

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

THE SUPREME COURT OF SOUTH CAROLINA
CASE NO. 2014-CP-400-2099

Albert Scruggs, #136701)
Applicant,)

-VS-)

STATE OF SOUTH CAROLINA)
RESPONDENT.)

EXPLANATION TO ORDER

Dear Honorable Clerk:

Please find enclosed reply to the order of October 11, 2016, correspondence.

This September 15, 2016, Filing to the lower court is respectfully submitted to the reply. You requested within 20 days. Pursuant to Rule 71.1 (d) and (e) SCRCF citing Coats v. state, 575 S.E. 2d557 (s.c. 2003)

See also Prutt Supra, Marljar Supra and also Hall Supra. and the fourteenth Amendment under the U.S. constitution, the state appointed a counsel to do a job and it is by Law that she or he has a mandated duty pursuant to Rule 407 COPC SCACR to follow and apply the strict PCR statutes and Rule, also pursuant to State v. Stuckey Supra, the applicant's hands are tied do to hybrid representation and the state created a structural defect that violated my due process of Law and it cost me my initial PCR. Therefore, the appointed counsel had a duty to file a Rule 59 (e) SCRCF to protect all of my issues and to preserve them all for writ of certerouri: and Federal Habeas Review.

I am constitutionally entitled to redress any grievance's I have in the lower court's without any prejudice.

RECEIVED

OCT 21 2016

S.C. SUPREME COURT

And the State/Respondent is doing just that. Therefore, I am entitled to address these issues because they do have merit that will reverse my sentence and conviction.

RESPECTFULLY SUBMITTED

si Albert Scruggs.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHALAND)	CASE NO. 2014-CP-40-02099
ALBERT SCRUGGS, #136701)	
Applicant,)	
v.)	REPLY TO CONDITIONAL ORDER OF
STATE OF SOUTH)	DISMISSAL
CAROLINA,)	
Respondent.)	

PROCEDURAL HISTORY

Applicant agrees with the Procedural History outlined in the Conditional Order of Dismissal ("COD").

STATEMENT OF ISSUES

Whether Petitioner is entitled to an Austin review to appeal trial counsel's objections to Respondent's improper comments during closing arguments in three (3) separate instances. Austin v. State, 304 S.C. 453, 409 S.E.2d 395 (1991).

STATEMENT OF CASE

At trial, trial counsel objected to three (3) separate improper comments to the jury by Respondent during closing arguments.

1. When Respondent asserted that a supervising officer had been fired for not initially taking Petitioner into custody when he was first interviewed near the scene of the incident. App. p. 485 line 10-25).

2. The burden shifting argument that Respondent failed to produce evidence that Petitioner was in Five Points drinking at the time of the incident. (App. p. 475, line 5-25. Petitioner

did not testify at his trial).

3. When the Respondent asserted that defense expert witness, Dr. Cutler, agreed to testify before he even saw the file in this case. Respondent disparaged the expert witness in eye identification process without producing any evidence of those arguments.

The jury returned a verdict of guilty for second degree, kidnapping, and assault with intent to commit criminal sexual conduct. Petitioner was sentenced to life without parole pursuant to S.C. Code 17-25-45.

A timely Notice of Intent to Appeal was filed on Petitioner's behalf. State v. Scruggs, Op. Mp. 2005 UP-537 (SC Ct. App. filed October 5, 2005). However, direct appeal counsel failed to assert the three (3) improper closing arguments outlined above. Odom v. State, 337 S.E.2d 256, 262 S.E.2d 753, 756 (1999). The South Carolina Court of Appeals affirmed Petitioner's conviction in State v. Scruggs, OP. NO. 2005-UP-537. A post-conviction application was filed on September 20, 2004, before the direct had been decided. That case was dismissed without prejudice on October 14, 2005, and was refiled on January 5, 2009. The Respondent file a Return. An evidentiary hearing was held on February 25, 2009, before the Honorable L. Casey Manning.

At the hearing, PCR counsel argued that trial counsel was ineffective for failing to move for a mistrial based on his objection to the Respondent's three improper closing arguments. App. p. 615, line 10-p.616, 617, line 1-9.

