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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Richland County
Honorable Robert E. Hood, Trial Judge
Honorable Donald B. Hocker, Post-Conviction Relief Judge

Appellate Case No. 2025-001994

COURTNEY S. THOMPSON, #360154,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Whether the post-conviction relief court erred by refusing to find trial counsel ineffective for failing to move to sever petitioner's trial from her co-defendant's trial because the joint trial presented a serious risk that the jury would be prevented from making a reliable judgment about petitioner's guilt and the joint trial greatly prejudiced petitioner by subjecting her to a highly prejudicial opening statement by her co-defendant and allowed her co-defendant to act as a second prosecutor thus reducing the state's burden to prove petitioner's guilt.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED

Whether the post-conviction relief court correctly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse her conviction and grant her a new trial based on Trial Counsel's failure to move to sever the trial from her co-defendant where there was no legally supportable basis for severance, Trial Counsel made a strategic decision to proceed jointly, and the evidence of Petitioner's guilt was overwhelming.

STATEMENT OF THE CASE

Petitioner Courtney S. Thompson is presently confined in the South Carolina Department of Corrections. Petitioner was indicted at the October 2013 term by the Richland County Grand Jury for homicide by child abuse (2013–GS–40–6520) and unlawful conduct toward a child (2013–GS–40–6521). Petitioner was represented by Assistant Public Defenders Adam Ruffin, Tracy Pinnock, and Eric Staggs, all of the Fifth Circuit Public Defender's Office. Assistant Solicitors Luck Campbell, Joanna McDuffie, and Meghan Walker, of the Fifth Circuit Solicitor's Office, prosecuted the case.

Petitioner's case proceeded to a jury trial May 19–28, 2014, before the Honorable Robert E. Hood. Petitioner was tried simultaneously with her co-defendant, Antonio Robert Guinyard. The jury convicted Petitioner as indicted on both charges. Judge Hood sentenced Petitioner to serve ten years' imprisonment for unlawful conduct toward a child, consecutive to serving life without parole (LWOP) for homicide by child abuse.

Petitioner filed a Notice of Appeal. Mitzi Campbell Williams, Esquire, and Chief Appellate Defender Robert M. Dudek represented Petitioner on appeal, raising two issues:

- (I) Did the trial court err in denying Courtney's motion for a directed verdict in that the state failed to present substantial circumstantial evidence?
- (II) Did the trial court err in denying Courtneys motion to exclude graphic photographs of the child which were calculated to arouse the sympathies and prejudices of the jury?

After briefing and oral argument, the Court of Appeals affirmed Petitioner's conviction in State v. Thompson, 420 S.C. 192, 802 S.E.2d 623 (Ct. App. 2017). Thereafter, Petitioner petitioned the Supreme Court for a writ of certiorari of the Court of Appeals' decision. The South Carolina Supreme Court denied Petitioner's petition on March 28, 2018, and the Remittitur was returned to the circuit court on April 4, 2018.

Petitioner then filed an application for post-conviction relief on March 29, 2019. The State made its Return, Partial Motion to Dismiss, and Motion for a More Definite Statement on August 29, 2019. Return and Motion to Dismiss on September 10, 2018. On April 10, 2025, an evidentiary hearing was convened before the Honorable Donald B. Hocker at the Richland County Courthouse. Timothy L. Griffith, Esquire, represented Petitioner. Assistant Attorney General Talida Balaj represented the State. Petitioner testified on her own behalf, and the State presented testimony from Tracy Pinnock, Esquire (Trial Counsel), Joanna A. McDuffie, Esquire, and K. Luck Campbell, Esquire. By written order filed September 16, 2025, the post-conviction relief court denied relief and dismissed the application with prejudice.

Petitioner filed a timely notice of appeal. On March 5, 2026, Petitioner filed her petition for writ of certiorari.

This return to petition for writ of certiorari follows.

STATEMENT OF THE FACTS

Because of the page limitation for this Return, the State incorporates the facts as set out in the "Statement of Facts" contained in the Final Brief of Respondent filed in the South Carolina Court of Appeals. (App'x pp. 1853–1886). The following are just highlights of the facts.

