

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 09 2014

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

S.C. Supreme Court

Appellate Case No. 2013-001904

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JAN 09 2014

The State,

S.C. Supreme Court
Respondent,

v.

Johnnie Walker Gaskins,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies, pursuant to Rule 242(d)(1), SCACR, that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 6, 2013.

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QUESTIONS PRESENTED

I.

Did the Court of Appeals improperly conclude that the Trial Court correctly ruled on the issue of the admissibility of crime scene photographs depicting blood splatters and blood pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury?

II.

Did the Court of Appeals erred in finding that the Trial Court did not abuse its discretion in denying the Petitioner's motion for a mistrial, based on the admission of improper and highly prejudicial hearsay testimony, in the form of a dying declaration and a statement from an anonymous telephone caller?

III.

Did the Court of Appeals err in failing to recognize that Petitioner's right to due process of law was violated by the trial judge's improper and heated response to an objection made by defense counsel and in concluding that the remarks of the trial judge, on a whole, were not directed to either side ?

STATEMENT OF THE CASE

The Petitioner was indicted in July 2008 by the Richland County Grand Jury for two counts of Murder (2008-GS-40-3948, 2008-GS-40-1626), three counts of Assault and Battery with Intent to Kill (“ABWIK”) (2008-GS-40-1629, 2008-GS-40-1631, 2008-GS-40-1632), and one count of Possession of a Weapon during the commission of a violent crime (2008-GS-40-1627). On October 19, 2009, the Petitioner proceeded to trial by jury where he was convicted of all charges. The Honorable L. Casey Manning, presiding circuit judge, sentenced the Petitioner to two terms of life imprisonment on the Murder charges, to be served concurrently, and consecutive sentences of twenty years on each of the three ABWIK charges, and five years on the weapon charge.

The Petitioner timely filed a Notice of Appeal. On July 3, 2013, the South Carolina Court of Appeals filed an unpublished opinion affirming the Petitioner’s convictions and sentences. See State v. Johnnie Gaskins, Op. No. 13-UP-304 (S.C. Ct. App. filed July 3, 2013). On July 18, 2013, the Petitioner timely filed a Petition for Rehearing. That Petition was denied by written order on August 6, 2013.

The Petitioner now seeks a writ of certiorari to the South Carolina Court of Appeals

STATEMENT OF FACTS

On February 5th, 2007, Club 360 located at 826 Bush River Road in Columbia, South Carolina was having a Super Bowl Party that began late in the afternoon and continued after midnight. ROA at p. 34, l. 21-p. 36, l. 11; p. 46, ll. 8-16; p. 89, ll. 8-11. Around 12:30 a.m., staff members of Club 360 claim that the Petitioner was escorted out of the Club for unruly behavior. ROA at p. 41, ll. 20-24; p. 43, ll. 12-19; p. 90, l. 21-p. 91, l. 6. A friend of Petitioner's, Sydney Williams, testified that he was present and spoke with the security staff to obtain the Petitioner's release. ROA at p. 219, ll. 15-25; p. 92, ll. 13-24. Almost immediately after the Petitioner was escorted out the door, another unruly patron, Christopher Lyles, was forcibly removed. ROA at p. 93, ll. 18-23; p. 126, l. 18-p. 127, l. 7; p. 208, l. 16-p. 209, l. 8.

At approximately 1:00 a.m. in the morning, while security staff members were standing around the entrance to the club, someone began firing a weapon towards the front door. ROA at p. 43, l. 18-p. 44, l. 1. One of the contract security staff, Lamont Davis, testified that the suspect had pulled around the front of the Club in a vehicle and had fired multiple shots out of the window before driving away. ROA at p. 94, ll. 7-25. Davis stated that he fired four shots at the retreating vehicle from his .38 caliber revolver. ROA at p. 98, ll. 7-11. When the shooting ended, one of the bar patrons, Shannavia Williams, was dead and a member of the security staff, John Adams, was mortally wounded. ROA at p. 45, ll. 1-14; p. 434, ll. 4-13; p. 439, l. 20-p. 440, l. 4. Two other members of the security staff, Lamont Davis and Quentin Harris, were wounded in the shooting and another Club patron, Deirdre Houston, was wounded from a gunshot to the face. ROA at p. 95, ll. 17-23; p. 157, ll. 20-25; p. 295, ll. 8-14. A mobile phone allegedly belonging to Petitioner was found by the Club owner, Lindburgh Porterfield, inside the Club at some point