However, the written PCR signed by Judge Manning dated June 23, 2009, denying relief only addressed one (1) specific objection to the Respondent's improper closing arguments as follows:

Regarding any allegation that trial counsel was ineffective for failing to move for a mistrial after objecting to State closing argument, the Court finds that Applicant's claim to be without merit. Specifically, during closing argument the State alluding to testimony to testimony of Officer Patterson. Tr. 237 Presumably, the Applicant's claim is that trial counsel should have moved for a mistrial following the objections. This Court finds that the failed to demonstrate how the State's closing warranted such a response by trial counsel and further whether trial court would find grounds for a mistrial. (See PCR Order Case No. 2005-CP-40-05306).

Because PCR order did not specifically address the other two objections by counsel during closing arguments, Petitioner was denied his full and fair one bite at the apple as explained in Austin which includes the right to appeal the denial of a PCR application and the right to assistance of counsel in that appeal. Austin

After Petitioner received the PCR Order, he wrote PCR counsel within ten (10) days to file a 59 (e) motion pursuant in accordance with the SCRCivP regarding the two issues that were not addressed by the PCR Court's Order. S.C. Code Ann. 17-27-80 (2003). Rule 59 (e). Mavlar v. State, 373 S.E.2d 275, 644 S.E.2d 769 (Ct. App. 2007).

PCR Counsel wrote Petitioner back informing petitioner that the issue were preserved for appellate review, and that the PCR Court error in its finding of fact and conclusion of law. (See Applicant's Exhibit 1 attached). Al-Shabazz v. State,

338 S.C. 354, 527 S.E.2d 742, 747 (2000). citing Pruitt v.

State, 310 S.C. 254, 423 S.E.2d 127, 128 n. 2 (S.C. 1992).

PCR counsel then filed a timely notice of appeal on July 17, 2009. The South Carolina Supreme Court granted Writ of Certiorari on November 17, 2011. The petitioner's appellate counsel filed a brief on December 19, 2011, arguing "that PCR judge erred in refusing to find counsel ineffective for failing to move for a mistrial based on three separate improper comment objections during closing arguments "cumulative effect on jury." (See Supreme Court Brief No. 2005-CP-40-05306).

The South Carolina Supreme Court granted certiorari on November 17, 2011. The Petitioner's brief was filed December 19, 2011, arguing "that PCR judge erred in refusing to find counsel ineffective for failing to move for a mistrial based on all three improper comments cumulative effect during closing arguments to jury. (See Applicant's Exhibit 2).

The South Carolina Supreme Court later dismissed the Writ of Certiorari as improperly granted because only one (1) of those three (3) issues was pursued at the PCR hearing or were addressed by the PCR Court's Order of Dismissal and because PCR counsel failed to make a 59 (e) in accordance with SCRCivP even when petitioner requested it from counsel.

Therefore, the other two improper closing argument to the jury are barred from appellate review. Had PCR counsel respectfully filed a 59 (e) Motion to properly preserve the other two (2) issues that were not addressed by the PCR Court

in its Order of Dismissal, the petitioner would have received

"a full bite at the apple" on all three (3) improper closing argument issues, and the Writ of Certiorari would not have been dismissed as improperly granted because the issues would have been properly preserved for appellate review. Therefore, Petitioner is now entitled to an Austin review in this situation that constitutes a "gross miscarriage of justice." The Petitioner did not knowingly and intelligently waive the other two (2) objections that were not properly address in the Order of Dismissal.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner is entitled to a hearing on the two (2) issues that were not addressed in the Order of Dismissal.

Albert Scruggs

ALBERT SCRUGGS, #136701
BROAD RIVER C. I.
4460 BROAD RIVER RD
COLUMBIA, SC 29210

Sworn To And Subscribed Before Me

This 25 day of September 2015

Notary for the State of South Carolina Jennifer Montgomery
September 24, 2015

Columbia, South Carolina

My Commission Expires on: 6/10/2018

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Albert Scruggs, #136701
Applicant,

v.

STATE OF SOUTH CAROLINA
Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No. 2014-CP-40-02009

MOTION OF OPPOSITION TO THE
RESPONDENT'S UNLAWFUL ATTEMPT
TO HAVE PCR DISMISSED

pursuant to Rule 59 (e), SCRPC
and Coats v. State, 575 S.E.2d
557 (S.C. 2003) Pruitt, 423 S.E.
2d at 128; Marlar, 653 S.E.2d
267; Hall, 601 S.E.2d at 341
citing S.C. Code Ann. §17-27-
45(c) SCRPC.

