ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

JOSHUA A. REED,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000555

PETITION FOR WRIT OF CERTIORARI

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Whether the PCR court erred in finding defense counsel was effective where he neither moved for severance nor objected or moved for a mistrial when counsel Swilley, who represented petitioner's codefendant brother during their joint trial, said that although the codefendant would not testify against petitioner that Swilley knew and conceded petitioner shot the decedent and Swilley's codefendant client merely ran away, since Swilley was injecting devastatingly prejudicial alleged facts into the trial that were not in evidence?

STATEMENT

On February 15, 2012, Milton "Wop" Hunter was eating Yogi Bear's fried chicken in a park with his sister Asia Gregg (Gregg), when two men walked up and one of them shot Hunter in the head and killed him. App. 204, l. 2-20; App. 207, l. 4 – 208, l. 22; App. 290, ll. 19-23. Gregg initially told police officers she did not know who shot the decedent but a day or two later told officers the two men were the "Rail brothers." App. 518, l. 4 – 519, l. 2; App. 226, l. 14 – 228, l. 1.

However, Gregg later claimed the two men were the Reed brothers—Joshua Reed, the petitioner, and Johnathan Reed, his codefendant. App. 213, l. 13 – 214, l. 1. Additionally, Gregg alleged to police officers that Johnathan Reed was the shooter, but later said she had a "little mix-up" and claimed petitioner Joshua Reed was the shooter. App. 208, ll. 13-14; App. 226, l. 25 – 227, l. 17; App. 248, l. 17 – 249, l. 8.

Petitioner and his brother Johnathan Reed were tried jointly before the Honorable Howard P. King and a jury from October 21 – 24, 2013, for murder and possession of a weapon during a violent crime. App. 1; App. 6, ll. 1-9. J. Richard Jones and Julie Wooten Rochester represented petitioner. App. 1; App. 736, l. 3. Matthew S. Swilley represented petitioner's codefendant brother Johnathan Reed. App. 1; App. 205, ll. 15-16. John W. Holt, IV, and Patti M. Parker represented the state. App. 1.

In opening statements, Swilley said: "The reason that Johnathan is on trial right now; I'm gonna tell y'all, the reason why he's in that chair, because he's not gonna sit in that chair, and bear wit[ness], against his brother." App. 199, ll. 10-14. "That's why he's charged with a crime." App. 199, ll. 15-16. Counsel did not make any objection or motion in response to this statement by Swilley. Co-counsel Rochester later recalled that she first realized the codefendant would

likely present an "adverse defense" during pretrial motions when Swilley "took the table and physically separated his table from ours because he wanted to create actual distance between his client and ours." App. 747, l. 8 – 748, l. 7. Rochester said: "I got the feeling of dread as soon as [Swilley] began his opening argument." App. 750, ll. 21-22.

Gregg alleged for the first time at trial that both Reed brothers had guns but denied attempting to mislead police officers when she told them only one brother had a gun. App. 239, l. 1 – 241, l. 23. Gregg was impeached with a prior arson conviction. App. 232, ll. 15-20.

Johnny Lee Washington and Anthony Wingate, men of dubious credibility, were also at the park when the decedent was shot. App. 254, ll. 9-14; App. 256, ll. 6-7; App. 285, ll. 12-15. According to Wingate, he was at the park drinking vodka to dull the pain of a fresh tattoo when he saw one "little dude shoot the other dude." App. 276, ll. 4-17; App. 281, ll. 15-21. Washington claimed he and Wingate were cousins, but Wingate denied the men were related. App. 262, ll. 3-5; App. 290, ll. 8-14. Washington was impeached with prior burglary convictions. App. 264, ll. 23-25.

Even though Gregg and Washington knew the Reeds prior to the shooting, neither initially identified the suspects as the Reeds to responding officers. App. 225, ll. 2-7; App. 267, ll. 5-8; App. 517, l. 21 – 519, l. 2; App. 454, l. 15 – 455, l. 19; App. 520, l. 14 – 521, l. 7. Nevertheless, Gregg, Washington, and Wingate picked Joshua Reed and Johnathan Reed out of photo lineups. App. 213, ll. 13-23; App. 257, ll. 7-16; App. 288, ll. 6-14.

A tailpipe that fell off the suspects' truck was found in the parking lot at the park. App. 436, ll. 12-15. Officers saw Johnathan Reed's truck was missing its tailpipe. App. 335, l. 20 – 336, l. 6; App. 342, ll. 14-21. The tailpipe found in the parking lot matched Johnathan Reed's

truck. App. 376, ll. 3-8. Gunshot residue particles were found on the hands of petitioner and of Johnathan Reed. App. 472, l. 14 – 473, l. 5.

