

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO COLLETON COUNTY

Court of Common Pleas  
Hon. Thomas A. Russo, Circuit Court Judge

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Appellate Case No. 2018-000182

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MACK WASHINGTON,

Petitioner,

v.

THE STATE,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERIORARI**

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## STATEMENT OF ISSUES ON CERTIORARI

### I.

Petitioner's argument that trial counsel was deficient for failing to object to the prosecutor's comment "Who among us is safe?" is not preserved for appellate review because it was not ruled upon by the PCR court.

### II.

The PCR court did not err by finding trial counsel acted reasonably when declined to accept a curative instruction regarding the prosecutor's closing argument.

## STATEMENT OF THE CASE

Mack Washington (Petitioner) was indicted by the August 2012 term of the Colleton County grand jury for kidnapping and armed robbery. Petitioner was subsequently indicted by the August 2013 term of the Colleton County grand jury for two additional counts kidnapping and armed robbery, and for possession of a weapon during the commission of a violent crime. On March 17-20, 2014, Petitioner proceeded to trial before The Honorable Perry M. Buckner, III and a jury. Petitioner was represented by Everett W. Bennett Jr., Esquire. Petitioner was found guilty as indicted on all charges. Judge Buckner sentenced Petitioner to thirty years' incarceration for each charge of kidnapping and armed robbery, to run concurrently. Petitioner was sentenced to five years for the weapons charge, to run consecutively.

Petitioner filed a timely notice of appeal. Tiffany Lorraine Butler, Esquire, represented Petitioner on appeal and filed an Anders brief. Petitioner also filed a pro se supplemental brief. On March 2, 2016, the South Carolina Court of Appeals dismissed Petitioner's appeal after review. State v. Washington, Op. No. 2016-UP-101 (S.C. Ct. App., Filed March 2, 2016). The Remittitur was returned on March 21, 2016.

Petitioner filed an application for post-conviction relief (PCR) on April 7, 2016. An evidentiary hearing into the matter was held on October 11, 2017, at the Beaufort County Courthouse before the Honorable Thomas A. Russo, circuit court judge. Petitioner was present at the hearing and represented by James Falk, Esquire. The PCR court heard testimony from Petitioner, Bennett, and both assistant solicitors who prosecuted the case.

Two of the allegations of ineffective assistance of counsel contained in Petitioner's application concerned the prosecutor's closing statement. Of those two allegations, Petitioner appeals only the PCR court's ruling concerning the prosecutor's comment that Petitioner had a

“pattern of manipulating young people and luring them and intimidating them” and a “pattern of robbing old folks, intimidating old folks, kidnapping old folks, holding them up.” App. 696-99.<sup>1</sup> Trial counsel objected to this portion of the prosecutor’s closing argument and moved for a mistrial on the basis that the comment unfairly referenced Petitioner’s prior record even though no evidence was presented thereof. App. 497-98. The prosecutor responded that the “pattern” comment did not refer to Petitioner’s prior record, but rather to the multiple victims involved in the case and Petitioner’s actions organizing, executing, and covering up the crime. App. 498-99. The trial judge denied the motion for mistrial but offered to give a curative instruction that the jury should disregard the reference to a “pattern.” App. 499-500. Trial counsel declined to accept a curative instruction on the basis that it would serve only to call attention to the remark. App. 499.

The PCR court found that trial counsel was not deficient for failing to accept a curative instruction in response to the trial court’s denial of his mistrial motion. However, the PCR court further found that in doing so counsel waived the right to challenge the ruling on appeal.<sup>2</sup> App. 697-98. The lower court found that trial counsel’s decision was based on reasonable trial strategy. App. 697. The PCR court further found that even had counsel accepted the curative instruction, the result of trial would not have changed. App. 698-99.

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<sup>1</sup> As explained below, Petitioner’s argument regarding the comment “Who among us is safe?” was not included in his application and was not ruled upon by the PCR court.