prior to the shooting, and was turned over to the Richland County Sheriff's Department in the ensuing investigation. ROA at p. 174, ll. 2-22; p. 180, l. 16-p. 181, l. 17; p. 172, ll. 12-23. A vehicle belonging to the mother of Petitioner's girlfriend was searched in connection with the shooting. ROA at p. 525, l. 5-p. 527, l. 23. The murder weapon was never recovered, but a weapon matching the caliber of shell casings recovered from the scene, belonging to two Club patrons, was turned into the police and subsequently excluded as unrelated. ROA at p. 535, ll. 5-9; p. 466, ll. 3-10; p. 472, l. 5-p. 473, l. 3; p. 479, l. 23-p. 480, l. 1.

ARGUMENT

I.

The Court of Appeals improperly concluded that the Trial Court correctly ruled on the issue of the admissibility of crime scene photographs depicting blood splatters and blood pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury.

A. How the Issue Arose Below

During the Petitioner's trial, the State sought to introduce numerous photographs of the Club's interior showing blood in the form of smears and splatters and pooling. ROA at p. 83, ll. 5-12; Court's Exhibit # 5: State's Photo Exhibit List. The photographs appeared to be taken in groups with distance shots that established the position of each bloodstain and then close-up shots of the blood. ROA at p. 85, ll. 15-21. Some of the photographs contained numerical markers near the blood stains. The State argued that the photographs were going to corroborate the testimony of Investigator Richards, whose report on blood analysis had been provided to the defense. ROA at p. 83, ll. 5-12. The State asserted that the photographs displayed the location and movement of at least one victim, who could identify her own trail of blood in testimony.

ROA at p. 83, l. 21-p. 84, l. 7. The Petitioner objected to these photographs on the grounds that they were gruesome and prejudicial, as well as duplicative and lacking in probative value. ROA at p. 82, l. 5-p. 83, l. 2; p. 85, l. 15-p. 86, l. 5; p. 86, l. 19-p. 88, l. 3. The judge denied the motion to exclude and found that the probative value of demonstrating where and how the victims were shot outweighed the prejudicial consequences of the evidence's introduction. Specifically, the judge stated:

I think it might be a close call but I do not believe the prejudice outweighs the probative value. Inasmuch as the jury already knows that two people were killed, three were shot, and at least at this point in time, I think I'll give the State an opportunity to connect the locations where the victims were shot, who was shot, where they were shot, that sort of thing. And at this point in time, Mr. McCulloch, it may be a close call but I think your objection is a little bit premature. If later on something evolves that I think prejudice does outweigh the probative value, I don't make that assessment at this time, I'll revisit it.

ROA at p. 88, ll. 14-25.

The Petitioner renewed his objection to the introduction of the contested photographs during the testimony of Deirdre Houston, one of the shooting victims. ROA at p. 285, ll. 5-14. The judge had the witness briefly provide in-camera testimony regarding the photographs. Houston generally described her location in the bar when she was struck and her movement in the immediate aftermath of the shooting. ROA at p. 286, l. 11-p. 289, l. 4. In an attempt to spare the witness, the Petitioner conceded that a proper foundation had been laid for the introduction of the photos, based on the victim's testimony. ROA at p. 287, l. 21-p. 288, l. 5. The Court denied the Petitioner's renewed motion to exclude the photographs. ROA at p. 289, l. 8-p. 290, l. 12. Some of these contested photos were admitted into evidence during the testimony of Houston,

the remaining photos were admitted during the testimony of Investigator Richards. ROA at pp. 289-290; pp. 345-347; State's Exhibits #22-46.

B. Argument on direct appeal to the South Carolina Court of Appeals.

In his appeal to the Court of Appeals, the Petitioner contended that while some testimony regarding the location of victims or the extent of bloodshed may have been relevant in this case, the extent to which the photographic evidence was presented by the State became both cumulative and prejudicial to the Petitioner. Furthermore, he argued that the prejudicial impact of this evidence was augmented by the chilling testimony of victim Deirdre Houston. Houston testified that she was crawling along the floor after being shot in the face and identifies her own bloody path from the pool tables to the bathroom in several of the afore-mentioned photos. The close-up photos of blood smears were prejudicial in and of themselves, even without a victim identifying the pathway of blood in the photos as originating from her own body. The Petitioner asserted that the extent of prejudice to the Petitioner resulting from the judge's denial of the motion to exclude more than outweighed the minimal probative value of the cumulative photographs. Consequently, the Petitioner argues that he is entitled to a new trial.

