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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

On Petition for Writ of Certiorari to Lexington County
Court of Common Pleas
The Honorable Jocelyn J. Newman, PCR Judge
The Honorable R. Knox McMahon, Plea Judge
2020-CP-32-02225

Appellate Case No. 2025-000761

BRYAN JEFFREY ELLIS,

Petitioner,

v.

State Of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Did the PCR court err in finding trial counsel was effective when he neither objected to the solicitor's improper characterization of petitioner as a convicted sex offender nor moved for a mistrial or get an affirmative ruling acknowledging the solicitor's improper closing argument that appealed to the jury's passions and prejudices to convict rather than the evidence presented during trial?

RESPONDENT'S QUESTION PRESENTED

Certiorari should be denied when the PCR judge properly applied the correct standard in concluding that counsel was not deficient in failing to object to the solicitor's use of the term "sex offender" in her closing argument in a trial on criminal sexual conduct with a minor when it was not a suggestion of a prior record and reasonably drew from the evidence in the record including his admitted confession. A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations. The use of the phrase was limited during the closing argument and Sixth Amendment prejudice was also not shown.

STATEMENT OF THE PROCEEDINGS

This matter comes before the Court by an appeal from the denial of an application for post-conviction relief by the Honorable Jocelyn Newman on March 25, 2025. App.p. 624-685.

The Petitioner, Bryan Jeffery Ellis made an application for post-conviction relief on June 25, 2020. App.p. 487-509. In the initial pro se application, the Applicant raised the following allegations:

Pertinent to this Petition, the Petitioner raised the following specific allegations in his original application for post-conviction relief :

I. "Ineffective assistance of trial counsel" (allegations unrelated to issue in petition)

II. "Malicious prosecution"

...3. "Unjustly and unfairly opined in opening and closing arguments multiple times, dehumanizing defendant and inciting the jury's passions by continually calling defendant 'sex offender,' 'predator;' suggesting multiple victims; bolstering and vouching, by religious oath, the alleged victim while demeaning defendant; and out-right instructing the jury to 'find the defendant guilty'—twice in the same instance and the court instructions cannot remove this taint of flagrant misconduct." U.S. v. Davis, 514 F.3d 596, 613–14 (6th Cir. 2008), Berger v. U.S., 295 U.S. 78, 88 (1935), U.S. v. Kennedy, 372 F.3d 686 (4th Cir. 2004), Boyd v. French, 147 F.3d 319, 328–29 (4th Cir. 1998)."

III. "Judicial error" (allegations unrelated to Petition)

IV. "Ineffective assistance of appellate counsel" (specific allegations unrelated to Petition)

V. "Pre-conviction violations" (specific allegations unrelated to Petition)

On November 23, 2020, Respondent State of South Carolina filed its Return and Partial Motion to Dismiss, requesting an evidentiary hearing to resolve the claims set forth in the application. App.p. 510-534. Ola Johnson was appointed to represent the Applicant and made an amended application on May 25, 2022 and a second amended application on June 5, 2022. App.p. 535-537, 538-539.

In the first Amended Application filed May 25, 2022, the Applicant made the following allegation. (other allegations were unrelated to Petition) :

2(h). Applicant's counsel, David Mauldin, failed to obtain a ruling from the court on his objections to the states closing and failed to move for a mistrial (P. 446 – 477).

In the second Amended Application, filed June 5, 2022, the Applicant made the following allegations (verbatim):

3(a). Applicants counsel David Mauldin failed to object to the state describing the Applicant as a sex offender in arguments to the jury (p. 436, 437, 441, 456).

On June 8, 2022, an evidentiary hearing was held at the Lexington County Courthouse before the Honorable Jocelyn Newman. Applicant was present and represented by Ola Johnson, Esquire. Assistant Attorney General Taylor Smith, Esquire represented Respondent. At the hearing, Applicant proceeded forward on allegations 3, 4, 7, 8, 9, and 11 within his original PCR application and additionally the allegations in his first and second amended applications. App.p. 544. In support of these claims, Applicant testified on his own behalf. Respondent presented the testimony of David Mauldin (Trial Counsel).

On March 19, 2025, Judge Newman issued her order of dismissal. App.p. 625-687. The Petitioner filed a timely notice of appeal on April 21, 2025. This certiorari proceeding follows.

