STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Certiorari to Laurens County

Honorable J. Mark Hayes, Circuit Court Judge

MAURICE ANTHONY ODOM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001223

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT IN REPLY

I.

Respondent's argument that Petitioner has not shown prejudice is not supported by the probative evidence in the record or by the jurisprudence of this State.

Respondent asserts that there is no evidence in the record to support a finding of prejudice because Petitioner only testified to his side of the story "during the PCR hearing in the context of whether Counsel properly challenged Petitioner's ownership of the car, *not* the context of what Petitioner would have testified to if he had taken the stand at trial. What a criminal defendant discusses privately with Counsel is not the same thing as what a defendant would testify to at trial." BOR pg. 10-11.

This argument is wholly specious. The question before this Court is not whether Petitioner specifically testified as he would have at trial but whether there is *any evidence* in the record to uphold or overturn the PCR judge's finding regarding what Petitioner's testimony at trial would have been. *See* Cherry v. State, 300 S.C. 115, 386 S.E.2d 624. *See also* Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011) ("In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision.").

Admittedly, PCR Counsel argued at the hearing on the Rule 59(e) motion that Petitioner's testimony would be "I didn't do it and then you can extrapolate from that." However, that was almost a year after the original PCR hearing, and he lacked the benefit of the PCR hearing transcript which contains explicit probative evidence of what Petitioner alleged occurred on the day of the burglary. Specifically, that Mixon knew Petitioner left his keys in his vehicle, that Mixon had on prior occasions used Petitioner's vehicle, and that he must have taken

Petitioner's vehicle without his knowledge to commit the burglary. App. 538, ll. 10-12; App. 574, l. 25-App. 575, l. 5.

Importantly, Petitioner did not argue, as suggested by Respondent, that the only evidence in the record connecting Petitioner to the burglary was Mixon's testimony. Petitioner argued that the only *direct evidence* of his alleged participation in the burglary was the testimony of Mixon as the mere presence of Petitioner's car alongside I-26 at the time of the burglary was not evidence of his involvement in the burglary. Without the testimony from Mixon, the State would have been wholly unable to connect Petitioner to the actual burglary as there was no forensic evidence or anything else definitively linking Petitioner to the burglary.

The probative evidence in the record directly refutes the PCR court's ruling. The record before this Court contains Petitioner's version of events. The State's case was based around the testimony of Mixon and Petitioner was unable to present his side of the story due to the improper and deficient advice of Counsel Wiygul. Petitioner's testimony, as demonstrated by the record, was that Mixon committed the burglary using Petitioner's car without Petitioner's knowledge. Had the jury been privy to that testimony, there is a reasonable probability[1] that the results of the proceeding would have been different. *See* Cherry 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Petitioner has shown both deficiency and prejudice. This Court should reverse the PCR court.

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1 Respondent asserted that the standard is "a substantial likelihood that the results of the proceeding would have been different." BOR pg. 11, fn 4. Under Strickland v. Washington, 466 U.S. 668, 694 (1984) "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

II.

Respondent's argument that the solicitor's comments during opening statements and closing arguments were not improper is not supported by the probative evidence in the record or the jurisprudence of this State.

Vouching

Respondent's argument that the comments by the solicitor during opening statement and closing arguments were not vouching ignores the explicit personal assurances the solicitor made to the jury by his repeated use of "I believe" or "I submit" as he described the credibility of the State's witnesses. The argument also ignores the fact that the solicitor referenced information that *was not* entered at trial to further vouch for the credibility of Mixon. The solicitor blatantly used Mixon's unintroduced prior police statement to vouch for the credibility of Mixon's in-court testimony stating,

> Now you heard from Tyrone Goggins that Mr. Mixon made a statement to law enforcement back on November 18th of 2011. Mixon apparently said on -- well, he said on the witness stand he didn't remember making the statement. *The defense has access to it. Don't you think if there had been some gross inconsistency with what he said back then and what he testified to in court we would have heard about it? So [,] I submit to you that Mixon's statement on November 18th, ladies and gentlemen, and his testimony are consistent and the one reason that they're consistent is because he told the truth. He told it then, he told it now. It's a lot easier to remember the truth than to remember what lies you told. Christopher Mixon told you the truth yesterday because he also told you the truth back on November 18th.* App. 333, l. 19- App. 334, l. 9 (emphasis added).