This matter comes before this court by way of opposition to the Final Order of Dismissal that is before the Honorable DeAndrea G. Benjamin, Chief Judge for Administrative Purposes for the Fifth Circuit as follows.

Pursuant to the Subject Matter Jurisdiction issue that is before this Court cannot be Summarily Dismissed or Successive nor barred by the PCR Doctrine of Res-judicata, pursuant to Brown v. State, 540 S.E.2d 846 at N. [2-5] (2002) in which this court held that when a claim is that a conviction is void for lack of Jurisdiction citing Carter, 329 S.C. 355 S.E.2d 773 (1985) it would be a clear violation of Due Process of law to deny a pro-se indigent a full and fair and meaningful opportunity to bring his case before a court to be properly adjudicated.

The three issues raised in the 2014-CP-40-02009 PCR Application does have merit and are cognizable claims S.C. Code Ann. §17-27-20(a) (1-6).

Pursuant to the uniform Post-Conviction Procedure Act app. 11 (1966) Id § 1 Cmt. S.C. Code Ann. § 17-27-10 to 160 (2003) the applicant must be afforded to bring his issues before this court to establish the evidence in order to be granted a "Successive Application."

If the applicant is not afforded the same opportunity as the Respondent has, to come into a court and bring his evidence to bar, Sharper v. State, 279 S.C. 264. 305 S.E.2d 247 (1983) or for the Honorable to rule on every issue contained in this Application would violate due process of law under the Fourteenth Amendment.

To satisfy the exhaustion requirement, the Applicant is giving this Court one full opportunity to resolve these claims, and then invoking one complete round to the State Supreme Court 28 U.S.C. § 2254 (b), (1), (c) O'sullivan v. Boerckel 526 U.S. 838. 842 (1999) then these issues will be "fairly presented" this Court has had a fair opportunity to resolve the claims herein. Therefore, it was reasonable informed of the nature of the claims Anderson v. Harless, 459 U.S. 4 (1982) (percuriam) Picard v. Conner, 404 U.S. 270, 275-76 (1971) (discussing the requirements of the exhaustion doctrine). Wise v. Warden. 839 F.2d 1030, 1033 (4th. Cir. 1988) (applying the exhaustion doctrine);

Also pursuant to State v. Stucky 33 S.C. 56, 508 S.E.2d 564 (1988) once the Respondent appointed the Public Defender, PCR Counsel; writ of Certiorari Counsel, the Applicant's hands are tied due to hybrid Representation, and the Respondent is responsible to make sure those Counsels follow the Rules for Direct Appeal; PCR; and Writ of Certiorari pursuant to Rule 407 COPC. SCACR and for PCR Counsel to fail in filing a Rule 59(e) SCRPC, does not fall into the hands of the Applicant, it falls in the Respondent's hands.

Pursuant to S.C. App. Ct. Rule 243 (g) Writ of Certiorari Counsel must raise every issue raised in the PCR (2004-CP-40-4359) in order to preserve the issue for Federal Review in order to prevent Procedural Default.

Therefore, the Applicant moves this Court pursuant to Sharper v. State, Supra, to grant an Evidentiary Hearing in order to give this Court its opportunity to hear these claims on record and to give the Applicant a full and fair and meaningful opportunity to resolve these issues citing Rule 71.1 (d) & (E) SCRPC. S.C.Code Ann. § 17-27-45 (c) S.C. Const. Amed. Art. 1. § 3 and the 1st; 5th; 8th and 14th Amend(s) U.S. Const. Enclosed is material fact to support a Rule 71.1 (d) and (e) SCRPC Due Process Violation of the Applicant's initial Collateral Post Conviction attorney pursuant to the fourteenth Amendment citing Strickland v. Washington, Supra. also Rule 59 (e) SCRPC. If the issues are incorrect or the issues are not properly adjudicated or there has been an erroneous ruling that conflicts with the true merit. See exhibit dated July 16, 2009 by Ms. Tara Dawn Shurling, Esq. 04-CP-40-4395 and 05-CP-40-5306 "I carefully reviewed the Order and concluded that a Rule 59(e) Motions was not appropriate." Please do not misunderstand me, I'm not saying I agree with the rulings in the Order. I do not. But I

~~believe all your good issues are sufficiently addressed in the Order to~~
preserve your right to appeal ... Not so, material fact clearly supports that the issues were not preserved. Because (1) a rule 59(e) must be filed in order to preserve the issues for Appellate review; (2) the Applicant lost his PCR and no relief was given. (3) Writ of Certiorari was lost because no Rule 59(e) was filed. (4) Federal Habeas Corpus §2254 was lost due to procedural default of claims.

