

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Williamsburg County  
Honorable Steven H. John, Circuit Court Judge

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**SC SUPREME COURT**

DAVID VICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002398

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PETITION FOR WRIT OF CERTIORARI

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**INDEX**

INDEX..... 1

ISSUE PRESENTED..... 2

STATEMENT..... 3

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for not objecting to the curative instruction given as insufficient after an officer testified that Petitioner was known to run from law enforcement when Petitioner stood trial for failure to stop for a blue light and siren and drug offenses..... 4

CONCLUSION..... 10

**ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective for not objecting to the curative instruction given as insufficient after an officer testified that Petitioner was known to run from law enforcement when Petitioner stood trial for failure to stop for a blue light and siren and drug offenses?

## STATEMENT

In March of 2012, the Williamsburg County Grand Jury indicted Petitioner for failure to stop for a blue light, possession with intent to distribute marijuana and trafficking cocaine, indictment #2012-GS-45-0050. On November 5, 2012, Petitioner proceeded to jury trial before the Honorable Clifton Newman. Matt Swilley represented Petitioner at trial. Kimberly Barr prosecuted the case. The jury found Petitioner guilty as charged. Judge Newman sentenced Petitioner to ten (10) years for trafficking, five (5) years concurrent for the possession with intent to distribute marijuana and three (3) years concurrent for failure to stop for a blue light. A timely notice of intent to appeal was filed and the direct appeal perfected. Wanda H. Carter represented Petitioner on appeal. On March 12, 2014, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Vice, 2014-UP-103 (S.C. Ct.App. Filed March 12, 2014).

On September 17, 2014, petitioner filed an application for post conviction relief. The State filed a return on March 3, 2015. On July 15, 2015, an evidentiary hearing was held at the Sumter County Courthouse before the Honorable Steven H. John. Ralph Wilson, Sr. represented Petitioner at the PCR hearing. Daniel Gourley represented the State. In a written order signed August 4, 2015, Judge John denied relief and dismissed the application. A timely notice of intent to appeal was served on November 17, 2015. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for not objecting to the curative instruction given as insufficient after an officer testified that Petitioner was known to run from law enforcement when Petitioner stood trial for failure to stop for a blue light and siren and drug offenses.

During the trial for failure to stop for a blue light and drug offenses, the second witness called by the State, Deputy Loy Hayes with the Williamsburg Sheriff's Department, testified as follows:

A: Okay. Again, I was – I was patrolling Red Road area and I noticed a gray in color Chevy known to be driven by a David Vice and he was also known to be driving under suspension.

(App. p. 80, lines 1-3). Counsel for Petitioner objected but the judge overruled the objection. (App. p. 80, lines 4-5). The deputy then testified as follows:

A: I noticed that as he came around a curve I noticed the vehicle crossed over the center line.

Q: Okay.

A: Which was left of center. Considering knowing that – of who the suspect was and knowing he was known to run from law enforcement ---

(App. p. 80, lines 7-12). Counsel for Petitioner objected and moved for a mistrial. (App. p. 80, lines 13-14). The judge excused the jury and heard arguments from both sides in regard to the mistrial motion. (App. pp. 80-86). The judge sustained the objection but denied the mistrial motion stating, "I think on balance I'm going to sustain the objection and give a curative instruction and deny the motion for a mistrial even though it's a very thin line as to whether or not the testimony was appropriate or not." (App. p. 86, lines 7-10).

The judge then instructed the jury, "Ladies and gentlemen, I – I sustained the objection to the last portion of the testimony given by the officer and you are to disregard that testimony. In

fact, we'll have you disregard the entire question and response to the last – the last question and have the State restate.” (App. p. 86, lines 20-25). Counsel did not object to the curative instruction and did not argue that the instruction was insufficient. Instead, counsel renewed the motion for a mistrial. (App. p. 87, lines 1-2). Trial counsel erred in failing to object to the curative instruction as insufficient.

On direct appeal the Court of Appeals found that the trial court did not err in denying the motion for a mistrial. State v. Vice, 2014-UP-103 (S.C. Ct.App. Filed March 12, 2014). During the PCR hearing Petitioner testified that trial counsel was ineffective in failing to object to the curative instruction as insufficient. (App. p. 302, line 14 – p. 303, lines 1-15). Trial counsel admitted during the PCR hearing that he should have objected to the curative instruction as insufficient. (App. p. 332, lines 10-11). Trial counsel admitted that he made a mistake. (App. p. 332, line 13).

In the order of dismissal the PCR judge wrote:

Applicant now contends that Trial Counsel should have objected to the curative instruction. However, this Court finds the Trial Court's curative instruction was proper. As a result, this Court finds 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 norms. Furthermore, Applicant has failed to present any credible evidence as to how he was prejudiced by Trial Counsel's failure to object to the curative instruction. Based off of 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.

(App. pp. 359-360). The PCR judge erred. Counsel was ineffective in failing to object to the curative instruction as insufficient. Petitioner was prejudiced by counsel's deficient performance because the curative instruction must be insufficient to support the motion for a mistrial. Petitioner was unable to support his argument on appeal in regard to the mistrial motion when there was no argument that the curative instruction was insufficient.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was ineffective in failing to object to the curative instruction as insufficient. There is a reasonable probability that if trial counsel had objected to the curative instruction as insufficient to cure the error, arguing that the instruction was weak and that the error in the officer's comment that Petitioner was known to run from law enforcement was particularly prejudicial because Petitioner stood trial for running from the police, the judge would have granted the mistrial motion or the Court of Appeals would have reversed the trial judge's refusal to grant a mistrial.

In State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010), the South Carolina Court of Appeals wrote:

If a trial court issues a curative instruction, a party must make a contemporaneous objection to the sufficiency of the curative instruction to preserve an alleged error for review. State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct.App.1996) (holding no issue is preserved for appellate review if the complaining party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge).