The first three witnesses called by the state were eyewitnesses Gregg, Wingate, and Washington. App. 2. The cross-examination of Gregg, Wingate, and Washington by Johnathan Reed's attorney Matt Swilley was clearly intended to elicit testimony that petitioner murdered the decedent and Johnathan Reed was merely present. Swilley asked Wingate:

> Q. And at the time you saw Joshua Reed shoot Milton [the decedent] Johnathan Reed wasn't doing anything, right?
>
> A. He was standing, he was standing—see, he was standing opposite side of Johnny Lee.
>
> Q. Right. And did I hear you say before that he looked shooked [sic] when all this was going on?
>
> A. Yeah, I honestly say that.

App. 298, ll. 10-16. Swilley asked Washington:

> Q. The best you could tell Johnathan Reed was just there, right?
>
> A. Yes, sir.
>
> Q. Didn't do anything to assist or help with the shooting of Milton, did he?
>
> A. Well, he could have stopped it though.
>
> Q. I'm not asking if he could have stopped it or not. I'm asking he didn't do anything to assist or help with the shooting of Milton, did he?

App. 268, ll. 12-20. Swilley asked Gregg:

> Q. Okay. Johnathan didn't occur—didn't tell his brother to shoot your brother, did he?
>
> A. I don't know.
>
> Q. Based on your—you don't remember that, do you? That didn't happen, right, from your recollection?

A. Could you explain that question.

Q. Johnathan didn't have anything to do with shooting your brother, right, as far as aiding or abetting, right, that's correct?

A. I don't know.

App. 235, ll. 12-21.

In closing argument, Swilley told the jury that Johnathan Reed was only trying "to protect his brother." App. 630, ll. 7-9. Swilley told the jury

> **If Johnathan had his way I wouldn't be up here to concede, telling that Joshua shot Milton** and telling y'all what you already know, the fact you know, they were there and that **Joshua shot Milton and that Johnathan just ran** when the gunshot rang out like any regular person would. My job is to protect him from an unlawful conviction. He doesn't call that shot; I do. That's my decision. **I've been charged with his defense for a long time now.**

App. 638, l. 18 – 639, l. 1 (emphasis added). Petitioner's trial counsel did not make any objection or motion in response to Swilley's argument.

Swilley's strategy worked. The jury found petitioner guilty but found Johnathan Reed not guilty. App. 678, l. 19 – 679, l. 1.

After his direct appeal was dismissed pursuant to *Anders v. California*, 386 U.S. 738 (1967), petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel on November 3, 2016. App. 695 – 716; App. 717 – 724. The state made a return and partial motion to dismiss December 11, 2017. App. 725 – 731. An amended PCR application was filed December 14. 2017. App. 732 – 734. A hearing was held on the matter January 16, 2018, before the Honorable Roger E. Henderson. App. 735. Lance Boozer represented petitioner and Johnny E. James, Jr., represented the state. App. 735.

PCR counsel argued defense counsel's failure to take any action to prevent or respond to Swilley's improper remarks constituted ineffective assistance of counsel. PCR counsel said that Swilley: "Essentially, became the witness in the case." App. 741, ll. 14-16. PCR counsel argued this left petitioner in the position of not only "defending against the State, they're defending against their co-defendant's lawyer who they cannot examine." App. 741, ll. 22-25. PCR counsel explained that petitioner's ineffective assistance claim was based on counsel's "failing to act in to either sever the case and failing to object at trial or in failing to request a mistrial during the trial." App. 741, l. 25 – 742, l. 3.

Petitioner's trial counsel Julie Rochester agreed the defense should have moved to sever, objected, or moved for a mistrial, since Swilley was trying to convict petitioner as much as the state. App. 749, ll. 7-25; App. 750, ll. 10-17. As seen, Rochester said she first realized the codefendant could likely present an "adverse defense" during pretrial motions when Swilley "took the table and physically separated his table from ours because he wanted to create actual distance between his client and ours." App. 747, l. 8 – 748, l. 7. Rochester agreed that although the codefendant never testified, Swilley essentially "stepped into his shoes." App. 748, ll. 18-24. However, Rochester said she was second chair and deferred to Rick Jones as the more experienced attorney during the trial. App. 743, ll. 1-3; App. 752, l. 20 – 753, l. 5.