Evidence of the extent of a victim's injury is relevant in prosecutions for assault and battery with intent to kill and assault and battery of a high and aggravated nature. State v. Owens, 224 S.C. 533, 535, 80 S.E.2d 113, 114 (1954); see also State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). Furthermore, all relevant evidence is admissible. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice. Rule 403, SCRE.

In State v. Franklin, our Supreme Court held that prejudicial photos of a crime scene and body, that would otherwise be inadmissible, were properly admitted where they demonstrated the aggravated circumstances that attended the crime; in that case, the defendant's brutal torture of the victim. State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995). The State v. Powers decision revisited Franklin and the Court clarified that aggravating circumstances are not necessary to admit gruesome and prejudicial photographs, as long as the evidence demonstrates the circumstance of the crime and the character of the defendant or else depicts the victim's body in the condition in which it was left. State v. Powers, 331 S.C. 37, 47, 501 S.E.2d 116, 121 (1998).

The Petitioner agrees, as trial counsel did below, that *some* of the photographs introduced by the State regarding the locations of shooting victims were arguably relevant. ROA. at p. 87, ll. 16-21. However, once that evidence had been admitted, any further evidence detailing the extent of bloodshed became cumulative, rendering the probative value of the additional testimony minimal. The Petitioner would further assert that any probative value the photos had in demonstrating the circumstance of the crime or the defendant's character was very minimal, since the primary issue in this case was the identification of the shooter. The extent or manner of the injuries incurred and the movements of victim Houston were otherwise established through photographs taken from a distance of the Club's interior, testimony of the victims and the forensic pathologist and the cap of Deirdre Houston entered in evidence.¹ There was no clear item in dispute regarding either of these issues.

¹ The Petitioner would note that the State introduced a cap worn by shooting victim Deirdre Houston, which was found with a bullet fragment attached to its fabric. ROA p. 296, ll. 9-16; p. 399, l. 1-p. 400, l. 8.

This highly inflammatory evidence was designed to inflame the jury and distract them from the operative question which *was not* how the victims were injured or even where they were located during and after the shooting. The true operative question was whether the State's theory of the shooting could establish, beyond a reasonable doubt, that Petitioner was the shooter. These inflammatory photographs should therefore have been excluded from evidence in the State's case in chief. The defense team did not put forth any evidence to contradict the manner of victim's injuries or the victims' locations throughout the Club; the issues cited by the State in its defense of the photographs' relevancy. Had the defense done so in its case, the State could have possibly justified the introduction of additional photographic evidence on Reply. "There can be no justice in a trial by jurors inflamed by passion..." Groppi v. Wisconsin, 400 U.S. 505, 511 (1971) (footnote 12) (quoting Crocker v. Justices of Superior Court, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911)).

By permitting the State to present unnecessarily cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly and undeniably prejudiced the Petitioner. The cumulative close-up photographs served *no* purpose except to exacerbate the jury's reaction to the victim and eyewitness testimony. There was no testimony suggesting that the contour of any of the blood evidence provided any forensic information of relevance in this case. If there had been, the State might have a stronger basis for their position that the jury for some reason needed a close-up view of the blood in some location(s).

As the Petitioner respectfully argued in his Petition for Rehearing, the opinion of the Court of Appeals either overlooked or misapprehended a significant factual question with regard to the lower court's error in admitting bloody crime scene photographs. Specifically, the decision of the Court of Appeals found that the photographs in question were probative in that

they showed, “the actions of one of the victims during the shooting” as corroborated by the State’s expert through the photographs in question. App. p. 4. This portion of the decision of the Court of Appeals failed to take into account two significant factors.