PRIOR PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on January 24, 2016, following an investigation into allegations of sexual abuse involving his stepdaughter. During its July 2017 term, the Lexington County Grand Jury indicted Applicant for first-degree criminal sexual conduct (CSC) with a minor (2017-GS-32-2303) and third-degree CSC with a minor (2017-GS-32-2305(A)). On July 10, 2017, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. Assistant Public Defender David Mauldin represented Applicant. Assistant Solicitors Suzanne Mayes and La'Jessica Stringfellow prosecuted the case.

On June 12, 2017, the jury convicted Applicant as indicted. Judge McMahon sentenced Applicant to consecutive terms of life imprisonment for first-degree CSC with a minor and fifteen years' imprisonment for third-degree CSC with a minor.

Applicant filed a timely notice of appeal. Appellate Defender Joanna K. Delany (Appellate Counsel) perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issue:

Whether the trial court erred in denying the defense's motion to redact part of [Applicant]'s statement in which he admitted to Detective Rawl that he discussed masturbation with another minor child, prejudicing [Applicant] by injecting potential sexual misconduct with another child since [Applicant] was not charged with any offense regarding that child, particularly where the refusal to redact allowed the solicitor to argue in closing that [Applicant] was a sex offender who must be stopped?

The Respondent was represented in the appeal by Assistant Attorney General Scott Matthews. Following further briefing, the Court of Appeals affirmed Applicant's conviction and sentence.

State v. Ellis, 2019-UP-166 (S.C. Ct. App. withdrawn, substituted, and refiled June 26, 2019).

The Remittitur was returned to the lower court on August 2, 2019.

FINDINGS AND CONCLUSIONS OF LAW RELATED TO ISSUE IN CERTIORARI PETITION

In denying PCR Relief on the issues, Judge Newman made the following findings and conclusions:

Allegation 2(h): Applicant's counsel, David Mauldin, failed to obtain a ruling from the court on his objections to the state's closing and failed to move for a mistrial. (P.446 – 447).

Applicant alleged Trial Counsel was constitutionally ineffective for failing to obtain a ruling from the court on his objections to the states closing and failed to move for a mistrial.

As stated in the next allegation, there were objections to two comments to the solicitor's closing argument. R.p. 446, l. 15-22 and R. p. 447, l. 4-11. However, there was no motion for a mistrial. Accor. PCR Tr. p 56-57.

MS. MAYES: ...This is a sex offender and there's no other way around it. Let this be the last time that he hurts a child in this way. Let this be the last time he steals the innocence –

MR. MAULDIN: Objection, Your Honor.

MS. MAYES: -- of a child.

MR. MAULDIN: Appealing to passion and prejudice.

THE COURT: All right. Of course, ladies and gentlemen, your verdict will not be based on passion and prejudice, biased or any other motive not in evidence or emotion not in evidence in the case. It must be based on the facts and the reasonable inferences therefrom. Thank you, Mr. Mauldin. Thank you, Solicitor. You may continue.

MS. MAYES: Yes, sir, Your Honor. I submit to you this must be the last time. The correct verdict in this case –

MR. MAULDIN: Objection, Your Honor.

THE COURT: Again, ladies and gentlemen, your verdict must be based on the evidence, the reasonable inferences drawn therefrom and the law as I tell you the law is.

R.p. 446, l. 15 – 447, l. 11.

“The decision to grant or deny a mistrial is within the sound discretion of the trial court.” State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). “The power of the trial court to declare a mistrial should be used with the greatest caution” and only “when absolutely necessary” and a defendant has to “show both error and resulting prejudice.” *Id.* “The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” *Id.* Washington v. State, 440 S.C. 550, 565, 891 S.E.2d 668, 676 (Ct. App. 2023), reh'g denied (Sept. 21, 2023)

When asked about the allegation on direct-examination at the PCR evidentiary hearing, Applicant testified "actually, I believe he did ask for a mistrial". (PCR Tr. p. 14). However, counsel clarified that he did not move for a mistrial after his objections. (PCR Tr.p. 56-57).

