

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Feb 18 2021**

**S.C. SUPREME COURT**

On Petition for Writ of Certiorari to York County  
Court of Common Pleas  
The Honorable Daniel D. Hall, Trial Judge  
The Honorable Michael G. Nettles, PCR Judge

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Appellate Case No. 2020-000275

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JONATHON ALEXANDER PHILLIPS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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The PCR court did not err in finding Counsel was not constitutionally ineffective because Counsel was not deficient where she objected to the solicitor’s statement, but the objection was overruled, and because Petitioner was not prejudiced where, in any event, the solicitor’s statement did not warrant a mistrial, and where Petitioner has not met his requisite burden requiring him to show that the alleged deficiency would have, with reasonable probability, changed the outcome of his case.

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**PETITIONER’S STATEMENT OF ISSUE ON CERTIORARI**

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.

**RESPONDENT’S COUNTERSTATEMENT OF ISSUE ON CERTIORARI**

The PCR court did not err in finding Counsel was not constitutionally ineffective because Counsel was not deficient where she objected to the solicitor’s statement, but the objection was overruled, and because Petitioner was not prejudiced where, in any event, the solicitor’s statement did not warrant a mistrial, and where Petitioner has not met his requisite burden requiring him to show that the alleged deficiency would have, with reasonable probability, changed the outcome of his case.

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. Petitioner was indicted during the November 2015 term of the York County Grand Jury for one count of armed robbery (2015-GS-46-03438). Public Defender Melissa Inzerillo of the Sixteenth Circuit Public Defender's Office (Counsel) represented Petitioner. Assistant Solicitors Thomas Blaine Fleming and Daniel Porter of the Sixteenth Circuit Solicitor's Office prosecuted the case. On February 10, 2016, Petitioner proceeded to a jury trial before the Honorable Daniel D. Hall.

On February 11, 2016, the jury convicted Petitioner as indicted for armed robbery (App. 235). Judge Hall sentenced Petitioner to fifteen years of imprisonment. (App. 241). Petitioner appealed.

Appellate Defender Lara M. Caudy represented Petitioner on appeal. The following issue was briefed to the Court of Appeals:

Whether the court erred by admitting the store clerk's out-of-court and in-court identification of [Petitioner] as the armed robber in violation of [Petitioner]'s due process rights when the identification procedure used by law enforcement, specifically showing the clerk a single photograph of [Petitioner] taken after his arrest, was unduly suggestive and tainted the clerk's identification making it so unreliable that a substantial likelihood of making it so unreliable that a substantial likelihood of irreparable misidentification existed.

Following briefing, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion filed on October 18, 2017. (App. 274). The Remittitur was sent November 16, 2017.

Petitioner timely commenced the underlying PCR action on June 18, 2018. (App. 275). An evidentiary hearing convened on January 7, 2020, before the Honorable Michael G. Nettles. Petitioner was present and represented by Jonathan D. Waller, Esquire. By Order dated February

5, 2020, and filed February 13, 2020, the PCR court denied relief and dismissed the action with prejudice. (App. 339). This appeal follows.

## FACTUAL SUMMARY

In the early morning hours of August 13, 2015, Petitioner entered the Murphy Express in Lake Wylie, retrieved beer, brought the beer to the store counter, and handed the store clerk five dollars. (App. 104-105). When the clerk opened the cash register, Petitioner handed him a note that read, “Give me all the money.” (App. 104, l. 23 – 105, l. 3). The clerk then observed Petitioner raise his shirt to reveal what the clerk believed to be a firearm tucked in the waistband of his pants. (App. 105, l. 1-20). The clerk complied and handed Petitioner all of the money from the till, and Petitioner then fled the scene. (App. 105). The clerk called the police immediately. (App. 105, 18-20).

During the police investigation, the clerk described the perpetrator as a black male in his mid-twenties, 5’9”, approximately 145 pounds, with “short-shaved” hair wearing a brown shirt and camo shorts. (App. 107, l. 1-12). The clerk also noted the perpetrator had a “bloodshot eye.” (App. 107). The clerk subsequently showed law enforcement surveillance video of the incident. (App. 112).

Lieutenant Rick Thomasson (Thomasson) of the York City Police Department testified Petitioner’s mother, who is married to Thomasson’s cousin, contacted him after she heard about the robbery. (App. 161-163). After speaking with her, Thomasson viewed a photo from the incident and recognized Petitioner as the suspect. (App. 160). Thomasson and other officers took a still photo from the surveillance video to Petitioner’s mother and she also identified Petitioner as the suspect. (App. 163). Several days later, Petitioner turned himself in to Thomasson. (App. 165). At that time, Thomasson noted one of Petitioner’s eyes was very bloodshot. (App. 165).

During closing arguments, the solicitor made the following statement:

“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 Jonathon 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. 23 – 208, 2).

Counsel objected to the statement, but the objection was ultimately overruled by the trial judge.

(App. 208).