<sup>2</sup> Respondent disagrees that trial counsel failed to preserve the issue by refusing a curative instruction. See State v. Wilson, 389 S.C. 579, 584, 698 S.E.2d 862, 865 (Ct. App. 2010). Trial counsel likely failed to preserve the issue, but he failed to do so because he did not contemporaneously object.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an Petitioner has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an Petitioner alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). Second, counsel’s deficient performance must have prejudiced the petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

## ARGUMENT

### I.

**Petitioner's argument that trial counsel was deficient for failing to object to the prosecutor's comment "Who among us is safe?" is not preserved for appellate review because it was not ruled upon by the PCR court.**

Petitioner claims the PCR court erred by not granting Petitioner a new trial on the basis that the prosecutor made an improper "golden rule" argument to the jury when she asked the jury "Who among us is safe?" This issue is not preserved for review because it was not ruled upon by the PCR court. There is no ruling on this issue to be found anywhere in the appendix before this Court. "An argument not raised and ruled on by the trial court is not preserved for appeal." State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997).

### II.

**The PCR court did not err by finding trial counsel acted reasonably when he declined to accept a curative instruction regarding the prosecutor's closing argument.**

Following the prosecutor's closing argument, trial counsel moved for a mistrial based on the prosecutor's comment that Petitioner demonstrated a "pattern" of criminal conduct in carrying out his crimes. App. 497-99. The trial court refused to grant a mistrial but offered to give a curative instructive informing the jury not to consider any conduct for which Petitioner was not currently on trial. App. 499. Trial counsel refused the curative instruction because he did not want to draw attention to the prosecutor's comments. App. 499. At the PCR hearing, he explained he refused the instruction because he thought drawing attention to the comment would harm Petitioner's case, and believed he had a meritorious argument for a mistrial. App. 633-34; 643.

The PCR court found trial counsel's decision to refuse the curative instruction was a valid trial strategy. "Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Brown v. State, 375 S.C. 464, 481, 652 S.E.2d 765, 774 (Ct. App. 2007) (collecting cases and holding defense attorney's decision not to object to prosecutor's closing argument was reasonable trial strategy). Petitioner's claim that a "valid trial strategy cannot include failing to preserve a client's direct appeal" is incorrect. See Id. Petitioner's claim that trial counsel failed to preserve the issue because he insisted on a mistrial rather than accepting a curative instruction is also incorrect. See State v. Wilson, 389 S.C. 579, 584, 698 S.E.2d 862, 865 (Ct. App. 2010) ("When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, **or move for a mistrial if such a cure is insufficient**, in order to create an appealable issue."). Ultimately, this distinction is inconsequential because trial counsel likely failed to preserve the issue by not contemporaneously objecting during the prosecutor's argument. In any case, the allegation is without merit for the same reason the allegation regarding counsel's decision to refuse a curative instruction is without merit—trial counsel did not want to draw attention to the comment. The lower court found this to be reasonable trial strategy. Because there is evidence to support the PCR court's ruling, his decision should not be disturbed on appeal.

Regardless, the PCR court found that Petitioner suffered no prejudice. App. 699. The PCR court agreed with the trial court that the comment referred to Petitioner's pattern of conduct in carrying out and covering up the actions for which he was on trial. App. 698. The lower court further found that the comment did not affect the outcome of the trial, and Petitioner therefore failed to establish prejudice. App. 698. The post-conviction relief court's findings of fact receive

great deference during appellate review and will be upheld if “any evidence of probative value” exists in the record to support the lower court’s findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Evidence supports the PCR court’s decision and his ruling should not be disturbed on appeal. Certiorari should be denied.

**CONCLUSION**

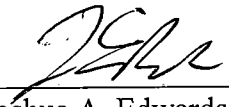
For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

January 22, 2019

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari from Colleton County  
Honorable Thomas A. Russo, Circuit Court Judge

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Appellate Case No. 2018-000182

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MACK WASHINGTON, JR., #314550,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Taylor D. Gilliam, Esquire**  
**S.C. Commission on Indigent Defense**  
**Post Office Box 11589**  
**Columbia, South Carolina 29201**

This 22<sup>nd</sup> day of January, 2019

  
TAMIEKA RUSSELL-BROWN  
LEGAL ASSISTANT



RECEIVED

JAN 22 2019

S.C. SUPREME COURT

IT

ALAN WILSON  
ATTORNEY GENERAL

January 22, 2019

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Mack Washington, Jr., #314550 v. State of South Carolina**  
**Appellate Case No. 2018-000182**  
**Lower Court Case No. 2016-CP-15-0366**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua A. Edwards  
Assistant Attorney General  
SC Bar No. 101188

JAE/trb  
Enclosures

cc: Taylor D. Gilliam, Esquire (2 copies)  
Victim Advocacy Division