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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari to Darlington County
Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2018-000555

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JOSHUA A. REED,

Petitioner,

vs.

THE STATE,

Respondent.

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF ISSUE ON CERTIORARI

The post-conviction relief judge correctly determined Petitioner failed to establish his ineffective assistance of counsel claim because Petitioner's defense counsel did not provide objectively unreasonable representation by failing to seek an unwarranted severance or by failing to raise a challenge to appropriate remarks made by Petitioner's brother's defense counsel and because Petitioner suffered no actual prejudice as a result of his defense counsel's purported deficient representation in light of the overwhelming evidence of Petitioner's guilt that was presented to the jury.

## STATEMENT OF THE CASE

**Procedural History**

In February of 2012, Petitioner Joshua Alexander Reed was arrested along with his brother, Johnathan Tyrone Reed ("Brother"), following an investigation into a fatal shooting that occurred in a park located in Hartsville, South Carolina. Subsequent to the arrests, the Darlington County Grand Jury indicted both Petitioner and Brother for one count each of murder and possession of a weapon during the commission of a violent crime. On October 21, 2013, a joint jury trial was commenced in the Darlington County Court of General Sessions with the Honorable Howard P. King, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Petitioner as indicted and acquitted Brother of all charges. Following the verdict, the trial judge sentenced Petitioner to an aggregate term of imprisonment of life without parole. Petitioner then timely initiated an appeal.

On appeal, Petitioner's appellate counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), along with a petition to be relieved as counsel, and Petitioner submitted a pro se document in support of his appeal. After reviewing the matter, the Court of Appeals issued an unpublished decision dismissing the appeal and granting appellate counsel's petition to be relieved. State v. Reed, Op. No. 2015-UP-484 (S.C. Ct. App. filed Oct. 14, 2015). Thereafter, on November 13, 2015, remittitur was issued.

Subsequent to the issuance of the remittitur, Petitioner timely filed an application for post-conviction relief, and, in response, the State filed a return and partial motion to dismiss requesting an evidentiary hearing. Petitioner then filed an amendment to his post-conviction relief application raising additional grounds for relief. On January 16, 2018, an evidentiary hearing was conducted in the Dillon County Court of Common Pleas with the Honorable Roger

E. Henderson, circuit court judge, presiding. At the conclusion of the hearing, the post-conviction relief judge took the matter under advisement. Thereafter, through an order filed on March 21, 2018, the post-conviction relief judge denied and dismissed Petitioner's post-conviction relief application. Petitioner then timely filed a notice of appeal.

## Factual History

### Summary of Petitioner's Crimes and the Evidence Discovered during the Investigation of the Crimes

On the afternoon of February 15, 2012, Asia Gregg and her child's father, Johnny Lee Washington, met up with her brother, Milton Hunter ("Victim"), and another individual, Anthony Wingate, at Pride Park located in Hartsville, South Carolina. (App'x pp. 56-57; p. 89; pp. 102-103; pp. 204-205; pp. 253-254; p. 262; p. 280; p. 290). Once there, the four socialized and ate some food together before Victim left to go get a soda from a nearby business. (App'x pp. 56-57; p. 90; pp. 102-103; p. 205; p. 254). When Victim returned with his drink, Petitioner and Brother drove by in a green truck, and Victim seemed to be concerned about their appearance based on his apparent involvement in a prior incident with them in the past. (App'x p. 58; pp. 90-91; p. 205). Nonetheless, the group remained in the park and continued to eat their meals, and, as they did, Petitioner and Brother drove back by several more times in their truck. (App'x p. 60; p. 91; p. 103; p. 207; p. 254; p. 283).

A short time after that, Petitioner and Brother drove by once again, stopped, parked their vehicle nearby, and entered the park on foot. (App'x p. 61; p. 91; p. 103; p. 207; p. 255; pp. 283-284). The two then proceeded directly towards Victim and the others and briefly engaged in a conversation with them. (App'x p. 207; p. 212; pp. 233-234; p. 255; p. 259). During the conversation, Petitioner asked Victim if he had spoken with his "big brother," Victim replied everything had been "squashed," and Brother responded to that reply by skeptically stating:

"Oh, really?" (App'x pp. 62-63; p. 79; p. 91; p. 208; p. 234). Petitioner then suddenly pulled out a revolver and shot Victim multiple times, including several times in the head. (App'x p. 63; p. 79; p. 92; p. 103; p. 106; p. 208; p. 248; p. 256; p. 285).

Following that shocking and horrific occurrence, Petitioner and Brother quickly fled from the park and sped away from the area in their truck, and, as they did, a piece of the truck's exhaust pipe fell to the ground. (App'x pp. 64-65; pp. 208-209; pp. 271-272). Meanwhile, Wingate immediately called 911, and officers from the Hartsville Police Department rapidly responded to the scene along with other emergency personnel. (App'x p. 212; pp. 286-287; pp. 312-313; pp. 320-321; pp. 326-327; pp. 333-335; pp. 405-406; p. 416; pp. 432-433; pp. 497-498). Upon arriving, they found Victim bleeding and unresponsive on the ground suffering from multiple gunshot wounds, and he was rushed to the hospital in a futile attempt to save his life. (App'x p. 322; p. 324; pp. 539-541). Officers then began investigating the shooting, and they obtained a description of the shooters and the green truck they fled in from the eyewitnesses. (App'x p. 328; p. 335; pp. 340-341; p. 435; p. 452; pp. 499).