Applicant failed to prove that counsel was deficient in failing to request a mistrial. It is unclear that, in this setting, a mistrial was appropriate with the trial court cautionary instructions to the jury. Upon review of the record, this Court must find that counsel was not deficient in failing to request a mistrial after the instructions to the brief comments by the prosecutor. Further Sixth Amendment prejudice was not shown. This Court finds that the Applicant has failed to prove that there is a reasonable probability that if counsel would have requested a mistrial based upon those comments the results would have been a mistrial. The comments were brief at the end of the closing argument and a cautionary instruction was given. A review of the argument and instruction does not show that a mistrial appropriate as, “an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” Sixth Amendment prejudice has not been shown.

Allegation 3(a): Applicant's counsel, David Mauldin, failed to object to the state describing the Applicant as a sex offender in arguments to the jury (p. 436, 437, 441, 456).

During the trial, the following argument was presented that he is currently challenging:

. . . Here we have direct evidence from [REDACTED] as well as people who heard directly from his mouth what he did to that child and, in fact, direct evidence by his own hand every single word in that confession is true except the one thing he had to **do because that's how sex offenders operate**. Right there in that confession he's still trying to cast blame on that child. Seven years old. She had questions.

I had to ask what she liked and didn't like. What she liked? **That's how a sex offender thinks** and I submit to you it's something that can't be understood or rationalized by anybody in this courtroom but that is not the law. It is not our job to try to interpret what the twisted mind of a sex

offender thinks or feels or how he operates. That's not the law. The way the law works is do we have the proof that he did it? By his own admission he did it and by that child's own sworn testimony he did it.

R. p. 436, l. 13-p 437, l. 5. (emphasis added).

He is everything he owns up to being right here in this confession. A sex offender is as bad as it gets.

R.p. 437, l. 18-19.

Well, all the coaching and encouragement, the grooming that he described is exactly what he has done to [REDACTED]. He wanted to break down every barrier and inhibition that that child had to teach her from the youngest age possible that it was okay and that it was right so that she would do everything that he said and **I submit to you that is only how a sex offender would think and would act.** It's all about making her believe that it's okay and that it's their secret and not to tell because as long as he's got her doing whatever he wants her to do, he's going to keep doing it and it's going to keep escalating exactly like it did and ultimately with [REDACTED] it only stopped because she told.

R.p. 441, l. 6-18.

This is **a sex offender** and there's no other way around it.

R.p. 446, l. 15-16.

There was no threats. No coercions. Just the attempts of a **manipulative sex offender** trying to talk his way out of it with Sergeant Rawl the same way he took that stand and tried to talk his way out of it to everyone in this courtroom.

R.p. 456, l. 2-7.

Applicant alleges Trial Counsel failed to object to the state describing the Applicant as a sex offender in arguments to the jury. The Court finds this allegation to be without merit.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughy, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness").

Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did object to the state describing him as a sex offender, and the solicitor was "admonished and then continued to do so after." (PCR Tr. p. 14).

On direct examination, Trial Counsel testified that Applicant was charged with being a sex offender as the crime of his interaction with the child. (PCR Tr. p. 46). Trial Counsel testified that obviously the solicitor's position was that he was a sex offender, that she had proved he was a sex offender, and that was what she was arguing to the jury. Id. Trial Counsel testified that he did object to future dangers during the closing, and he got a curative instruction. (PCR Tr. p. 47).

On cross-examination, Trial Counsel testified that Applicant's seven-page confession was detailing how he molested a child, and so the fact that the solicitor called him a child molester "it's kind of a six, and one half a dozen of another." (PCR Tr. p. 57).¹

Findings

Trial Counsel **credibly** testified that there was a seven-page confession detailing how Applicant molested a child and so the solicitor did not find the term to be objectionable. Trial Counsel articulated his reason for not objecting and therefore is found to not be deficient. See Underwood supra.

During closing argument, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 531–32 (2007) (citation omitted) (quoting Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 n.2 (2018). However, "[a] solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be

¹ Evidence in the trial in addition to his confession revealed that he had admitted to another that he had "molested" the victim. App.p. 280, l. 5-7 (Thomas Havird).

drawn from the evidence.” Smith v. State, 375 S.C. at 522–23, 654 S.E.2d at 531. “In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine ‘whether the solicitor's comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”’ Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016).

Further, Applicant provided no evidence to show that had Trial Counsel objected, the outcome of the trial would have been different. Applicant confessed to the allegations and there was a significant amount of evidence provided at trial confirming his confession and the interaction with the child. . There was no evidence presented by Applicant that specifically the State referring to him as a sex offender, had any impact on the outcome of the trial. Therefore, Applicant failed to show any resulting prejudice.