Also, the Applicant sent an official Correspondence to PCR Counsel on July 4, 2009 pursuant to Rule 52(a) and Rule 59(e) SCRCP.

The Applicant did instruct the counsel to file a Rule 59(e) SCRCP But she refused, therefore, pursuant to State v. Stuckey, Supra, Counsel is responsible for any Court filings and Responsible for making sure that the rules of PCR is followed. The Applicants hands are tied due to hybrid representation and in which violated the 14th Amend. Under the U.S. Const. and Article 1 § 3 S.C. Cont. Due Process of law standards and Rule 71.1(d) and (e) SCRCP.

Respectfully Submitted

Albert Scruggs
Albert Scruggs #136701
BRCI Murray 138
4460 Broad River Rd.
Columbia, SC 29210-4012

DATE: 9-15-2016

LAW OFFICE OF



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Jeremy A. Thompson

Associate Attorney

July 16, 2009

Albert Scruggs, 136701
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210-0000

RE: Albert Scruggs, 136701 v. State of South Carolina; 04-CP-40-4395 & 05-CP-40-5306.

Dear Mr. Scruggs:

Enclosed you will find a copy of the Notice of Appeal I filed on your behalf with the Supreme Court of South Carolina. This Notice advises both the Attorney General's Office and the Supreme Court of your intent to appeal the Order of Dismissal issued in your case by Judge L. Casey Manning. I carefully reviewed the Order and concluded that a 59(e) Motion was not appropriate. Please do not misunderstand me. I am *not* saying I agree with the rulings in the Order. I do not. But, I believe all your good issues are sufficiently addressed in the Order to preserve your right to appeal Judge Manning's rulings on each of them.

I was court-appointed to represent you in the Circuit Court. Now that the Circuit Court has denied your Application, it will be the responsibility of the South Carolina Commission on Indigent Defense, Office of Appellate Defense to represent you on appeal to the Supreme Court of South Carolina. I am in private practice however and would be available to be hired to handle this appeal on your behalf. It is my policy to give my former court-appointed clients a reduced fee if they retain me for a subsequent appeal. In the next few days, I will be sending the Office of Appellate Defense a package concerning your case which will include all documents necessary to perfect this appeal on your behalf. Your right to appeal the decisions of Judge Manning has been preserved. Feel free to write me or call if you have any further questions concerning the status of your case. For now, I remain,

Yours sincerely,

A large, stylized handwritten signature in black ink that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: Nancy Scruggs

Mr. Albert Scruggs, #136701
BRCI, Murray 196
4460 Broad River Road
Columbia, S.C. 29210

July 4, 2009

Tara Dawn Shurling, P.A.
3614 Landmark Dr., Suite D
Columbia, S.C. 29204

Re: Rules 52(a), 59 (e), SCRPC Motions & PCR Appeal

Dear Ms. Shurling,

I really hope that this letter finds you in the best of spirits today. Ms. Shurling, do you see how the PCR judge misunderstood and misinterpreted all of our issues that we brought up in front of him, about me receiving ineffective assistance of Counsel at trial, that denied and deprived me of a fair trial and did in fact prejudiced my defense. This is what we call a miscarriage of justice, its really a mocking the sheets of pages you talked about or we filed on the law in my case. The statutes about the LWOP S.C. Code Ann. § 17-25-45; if you really read it, it says even if the solicitor put a person or his lawyer on notice, he still had to have a hearing on this matter before a judge to make a decision on it or adjudicate it by the procedures and if the solicitor does not, then the person's charge shall be reversed for the violation of this procedure...

Ms. Shurling, a judge must make this decision and/or decide, is there's enough evidence or enough charges for this statute, this is a real serious statute here... Now you see how they do people like us.

Upon review, the Judge's PCR Order did not rule on all of
the issues that I raised at PCR. Therefore, I need you to file a
MOTION TO ALTER OR AMEND JUDGEMENT pursuant to Code 1976, § Rules
52(a) & 59(e), SCRPC, U.S.C.A. Const. Amend. Six.