First, the shots fired in this case were made from the window of a car that had pulled up in front of the club where this incident took place. A witness from the security staff of the club testified to the fact that the shooter pulled up and fired multiple shots out of the window of the car before driving away. ROA at p. 94, ll.7-11. Witnesses described the shooter as firing shots from outside towards the front door. ROA at p. 43, l.18 – p. 44, l. 1. Thus, how the victims responded to the shots was not directly relevant to the operative question of who fired them. Although the photographs did not depict bodies, they were extremely bloody and gruesome. Where they had no probative value on the operative issue before the jury for decision, their potential for appealing to the passions and emotions of the jury clearly outweighed any evidentiary value they had and therefore, the Petitioner respectfully submits, they should have been excluded from evidence.

Secondly, the photographs in question were clearly cumulative to others introduced without objection from the Petitioner. ROA at p. 87, ll.16 – 21. Assuming, *arguendo*, that the photographs of the interior of the club had any logical relevance to the issues before the lower court, other photographs admitted without objection addressed the issues demonstrated through this photographic evidence. Therefore, the inclusion in evidence of the particularly graphic photos introduced over the objection of the Petitioner constituted reversible error where the evidence in question served no purpose except to inflame the passions as prejudices of the jury.

As argued by the Petitioner in his Brief, *“There can be no justice in a trial by jurors inflamed by passion...”* *Groppi v. Wisconsin*, 400 U.S. 505, 511 (1971) (footnote 12) (quoting *Crocker v. Justices of Superior Court*, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911)). The Petitioner respectfully submits that by permitting the State to present unnecessary and cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly prejudiced the Petitioner. The cumulative close-up photographs at issue served *no purpose* except to exacerbate the jury’s reaction to the victim and eyewitness testimony.

C. Argument for Reversal.

The Petitioner now respectfully asserts that the Court of Appeals erred in finding that this prejudicial evidence had probative value sufficient to outweigh its obvious potential for inflaming the passions and prejudices of the Petitioner’s jury. Accordingly, the Petitioner argues that he should be granted a new trial.

II.

The lower court erred in denying the Petitioner’s motion for a mistrial following improper hearsay testimony concerning an alleged dying declaration, that had not been previously disclosed to the defense, and an alleged statement made by an anonymous caller on Petitioner’s mobile phone.

A. How the issue developed at trial.

During his direct examination, the Club owner, Porterfield, set forth his limited acquaintance with the Petitioner and described the circumstances of Petitioner’s departure from the Club on the evening in question. ROA at p. 172, l. 12-p. 173, l. 21. Porterfield testified that, after the shooting, he was communicating with one of the victims, John Adams, before he died.

The State asked Porterfield, "What did he [Adams] say?" Porterfield replied, "*He [Adams] was like the guy that we put out, shot me, was shooting.*" ROA at p. 177, ll. 20-22. At this moment, the Defense Counsel began to object and was interrupted by the judge, who identified the statement as an exception to the general rule on hearsay. Defense Counsel then asked to approach and a conversation was had, off the record, before direct examination continued. ROA at p. 177, l. 23-p. 178, l. 5. The statement was not repeated.

Minutes later in the direct examination, Porterfield began speaking about the mobile phone, allegedly belonging to Petitioner, which he found in the Club earlier that night. He said that the phone began to ring when the investigators arrived, and that he answered it. At that point in time, Defense Counsel objected and the following statements were made on the record:

Mr. Mcculloch: And, Your Honor, of course we're going to object to anything that would not be proper—

The Court: What's your objection right now?

Mr. Mcculloch: My objection is to hearsay.

The Court: It's anticipatory, is that correct?

Mr. Mcculloch: It is anticipatory, Your Honor.

The Court: All right. Let's cross that river when we get to it. Right now, I'll note it but nothing has happened yet.

Mr. Meadors: We're not offering this for the truth of the matter asserted—

The Court: All right.

Mr. Meadors: Oh.

When you get a phone call, you answer it?

[Witness]: Yeah, I got two phone—two phone calls from two ladies.

[Mr. Meadors]: All right. What—who if anyone—what did the phone call say?

[Witness]: Well, as soon as I answered the phone, I was trying to disguise my voice because it wasn't my phone. I didn't know who it was. I was like, hello. And they was like, *Blackie (phonetic), was that you out there shooting?* I then, I was like, what, you know.

[Mr. Meadors]: Did someone say the name Black?

[Witness]: Yeah.

[Mr. Meadors]: Was it male or female?

