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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable Diane Schafer Goodstein, Circuit Court Judge

JEREMIAH SMITH, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001998

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find prejudice resulting from trial counsel's failure to renew the objection to the identification testimony at trial after the judge, pre-trial, refused to suppress the identification as unnecessarily suggestive and unreliable?
2. Did the PCR judge err in refusing to find prejudicial error resulting from trial counsel's failure to object and seek a curative instruction when Petitioner's sister testified the gun used in the shooting could not have been used by her brother because she had misplaced the gun before Petitioner came home from prison?

STATEMENT

On July 2, 2015, the Clarendon County Grand Jury indicted Petitioner, Jeremiah Brandon Smith, for attempted murder, indictment #2015-GS-14-00189. (App. pp. 423-424). On January 16, 2018, Petitioner proceeded to jury trial before the Honorable D. Craig Brown. Timothy Griffith represented Petitioner. Assistant Solicitors Chris Durant and Hugh McMillan prosecuted the case. The jury found Petitioner guilty as indicted. Judge Brown sentenced Petitioner to twenty-five years in prison. (App. p. 384, lines 11-14; p. 425). A timely notice of appeal was filed and the direct appeal perfected. (App. pp. 386-401). On December 18, 2019, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Smith, 2019-UP-388 (S.C.Ct.App. filed Dec. 18, 2019). (App. pp. 421-422).

On December 7, 2020, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 426-431). The State filed a return and motion for more definite statement on July 20, 2021. (App. pp. 433-443). Petitioner, by counsel, filed an amended PCR application on November 8, 2021. (App. pp. 444-445). On November 16, 2021, an evidentiary hearing was held, via WebEx, before the Honorable Diane S. Goodstein. James K. Falk represented Petitioner. Michael J. Neubauer appeared on behalf of the State. In a written order signed August 1, 2025, Judge Goodstein denied relief and dismissed the application. (App. pp. 502-516). A timely notice of intent to appeal was filed on September 8, 2025. This appeal follows.

ARGUMENTS

1. **The PCR judge erred in refusing to find prejudice resulting from trial counsel's failure to renew the objection to the identification testimony at trial after the judge, pre-trial, refused to suppress the identification as unnecessarily suggestive and unreliable.**

Facts

The jury found Petitioner guilty of shooting Breshaun Pendergrass outside the Browntown Social Club in Manning, South Carolina on December 20, 2014. Lieutenant Scott Danback with the Manning Police Department responded to the scene and interviewed two witnesses, Cindy Calvin and Shardara Abraham. (App. p. 138, lines 6-15). Neither witness identified the shooter. (App. p. 138, line 24 – p. 139, lines 1-3).

The week before trial, for the first time, Calvin identified Petitioner in a photographic lineup as the shooter. (App. p. 254, line 2 - p. 255, lines 1-7). At trial and without objection, Calvin also identified Petitioner in the court room as the person who shot Pendergrass. (App. p. 255, lines 8-18). Calvin admitted she did not see the shooting. She merely heard a gunshot. She also never saw a gun. (App. p. 256, lines 12-18).

Lieutenant Sonia Daniels with the Manning Police Department received information that Fritz Aguon was involved in the shooting. (App. p. 270, lines 1-17). Aguon initially told the police that "he was with the individual that's accused of this crime; however, he didn't have anything to do with it." (App. p. 270, lines 18-20). Later on December 23, 2014, Aguon provided a recorded statement to law enforcement claiming that he saw Petitioner shoot Pendergrass. Aguon claimed in his recorded statement that he saw Petitioner and Pendergrass arguing at the door of the club and that the two continued to argue outside the club. (App. p. 194, line 24 – p. 195, lines 1-18). Aguon told law enforcement that Pendergrass punched Petitioner in the face. (App. p. 196, lines 5-9). According to Aguon, Petitioner ultimately pulled

out a gun and shot Pendergrass. (App. p. 196, line 5 – p. 197, lines 1-2). Aguon was charged in connection with the shooting but was later granted immunity from prosecution. (App. p. 188, lines 3-21).