If the judge rules in the State's favor in regards to the
Rule 52(a) & 59(e), SCRPC Motions; then would you please
immediately file a PCR Appeal.

I thank you for your performance of your duties both in the
past and in the future.

Sworn to before me
this 16th day of July, 2009.

Susan J. Johnson

Notary Public for South Carolina:

My Commission Expires: _____

Respectfully requested,

Albert Scruggs

Mr. Albert Scruggs, #136701

Pro Se

My Commission Expires
March 5, 2018

cc: S.C. Attorney General
Judge Manning
Clerk of Court, Richland County

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

ALBERT SCRUGGS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

BRIEF OF PETITIONER

KATHRINE H. HUDGINS
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to move for a mistrial based on three separate improper comments made by the State in closing argument?

STATEMENT

In June 2002, the Richland County Grand Jury indicted Scruggs for burglary second degree, kidnapping and assault with intent to commit criminal sexual conduct, indictments #02-GS-40-5055, 56, 57. The burglary and assault indictments were amended by the Grand Jury on November 14, 2002. On January 15, 2003, Scruggs proceeded to jury trial before the Honorable G. Thomas Cooper. The jury returned verdicts of guilty and Scruggs was sentenced to life without parole pursuant to S.C. Code §17-25-45.

A timely notice of intent to appeal was filed on Scruggs' behalf. The South Carolina Court of Appeals remanded the case for a factual determination in regard to the amendment of the indictment. On October 3, 2005, after the remand, the Court of Appeals affirmed the sentence and conviction. State v. Scruggs, Op. No. 2005 UP-537 (S.C. Ct. App. filed Oct. 3, 2005).

Petitioner filed an application for post conviction relief on September 20, 2004, before the direct appeal had been decided. That case was dismissed without prejudice. On October 14, 2005, petitioner filed a timely application for post conviction relief. On January 5, 2009, the State filed a return. An evidentiary hearing was held on February 25, 2009, before the Honorable L. Casey Manning. In a written order signed June 23, 2009, Judge Manning denied relief and dismissed the application. A timely notice of intent to appeal was filed on July 17, 2009. A petition for writ of certiorari was filed on April 30, 2010. The State filed a return on June 28, 2010. On August 18, 2011, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to move for a mistrial based on three separate improper comments made by the State in closing argument.

During the PCR hearing petitioner alleged that trial counsel was ineffective for failing to move for a mistrial when the State, in closing argument, argued facts not in evidence. (App. p. 615, lines 10 – p. 616, 617, lines 1-9) Specifically, petitioner alleged that trial counsel was ineffective for failing to ask for a mistrial when the State asserted that a supervising officer had been fired for not initially taking petitioner into custody when he was first interviewed near the scene of the incident. (App. p. 485, lines 10-25). In the order of dismissal the PCR judge wrote, “The Applicant failed to demonstrate any prejudice regarding the State’s closing argument and comment about why the Officer’s supervisor may have been fired and how that would reasonably affect the outcome of the trial.” (App. p. 629). The PCR judge erred.

Trial counsel for Scruggs lodged three different objections during the course of the State’s closing argument. First, trial counsel objected to the State’s burden shifting argument that the defense failed to produce evidence that Scruggs was in Five Points drinking at the time of the incident. (App. p. 475, lines 5-25). Scruggs did not testify at his trial. The assistant solicitor agreed to “move on” with his argument. (App. p. 475, line 17). The second objection came as the result of the State arguing facts not in evidence in regard to Dr. Cutler, an expert witness in eye witness identification called by the defense. (App. p. 478, lines 2-12). In an attempt to disparage the credibility of the expert witness, the State argued, “And finally with regards to Dr. Cutler, an expert witness on identification. You know what is very telling about Dr. Cutler? He agreed to testify before he even saw the file in this case. He agreed to testify before he knew one fact in this

~~case.” (App. p. 478, lines 3-7). Trial counsel objected and the trial judge admonished the State to~~

confine the argument to the facts in evidence. (App. p. 478, lines 8-15).

The last objection was also based on the State arguing facts not in evidence. The State asserted that a supervising officer had been fired for not initially taking petitioner into custody when he was first interviewed near the scene of the incident. (App. p. 485, lines 10-25). The solicitor stated, “And let’s get another straight. Did Officer Patterson want to let the defendant go? Absolutely not. And he told you that. But his supervisor who has since been fired, and if this is any reflection on why he was fired - - - “ (App. p. 485, lines 10-13). There is no evidence in the record to support such an assertion. The trial judge properly sustained the objection. (App. p. 485, line 17). Counsel did not move for a mistrial based on the improper closing arguments.

