

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
G. Edward Welmaker, Circuit Court Judge  
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APR 30 2012

S.C. Supreme Court

MELVIN DEVALE THOMASON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

BREEN RICHARD STEVENS  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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ATTORNEY FOR PETITIONER

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The PCR court reversibly erred by finding Counsel’s performance was not constitutionally deficient where Counsel failed to object to comments made by the State during its closing argument that the use of a bottle of wine as a jagged knife was a “deadly weapon” in Petitioner’s trial for armed robbery and ABHAN, and where there was no evidence in the record that the bottle of wine was used as a jagged knife. .... 6

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### ISSUE PRESENTED

Whether the PCR court reversibly erred by finding Counsel's performance was not constitutionally deficient where Counsel failed to object to comments made by the State during its closing argument that the use of a bottle of wine as a jagged knife was a "deadly weapon" in Petitioner's trial for armed robbery and ABHAN, and where there was no evidence in the record that the bottle of wine was used as a jagged knife?

## STATEMENT

Petitioner Melvin Devale Thomason was indicted in Greenville County for assault and battery of a high and aggravated nature (ABHAN) and armed robbery. App. 153—App. 154; App. 156—App. 157. His case proceeded to trial on October 3, 2007, before the honorable Larry R. Patterson, and a jury. Petitioner was represented by Daniel J. Farnsworth (Counsel), while the State was represented by Douglass Webb. App. 1.

At trial, the State claimed to satisfy the “deadly weapon” elements of armed robbery and ABHAN by alleging Petitioner used full and unopened bottles of wine to threaten the two complaining witnesses at a gas station convenience store: one bottle was allegedly thrown and hit store clerk Stephen Kiser (Kiser) in the wrist, the other bottle was purportedly held by Petitioner over his head while he threatened store manager April Benson (Benson). App. 19, ln. 13—App. 21, ln. 23; App. 30, ll. 4—App. 31, ln. App. 31, ln. 7; App. 36, ln. 7—App. 37, ln. 2; App. 47, ln. 17—App. 50, ln. 3; App. 54, ll. 4-15. However, in its closing argument, the State told the following to the jury:

*This bottle of wine being heavy and glass, used not only to hit someone, but also to break and then use as a jagged knife is a deadly weapon, . . .*

App. 86, ll. 5-7 (emphasis added). No objection was made by Counsel.

The jury found Petitioner guilty as charged. App. 103, ll. 12-19. The trial court imposed concurrent sentences of ten years for ABHAN, and seventeen years for armed robbery. App. 105, ll. 13-16; App. 152; App. 155. Petitioner appealed, and was represented by Kathrine H. Hudgins.

The Court of Appeals dismissed Petitioner's appeal pursuant to Anders v. California.<sup>1</sup> State v. Thomason, Op. No. 2010-UP-017 (S.C. Ct. App. Filed January 25, 2010).

Petitioner then filed his application for post-conviction relief on March 23, 2010, asserting *inter alia* ineffective assistance of counsel due to Counsel's failure to object to the State's comments in closing argument. App. 107; App. 114. An evidentiary hearing was held on May 12, 2011, before the Honorable G. Edward Welmaker. Petitioner was represented by Alex Kornfeld, while the State was represented by Karen C. Ratigan. App. 121.

Counsel testified at the hearing, and indicated his trial strategy was to assert the unopened bottles were not deadly weapons. App. 140, ll. 17-21. In his own words, Counsel stated, "[T]hat was my whole argument and I argued that. That the bottle itself was not . . . a deadly weapon." App. 136, ll. 23-25. Counsel acknowledged the State's language regarding a broken bottle used as a jagged knife in its closing argument, and that there was never any testimony that Petitioner broke the bottle and then used it as a jagged knife. App. 136, ln. 6–App. 137, ln. 21. However, Counsel claimed the State's argument was supported by the evidence due to trial testimony of Benson who said she was scared of getting hit, and was in fear of her life. App. 137, ln. 25–App. 138, ln. 17.

The PCR court filed its Order of Dismissal on July 6, 2011. App. 144. The court held Petitioner "failed to meet his burden of proving trial counsel should have objected during the State's closing argument when the solicitor stated the wine bottle could have been used as a jagged edge." App. 148. Despite the PCR court's acknowledgment that "trial attorneys have been held ineffective for failing to object to closing arguments that are not supported by evidence in the record," the court specifically found the complaining witness's testimony that she "was afraid of [Petitioner] using the

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<sup>1</sup> 386 U.S. 738, 87 S.Ct. 1396 (1967).

bottle to hurt her” constituted sufficient evidentiary basis to support the State’s closing argument.

App. 148—App. 149. This petition follows.

## ARGUMENT

**The PCR court reversibly erred by finding Counsel's performance was not constitutionally deficient where Counsel failed to object to comments made by the State during its closing argument that the use of a bottle of wine as a jagged knife was a "deadly weapon" in Petitioner's trial for armed robbery and ABHAN, and where there was no evidence in the record that the bottle of wine was used as a jagged knife.**

Counsel's performance was constitutionally deficient for failing to object to the State's improper comments in its closing argument; the comments were unsupported by the evidence in the record, and inflammatory regarding the question of whether the wine bottle allegedly held by Petitioner was a deadly weapon.<sup>2</sup> Further, Petitioner was prejudiced by the State's unsupported assertion that the wine bottle was used as a jagged edge comment as it was contrary Petitioner's trial strategy that the unopened wine bottle was not a deadly weapon, and it likely aroused the jurors' passions and prejudices to determine in its capacity of fact finder that the bottle was a deadly weapon.