In State v. Craig, 267 S.C. 262, 268, 227 S.E.2d 306, 309 (1976), the South Carolina

Supreme Court wrote:

An instruction to disregard incompetent evidence or the withdrawal of such evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced. State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); 24 C.J.S. Criminal Law s 1444a (1961). Generally, the consideration of whether there was any prejudice requires that a motion for mistrial be made after the trial judge attempts to cure the error. State v. Anderson, 181 S.C. 527, 188 S.E. 186 (1936); State v. Britt, *supra*.

While trial counsel in the present case renewed the mistrial motion following the judge's curative instruction, trial counsel failed to argue that the mistrial was necessary because the curative instruction was insufficient. The curative instruction in the present case did not sufficiently cure the prejudicial error caused by the officer's testimony that Petitioner was known to run from law enforcement. First, the curative instruction was not strongly worded. In Brown the trial judge told the jury to:

[D]isregard the last question and last answer, asked of the witness in its entirety. You are to give absolutely no consideration to the question or the answer. It is not to be discussed in any way during your deliberation. You are to completely disregard it, and you are to completely disabuse your mind of it. And I am instructing your foreperson that if it is discussed in any way during deliberations, it is to be reported to the Court immediately.

389 S.C. at 96, 697 S.E.2d at 628 (Ct. App. 2010). In contrast, in the present case the judge simply told the jury, "Ladies and gentlemen, I – I sustained the objection to the last portion of the testimony given by the officer and you are to disregard that testimony. In fact, we'll have you disregard the entire question and response to the last – the last question and have the State

restate.” (App. p. 86, lines 20-25). The trial judge in the present case should have more strongly admonished the jury to **completely** disregard the testimony and completely disabuse their mind of it. The judge in the present case also should have instructed the jury that they could not consider the testimony during their deliberations and any violation of the instruction should be reported to the judge immediately. The curative instruction was not adequate.

Second, unlike the error in Brown where the officer’s testimony indicated that defense counsel instructed the defendant’s mother not to cooperate with the police, the error in the present case involves the officer’s testimony that **Petitioner** was known to run from law enforcement when Petitioner was on trial for failure to stop for a blue light. See State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) (When the prior bad acts are “strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.). The error in the present case can also be distinguished from the error in State v. McEachern, 399 S.C. 125, 731 S.E.2d 604 (Ct. App. 2012), where on cross examination the prosecutor asked the defendant if she sold an individual four cookies of crack. While the defendant in McEachern was on trial for drug charges, she was able to deny the prosecution’s question about selling the four cookies of crack, prior to the curative instruction. In the present case the officer’s improper statement created prejudice. Based on the particular facts of this case with a weak curative instruction and the error being a reference to alleged prior acts which were substantially the same as one of the charges for which Petitioner stood trial, the instruction was not sufficient to cure the error. Trial counsel was ineffective in failing to object to the curative instruction as insufficient. Trial counsel admitted that he should have objected to the curative instruction as insufficient and admitted that he made a mistake. (App. p. 332, lines 10-13).

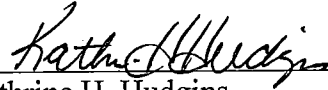
Petitioner was prejudiced by trial counsel's deficient performance. If trial counsel had objected to the curative instruction as insufficient to cure the error caused by the officer's improper statement that Petitioner was known to run from law enforcement and articulated the weak nature of the instruction and the highly prejudicial nature of the comment in light of the fact that Petitioner was on trial for failure to stop for a blue light, there is a reasonable probability that either the trial judge would have granted the motion for a mistrial or the Court of Appeals would have reversed the trial judge's refusal to grant a mistrial.

Addressing circumstances warranting a mistrial the South Carolina Supreme Court in State v. Craig, 267 S.C. 262, 268-69, 227 S.E.2d 306, 309-10 (1976), wrote, "A mistrial should not be ordered in every case where incompetent evidence is received and later stricken out. State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932). This Court 'favors the exercise of a wise discretion of the circuit judge in determining the merits of such motion in each individual case . . . (T)he character of the testimony, the circumstances under which offered, the nature of the case, other testimony in the case, and perhaps other matters, should be considered.' Id." In the present case the character of the testimony offered, that Petitioner was known to run from law enforcement, by a law enforcement officer in a case where Petitioner stood trial for failure to stop for a blue light warrants the granting a mistrial. If trial counsel had objected to the curative instruction and argued that a mistrial was needed because of the insufficiency of the curative instruction, the trial judge would have abused his discretion in refusing to grant the mistrial. The mistrial issue could not have been properly argued on direct appeal because in order to warrant a mistrial the curative instruction must be insufficient and no such argument was made to the trial judge.

**CONCLUSION**

Based on the above argument this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,



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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of July, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Williamsburg County  
Honorable Steven H. John, Circuit Court Judge

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DAVID VICE,

PETITIONER,

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STATE OF SOUTH CAROLINA,

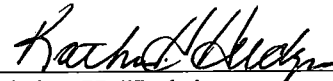
RESPONDENT

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CERTIFICATE OF SERVICE

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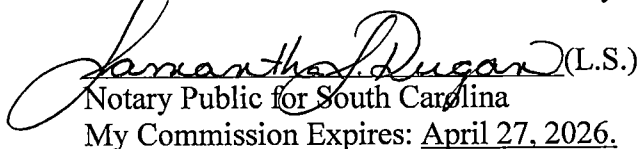
The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Julie Coleman, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and David Vice, #314663, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 22nd day of July, 2016.



Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day of July, 2016.



(L.S.)  
Notary Public for South Carolina  
My Commission Expires: April 27, 2026.