Despite being offered immunity, at trial Aguon either maintained he did not recall the content of his recorded statement or denied making specific claims in his statement. He was repeatedly impeached with his recorded statement pursuant to Rule 613(b), SCRE. (App. pp. 193-198). Later, on August 22, 2016, Aguon wrote a letter from the jail to Investigator Rick Elms with the Manning Police Department indicating that he was not at the club on the night of the shooting. (App. p. 202, line 23 – p. 203, lines 1-19; p. 272, line 22 – p. 273, lines 1-9; p. 293, line 15 – p. 294, lines 1-3). Aguon wrote a similar letter to the clerk of court indicating that he was not at the club on the night of the shooting. (App. pp. 498-500). The letter was discussed at the PCR hearing. (App. pp. 445-449).

Pendergrass admitted he did not see who shot him. He did not even see a gun. (App. p.168, line 25 – p. 169, lines 1-7). He claimed, however, he knew Petitioner was the shooter because Petitioner "was close enough to [him]." (App. p. 163, line 20 – p. 164, lines 1-4). Despite his insistence that Petitioner shot him, Pendergrass acknowledged the three individuals who were with Petitioner were also standing near the car and were behind Pendergrass when he was shot. (App. p. 175, lines 5-14).

Discussion

Petitioner moved pretrial to suppress Cindy Calvin's identification of Petitioner as the shooter. (App. p. 61, lines 16-20; p. 62, lines 11-25). In response to Petitioner's motion, the trial judge held a Neil v. Biggers[1] hearing. (App. pp. 68-91). During the hearing, Calvin admitted

[1] 409 U.S. 188 (1972)

she was sitting inside a car at the time of the shooting, which occurred after midnight when it was dark outside. (App. p. 69, lines 1-11). She further admitted she did not see the shooting and did not see who shot Pendergrass. Instead, Calvin merely heard a gunshot. (App. p. 75, line 10- p. 76, lines 1-3).

Calvin testified that, while she and Petitioner were not friends and have never socialized together, she knew Petitioner "from the community." (App. p. 69, line 23 - p. 70, lines 1-11). She further claimed she knew Petitioner by first name at the time of the shooting and would have been able to identify him if she saw him at Walmart.[2] (App. p. 69, line 23 – p. 70, lines 1-25).

Lieutenant Sonia Daniels testified that she presented a photographic lineup to Calvin the week before trial on January 9, 2018, which was over three years after the shooting and after Petitioner had been named as a suspect and arrested. (App. p. 82, lines 2-12). She stated Calvin selected Petitioner from the lineup as the shooter. Daniels further maintained that she did not suggest to Calvin in any way who she should identify. (App. p. 83, line 21 – p. 84, lines 1- 18).

At the conclusion of the *in camera* testimony, defense counsel argued Calvin's identification of Petitioner should be excluded as a result of the suggestive photographic lineup, which was only shown to Calvin the week before trial, over three years after the shooting. He asserted, "Three years have gone by, and so much time has gone by that she may or may not have come to hear about the case." (App. p. 87, lines 14-18). Counsel further argued that Calvin's identification was unreliable because she admitted she did not see who shot Pendergrass, but had heard about the identity of the shooter from outside sources. (App. p. 87, lines 19-21).

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[2] Calvin's *in camera* testimony directly contradicts her testimony before the jury where she admitted she did not identify Petitioner as the shooter when she was interviewed by Lieutenant Danback on the morning of the shooting because "I didn't know his name." Tr. 252, ll. 10-16.

The trial judge found the photographic lineup presented to Cindy Calvin was not an unduly suggestive identification procedure nor was the procedure so suggestive as to give rise to irreparable misidentification. (App. p. 90, lines 10-20). Consequently, the judge ruled Calvin's out of court and in court identification of Petitioner was admissible. (App. p. 90, lines 4-5).

During Calvin's testimony before the jury, trial counsel failed to renew the objection to the identification testimony. (App. p. 254, line 11 – p. 255, lines 1-17). During Lieutenant Daniels' testimony before the jury, trial counsel failed to renew the objection to the identification testimony. (App. p. 275, line 16 – p. 276, 277, lines 1-17). On direct appeal Petitioner argued, "The trial judge erred by admitting a witness's in court identification of Appellant as the shooter when the judge erroneously found the six pack photographic lineup was not unduly suggestive and the identification was reliable when, at the time of the shooting, the witness could not identify or name the shooter, but over three years later, after Appellant had been named as a suspect and arrested, the witness identified Appellant, and where, in finding the identification was reliable because the witness allegedly knew Appellant, erroneously concluded a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972) was not required since the witness had personal knowledge of Appellant." (App. pp. 386-401).

The Court of Appeals found the issue unpreserved writing:

> Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."); State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial."); id. ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); State v. Garris, 394 S.C. 336, 348, 714 S.E.2d 888, 894-95 (Ct. App. 2011) (holding a defendant's failure to object to the introduction of a photo lineup at trial waived his right to contest its introduction on appeal).

State v. Smith, 2019- UP-388 (S.C.Ct.App. filed Dec. 18, 2019). (App. pp. 421-422).

In the amended PCR application Petitioner alleged that, "Trial counsel was ineffective for failing to make a contemporaneous objection to the introduction of State's exhibits 1 & 2 (The photo lineups) as well as the in- court identifications of State's witnesses (Transcript 254, Lines 9-20; 274 lines 3-15; 276 line 9-12)" (App. p.444). The photo lineups were not introduced in evidence, but Calvin and Lieutenant Daniels testified about the lineup. During the PCR hearing trial counsel acknowledged that he did not "object again" to the photo lineups. (App. p. 460, lines 7-14). In closing PCR counsel argued, "The *Biggers* type issues that would come, especially when you've got such a delay in the identification, and it was an issue that could not have been addressed by Bob Dudek and company at appellate defense, and I think that is – that's what I'm relying on here." (App. p. 492, lines14-18).

In the order of dismissal, the PCR judge wrote:

> Counsel was not constitutionally ineffective for failing to object to the photographic lineup. Counsel acknowledged he had a *Biggers* hearing but did not renew his objection. Counsel was deficient for failing to renew the objection. However, no prejudice is found because Applicant has failed to establish that renewing the objection would have caused the photographic lineup to be suppressed at trial after the motion was denied pretrial. Additionally, this Court declines to find prejudice in the case because there were eyewitnesses and the victim knew Applicant personally and testified to that at trial. Accordingly, relief is denied on this ground.

(App. p. 512).

The PCR judge correctly found trial counsel was deficient in failing to renew the objection to the identification testimony. The PCR judge erred, however, in refusing to find prejudice. First, the PCR judge used an incorrect standard in requiring Petitioner to establish that a contemporaneous objection would have resulted in the lineup being suppressed. Second, the only witness who claimed to have seen the shooting was Fritz Aguon. Aguon was given

immunity from prosecution, at one point denied being at the club on the night of the shooting, and was repeatedly impeached with his recorded statement pursuant to Rule 613(b), SCRE. On the night of the shooting neither Cindy Calvin nor Shardara Abraham identified the shooter. (App. p. 138, line 24 – p. 139, lines 1-3). Calvin admitted she did not see the shooting. She merely heard a gunshot. She did not see gun. (App. p. 256, lines 12-18). Abrahm never saw a gun. (App. p. 240, lines 14-16). Pendergrass admitted he did not see who shot him that morning. He did not see a gun. (App. p.168, line 25 – p. 169, lines 1-7). The testimony by Calvin identifying Petitioner as the shooter was highly prejudicial.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Petitioner was not required to establish that a contemporaneous objection would have resulted in the lineup being suppressed at trial, as referenced in the order of dismissal. Instead, there is a reasonable probability that if trial counsel had renewed the objection to the identification testimony, the trial judge's pre-trial refusal to suppress the identification testimony would have been reversed on appeal. In Milledge v. State, 422 S.C. 366, 375, 811 S.E.2d 796, 801 (2018), the South Carolina Supreme Court wrote:

> In particular, the State contends that, even if defense counsel had renewed his objection when the evidence was presented, the trial court would have denied it, and an appellate court would have upheld the ruling on appeal. Thus, while the State does not contest the PCR court's findings regarding the first prong of *Strickland*—that Milledge's defense counsel was deficient in failing to object to the evidence when it was entered—the State contends Milledge suffered no prejudice because the search conducted by the deputies was lawful under the Fourth Amendment. We agree the appropriate inquiry is whether the search conducted by the deputies was lawful under the Fourth Amendment, as that issue would have controlled the outcome on direct appeal.