This Court finds that counsel was not deficient in failing to object to the State’s use of the words “sex offender” in their argument. The majority of the prosecutor's closing argument was devoted to explaining how the evidence adduced at trial satisfied the elements of the offenses. The Court notes that the terms “sex offender,” “molester,” and “child molester,” are descriptive labels that are inherently connected to sexual perpetrators and, although arguably used to stigmatize those labeled as such, were specific to the evidence presented at this trial. The Applicant attempts to suggest that the jury would have concluded that the Applicant was a registered sex offender and imply that he had a prior sexual offense conviction. PCR Tr.p. 57. However, the Court must find that suggestion is unlikely and does not find deficiency in counsel’s performance.

In this case, the prosecutor's invocation of these descriptive labels were not excessive within the context of the closing argument as a whole and, further, did not purposely or otherwise saturate the trial with emotion. Especially in this case, where there was abundant evidence of Applicant’s guilt, including testimony from admissions, this Court does not find reasonable counsel was under a duty to object to the use of that term of art where the prosecutor's occasional use of the term “sex offender” did not render the trial fundamentally unfair.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. This court does not find in this setting that there was a reasonable probability that had counsel objected the result of the proceeding would have been different.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

App.p. 675-682.

STANDARD OF REVIEW

Generally, “[o]ur standard of review in PCR cases depends on the specific issue before us.” *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). “We defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them.” *Id.* (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). “We review questions of law de novo, with no deference to trial courts.” *Id.* at 180-81, 810 S.E.2d at 839. Whether trial counsel was deficient and whether any deficiency prejudiced a PCR applicant are questions of law. *Lindsey v. State*, 447 S.C. 93, 924 S.E.2d 104 (S.C. Nov. 5, 2025).

“A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “First, the defendant must show that counsel’s performance was deficient.” *Id.* “Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* The prejudice prong requires the defendant to show but for counsel’s errors, there is a reasonable probability the result at trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

Certiorari should be denied when the PCR judge properly applied the correct standard in concluding that counsel was not deficient in failing to object to the solicitor's use of the term "sex offender" in her closing argument in a trial on criminal sexual conduct with a minor when it was not a suggestion of a prior record and reasonably drew from the evidence in the record including his admitted confession. A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations. The use of the phrase was limited during the closing argument and Sixth Amendment prejudice was also not shown.

The State during its closing argument never use the phrase "convicted sex offender" in reference to Petitioner. The Petitioner asserts that the prosecutor's use of the phrase "sex offender" seven (7) times during her extensive closing argument should have been objected to by my Petitioner's defense counsel or a mistrial requested.² Despite the fact that no evidence was presented to the jury that Petitioner had a prior record of convictions for similar acts, Petitioner contends that the prosecution was actually asserting that Petitioner was a "**convicted** sex offender" in her use of that term claiming "with the clear implication that Ellis had already been convicted of prior sex acts by the same nature, even though he acknowledged that there was no prior record of convictions. App.p. 302. The PCR Court rejected that assertion and found that counsel was not deficient and acted reasonably in failing to object to the limited Solicitor's use of the term during her closing and reply argument.

In *Donnelly v. DeChristoforo*, 416 U.S. 637 at 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) the U.S. Supreme Court that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). In

² It should be noted that the phrase "sex offender" arose when the Petitioner testified that he was groomed as a child as a sex offender. App.p. 417, 440.

State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975), the Supreme Court set forth the parameters of permissible prosecutorial argument. So long as the prosecutor stays within the record and its reasonable inferences, he may legitimately appeal to the jury to do their full duty. *Id.* at 92, 212 S.E.2d at 590. A closing argument must stay confined to the evidence within the record or any reasonable inferences that can be drawn therefrom. *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010).