Rochester said: "I got the feeling of dread as soon as [Swilley] began his opening argument." App. 750, ll. 21-22. "I didn't think there was any chance [petitioner] would walk away from that because you had a credible, charming, convincing attorney who's also on the defense side parroting what the State is saying." App. 750, l. 21 – 751, l. 1.

Rick Jones said of Swilley's strategy, "I was not aware what was happening until the final arguments." App. 768, ll. 1-4. Jones said his own trial strategy was to try to "muddy the

waters" App. 765, l. 25 – 766, l. 2. Jones said he "tried to raise reasonable doubt" with the fact that the eyewitnesses did not immediately identify the Reed brothers, **who they knew**, but only said it was two black males. App. 768, ll. 10-21.

Rick Jones agreed with PCR counsel that the defense was essentially presented with a *Bruton*[1]-like problem by Swilley, because they were unable to cross-examine Swilley. App. 758, ll. 12-23. Jones said he did not take any action in response to Swilley's closing argument because in Jones' "opinion he [Swilley] was arguing facts already in evidence from the other witnesses." App. 760, ll. 14-19. However, Jones conceded that "it's not a fact in evidence that Jonathan doesn't want to get up to testify – and doesn't want to squeal on his brother." App. 760, l. 25 – 761, l. 6.

In summation, PCR counsel explained that Swilley's adverse defense threw his trial counsel's defense of muddying the waters "out the window." App. 774, l. 20 – 775, l. 13. PCR counsel said Swilley caused a *Bruton*-like issue when he "essentially, became his client and he's making these statements that he knows he's not [going to] get out of his client, he's making those to the jury." App. 775, ll. 5-10.

The PCR court found defense counsel was not ineffective for failing to object to Swilley's closing argument, failing to move for a mistrial, or failing to try to initially avert the situation by moving for severance, and found no prejudice. App. 787 – 791.

This petition for writ of certiorari follows.

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[1] *Bruton v. U.S.*, 391 U.S. 123 (1968), held a defendant's right to cross-examination is violated when a statement made by a non-testifying codefendant that implicates the defendant is heard by the jury.

ARGUMENT

The PCR court erred in finding defense counsel was effective where he neither moved for severance nor objected or moved for a mistrial when counsel Swilley, who represented petitioner's codefendant brother during their joint trial, said that although the codefendant would not testify against petitioner that Swilley knew and conceded petitioner shot the decedent and Swilley's codefendant client merely ran away, since Swilley was injecting devastatingly prejudicial alleged facts into the trial that were not in evidence.

Counsel was deficient in failing to act to prevent or respond to Swilley's remarks to the jury that he, Swilley, knew from his client Johnathan Reed that petitioner was the shooter. The jury was effectively presented with testimony from Swilley as if Swilley had testified himself without being subject to cross-examination.

"The Sixth Amendment's Confrontation Clause provides that, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (internal quotations omitted); U.S. CONST. amend. VI. In *Bruton v. U.S.*, 391 U.S. 123, 137 (1968), the United States Supreme Court held the admission of a non-testifying codefendant's confession that implicated Bruton violated Bruton's right to confront the witnesses against him.

"[T]he right to cross-examine a prosecuting witness is of constitutional dimensions, being essential to a fair trial as guaranteed by the Sixth Amendment and the due process clause of the Fourteenth Amendment." *State v. Sierra*, 337 S.C. 368, 378, 523 S.E.2d 187, 192 (Ct. App. 1999) (citing *State v. McCoy*, 274 S.C. 70, 72, 261 S.E.2d 159, 160 (1979)).

An attorney is generally prohibited from acting as an advocate where he is likely to become a witness because combining the roles of attorney and witness can prejudice the court and the opposing party. Comment 2 to Rule 3.7, RPC, Rule 407, SCACR explains

> The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. **The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation.** A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.

(emphasis added).

This Court has often addressed the impropriety of the solicitor vouching like Swilley did during closing argument. In *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002), this Court explained: "A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." "Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction." *Id.* "It is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record." *Id. See State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (solicitor may not make explicit personal assurances of a witness' veracity or implicitly vouch for a witness' veracity by indicating information not presented to the jury supports the testimony).