In the present case Petitioner showed prejudice because the judge erred in failing to suppress the identification testimony and if trial counsel had renewed the objection, the ruling would have been reversed on appeal. "A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id.

"In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court

identification was nevertheless so reliable that no substantial likelihood of misidentification existed." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (citing Neil v. Biggers, 409 U.S. 188, 198 (1972)).

"Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation." Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (citing Manson v. Brathwaite, 432 U.S. 98, 114 (1977)); See Biggers, 409 U.S. at 199-200.

The trial judge erred by admitting Calvin's identification of Appellant as the shooter since the photographic lineup was an unduly suggestive identification procedure arranged by law enforcement and Calvin's out of court identification of Appellant was so unreliable that a substantial likelihood of misidentification existed.

Considering the factors set forth in Liverman, Calvin's identification was wholly unreliable. See Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, Calvin admitted she did not see the shooting and did not see who shot Pendergrass. Specifically, she testified, "I didn't see who shot him." R. 16, ll. 10-20. Calvin also did not have a strong degree of attention at the time of the shooting given that she was yards away in her car and not involved in the altercation, which occurred outside in the dark after midnight. She never gave a prior description of the shooter. Therefore, the accuracy of her prior description cannot be judged. More than three years had passed since the shooting and when Calvin was shown the photographic lineup. During those three years, Appellant was named as a suspect and arrested for the shooting. This

fact would have tainted Calvin's identification. The trial judge erred by admitting Calvin's identification of Appellant as the shooter.

Trial counsel was deficient in failing to renew the objection to the identification testimony. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different.

2. The PCR judge erred in refusing to find prejudicial error resulting from trial counsel's failure to object and seek a curative instruction when Petitioner's sister testified the gun used in the shooting could not have been used by her brother because she had misplaced the gun before Petitioner came home from prison.

Petitioner's sister, Sierra Smith, testified as a defense witness. (App. pp. 302-317). She testified that witness Cindy Calvin had a vendetta against Smith's family because of a physical altercation between Calvin and Smith's sister. (App. p. 303, line 17 – p. 304, lines 1-25). On cross-examination the State asked her if she owned a firearm. (App. p. 312, line 13). Smith testified that when she was asked by Lieutenant Daniels about her gun, she told her she did not know where it was. (App. p. 312, line 16 – p. 313, lines 1-5). The prosecutor then asked, "Okay. And it just so happens that that gun that she was asking you about, that you couldn't locate right after the incident happened . . . was a 380 Cobra, the same gun that Fritz Aguon said your brother had that night; isn't that true?" (App. p. 313, lines 6-11). Smith answered, "I been couldn't find my gun. Before my brother came home from prison, I had my gun. I misplaced my gun when I – before I moved to Winter Hill. So he wouldn't have any kind of contact with my gun because I been misplaced it." (App. p. 313, lines 12-15). Trial counsel did not object or ask for a curative instruction. The prosecutor emphasized, "Before he came home from prison."

(App. p. 313, line 18). The prosecutor again mentioned prison asking, "When did he come home from prison?" (App. p. 313, line 21). The prosecutor went a step further, mentioning prison for a third time and asking, "So your brother had recently come home from prison --" (App. p. 313, line 25 – p. 314, line 1). Trial counsel finally objected. (App. p. 314, lines 3-4). Trial counsel never asked for a curative instruction.

In the amended PCR application Petitioner alleged that, "Trial counsel was ineffective for failing to seek a curative instruction once its witness testified that the Defendant had been to prison.(Transcript p. 313 line 313)" During the hearing PCR counsel asked trial counsel, "Did you know that she was going to tell the jury that your client had been to prison?" (App. p. 461, lines 20-21). Trial counsel answered, "I absolutely did not. I had gone over with her before sending her up there, okay, this is what we're going to talk about and I'm asking you questions, you give me the – you tell me what the answer is so I would know what she was going to say when she went up there, and no, I did not know she was going to say that. That was not a help." (App. p. 461, line 22 – p. 462, lines 1-2). During cross-examination trial counsel testified, "My only regret in that case is letting his sister testify. That's a fact." (App. p. 472, lines 5-7).