Mr. Mcculloch: Your Honor, may we approach?

ROA at p. 180, l. 16-p. 181, l. 17. Earlier in his testimony, Porterfield had stated that he knew the Petitioner prior to the shooting and that the Petitioner was known to him as "Black." ROA at p. 172, ll. 12-23.

When the bench conference began, the Petitioner almost immediately moved for a mistrial on the ground that there were cumulative surprises in the evidence elicited by the State. In addition to an earlier in-camera identification of the suspect which had not been provided to the defense,² there was Porterfield's previously undisclosed testimony regarding a dying declaration and a speculative statement amounting to inadmissible hearsay from an anonymous caller. ROA at p. 182, l. 19- p. 183, l. 15; p. 187, l. 7- p. 188, l. 8. Petitioner's defense counsel further argued that a failure on the part of the State to disclose this information had created numerous Brady³ and Rule 5 violations.

The State responded that the first alleged violation, the witness identification, was not prejudicial as the witness had not testified in front of the jury. ROA at p. 184, l. 17-25. Regarding the second violation, the dying declaration, the State maintained that they had no prior

² During an in-camera examination of intended State witness Roger Glover, Glover stated that he had identified the Petitioner as the shooter on the night in question. Defense Counsel argued that this information was not contained in the material given to the defense, and the State did not ultimately call Glover as a witness. ROA at p. 61-81.

³ Brady v. Maryland, 373 U.S. 83 (1963).

knowledge of the conversation between Porterfield and Adams. ROA at p. 185, ll. 4-17. Addressing the final violation that was asserted by the Petitioner, the State claimed that the speculative question⁴ from the anonymous caller was described, somewhat poorly, in a discovery statement provided to the defense. ROA at p. 185, l. 21-p. 186, l. 5. This claim is dubious, from the record, as the State asserts that the actual language of the written statement was, "I kept receiving phone calls on the Verizon cell phone from women asking for Black, and he was at the place where you shooting at, 360." ROA at p. 185, l. 25-p. 186, l. 2. The State further asserted that this is essentially the same as the witness' testimony. In the argument for the mistrial, the Petitioner pointed out the obvious inconsistency between the written statement and the witness testimony and reiterated that the testimony was in the form of inadmissible hearsay. ROA p. 187, l. 22-p. 188, l. 8.

The defense clearly stated that it was requesting a mistrial, and in the event that motion was denied, it sought a curative instruction to the jury. ROA at p. 188, ll. 4-8. The judge denied the mistrial motion and ultimately issued a curative statement requiring that the jury disregard the portion of Porterfield's testimony that referenced Adam's dying statement, as well as the testimony that referenced a statement from an anonymous caller on a cell phone. ROA at p. 189, ll. 12-16; p. 197, ll. 6-24.

The Petitioner renewed his motion for a mistrial at the conclusion of the State's case, while he also noted that he respected the determination of the Court to strike the testimony and instruct the jurors. ROA at p. 556, l. 16-p. 557, l. 7. The Petitioner renewed the motion for a mistrial again when the jury retired to begin deliberation, and his renewed motion was once again denied. ROA at p. 562, ll. 7-21.

⁴ "...Blackie (phonetic), was that you out there shooting?" ROA at p. 181, ll. 12-13.

B. Argument on direct appeal to the South Carolina Court of Appeals.

On appeal the Petitioner recognized that the decision to grant or deny a motion for a mistrial is a matter within the discretion of the trial judge. State v. Culbreath, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008). The Petitioner recognized that the lower court's decision on such a motion will not ordinarily be disturbed absent an abuse of discretion. Id. It is only in cases where there is an abuse of discretion and resulting prejudice to the criminal defendant where this Court will reverse the lower court's decision to deny a mistrial motion. Id. A trial judge may not grant a mistrial, absent a manifest necessity or where it serves the ends of public justice. State v. Brown, 389 S.C. 84, 94, 697 S.E.2d 622, 627-28 (Ct. App. 2010). A defendant must demonstrate error and prejudice in order to justify a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless...it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced." State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996).