The Victim's Condition After Returning from Foster Care

After spending nearly all of his life in foster care, the four-year-old victim was returned to Petitioner and codefendant on April 6, 2012, as a healthy, developmentally on-track child. (App'x pp. 481–82; p. 520; p. 613; p. 831; p. 838; p. 955; pp. 959–60). His condition thereafter deteriorated. Family members repeatedly saw Petitioner beat him with a hanger, cable cord, fists, knees, belt, and shoe; starve him; withhold water; and become angry when others tried to feed him. (App'x pp. 481–84; pp. 504–14; pp. 518–20; pp. 615–18; pp. 628–32; p. 643; pp. 696–703). Multiple reports were made to DSS. Photographs of patterned injuries were shown to a pediatrician, who reported suspected abuse. (App'x pp. 677–86; pp. 959–60).

The Final Hours

Petitioner was discharged from the hospital with a newborn on the afternoon of July 1, 2013. At 5:05 p.m., she spoke with her sister Crystal. Crystal then heard, over an open line, the victim being beaten and screaming "Lord, help me," Petitioner telling him to "hush," Petitioner telling codefendant to hold his legs, and codefendant saying the child was not moving. (App'x pp. 487–92; p. 523; pp. 1248–50). Petitioner then searched Google for what to do if a child has a seizure. She did not call 911 until 6:12 p.m. (App'x pp. 1248–52). First responders found the child cold, pulseless, and already showing signs that he had been dead for some time. Petitioner claimed a fall from a dresser and a seizure. (App'x pp. 410–20). Blood consistent with the victim was found on walls, carpet, a white rod, and a pipe. (App'x pp. 440–48; pp. 1019–33).

Cause of Death

The forensic pathologist concluded that death resulted from extensive soft-tissue hemorrhage caused by multiple acute and healing blunt-force injuries from non-accidental, repeated trauma. The injuries were inconsistent with a fall from a dresser. The child would have survived with medical care. The last day's injuries alone would not have killed him; the cumulative effect of weeks of abuse did. (App'x pp. 844–71; pp. 1096–1117).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is any probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839–40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack the opportunity to directly observe the witnesses. Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839–40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court correctly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse her conviction and grant her a new trial based on Trial Counsel's failure to move to sever the trial from her co-defendant where there was no legally supportable basis for severance, Trial Counsel made a strategic decision to proceed jointly, and the evidence of Petitioner's guilt was overwhelming.

Petitioner contends the post-conviction relief court erred by refusing to find Trial Counsel ineffective for failing to move to sever Petitioner's trial from her co-defendant's trial. Specifically, Petitioner argues the joint trial presented a serious risk that the jury would be prevented from making a reliable judgment about her guilt, subjected her to a highly prejudicial opening by co-defendant's counsel, and allowed the co-defendant to act as a second prosecutor. However, the post-conviction relief court correctly determined Petitioner failed to establish that Trial Counsel's representation was deficient or that she suffered the prejudice required to reverse her convictions where there was no legally supportable basis for a motion to sever the defendants' trial, Trial Counsel made a reasonable strategic decision to remain joined, and the result of Petitioner's trial would not have been different had Trial Counsel moved for severance. This Court should deny certiorari.

A criminal defendant is entitled to the effective assistance of counsel. See U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686 (1984). To obtain relief, Petitioner must prove two things: first, the deficiency prong requires a showing that counsel's performance fell below an objective standard of reasonableness; and second, the prejudice prong requires a showing that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 687–88, 694; Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thompson v. State, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (citing Rutland

v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016)). The likelihood of a different result must be substantial, not merely conceivable. Harrington v. Richter, 562 U.S. 86, 111–12 (2011).

Judicial scrutiny of counsel's performance is highly deferential. Strickland, 466 U.S. at 689. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690; Burt v. Titlow, 571 U.S. 12, 22–23 (2013). The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or from what a reviewing court might have done in hindsight. Richter, 562 U.S. at 105; Yarborough v. Gentry, 540 U.S. 1, 8 (2003). A court need not determine whether counsel's performance was deficient before examining prejudice, and should dispose of the claim on prejudice grounds if that is the easier path. Strickland, 466 U.S. at 697. Failure to prove either prong defeats the claim. Id. at 700; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

(A) There was no legally supportable basis for severance, and mutually antagonistic defenses did not require one.

Defendants indicted together for connected crimes are not entitled to separate trials as a matter of right and may ordinarily be tried jointly. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999); State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998). "Barring 'special circumstances,' the general rule is that defendants indicted together should be tried together." United States v. Chorman, 910 F.2d 102, 114 (4th Cir. 1990). Joint trials promote efficiency, avoid inconsistent verdicts, prevent inequity, and permit a more accurate assessment of relative culpability. Zafiro v. United States, 506 U.S. 534, 537 (1993); Richardson v. Marsh, 481 U.S. 200, 209–10 (1987). They are "not only permissible but are often preferable when the joined defendants' criminal conduct arises out of a

single chain of events." Kansas v. Carr, 577 U.S. 108, 125 (2016). Those principles are fully consistent with South Carolina law. Dennis, 337 S.C. at 282, 523 S.E.2d at 176.

Severance is warranted only when there is a serious risk that a joint trial would compromise a specific trial right of one defendant or prevent the jury from making a reliable judgment about guilt or innocence. Zafiro, 506 U.S. at 539; State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011); State v. Barnes, 421 S.C. 47, 51, 804 S.E.2d 301, 304 (Ct. App. 2017). Situations that *might* justify severance include the admission against one defendant of evidence that would be inadmissible against the other, a marked disparity in culpability, or the existence of essential exculpatory evidence available only in a separate trial. Zafiro, 506 U.S. at 539. Even then, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." Id.; Hughes, 346 S.C. at 559, 552 S.E.2d at 317. Defendants are not entitled to severance merely because they may have a better chance of acquittal if tried alone. Zafiro, 506 U.S. at 539.

Here, Petitioner's and codefendant's charges arose from the same course of conduct, committed in each other's presence, in the same house, at the same time, against the same child. (App'x p. 973, ll. 23–25; p. 1599, ll. 24–25; pp. 2056–59). Because the charges arose from actions of the same general nature and were closely related in kind, place, and character, joinder was proper. State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002); State v. Smith, 359 S.C. 481, 489, 597 S.E.2d 888, 893 (Ct. App. 2004). Notably, Petitioner never identified a specific trial right, such as confrontation, compulsory process, or otherwise, that the joinder of the trials compromised.

Instead, Petitioner contends that because the defenses were mutually antagonistic, the joint trial was unfair. Petitioner's argument rests almost entirely on the claim that her codefendant's

defense turned the trial into a two-prosecutor proceeding. However, Petitioner's argument is not legally sound because mutually antagonistic defenses are not prejudicial *per se*. Zafiro, 506 U.S. at 538–39; see State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005) ("The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime."); see also Dennis, 337 S.C. at 281, 523 S.E.2d at 176 ("The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime.") (citing State v. Leonard, 287 S.C. 462, 473, 339 S.E.2d 159, 165 (Ct. App. 1986), reversed on other grounds, 292 S.C. 133, 355 S.E.2d 270 (1987). "Hostility among defendants, and even a defendant's desire to exculpate himself by inculcating others, do not of themselves qualify as sufficient grounds to require separate trials." United States v. Dinkins, 691 F.3d 358, 368–69 (4th Cir. 2012) (citing United States v. Najjar, 300 F.3d 466, 474 (4th Cir. 2002)). Here, the post-conviction relief court correctly held Petitioner was not entitled to severance as a matter of right simply because the defenses were mutually antagonistic. (App'x p. 2040).

The State's theory was not that only one defendant could have been responsible for the child's death; it was that both Petitioner and codefendant participated in a course of abuse and neglect that caused the child's death. S.C. Code Ann. § 16-3-85; (App'x p. 855, ll. 11–15; pp. 867, l. 22 – 868, l. 5; p. 1143, ll. 1–5). So, the jury could believe Petitioner beat and starved the child *and* believe the codefendant participated, which is what happened. That is what the jury did and the jury convicted both. (App'x pp. 1810, l. 18 – 1811, l. 21). Petitioner's and codefendant's defenses emphasized different points and were mutually antagonistic, not mutually exclusive. See United States v Lighty, 616 F.3d 321, 349–50 (4th Cir. 2010).

Further, Petitioner's reliance on United States v. Tootick, 952 F.2d 1078, 1080–82 (9th Cir. 1991), and Justice Stevens's concurrence in Zafiro, 506 U.S. at 543–44 (Stevens, J., concurring), do not change that result. In Tootick, two defendants each claimed the other was the sole assailant, and the trial involved a government that offered almost no theory of dual responsibility. 952 F.2d at 1080–82. That is distinguishable from the case *sub judice* where the State presented family witnesses, medical testimony, and Petitioner's own statements establishing a months-long pattern of abuse in a household both adults occupied. (App'x pp. 481–84; pp. 615–32; pp. 696–703; pp. 1043–44; pp. 1599–1602).

Also, contrary to Petitioner's assertions, Justice Stevens's "second prosecutor" observation was not the holding of Zafiro. Instead, the holding in Zafiro is that antagonistic defenses are not prejudicial *per se* and that limiting instructions will often suffice. 506 U.S. at 538–39. Nor was this a case of a marked disparity in culpability of the kind Zafiro contemplated. 506 U.S. at 539. Here, both defendants were charged with the same offenses, both were present in the home, and both were convicted. (App'x p. 1810, ll. 2–10; pp. 1810, l. 18 – 1811, l. 21; pp. 2056–59). Petitioner's claim that codefendant's counsel reduced the State's burden is inconsistent with the court's instructions that the State had to prove each defendant guilty beyond a reasonable doubt and that the jury was required to consider the defendants separately.

(B) Trial Counsel made a reasonable strategic decision to remain joined.

The post-conviction relief court found the solicitor "credibly testified that she recalled that [Petitioner's] attorneys wanted a joint trial to point the finger at Guinyard." (App'x p. 2041). That credibility finding is supported by the record and is entitled to deference. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). Trial Counsel's stated strategy was to distance Petitioner from the homicide charge and accept exposure on the unlawful conduct charge. (App'x p. 1972,

ll. 9–12). Remaining joined kept the codefendant in front of the jury as a possible alternative perpetrator. The post-conviction relief court correctly observed that a successful severance would have cost Petitioner "[codefendant's] constant presence before the jury as a possible scapegoat." (App'x p. 2041).

Petitioner emphasizes counsel's post-conviction relief testimony that, in hindsight, they "probably would have been better off by ourselves" and that she "probably should have" made the motion. (App'x p. 1977, ll. 10–23; pp. 1980, l. 20 – 1981, l. 9). However, hindsight is not the Strickland standard. 466 U.S. at 689. An attorney's later regret does not establish that the contemporaneous decision was professionally unreasonable. Richter, 562 U.S. at 105. Trial Counsel did not sit idle where she moved to sever the *charges*, not the defendants. (App'x pp. 172, l. 19 – 174, l. 7; p. 177, ll. 7–18; p. 213, ll. 17–25; p. 1980, ll. 2–13). Trial Counsel objected repeatedly to codefendant's evidence, moved for a mistrial after the opening, during the State's case, during codefendant's testimony, after Petitioner testified, and at sentencing. (App'x pp. 394, l. 22 – 398, l. 23; p. 810, ll. 9–16; p. 812, l. 10; p. 1533, ll. 9–25; p. 1535, ll. 12–19; p. 1663, ll. 6–20; p. 1817, ll. 1–21). Those actions are inconsistent with a claim of abdication; rather, they are indicative of Trial Counsel managing the risks of a joint trial rather than ignoring them.

The solicitor testified there was no legally supportable basis for a severance motion and that it was "totally proper" to try them together. (App'x pp. 1986, l. 22 – 1987, l. 7). Trial Counsel is not deficient for failing to make a motion that the trial court had no logical reason to grant. Hughes, 346 S.C. at 558, 552 S.E.2d at 317. On this record, a pretrial motion to sever the defendants would have been denied for the same reasons the post-conviction relief court later identified: proper joinder, no compromised trial rights, and the availability of limiting instructions. (App'x pp. 2040–41).

(C) Codefendant's opening and examination did not render Trial Counsel's performance deficient.

An opening statement informs the jury of the general nature of the action and the defenses. State v. Brown, 277 S.C. 203, 204, 284 S.E.2d 777, 778 (1981). Counsel may argue the record and the reasonable inferences from it. State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975). Arguments of counsel are not evidence.

Codefendant's counsel opened from the deceased child's point of view, describing beatings with a cable, a shoe, and a rod, and contrasting a father who "never, ever beat me" with a mother from whose "hands and feet and knees" the child died. (App'x pp. 378, l. 5 – 388, l. 19). The trial court struck the portion concerning alleged false police reports. (App'x pp. 385, l. 11 – 386, l. 2). Petitioner's counsel immediately moved for a mistrial and argued a curative instruction would be insufficient. (App'x pp. 394, l. 22 – 397, l. 6). The trial court denied the motion because the issue did not rise to manifest necessity and because the jury had been told several times that openings are not evidence. (App'x p. 398, ll. 7–23). Trial Counsel renewed the motion "based on pretty much the combination of everything that has happened, starting with opening statements." (App'x p. 810, ll. 9–16). Again, the trial court denied it. (App'x p. 812, l. 10).

Further, the Golden Rule cases Petitioner cites do not control and are distinguishable. Those decisions condemn a *solicitor's* invitation that jurors put themselves in the victim's place. See Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010); Von Dohlen v. State, 360 S.C. 598, 611, 602 S.E.2d 738, 745 (2004); see also United States v. Jackson, 126 F.4th 847, 865 (4th Cir. 2025). Codefendant's counsel was not the State; rather, he was the codefendant's lawyer advancing a defense. Nevertheless, even if the rhetoric was aggressive, Bruton¹ does not apply to

¹ Bruton v. United States, 391 U.S. 123 (1968).

an attorney's argument. United States v. Sandini, 888 F.2d 300, 310–11 (3d Cir. 1989); United States v. Quintero, 38 F.3d 1317, 1342 (3d Cir. 1994). Courts do not lightly infer that a jury will draw the most damaging meaning from argument. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974). Any alleged impropriety is judged in light of the entire record. State v. Brown, 333 S.C. 185, 191, 508 S.E.2d 38, 41 (Ct. App. 1998).

The same is true of the examination that followed. On cross-examination of the State's witnesses, codefendant's counsel elicited that Crystal saw Petitioner beat the child and that codefendant would do what Petitioner wanted; that codefendant was scared of Petitioner; that Petitioner became angry when codefendant did not hit the child hard enough; and that Natalie knew codefendant "did not beat [the child] the way [Petitioner] beat [the child]." (App'x pp. 504, l. 2 – 505, l. 20; p. 513, ll. 21–24; p. 516, ll. 13–19; p. 660, ll. 19–21). Codendant's counsel also had Latoya Anderson repeat Petitioner's statement that she starved the child for eight days and was relieved when he died—testimony the State had already elicited. (App'x pp. 1055, l. 7 – 1056, l. 23; p. 1057, ll. 12–17).

After a proffer, the trial court excluded testimony that Petitioner called the police falsely on the codefendant, allowed testimony that she kicked him out as evidence of control, and conducted a Rule 403 analysis while expressly balancing the codefendant's constitutional right to present a defense. (App'x p. 1323, ll. 2–5; p. 1380, ll. 14–16; pp. 1393, l. 23 – 1394, l. 10; p. 1396, ll. 22–25; pp. 1410, l. 9 – 1411, l. 12; pp. 1418, l. 21 – 1419, l. 13). That ruling did not establish a right to severance. It is the ordinary management of a joint trial, and the post-conviction relief court later found the same evidence independently admissible against Petitioner. (App'x pp. 2040–41).

In the codefendant's case-in-chief, Charles Robinson, Gladys Thompson, and codefendant himself described Petitioner beating the child, becoming angry when others fed him, and putting codefendant out of the house. (App'x pp. 1450, l. 6 – 1460, l. 11; pp. 1484, l. 21 – 1493, l. 14; p. 1506, l. 25; p. 1523, ll. 13–18; p. 1525, ll. 2–17; p. 1526, l. 21; p. 1528, ll. 16–17; p. 1529, ll. 9–10; pp. 1530, l. 15 – 1531, l. 21). When codefendant began to describe physical fights, the court sustained Petitioner's objection, denied another mistrial motion, and warned counsel he was "on a tightrope." (App'x pp. 1532, l. 24 – 1535, l. 19). Trial Counsel renewed the mistrial motion after Petitioner testified and again at sentencing. (App'x p. 1663, ll. 6–20; p. 1817, ll. 1–21). That is the opposite of an unmanaged free-for-all. It is a trial judge regulating antagonistic defenses, which is the ordinary work of a joint trial.