The solicitor's comments were vouching as the comments "constitute[d] an assurance by the prosecuting attorney of the credibility of a [g]overnment witness through personal knowledge or by other information outside of the testimony before the jury." United States v. Walker, 155 F.3d 180, 184 (3d Cir.1998).

Petitioner's Right to Remain Silent

Respondent argued that the comments challenged by Petitioner as comments on his right to remain silent were not improper because they were in response to Counsel Wiygul's cross-examination of Mixon and to her closing argument where she proposed an alternative scenario. These arguments are unpersuasive. The cross-examination concerning Mixon's prior police interview consisted of five questions--twelve lines of text in the transcript--where Mixon ultimately stated he did not remember the contents of the interview. App. 181, ll. 10-22. There was not a suggestion that Mixon was testifying inconsistently because once Mixon acknowledged that he could not recall the contents of the interview, Counsel Wiygul moved on from the line of questions. At no point did she confront Mixon with his police interview or attempt to show any inconsistencies in his testimony. In fact, Mixon's statement was never entered into evidence. As the statement was not admitted into evidence, referencing it as support for Mixon's uncontradicted testimony was highly improper.

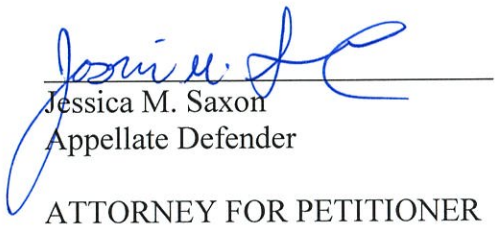
Respondent's argument that the solicitor was somehow replying to Counsel Wiygul's argument is refuted by the record as *the State went first during closing arguments*. The solicitor had no idea what Counsel Wiygul would argue to the jury and therefore could not be replying to her arguments when he improperly commented that Mixon's testimony was uncontradicted and that there were no other scenarios offered for the jury to consider. As the record reflects, Counsel Wiygul's argument regarding an alternative scenario was in direct response to the solicitor's improper comments that Mixon's testimony was the only evidence as to who the two burglars were.

Finally, Respondent contends that calling Mixon's testimony uncontradicted was not error and attempts to distinguish the present matter from State v. Sweet, 342 S.C. 342, 536

S.E.2d 91, (Ct. App. 2000), arguing that the solicitor did not directly comment that only Petitioner could refute Mixon's testimony. This argument disregards the facts of the case. There were two individuals accused of the burglary. Mixon admitted to being one burglar and asserted that Petitioner was the other burglar. The jury would have naturally understood that the only other person who could refute Mixon's claims was Petitioner. Thus, the only party that could contradict Mixon's testimony would have been the second burglar who the State asserted was Petitioner. The arguments made by the solicitor were indirect comments on Petitioner's right to remain silent as Petitioner was the only individual with the information to contradict Mixon. *See* Sidebottom v. Delo, 46 F.3d 744, 759 (8th Cir. 1995) (Indirect references to a defendant's failure to testify are also prohibited if they either "(1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally have understood them as a comment on defendant's failure to testify."...The prosecution may comment on the defense's failure to present evidence to contradict the State's case "unless the defendant alone had the information to do so.")

CONCLUSION

Based on the foregoing argument, as well as the argument in the Brief of Petitioner, Petitioner respectfully requests this Court reverse the order of the PCR court and grant him a new trial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of May, 2025.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Reply Brief of Petitioner in the above-referenced case has been served upon Zachary W. Jones, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), and on Maurice Anthony Odom, #199677, at Broad River Correctional Institution, 4460 Broad, this 14th day of May, 2025.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER