

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County

Honorable Michael G. Nettles, Circuit Court Judge

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JONATHON PHILLIPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000275

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PETITION FOR WRIT OF CERTIORARI

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**Oct 05 2020**

**S.C. SUPREME COURT**

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**ISSUE PRESENTED**

Whether the PCR court erred in denying relief where the state, in closing argument, asked the jury to return a verdict that spoke the truth and served as a public warning against bringing weapons into a place of business, where trial counsel objected but failed to request a mistrial?

## STATEMENT

On November 12, 2015, a York County grand jury indicted Petitioner for armed robbery. App. 353 – 354. He proceeded to trial on February 10, 2016 before the Honorable Daniel D. Hall and a jury. App. 1. Melissa Inzerillo represented Petitioner; Blaine Pleming and Daniel Porter appeared on behalf of the state. After a two-day trial, the jury found Petitioner guilty as indicted. App. 235 ll. 7 – 11. Judge Hall sentenced him to fifteen years' incarceration. App. 241 ll. 3 – 9.

Petitioner's conviction was affirmed. State v. Phillips, Op. No. 2017-UP-392 (S.C. Ct. App. filed October 18, 2017). He filed an application for post-conviction relief on June 18, 2018. App. 275. The state made its return on September 28, 2018. App. 284 – 290. Through counsel, Petitioner filed an amendment to his PCR application on November 7, 2019. App. 282 – 283. The amendment included three claims of ineffective assistance of counsel, including allegations that trial counsel failed to investigate, failed to object to a jury charge, and failed to move for a mistrial following improper comments during the solicitor's closing argument. App. 282.

An evidentiary hearing was held before the Honorable Michael G. Nettles on January 7, 2020. App. 292. Jonathan Waller represented Petitioner, and Brianna Schill appeared on behalf of the state. Petitioner and trial counsel testified at the hearing.

At the conclusion of the hearing, the PCR judge denied relief. App. 333 l. 22 – 337 l. 12. An Order of Dismissal was filed on February 13, 2020. App. 339 – 352.

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief where the state, in closing argument, asked the jury to return a verdict that spoke the truth and served as a public warning against bringing weapons into a place of business, where trial counsel objected but failed to request a mistrial.**

### Relevant facts

During closing argument at Petitioner's trial, the prosecutor improperly asked that the jury return a verdict which would prevent future crimes:

The threat of serious bodily injury [or] death, that's what these laws are made to protect us from. And in a few moments, you're going to be deliberating over the verdict that you should reach in this case, and the term verdict is from Latin, and it means to speak the truth, and so I'm asking you to return a verdict that does that, that speaks the truth. I ask you to return a verdict that speaks the truth to Jonathan Phillips and to anyone else out there who would bring a deadly weapon into a place of business threatening the safety and lives of store clerks and customers.

App. 207 l. 16 – 208 l. 2. This remark prompted an objection from trial counsel. App. 208 ll. 3 – 4. Following a bench conference, the objection was overruled. App. 208 ll. 6 – 10. The state then concluded its closing argument.

At the evidentiary hearing, Petitioner maintained his innocence. App. 302 ll. 19 – 22. He indicated that he never spoke with trial counsel regarding any defenses that could be used at trial. App. 302 ll. 2 – 4. Petitioner also testified that the two never spoke about the potential sentences he was facing. App. 299 ll. 1 – 4.

Trial counsel was appointed to represent Petitioner. App. 297 l. 24 – 298 l. 4. He met with her for the first time “a month or two” after being arrested. Id. She described the general allegations against Petitioner as a convenience store robbery. App. 312 ll. 15 – 18.

Regarding the improper comment by the solicitor, trial counsel recalled objecting during closing argument. App. 318 ll. 10 – 19. She stated that she did not consider making a motion for a mistrial at the time. Id.

At the conclusion of the PCR evidentiary hearing, the court heard arguments from counsel. PCR counsel posited that the “anyone else” language was a public safety argument and “reads ... as if the solicitor is asking the for the jury to send a message, so to speak.” App. 331 l. 11 – 332 l. 6.