During the PCR hearing, counsel admitted that he should have moved for a mistrial in regard to the comments made by the State in regard to the supervising officer. (App. p. 615, line 25 – p. 416, lines 1-14).. Trial counsel acknowledged that the mistrial issue was not preserved for appellate review as a result of counsel’s failure to move for a mistrial. (App. p. 616, lines 22 – p. 617, lines 1-9). In the order of dismissal the PCR judge wrote, “This court finds that the Applicant failed to demonstrate how the State’s closing warranted such a response [motion for mistrial] by trial counsel and further whether the trial court would find grounds for a mistrial.” (App. p. 628). Additionally the PCR judge found that petitioner failed to demonstrate prejudice from the failure to move for a mistrial. The PCR judge erred.

In State v. Smith, 375 S.C. 507, 523,654 S.E.2d 523, 531 (2007) the Court wrote:

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Id. “A

solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, "[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 66, 768 (2002).

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically 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." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). Furthermore, a trial judge is allowed discretion in dealing with the range and propriety of closing argument to the jury, and rulings on such matters will not be disturbed absent an abuse of discretion. State v. Patterson, 324 S.C.5, 17, 482 S.E.2d 760, 766 (1997).

The solicitor's comment in regard to the supervising officer being fired for not initially taking petitioner into custody when he was first interviewed near the scene of the incident was improper because it was clearly outside the record. At trial Officer Patterson testified that his supervising officer had been terminated from the U.S.C. Police Department. (App. p. 237, lines 11 - 12). There is nothing in the record, however, to support the State's assertion that the supervising officer's termination had anything to do with his actions in petitioner's case. The closing statements were improper because the State was, in effect, vouching for the credibility of the officer based on information outside the record. Trial counsel should have moved for a mistrial after the judge sustained the objection.

~~After the objection to the solicitor's statements was sustained, the trial judge did not provide~~
a curative instruction and none was requested. (App. p. 485, lines 10 – p. 486, lines 1-12). Viewed in the context of the entire record, including the other two improper comments made by the State in closing and the fact that the case was solely based on challenged eye-witness identification, the solicitor's improper comment in closing argument so infected the trial with unfairness as to make the conviction a due process violation.

There is not overwhelming evidence of guilt in this case. The State's evidence was based on an eye witness identification. The identification procedure used by the police was challenged by the defense at trial through the testimony of Dr. Cutler, an expert on eye witness identification. The State's improper comment in closing argument in regard to Dr. Cutler was particularly prejudicial given the fact that the State's case was based on eye witness identification.

The State's improper argument that the defense did not produce evidence that Scruggs was in Five Points drinking at the time of the incident further prejudiced the case. Under the United States and South Carolina Constitutions, a criminal defendant has a right to remain silent and to not testify during his trial. U.S. Const. amend. V; S.C. Const. art. I, §12. As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant's failure to testify at trial is constitutionally impermissible. State v. Graddick, 345 S.C. 383, 387, 548 S.E.2d 210, 211-12 (2001); State v. Hawkins, 292 S.C. 418, 423, 357 S.E.2d 10, 13 (1987), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). "Where the solicitor refers to certain evidence as uncontradicted and the defendant is the only person who could contradict that particular evidence, the statement is viewed as a comment on the defendant's failure to testify." State v. Sweet, 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000). The cumulative

~~effect of the three improper arguments required a mistrial. Counsel was ineffective for failing to~~
move for a mistrial.