"Hearsay" is defined as a statement, other than one made by the declarant while testifying at trial or the hearing, offered into evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Unless a hearsay statement falls within one of numerous exceptions, it is inadmissible. Rule 802, SCRE. A dying declaration is excluded from the general prohibition on hearsay where the declarant believed that death was imminent and the statement was addressing the cause or circumstances of the death. Rule 804(b)(2), SCRE. In the instant case the defense had no notice that this dying declaration existed or that it might be introduced at trial, and due to the obvious discovery deficiency, the State did not seek to have the statement admitted under one of the hearsay exceptions. Under the sharing requirements imposed by Rule 5, South Carolina

Rules of Criminal Procedure, the State had a duty to disclose evidence material to the preparation of a defense prior to the trial. Rule 5, SCRCrimP.

The speculative question from the anonymous caller was inadmissible hearsay in that it was uttered by someone other than the declarant, State witness Porterfield. The statement was also offered to prove the truth of the matter asserted, that someone questioned whether the Petitioner was the shooter at that location. The statement was incredibly prejudicial in its implication that someone close to the Petitioner, would know about the shooting almost as quickly as the authorities, and would have reason to believe that he was involved. The speculative phone call and the statement attributed to one of the deceased victims violated the hearsay rules and the defendant's right to confront adverse witnesses under the Confrontation Clause. U.S. Const. Amend. VI. Despite the fact that the jury was instructed to disregard the testimony in question, it would have been impossible for them to completely forget the damaging statements they had already heard. As is often said, "You cannot unring a bell."

In State v. Johnson, this Honorable Court held that the lower court erred in denying Johnson's mistrial motion where a redacted co-defendant's statement, taken in conjunction with the inference created by a witness' careless remark, erroneously implied that a co-defendant had implicated Johnson in the crime charged. State v. Johnson, 390 S.C. 600, 607, 703 S.E.2d 217, 220 (2010). The Court found that the inference violated Johnson's Confrontation Clause rights and the violation could not be remedied by an instruction limiting the jury's consideration of the redacted terms in the co-defendant's statement. Id. The jury in Petitioner's case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. Both statements go to the issue of the identification of the shooter, and both infer that the Petitioner was that person.

The Petitioner's central defense, as summarized in his closing arguments, was that the State could not demonstrate, beyond a reasonable doubt, that he was the shooter. In this case, there were a number of questions regarding the identity of the shooter because the murder weapon was never recovered and the shooting, itself, occurred in the confusion following two, almost simultaneous, disruptions involving allegedly unruly patrons. Additionally, law enforcement had briefly examined, and excluded, another gun that matched the caliber of the murder weapon, and, coincidentally, belonged to two other patrons of that Club. The reason that these statements are so highly prejudicial and so memorable to the jury is that they suggest that one of the dying victims and an acquaintance of Petitioner believed that the Petitioner was the shooter.⁵ The jury certainly recognized the possibility that the security staff and Club employees were distracted when the shooting began, but these improper statements strengthened the inferences being drawn from witness testimony indicating that the Petitioner was the shooter. For these reasons, the Petitioner argued that he was entitled to a new trial.

C. Argument for Reversal.

The Court of Appeals found that the effect of this testimony was minimal and that the explicit instruction given by the Trial Court cured any possible error. In so ruling, the Court of Appeals concluded that the Trial Court correctly ruled that a mistrial was not warranted on the facts of the Petitioner's case. In addition, the Court found that the evidence against the Petitioner was overwhelming and that for that reason the testimony at issue could not reasonably have affected the outcome of the Petitioner's trial. App. p. 5.

⁵ At first blush, it might seem that the dying declaration was not prejudicial to the Petitioner since there was evidence that the Club had to deal with another unruly patron, Christopher Lyles, and the declaration could be argued to refer to either the Petitioner or the other patron dealt with by security that night. A close review of the testimony, however, reveals that Lyles *had not been fully ejected from the Club*, when the shooting began. ROA at p. 126, l. 22-p. 128, l. 9. Therefore, the declaration was prejudicial to the Petitioner, who was the only patron the State claimed was actually "put out" of the Club.

In his Petition for Rehearing the Petitioner asked the Court of Appeals to rehear this issue where the jury in Petitioner's case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. He respectfully argued that both statements went to the issue of the identification of the shooter, and both invited the jury to infer that the Petitioner was that person. App. p. 13. The Petitioner also asserted that, contrary to the findings of the Court of Appeals, the nature of the testimony in dispute was such that the resultant prejudice could not be cured by the instructions issued by Trial Court in response to this evidence. The Petitioner argued that the State's case against him was far from conclusive. App. p. 14. The Petitioner now urges this Court to reverse the decision of the Court of Appeals and grant him a new trial.