A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976). A review of the closing argument is based upon the standard of “whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Hawkins*, 292 S.C. 418, 421, 357 S.E.2d 10, 12 (1987). *See State v. Caldwell*, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990) (a prosecutor may argue her case vigorously and give her version of the testimony, and what weight or credibility should be given to the evidence); *State v. Cannon*, 220 S.C. 614, 93 S.E.2d 880 (1956). “A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record.” *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

“A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences to it.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). A solicitor is allowed to argue his or her version of the evidence and to comment on how much weight to give such evidence. *Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566. However, a solicitor's duty is to see justice done, not to convict a defendant. *Id.* Therefore, a closing argument “must be carefully tailored so as not to appeal to the personal bias of the juror nor be

calculated to arouse his passion or prejudice.” *Id.* (quoting *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007)). “Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially.” *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006), overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). *Washington v. State*, 440 S.C. 550, 564, 891 S.E.2d 668, 675–76 (Ct. App. 2023).

When counsel makes an improper argument, opposing counsel should “immediately object and ... have a record made of the statements or language complained of and ... ask the court for a distinct ruling thereon.” *State v. Black*, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995). “The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion.” *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). “Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). Accordingly, the appellate court must determine whether the improper argument “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* To make this determination, the appellate court will review the improper argument in the context of the entire record. *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

The decision to grant or deny a mistrial is within the sound discretion of the trial court.” *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). “The power of the trial court to declare a mistrial should be used with the greatest caution” and only “when absolutely necessary” and a defendant has to “show both error and resulting prejudice.” *Id.* “The granting of

a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.” *Id.*

The Petitioner contends in this proceeding that the use of the term “sex offender” had a negative connotation and compared it to the phrase “domestic terrorist” which the Court found offensive in *Vasquez v. State, supra*. And the use of the phrase “outlaw” in *State v. Day*, 341 S.C. 410, 422-23, 535 S.E.2d 431, 438 (2000). Each of those cases are distinguishable from the use of “sex offender” by Solicitor Mayes.

In *Vasquez*, the Court was faced with a case involving the robbery and murder of employees at a Burger King by a prior employee who happened to be Muslim. In that setting the Court found the counsel was ineffective in failing to object to the prosecutor’s use in open and closing of references to the defendant as a “domestic terrorist” and drew a correlation between Petitioner's indicted conduct and the events of September 11, 2001 and (2) urged jurors to imagine the fear and terror of one of the murder victims. In *Day*, the Court found the prosecutor's referencing defendant's nickname of “outlaw” 23 times during closing argument in murder prosecution was excessive and repetitious, and deprived defendant of due process of law, as the nickname was not used to prove any matter in controversy.

In this setting, the limited references to sex offender were related to what the State was trial to prove the Petitioner was guilty of - criminal sexual conduct with a minor. The State’s first reference to “sex offender” was related to rhetorical comments about how a sex offender operates and thinks arising from the Petitioner’s own confession related to grooming and the question to the Petitioner at trial related to the statements related to what a victim liked and did not like (App.p. 436). Further, the Solicitor was relating the twisted mind of a sex offender thinks or feels or operates. The Solicitor noted that Petitioner testimony related that he was

abused as a child and lived with a sex offender. App.p. 440. In her description of the confession of Petitioner and his testimony he is relating it to how a sex offender is. He is proving from the evidence that the Petitioner is guilty of being a sex offender in this case. This is how the offender acts.

The Court should reject the assertion in the context of this record that the State was asserting that Petitioner was a previously convicted sex offender.

The Petitioner did not prove counsel was deficient in failing to object and/or request a mistrial to the limited use. Counsel David Mauldin testified that the State was trying to prove that Ellis was a sex offender and that she could call him as sex offender like you could call a defendant a drug dealing in the closing argument in a drug case or murderer in a murder case. App.p. 595-596. Although the Petitioner now refers to the responses as flippant in his Petitioner, counsel assessment was accurate. This is unlike Vasquez where the State was not trying to prove Vasquez was a “domestic terrorist” and references to 9-11 which according to the Court was presented to only inflame the passions of the jury in the State’s favor, not to prove the murder in a restaurant by a former employee. Unlike *Day* where over 23 references to him being an “outlaw” which was his nickname was found to be overly prejudicial because the nickname was not used to prove anything in controversy. Unlike those, here the State was trying to prove the Petitioner was a sex offender. It was used to explain based upon Petitioner’s confession and testimony how a sex offender thinks and operates – how Ellis thinks and operates.