When Swilley spoke outside the record on what his client knew about the murder, he impermissibly vouched for the credibility of the state's eyewitnesses, since he conveyed to the jury that he believed petitioner was guilty because he knew of evidence that was not presented to

the jury: that if Johnathan Reed were not such a good brother, he would have testified to what he apparently told his lawyer—that petitioner was the shooter. Swilley essentially told the jury that it should listen to him, because he, in his unique position as Johnathan Reed's attorney, knew what really happened. As Rochester admitted, hearing this from Swilley was much more effective than hearing it from the codefendant because Swilley was a "credible, charming, [and] convincing." App. 750, l. 21 – 751, l. 1. To boot, Swilley was not subject to cross-examination.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced petitioner. *Id.* at 687. "Trial counsel must provide 'reasonably effective assistance' under 'prevailing professional norms.'" *Putnam v. State*, 417 S.C. 252, 260, 789 S.E.2d 594, 598 (Ct. App. 2016) (quoting *Strickland*, 466 U.S. at 687-88).

Defense counsel should have anticipated the adverse defense and moved for severance. Swilley's strategy to defend Johnathan Reed at petitioner's expense was apparent in his opening statement and Swilley made this defense very clear during his cross-examination of the eyewitnesses. Regardless, counsel was ineffective for failing to object and move for a mistrial given Swilley's closing argument that Swilley knew from information the jury was not privy to that petitioner shot the decedent and his client merely ran away. While reasonably effective counsel acting in accordance with prevailing professional norms might have moved for a mistrial rather than a severance, or might have objected and moved to strike rather than move for a

mistrial, petitioner's defense counsel did not undertake any action on petitioner's behalf—this was deficient.

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In *Tappeiner v. State*, 416 S.C. 239, 246, 785 S.E.2d 471, 475 (2016), the solicitor vouched for the credibility of the victim in closing argument. This Court reversed the PCR court and granted Tappeiner a new trial where the solicitor's statements "misrepresented the evidence at trial." *Id.* at 251, 785 S.E.2d at 477. This Court found the solicitor's "statements were clearly improper and objectionable," and cited *Matthews v. State*, 350 S.C. at 276, 565 S.E.2d at 768, for the proposition that "[v]ouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction." *Id.* at 252, 785 S.E.2d at 477.

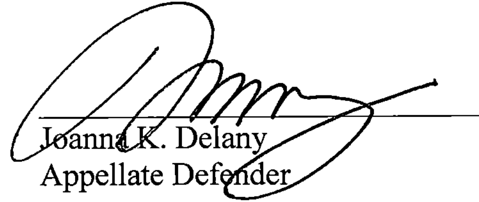
Petitioner submits that defense counsel's errors undermine confidence in the outcome of the trial, since petitioner was in effect being prosecuted by both the solicitor's office and as Julie Rochester put it, "a credible, charming, convincing attorney who's also on the defense side parroting what the State is saying." Swilley, who was not subject to cross-examination, remarked on evidence not in the record—that Johnathan Reed apparently only chose not to testify because he was such a good brother. Swilley said that although Johnathan Reed refused to testify, he, Swilley, was telling the jury what Johnathan Reed had told him—that petitioner shot the

decedent. This was devastatingly prejudicial given petitioner's inability to cross-examine either Johnathan Reed or Matt Swilley.

The evidence against petitioner was not overwhelming. The credibility of the eyewitnesses was questionable, the murder weapon was never found, and neither Joshua nor Johnathan Reed confessed to police. The case was primarily dependent on a credibility determination of the state's eyewitnesses. Petitioner was prejudiced by defense counsel's failure to respond in any way to Swilley's objectionable misrepresentation of evidence. Swilley's improper strategy was extraordinarily effective—his client was acquitted, and petitioner was convicted.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



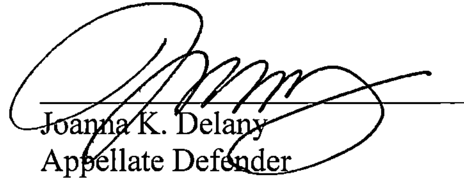
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of November, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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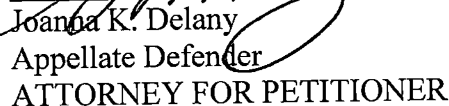
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

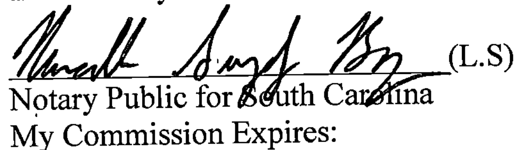
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Joshua Alexander Reed, #357568, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of November, 2018.



Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of November, 2018.


(L.S)
Notary Public for South Carolina
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