Trial Counsel cannot be ineffective for failing to object to remarks that are fair comment on the evidence. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Trial Counsel cannot be ineffective for failing to obtain a mistrial that the trial court correctly denied. Beckham, 334 S.C. at 310, 513 S.E.2d at 610; State v. Lunsford, 318 S.C. 241, 247, 456 S.E.2d 918, 922 (Ct. App. 1995). And Trial Counsel cannot be ineffective for failing to seek a severance that the same dynamics would not have justified. Spears, 393 S.C. at 477, 713 S.E.2d at 329; Walker, 366 S.C. at 657, 623 S.E.2d at 129.

(D) Petitioner failed to establish prejudice.

Even assuming a severance motion should have been made, and even assuming it would have been granted, Petitioner must still show a reasonable probability of a different result. Strickland, 466 U.S. at 694; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. The post-conviction relief court correctly found that Petitioner failed to prove any prejudice from the failure to move for a severance.

The post-conviction relief court found it "extremely likely" that the evidence Petitioner now calls character assassination would have been admissible against her alone "to show intent, absence of mistake or accident, as relevant to establish identity as to the person who fatally abused the child, to establish a pattern of abuse or neglect necessary to prove homicide by child abuse that supported the evidence of a common scheme or plan, and admissible under the *res gestae* theory." (App'x pp. 2040–41 (citing State v. Martucci, 380 S.C. 232, 252–58, 669 S.E.2d 598, 609–12 (Ct. App. 2008)).

The post-conviction relief court's conclusion is correct. Homicide by child abuse requires proof that the defendant caused the death of a child under circumstances manifesting an extreme indifference to human life. S.C. Code Ann. § 16-3-85. The State's theory was not a single blow on July 1. It was months of repeated, non-accidental trauma culminating in death from cumulative hemorrhage. (App'x p. 855, ll. 11–15; pp. 867, l. 22 – 868, l. 5; pp. 1114–17; p. 1143, ll. 1–5). Evidence that Petitioner beat the child with cords and hangers, starved him, withheld water, became angry when others fed him, and expressed a desire that he be returned to DSS or killed was not propensity evidence in the abstract. It was proof of the crime charged. Martucci, 380 S.C. at 252–58, 669 S.E.2d at 609–12; (App'x pp. 481–84; pp. 504–14; pp. 615–32; pp. 643–45; pp. 696–703).

The same evidence was independently relevant under Rule 404(b), SCRE, to intent, absence of accident, identity, and common scheme, and as part of the *res gestae* of the offense. The child's condition when he left foster care, the family's observations, the photographs shown to Dr. Lofton, the missed medical referrals, Crystal's overheard beating, the delayed 911 call, and the autopsy findings would all have been admitted in a trial of Petitioner alone. (App'x pp. 487–92; p. 523; pp. 546–48; pp. 677–86; pp. 832–42; pp. 844–71; pp. 950–60; pp. 1096–1117; pp. 1248–

52). Petitioner's own trial testimony would have been available to the State as well. (App'x p. 1599, ll. 5–20; p. 1602, ll. 1–7). A separate trial may have changed the speaker of some of the arguments, but it would not have changed the proof.

Furthermore, there were three categories of evidence, none of which depended on the codefendant's counsel, that established Petitioner's guilt.

First, Petitioner admitted the core conduct. She testified she beat the child with a cable cord and deprived him of food for eight days. (App'x p. 1599, ll. 5–20; p. 1602, ll. 11–25). Petitioner had already told her cousin she starved him for eight days without food or water and was relieved when he died. (App'x pp. 1043–44; pp. 1055, l. 7 – 1056, l. 23; p. 1057, ll. 12–17). Petitioner gave shifting accounts of the final incident to the police and at trial. (App'x p. 1215, ll. 5–15; pp. 1254, l. 15 – 1256, l. 14; pp. 1609–19). The trial court correctly treated her testimony as an essential confession to unlawful conduct toward a child. (App'x pp. 1661, l. 20 – 1663, l. 3). Those admissions also supplied extreme indifference for homicide by child abuse.