The Respondent submits that the Court cannot say that no reasonable counsel would have acted as counsel Mauldin did. The PCR Court had evidence to support its finding and the

conclusion of law that Petitioner had not proved deficient performance and counsel acted within the reasonable standards of competency demanded of criminal lawyers.³

Respondent further submits that certiorari is not proper because the Applicant has failed to prove prejudice under *Strickland*. There is no reasonable probability that the result would have been different had the counsel objected to the characterization of “sex offender” in the State’s closing and reply. A prosecutor’s comments deprive the accused of due process of law where the comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Tubbs*, 333 S.C. 316, 509 S.E.2d 815 (1999) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431, 437 (1974)). This Court held in *State v. Tubbs*, supra, that a prosecutor’s use of a nickname can deprive the defendant of due process if the use of the nickname is so excessive and repetitious as to infect the entire trial with unfairness. In *Tubbs*, the solicitor’s reference to defendant’s nickname, “Cobra”, during summation did not infect the entire trial with unfairness because it was only used seven times, and one of those times was used to establish identity. *Id.* at 316, 509 S.E.2d at 818. However, in *State v. Hawkins*, 292 S.C. 418, 357 S.E.2d 10 (1987) overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), this Court held that the solicitor’s reference to

³ In his Petition, he also refers to App.p. 435, l. 17-p. 436, l. 4. He claims this reference in which the State takes the Petitioner to task for calling his child a liar and gives the State’s version as to why the victim is credible and the Petitioner is not. He claims that counsel should have objected because it was an improper comment on the Petitioner’s right to testify. Counsel was not deficient in failing to object. See *State v. Caldwell*, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990) (a prosecutor may argue her case vigorously and give her version of the testimony, and what weight or credibility should be given to the evidence). However, the Petitioner never challenged this portion of the State’s closing argument in any fashion in his pleadings or amendment. It is procedurally barred from consideration in this certiorari proceeding since it was not raised or ruled upon by the PCR Court.

defendant's nickname, "Mad Dog", over forty times during the guilt and sentencing phase was excessive and repetitious and denied the defendant due process.

"In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine 'whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' " *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (quoting *Vaughn*, 362 S.C. at 169–70, 607 S.E.2d at 75). Similar to *Tubbs*, the use of "sex offender" only occurred 7 times. (App. 436, 437 (2), 440, 441, 446, 456. These limited comments did not affect the trial with unfairness. *See Arnold v. Evatt*, 113 F.3d 1352 (4th Cir.1997) (death penalty case in which the solicitor's occasional use of the defendant's nickname, "Mad Dog," during the guilt phase and resentencing proceedings did not deny defendant due process of law), This case is similar to *State v. Randall*, 356 S.C. 639, 591 S.E.2d 608. In *Randall*, the Court held a solicitor's closing argument wherein he referred to the defendant drug dealers as "dirty cockroaches" did not require a new trial because there was strong evidence of the defendants' guilt. 356 S.C. at 643, 591 S.E.2d at 610. The court also noted the solicitor's "dirty cockroach" argument only consisted of ten lines of the transcript and was not repeated throughout the trial. *Id.* at 643, 591 S.E.2d at 611.

The Petitioner assumed that he has proved prejudice based upon his reading of *Washington v. State*, 445 S.C. 233, 911 S.E.2d 536 (Ct. App. 2025). *Washington*, unlike this setting, referred to improper vouching during the closing argument in an alleged criminal sexual conduct case. In *Washington*, the Court found no physical evidence, so the vouching impacted upon the case since the credibility of the witnesses was the issue. In the present cases, it is not a vouching case at all. On the contrary, it is a case where limited phrases either compared or defined sex offender characteristics and the Petitioner. Evidence in the record includes statements

by the victim, inculpatory statements by the Petitioner. In this case, the prosecutor's invocation of these descriptive labels were not excessive within the context of the closing argument as a whole and, further, did not purposely or otherwise saturate the trial with emotion. Especially in this case, where there was abundant evidence of Applicant's guilt, including testimony from admissions, this Court does not find reasonable counsel was under a duty to object to the use of that term of art where the prosecutor's occasional use of the term "sex offender" did not render the trial fundamentally unfair.

Certiorari should be denied where the PCR Court properly found the Applicant has failed to present sufficient evidence to prove the first prong of the *Strickland* test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Respondent submits the Petitioner failed to prove, in this setting that there was a reasonable probability that had counsel objected the result of the proceeding would have been different.

CONCLUSION

For the foregoing reasons, this Court should deny the 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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