III.

The Court of Appeals erred in failing to recognize that Petitioner's right to due process of law was violated by the trial judge's improper and heated response to an objection made by defense counsel and in concluding that the remarks of the trial judge, on a whole, were not directed to either side.

A. Factual Background

During the redirect examination of State witness, Sydney Williams, the Petitioner objected three times to leading or improper questions by the State. ROA at p. 240, l. 6-p. 241, l. 23. The Court finally instructed the State to, "Do it with the magic words so there won't be any longer any objections." He assured the State that they would have a chance to "amplify" the testimony later in the examination. ROA at p. 242, ll. 1-3. Almost immediately thereafter, the State interrupted its own witness when he was reading a requested portion of his statement. The Petitioner began to object, and the judge yelled, "Stop. Go to the jury room, ladies and

gentlemen. Don't talk about this case." ROA at p. 242, ll. 7-17. The harsh or angry tenor of the judge's comment to the defense and abrupt instruction to the jury is apparent from the record, as the judge felt it necessary to address the matter in the jury room, as well as on the record. After the Court returned from a brief recess, but before the jury returned, the judge said:

Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels—high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad.

Somebody said, well, you scared me. I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

ROA at p. 244, ll. 4-15. When the jury returned to the courtroom, the Court instructed them as follows:

...And, members of the jury, I stuck my head in the door and sort of reminded y'all that this as [*sic*] an adversarial proceeding and both sides tend to get up on their high heels a little bit sometimes and it's my job to sort of control the civility in the courtroom. *If I yell, it's nothing personal. I'm not mad at anybody* but it's my job to sort of keep us on an even keel.

And that's all the latest example was. It has nothing to do with the merits of the case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

ROA at p. 245, ll. 2-15. With this statement, the redirect examination continued.

B. Argument on direct appeal to the South Carolina Court of Appeals.

“No State shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. In the language of the Supreme Court of the United States, “Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” Smith v. Phillips, 455 U.S. 209, 217 (1982).

As argued to the Court of Appeals, there is such importance attached to the appearance of impartiality from a trial judge, that the South Carolina Code of Judicial Conduct sets forth specific guidelines for judicial behavior. Canon 3 of Rule 501, SCRAP. Section B(4) of that Canon states that, “a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.” Canon 3 of Rule 501, SCRAP. “It is well settled that a trial judge must act with absolute impartiality in the performance of judicial duties.” State v. Cooper, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999); See State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). As a general rule, there is no prejudice to a defendant, if hostile comments of a judge are made outside the presence of the jury. Cooper, 334 S.C. at 546, 514 S.E.2d at 587. In Cooper, this Honorable Court did not find reversible error in a trial judge’s remarks that consisted of routine rulings against defense counsel. Id. None of the challenged communications in that case, however, involved personal or improper comments directed toward defense counsel, and they did not impugn defense counsel’s credibility or “diminish him in the eyes of the jury.” Id. at 546-47, 587-88.

In the current case, the Judge yelled at defense counsel, after a series of defense objections, and abruptly halted the proceedings. Defense counsel, understandably, did not object to the Judge's harsh remark in front of the jury or to the curative instruction that followed the recess. Case law suggests that a failure to object may be excused when the tone and tenor of the trial judge's comments make it clear that any objection would have been futile. Pace, 316 S.C. at 74, 447 S.E.2d at 187. This is especially true in the Petitioner's case, where the Judge's improper remark was an angry response to Defense Counsel's continuing objections. In Pace, the Judge's comments were of a gentler, albeit inappropriate, nature and were not rebuking counsel for objecting. Id., at 73, 186-87.

The jury certainly understood that the anger behind the Judge's response was directed at Petitioner's counsel, since his objection had prompted the abrupt interruption. While the Court's words were apparently brief, the delivery of the interrupting remarks was harsh enough to have "scared" one of the jurors. Even the judge, himself, felt that his remarks were prejudicial enough to warrant him entering the jury room to make off-the-record comments and subsequently to issue a formal instruction concerning the incident. At a minimum, the Court's treatment of defense counsel diminished his standing in the eyes of the jury. Although we do not have the benefit of a transcript of the judge's remarks to this jury in the jury room,⁶ based on his own recollection of those comments on the record there is a great danger that the jury understood them to mean that the Court felt the need to bring defense counsel down a notch.