Second, multiple family witnesses described Petitioner as the principal abuser over many months: hanger, cable cord, fists, knees, belt, and shoe; punishment for urinating; anger when others gave the child food or water; statements about sending him back to DSS or killing him. (App'x pp. 481–84; pp. 504–20; pp. 615–18; pp. 628–32; pp. 643–45; pp. 696–703). Angela Metze and Maria Thompson reported the child's decline to DSS. Dr. Lofton viewed patterned injuries and reported suspected abuse. (App'x pp. 617–21; pp. 677–86; pp. 950–60). This was not a case that turned on one disputed afternoon.

Third, the medical and physical evidence independently proved non-accidental, repeated trauma. The child left foster care healthy and developmentally on track. (App'x pp. 832–37; pp. 959–60). The child died with acute and healing injuries throughout his body, including rib

fractures of different ages, a healing humerus fracture with new hemorrhage, subdural hemorrhage several days old, and massive soft-tissue bleeding. (App'x pp. 842–64; pp. 1095–1114). The pathologists rejected a fall from a dresser. They concluded he died from cumulative blood loss caused by persistent abuse and that he would have survived with medical care. (App'x pp. 855–71; p. 1097; pp. 1114–17). Notably, Crystal testified that she heard the July 1 beating over an open phone line: the child screaming "Lord, help me," Petitioner telling him to "hush," Petitioner telling codefendant to hold his legs, and codefendant saying the child was not moving. (App'x pp. 487–92; p. 523). Petitioner then searched the internet for seizures and waited nearly an hour to call 911. (App'x pp. 1248–52). First responders who arrived on the scene found the child already cold and pulseless. (App'x pp. 412–17). Blood consistent with the victim was found on walls, carpet, a rod, and a pipe. (App'x pp. 440–48; pp. 1019–33).

Even giving the opening the most damaging interpretation Petitioner assigns it, it was argument, it was immediately the subject of a mistrial motion, and the jury was told it was not evidence. (App'x pp. 378, l. 5 – 388, l. 19; pp. 394, l. 22 – 398, l. 23). The subsequent testimony from the State's witnesses and from Petitioner herself supplied the same narrative in admissible form. An inflammatory opening does not create Strickland prejudice when the evidence the opening previewed is later proved, and proved overwhelmingly, by competent evidence.

Further, Petitioner's reliance on Hughes to support that she suffered "extensive prejudice" is misplaced. Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001). The Hughes Court recognized that a defendant jointly tried with a co-defendant is not barred from post-conviction relief if she can demonstrate prejudice from the joint trial. Id. at 561, 552 S.E.2d at 318. The Hughes Court did not hold that antagonism, a vivid opening, or a "second prosecutor" characterization is prejudice. The post-conviction relief court found Petitioner "merely provided that a severance

would have benefited her, without more." (App'x p. 2041). That is an accurate description of this record, and a better chance is not the Strickland standard. Zafiro, 506 U.S. at 539.

Lastly, Petitioner's prejudice argument assumes a separate trial would have been a different case. The homicide-by-child-abuse case against her did not require a codefendant. It required proof that she caused or participated in causing the child's death under circumstances manifesting extreme indifference. See S.C. Code Ann. § 16-3-85. Her admissions, the family's observations, Crystal's call, the delayed 911 report, and the autopsy were sufficient. Removing a codefendant would have removed a person the jury could also blame. It would not have removed the evidence that Petitioner beat and starved the child. The post-conviction relief court correctly found that a separate trial would not have been more beneficial. (App'x p. 2041). That finding is supported by the evidence.

Because Petitioner failed to prove deficient performance and independently failed to prove prejudice, the post-conviction relief court correctly denied relief. Strickland, 466 U.S. at 700.

Accordingly, this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's order. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

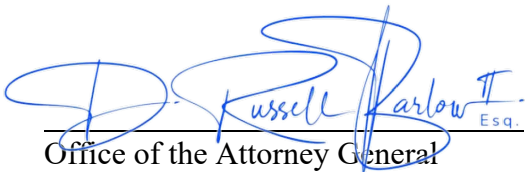
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August 21, 2026

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