Additionally, viewing the case in the context of the entire record, the statements in closing argument were not the only improper information before the jury. The State improperly elicited testimony from a City of Columbia police officer indicating that petitioner had a prior record. When questioning the officer the solicitor asked, "And he [petitioner] has reported in the past multiple date of birth?" (App. p. 396, lines 4-5). Trial counsel objected and the jury was instructed to disregard the last question and answer. (App. p. 396, lines 7-14). Trial counsel failed to move for a mistrial in regard to this improper testimony. During the PCR hearing, when asked about his failure to move for a mistrial in regard to this specific issue, trial counsel acknowledged that if he had moved for a mistrial and the judge had denied the motion, the issue could have been explored on direct appeal. (App. p. 610, lines 7 – p. 611, lines 1-13). Viewed in the context of the entire record, including the improper testimony about petitioner's prior record and the other two improper statements made by the solicitor in closing argument as well as the fact that there was not overwhelming evidence of guilt, the solicitor's comments implying that the supervising officer had been fired because he did not immediately arrest petitioner so infected the trial with unfairness as to make the conviction a due process violation. Trial counsel should have moved for a mistrial. A refusal to grant the motion for a mistrial would have constituted an abuse of discretion requiring reversal on direct appeal.

In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "A reasonable probability is

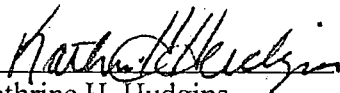
~~a probability sufficient to undermine confidence in the outcome of the trial.” Ard, 372 S.C. at 331, 642 S.E.2d at 596.”~~

Counsel was deficient in failing to move for a mistrial. There is a reasonable probability that the judge would have granted a mistrial based on the State’s improper closing argument, had counsel moved for a mistrial. If the trial judge erred in failing to grant the mistrial, the error could have been addressed on direct appeal. Counsel was deficient in failing to move for a mistrial based on the cumulative effect of the State’s improper closing argument.

CONCLUSION

Based on the above argument, petitioner's sentence and conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of December, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

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OCT 21 2016

S.C. SUPREME COURT

ALBERT SCRUGGS,

PETITIONER,

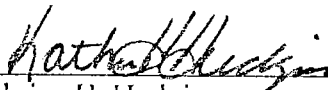
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

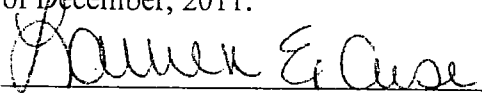
I certify that a true copy of the brief of petitioner, in this case has been served on Brian Petrano, Esquire, this 19th day of December, 2011.



Kathrine H. Hudgins
Appellate Defender

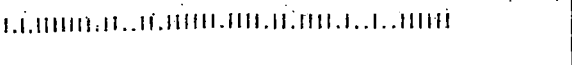
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of December, 2011.




Ramon E. Case (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

VOGS 136701



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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

THE SUPREME COURT OF SOUTH CAROLINA
CASE NO. 2014-CP-400-2099

Albert Scruggs, #136701)
Applicant,)

-VS-

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA)
Respondent.)

I, Albert Scruggs, #136701, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing order; that I know the contents thereof; that it includes every fundamental Law of this state that guarantee the offenses to be resolved. Attacked in this Order and that the matter and allegations therein set fourth are true.

s/ Albert Scruggs

Sworn to and subscribed before me
this 18 day of October 2016

[Signature]
Notary Public For South Carolina

My Commission Expires: 9/16/2026

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OCT 21 2016

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Albert Scruggs # 136701
Applicant,

C/A No. 2014-CP-40-02099

v.

CERTIFICATE OF SERVICE/AFFIDAVIT

STATE OF SOUTH CAROLINA
Respondent.

I Albert Scruggs # 136701, do here by submit under the penalty of perjury the foregoing information contained in this, three (3) page, Objections to the Respondent's Order that Contains fraud, misapplication, of relevant "genuine" material fact to support that the Applicant is entitled to a full and fair and meaningful opportunity to raise all of his issues pursuant to Pruitt, Supra, Marla, Supra, Hall, Supra, Coats v. State Supra, S.C. Code Anne. § 17-27-45 (c) and § 17-27-80.

The original and a true copy is hereby enclosed and placed into the Broad River Correctional Institution's mail room staff's hands, to be mailed through the U.S. Postal system with pre-paid postage and addressed to: Ms. Jeanette W. McBride, Richland County Clerk of Court, P.O. Box 2766, Columbia, SC 29202-2766.

Please forward a clock-stamp copy back to Applicant.

Respectfully Submitted

SWORN TO BEFORE ME this 15 day
of September, 2016.

Albert Scruggs

Albert Scruggs #136701
BRCI Murray 138
4460 Braod River Rd.
Columbia, SC 29210-4012

Lisa Brown-Alston (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/5/2023

LISA BROWN-ALSTON
Notary Public, State of South Carolina
My Commission Expires 2/5/2023