In the order of dismissal the PCR judge wrote:

> Counsel more likely than not was constitutionally ineffective for failing to request a curative instruction after Ms. Smith testified regarding Applicant's history of being in jail. Counsel concurred at the PCR hearing that in retrospect he should have sought such an instruction. Counsel failed to articulate a reason for not making the request at trial. Counsel testified one of the reasons for the failure was that Ms. Smith (Defendant's sister) was a witness called by Defendant and although Counsel met with her and prepared her for testifying at trial he was not expecting her to offer testimony regarding her brother having been in prison. Additionally, he was surprised by her testimony regarding "several matters that came out in the Solicitor's questioning of her. She had not revealed these additional matters to Counsel not had Mr. Smith. (T.T. 27).

> However, this Court declines to find prejudice in the case because of the strength of the evidence against him, direct and circumstantial, as outlined above. Accordingly, relief should be denied on this ground.

(App. p. 512). The PCR judge erred. Petitioner demonstrated both deficient performance and the resulting prejudice.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was deficient in failing to object and request a curative instruction when Smith testified Petitioner had recently been released from prison. Trial counsel allowed the prosecutor to improperly reference Petitioner coming home from prison three times before finally objecting. Trial counsel never requested a curative instruction. The witness' reference to

Petitioner coming home from prison and the prosecutor's three references to Petitioner coming home from prison was improper character evidence inadmissible pursuant to Rule 404(b).

In State v. Owens, 293 S.C. 161, 166, 359 S.E.2d 275, 277 (1987), the South Carolina Supreme Court found no prejudice when three State witnesses testified they met Owens in prison. The present case is distinguished from Owens. Unlike the present case, in Owens, "There was no testimony regarding any prior bad act by appellant. The evidence produced at trial indicated only that appellant was in jail for the crime for which he was then being tried. The trial judge in an abundance of caution gave curative instructions not to consider appellant's residence adversely to him. Moreover, appellant himself introduced testimony by three inmates and a corrections officer who each stated he knew appellant in prison. There was no unfair prejudice to appellant from the testimony of the State's witnesses." 293 S.C. at 166, 359 S.E.2d at 277.

In Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 345–46 (1991)(n. 1 omitted), the South Carolina Supreme Court wrote:

> It is well-settled that absent specific exceptions, evidence of other bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person. State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Here, evidence that petitioner was previously jailed on unspecified charges was not admissible under any exception. Nor was it admissible as impeachment evidence. See State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). This Court has held evidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper. State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986); see also People v. Bennett, 413 Ill. 601, 110 N.E.2d 175 (1954) (mere proof a party has been arrested is inadmissible). We therefore conclude counsel's failure to object to the repeated reference to petitioner's prior incarceration or to request a curative instruction constitutes deficient representation under an objective standard of reasonableness.

As in Geter, trial counsel's failure to immediately object to references to Petitioner coming home from prison and failure to request a curative instruction constitutes deficient representation. Unlike Geter, Petitioner was prejudiced by the deficient performance. The State did not present overwhelming evidence of guilt.

In Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018), the South Carolina Supreme Court wrote, "However, for the evidence to be "overwhelming" such that it categorically precludes a finding of prejudice—as we found it did in Rosemond and Harris—the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met."

As discussed above in issue one, the State's case was not strong. The only witness who claimed to have seen the shooting was Fritz Aguon. Aguon was given immunity from prosecution, at one point denied being at the club on the night of the shooting, and was repeatedly impeached with his recorded statement pursuant to Rule 613(b), SCRE. On the night of the shooting neither Cindy Calvin nor Shardara Abraham identified the shooter. (App. p. 138, line 24 – p. 139, lines 1-3). Calvin admitted she did not see the shooting. She merely heard a gunshot. She did not see gun. (App. p. 256, lines 12-18). Abrahm never saw a gun. (App. p. 240, lines 14-16). Pendergrass admitted he did not see who shot him. He did not see a gun. (App. p.168, line 25 – p. 169, lines 1-7). The PCR judge erred in refusing to find prejudice based on the "strength" of the State's case.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of March, 2026.