"To prove ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced thereby." Mincey v. State, 314 S.C. 355,

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<sup>2</sup> The statute for armed robbery provides that "A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a *deadly weapon* or any object which a person present during the commission of the robbery reasonably believed to be a *deadly weapon*. . . ." S.C. Code Ann. § 16-11-330(A) (West, Westlaw current through End of 2011 Reg. Sess.) (emphasis added). Further, ABHAN is a common law offense defined as "an unlawful act of violent injury to another, accompanied by circumstances of aggravation." State v. Easler, 327 S.C. 121, 133, 489 S.E.2d 617, 624 (1997). Aggravated circumstances include the use of a *deadly weapon*, infliction of serious bodily injury, the intent to commit a felony, disparity in age, physical condition or sex, indecent liberties, purposeful infliction of shame, and resistance to lawful authority. See, e.g., id. 327 S.C. at 133, n.17, 489 S.E.2d at 624, n.17 (emphasis added).

358, 444 S.E.2d 510, 511 (1994) (reversing PCR court's denial of relief and remanding for new trial where counsel failed to object to Solicitor's improper comments in closing argument).<sup>3</sup>

"It is most certainly proper, especially in criminal cases, that counsel, in addressing the jury, should keep themselves strictly within the record. This rule is essential, and must be enforced." State v. Cannon, 229 S.C. 614, 618, 93, S.E.2d 889, 891 (1956) (quoting State v. McDonald, 184 S.C. 290, 192 S.E. 365, 370 (1937)); see also Mincey, 314 S.C. at 358, 444 S.E.2d at 511 ("Counsel in a criminal case must confine themselves to the record in addressing the jury."). Simply stated, "[a] solicitor may not rely on statements not in evidence during closing argument." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (citing State v. Gains, 271 S.C. 65, 244 S.E.2d 539 (1978)). Rather, "[t]he State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). Further, "[a] solicitor's closing argument must not appeal to the personal biases of the jurors," and "the argument may not be calculated to arouse the jurors' passions or prejudices . . . ." State v. Liberte, 336 S.C. 648, 652, 521 S.E.2d 744, 746 (Ct. App. 1999) (quoting State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)).

In the present case, the State relied upon facts not in evidence during its closing argument.

In particular, the State made the following comment to the jury:

*This bottle of wine being heavy and glass, used not only to hit someone, but also to break and then use as a jagged knife is a deadly weapon, . . .*

App. 86, ll. 5-7 (emphasis added). Yet, despite the fact that there was no evidence in the record specifically stating or implying the unopened wine bottle was ever used as a jagged edged knife,

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<sup>3</sup> See also Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Counsel failed to object to this inflammatory comment made by the State. Accordingly, Counsel's performance was constitutionally deficient, as it fell well below an objective standard of reasonableness. Strickland, 466 U.S. at 688, 104 S. Ct. at 2065.

Further, Petitioner was prejudiced by Counsel's constitutionally deficient performance. The standard is whether Counsel's performance prejudiced Petitioner to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

In the present case, Counsel's stated trial strategy was to argue that the unopened wine bottle was not a deadly weapon:

[T]hat was my whole argument and I argued that. That the bottle itself was not . . . a deadly weapon.

App. 136, ll. 23-25. Yet, Counsel's failure to object permitted the State to argue inflammatory facts to the jury that were not in the record regarding this very issue: namely, that the unopened wine bottle was a deadly weapon because it was "used not only to hit someone, but also to break and then use as a jagged knife . . . ." App. 86, ll. 5-7. Moreover, the unsupported "jagged knife" description invoked by the State likely aroused the passions and prejudices of the jury on the key issue that was strictly for the jury to determine: whether the unopened bottle of wine was a "deadly weapon." See, e.g., State v. Simmons, 360, S.C. 33, 599 S.E.2d 448 (2004) ("Despite the egregious facts of this case, we adhere to the rule in [State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992)] and hold that whether the robbery was perpetrated with a deadly weapon was a question for the jury.");

see also Liberte, 336 S.C. at 652, 521 S.E.2d at 746 (stating a solicitor’s closing “argument may not be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences to it.”). Accordingly, “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

CONCLUSION

For the foregoing reasons, Petitioner Melvin D. Thomason respectfully requests this Court to grant his Petition, reverse the PCR court's Order of Dismissal, and grant a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2012.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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MELVIN DEVALE THOMASON,

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STATE OF SOUTH CAROLINA,

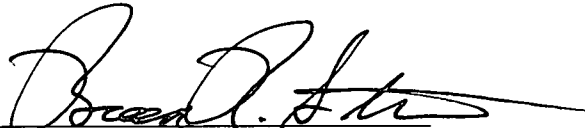
RESPONDENT

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CERTIFICATE OF SERVICE


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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, and Melvin Thomason, this 30th day of April, 2012.

  
Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day  
of April, 2012.

  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: December 4, 2017.