The PCR judge denied relief at the conclusion of the hearing. App. 333 ll. 22 – 24. The court found that the solicitor’s remark during closing argument was “an improper statement” but that a mistrial was not warranted:

As far as the statement, I think that it was an improper statement for him to talk about the safety of the public in general. And Ms. Inzerillo did indeed object to that. I think the proper strategy for - - at that time, the jury was still going to consider guilt versus innocence, and she made the objection and I do indeed believe that the mistrial would not have been granted given the nature of the statement.

The record speaks for itself. In order to get a new trial, you have to show that the error would have affected the outcome of the case, and I don’t think that had anything to do with that. I think academically typically lawyers aren’t supposed to talk about safety of the public in general, but I don’t think that’s why they convicted the defendant.

I think they convicted the defendant because of the testimony of the victim, the fact that he was identified as being in there, the testimony of the clerk, he said that he had a gun.

So based on that testimony, I think the comment of the solicitor was indeed objectionable. Ms. Inzerillo objected to it. I don’t think that it rises to the level of affecting the outcome of the trial, and I ask that you prepare an order that accurately reflects that.

App. 336 l. 10 – 337 l. 12.

The Order of Dismissal contained a finding that trial counsel's testimony on this matter was credible. App. 351. The PCR court indicated that counsel was not deficient for simply objecting and not requesting a mistrial: "This Court further agrees with Counsel that the comment did not rise to the high threshold warranting a mistrial." App. 351.

### Discussion

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). As to allegations of ineffective assistance of counsel, the applicant must show his counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, *supra*.

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996).

A solicitor's closing argument must be carefully tailored not to appeal to the personal biases of the jury. Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom. Id. Jurors are sworn to be governed by the evidence, and it is their duty to consider the fact of the case impartially.

Id.

Improper comments do not automatically require reversal if they are not prejudicial to the defendant. Johnson v. State, supra. 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. Johnson v. State, supra (a solicitor's improper comments may be cured by the judge's instructions to the jury); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); United States v. Wilson, 135 F.3d 291 (4th Cir.1998). The appellant has the burden of proving he did not receive a fair trial because of the alleged improper comment. Johnson v. State, supra; State v. Copeland, supra. 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. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997).

The solicitor improperly injected public safety considerations into the jury's decision and equated a finding of guilty with a statement against criminal activity. There was no instruction to the jury from the trial judge that would have corrected the solicitor's misstatements, admittedly improper according to the PCR court.

In Simmons v State, this Court held that overwhelming evidence of guilt did not prevent a finding that a solicitor's improper argument prevented the jury from fairly considering a verdict. 331 S.C. 333, 503 S.e.2d 164 (1998). Simmons was a PCR appeal wherein the argument was made that trial counsel was ineffective "for failing to object and move for a mistrial because of improper and inflammatory jury arguments by the solicitor and the solicitor's jury argument of matters outside the record." Id. at 336, 503 S.E.2d at 165. In particular, this Court held that "[t]he solicitor's improper comments prevented petitioner from having the jury

fairly consider the possible sentencing alternatives.” Id. at 341, 503 S.E.2d at 168. Additionally, because the instructions to the jury failed to cure the prejudice, this Court granted Simmons a new trial. Id.

In Fortune v. State, this Court held that the state engaged in prosecutorial misconduct that unfairly prejudiced the defendant such that he was deprived of a fair trial. 428 S.C. 545, 837 S.E.2d 37 (2019). The solicitor in that case suggested that it was defense attorneys’ job to “manipulate the truth.” Id. at 551, 837 S.E.2d 40. This Court noted that the PCR court found the remarks improper. Id. at 551, 837 S.E.2d at 41.

The state should be confined to the law when making its closing argument. When improper arguments are made, relief should be warranted. In this case, the PCR court found the remark improper but denied relief nonetheless, based upon a belief that the mistrial motion would not have been granted. As seen in Simmons, however, counsel was deficient for failing to move for a mistrial when improper remarks were made during closing argument. Although it is unknown what transpired during the bench conference in Petitioner’s case, there was no immediate clarification made by the trial judge. No motion for mistrial was made by trial counsel such that this matter could have been fully addressed on direct appeal. The solicitor’s argument indisputably and improperly asked jurors to abandon their impartiality and render a decision based on a public safety perspective.

**CONCLUSION**

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari and allow further briefing.

s/ Taylor D. Gilliam  
Taylor D. Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of October, 2020.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

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This 5th day of October, 2020.