⁶ The Petitioner would point out that in the recent decision, Bailey v. State, this Court took the opportunity to "caution the bench" against off-the-record commentary to jury members. Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) (footnote 5). In Bailey, the record did not indicate if attorneys were present during the communication. In the instant case, the Judge's own comments indicate that the attorneys were not present when the Judge entered the jury room.

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The Petitioner argued on appeal to the Court of Appeals that the Trial Court's subsequent charge to the jury appears to have been intended to mitigate the Court's earlier focus on defense counsel. The unavoidable truth, however, is that the jury was likely to take particular note of the remarks the Judge saw fit to enter the jury room to make after stopping this trial in the middle of a witness's testimony. The Trial Court cut defense counsel off, and dismissed the jury abruptly without explanation. Not only was the Petitioner prejudiced by the jury's diminished perception of defense counsel, but he was further prejudiced by the difficult dilemma that his counsel inevitably faced: whether to reinforce the previous objection and make a new objection to an angry judge's remark or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly. Defense counsel chose the latter, and the proceedings continued in a calmer manner.

C. Argument for Reversal.

The Court of Appeals found that the remarks of the trial judge, on a whole, were not directed to either side. App.p. 7. As argued by the Petitioner in his Petition for Rehearing, the record before this Honorable Court simply does not support that conclusion. App.p. 14 – 16.

Likewise, the Petitioner would respectfully submit that the decision in this case places undue significance on the responsive remarks of the defense counsel that the judge should just tell the jury, "*it was theater.*" The Petitioner would respectfully submit that where defense counsel had been spoken to in a manner which was likely to prejudice the Petitioner by diminishing the jury's perception of his lawyer, defense counsel was forced to choose between making a new objection to an already angry judge's remarks, or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly for the remainder of the trial. Defense

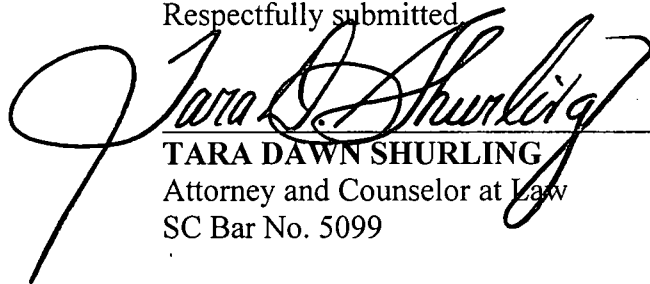
counsel chose the latter, and the proceedings continued in a calmer manner. The Petitioner would urge this Honorable Court to recognize that this remark by Defense Counsel was made in an effort to make the best out of a bad situation and in no way evidences that defense counsel was not dealt with in an overly harsh manner.

Inasmuch as the trial judge's actions were improper and the Petitioner was prejudiced, the Court of Appeals erred in finding that he was not entitled to a new trial based upon this error.

CONCLUSION

Based upon all the arguments presented to the Court of Appeals, and in this Petition, the Petitioner now respectfully prays that the writ might be issued and that he be granted to opportunity to be further heard on these issues.

Respectfully submitted,



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ATTORNEY FOR THE PETITIONER

This 6th day of January, 2014.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

Appellate Case No. 2013-001904

The State,

Respondent,

v.

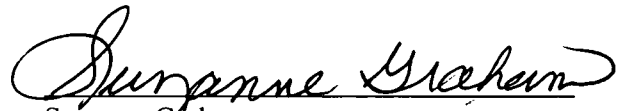
Johnnie Walker Gaskins,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari in the above matter has been served on opposing counsel this the 6th day of January, 2014, by mailing one (1) copy in a stamped envelope properly addressed to:

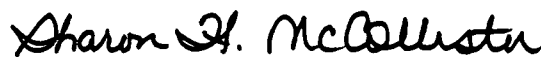
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ATTORNEY FOR APPELLANT.

SWORN TO BEFORE me this 6th day
of January, 2014.



NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires Jan. 16, 2017.