicitor's two questions at trial and has not proven that the trial court's curative instruction was insufficient to cure any prejudice that did result. The PCR court was correct in finding that, even if the mistrial issue had been preserved for direct appellate review, the convictions would have been affirmed. For the foregoing reasons, Respondent respectfully requests that this Court affirm the PCR court's denial of relief to Petitioner.

Respectfully submitted,

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