## **STANDARD OF REVIEW**

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

## ARGUMENT

**The PCR court did not err in finding Counsel was not constitutionally ineffective because Counsel was not deficient where she objected to the solicitor's statement, but the objection was overruled, and because Petitioner was not prejudiced where, in any event, the solicitor's statement did not warrant a mistrial, and where Petitioner has not met his requisite burden requiring him to show that the alleged deficiency would have, with reasonable probability, changed the outcome of his case.**

Petitioner alleges the PCR court erred in finding Counsel constitutionally effective because Counsel did not request a mistrial following a statement made by the solicitor in which the solicitor asks the jury to "...return a verdict that speaks the truth to [Petitioner] 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). However, Counsel in fact objected to this statement, but the objection was overruled. Thus, Counsel was not deficient as she preserved the issue for appeal and, since the Court found no error, she had no further basis on which to continue her objection or move for a mistrial. Additionally, Petitioner was not prejudiced because even if the judge had sustained the objection, the comment did not rise to the manifest necessity standard warranting the grant of a mistrial. Thus, this Court should deny certiorari on this issue.

To establish ineffective assistance of counsel under *Strickland*, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989); *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)). "The test for effective assistance of

counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove 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 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

#### **A. Counsel Was Not Deficient**

Counsel was not deficient, as Counsel objected to the solicitor’s statement, and the objection was overruled, thus the issue was preserved for appeal and Counsel had no valid basis to pursue a mistrial. Accordingly, Counsel was not constitutionally ineffective, and therefore, this Court should deny certiorari.

In *State v. Wilson*, the South Carolina Court of Appeals determined, “[ . . . ] When an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error.” 389 S.C. 579, 584, 698 S.E.2d 862, 864 (Ct. App. 2010). By overruling an objection, the trial judge deems the evidence or statement proper and admissible. *Wilson*, 389 S.C. at 584, 698 S.E.2d at 865 (2010) (citing *City of Columbia v. Myers*, 278 S.C. 288, 294 S.E.2d 787 (1982) (labeling motions and further objections made after the trial judge has overruled an objection to be both futile and nonsensical)).

In Petitioner’s case, Counsel was not deficient because she objected to the statement, but the trial judge overruled her objection. Clearly, by overruling the objection, the trial court deemed the statement proper and admissible, and accordingly, Counsel had no basis to request a mistrial or pose any further objections. Moreover, the overruled objection regarding the solicitor’s statement preserved the issue for appeal. Accordingly, Counsel was not deficient, and therefore,

this Court should deny certiorari.

**B. Petitioner Was Not Prejudiced By Any Alleged Deficiency**

With respect to prejudice, Petitioner has not and cannot show this statement prevented him from receiving a fair trial in this case, nor can he show that this statement changed the outcome of his case with reasonable probability.

An appellate court will review the alleged impropriety of a 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. *State v. Rudd*, 355 S.C. 543, 586 S.E.2d 153 (2003). A solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *State v. Webb*, 389 S.C. 174, 178-179, 697 S.E.2d 662, 664 (Ct. App. 2010). "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, 591 S.E.2d 608 (2004) (citing *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999)). "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 (1974). "Improper comments do not 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." *Smith v. State*, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Cooper*, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). A mistrial should be granted only when

absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). “A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons.” *State v. Patterson*, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). “Whether a mistrial is manifestly necessary is a fact specific inquiry. ‘It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.’ ” *State v. Rowlands*, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct.App.2000) (quoting *Gilliam v. Foster*, 75 F.3d 881, 895 (4th Cir. 1996)).

During closing argument, the solicitor made the following statement with which Petitioner takes issue:

“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 Jonathon 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. 23 – 208, 2).

Counsel testified she objected to this argument, but the trial court denied her objection, and in part for that reason, she did not move for a mistrial at that time. (App. 318, l. 12-20; *see also* App. 328). Counsel also testified she did not believe a mistrial would have been granted due to the high standard for granting mistrials. (App. 328). As discussed above, the PCR court agreed that the statement did not rise to the level of warranting a mistrial. This is also evident by the fact that after the jury verdict, Counsel renewed her objections and moved for a new trial, a motion which the trial court denied. Moreover, the statement was a brief statement contained within a long, constitutionally sound trial, during which Petitioner was afforded all due process rights. The

solicitor's comment did not rise to the level of manifest necessity required to justify a mistrial, and therefore, Petitioner was not prejudiced by any alleged deficiency.

As the PCR court properly found Petitioner did not, and cannot show he was prejudiced by the alleged comment. Contrary to Petitioner's assertion, clearly established case law indicates post-conviction relief is not warranted each and every single time an arguably objectionable or improper comment has been made. (Petitioner's Pet. p. 7; *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). Rather, based upon the standard above, Petitioner must show he was prejudiced by the solicitor's statement. Petitioner has not and cannot show the statement infected the trial with such unfairness as to make the resulting conviction a denial of due process, nor can he even show this statement altered the outcome of his trial with reasonable probability.

The PCR court properly analyzed the issue in accordance with this standard and determined the jury convicted Petitioner based upon strong evidence presented by the State as to Petitioner's identity, not by the short isolated statement by the solicitor. (*See* App. 336-337). The strong evidence included identifications made by the store clerk, Petitioner's own mother, and Lieutenant Thomasson. Petitioner also had a distinct bloodshot eye at the time of the incident and at the time he surrendered himself, making the already significant identifications of Petitioner even more reliable. (App. 165). Accordingly, Counsel was not ineffective for not asking for a mistrial. Accordingly, Petitioner has not and cannot meet his requisite burden, and therefore, this Court should deny certiorari.

**CONCLUSION**

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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