Not long after that, the green truck was located less than a mile away from the scene parked outside the residence of Petitioner and Brother. (App'x p. 335; p. 389; p. 391; p. 440). Officers then made contact with Petitioner and Brother, and Brother admitted he had been driving the truck a short time earlier. (App'x pp. 335-336). Additionally, the exhaust pipe that fell off the suspects' truck was recovered at the scene and matched to the green truck found at Petitioner and Brother's residence. (App'x p. 342; pp. 374-375; pp. 379-381; pp. 410-411; p. 436). Based on those discoveries coupled with the fact Petitioner matched the physical description of the shooter, Petitioner and Brother were arrested and transported to the police

department. (App'x pp. 336-337; pp. 342-343; pp. 392-393; p. 435; pp. 500-501; pp. 509-510; p. 527).

Following Petitioner and Brother's arrests, officers prepared two photographic line-ups containing their photographs along with the photographs of several other individuals, and the line-ups were shown to each of the eyewitnesses who were present during the shooting. (App'x ; pp. 346-347; pp. 348-349; p. 357; p. 367; pp. 395-396). Upon viewing the line-ups, Gregg, Washington, and Wingate all quickly identified Petitioner as the person who shot Victim and Brother as Petitioner's accomplice. (App'x pp. 66-67; p. 87; pp. 92-94; p. 96; pp. 103-105; pp. 107-108; p. 112; pp. 118-119; pp. 121-122; p. 128; pp. 131-133; p. 139; pp. 213-214; p. 257; pp. 287-288; pp. 348-349; pp. 351-352; p. 357; pp. 395-396).

Subsequently, as the investigation into the shooting progressed, officers searched Petitioner and Brother's residence and found a loaded gun and ammunition in Brother's bedroom. (App'x pp. 443-444; p. 448). Furthermore, through forensic analysis, officers determined gunshot residue was present on Petitioner's right palm after the shooting while particles consistent with or associated with gunshot residue were found on Petitioner's shirt, the back of one of Petitioner's hands, and the back of one of Brother's hands. (App'x pp. 469-470; pp. 472-473; p. 489; p. 492; p. 503).

**Relevant Details from Petitioner's Trial**

Towards the outset of the ensuing joint trial, the trial judge presented some preliminary remarks to the jury and, through those remarks, repeatedly affirmed neither the opening statements nor closing arguments of counsel constituted evidence. (App'x p. 6; pp. 183-191; pp. 793-796). The parties then proceeded to present their opening statements to the jury. (App'x pp. 191-202). During the solicitor's opening statement, the solicitor indicated the State intended to

prove Petitioner and Brother killed Victim. (App'x p. 192). During Petitioner's opening statement, Petitioner's defense counsel indicated there were two sides to every story and asserted conflicting stories would be presented during trial. (App'x p. 195; p. 197). During Brother's opening statement, Brother's defense counsel asserted Petitioner fired shots on the date of the incident, Victim was killed, and Brother fled to remove himself from the situation without participating in the shooting in any manner. (App'x pp. 198-199). Brother's defense counsel further opined Brother was only charged with a crime because he was not willing to go against Petitioner, who was his brother.[1] (App'x p. 199).

Thereafter, as the trial proceeded forward, Gregg, Washington, and Wingate all recounted the details of the incident, and they each identified Petitioner as the individual who shot and killed Victim. (App'x pp. 204-212; p. 248; pp. 253-256; pp. 280-288; pp. 297-298). In addition to that eyewitness testimony, the officers involved in the investigation into the shooting confirmed the eyewitnesses identified Petitioner and Brother from photographic line-ups shown to them on the date of the incident. (App'x pp. 351-352; pp. 395-397; p. 530). Additionally, testimony was presented establishing the exhaust pipe found at the scene of the crime was matched to the pipe missing from the green truck connected to the incident, a gun unrelated to the one used to kill Victim was found underneath Brother's bed shortly after the crime, gunshot residue was found on one of Petitioner's palms, a particle associated with gunshot residue was found on Petitioner's shirt and the back of one of Petitioner's hands, and a particle consistent with gunshot residue was found on the back of one of Brother's hands. (App'x pp. 370-371; pp. 374-375; pp. 379-381; pp. 410-411; p. 436; pp. 443-444; p. 448; pp. 469-470; pp. 472-473; p.

[1] Specifically, Brother's defense counsel stated: "The reason that [Brother] 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 with us, against his brother. He didn't do that from the beginning, and he's didn't exactly will do that now. That's why he's charged with a crime." (App'x p. 199).

489; p. 492; p. 507). Furthermore, testimony and evidence was presented establishing both Petitioner and Brother denied any involvement in Victim's murder. (App'x pp. 391-392; p. 399; pp. 502-503).

At the conclusion of the evidentiary phase of trial, the trial judge expressly reminded the jurors the arguments of counsel were not evidence, and the parties then proceeded to present their closing arguments to the jury. (App'x pp. 573-639). During the solicitor's closing argument, the solicitor identified and discussed the evidence of guilt that had been presented, including the unanimous eyewitness testimony establishing Petitioner was the gunman during the incident. (App'x pp. 574-599). During Petitioner's closing argument, Petitioner's defense counsel conceded eyewitness identification evidence was presented along with other evidence of guilt before focusing his remarks on purported weaknesses and inconsistencies with that evidence. (App'x pp. 599-619). Finally, during Brother's closing argument, Brother's defense counsel acknowledged the testimony of the eyewitnesses established Petitioner—and not Brother—shot Victim while arguing Brother was merely present during the purportedly unplanned killing. (App'x pp. 619-630; p. 635). Brother's defense counsel then concluded his closing argument with the following remarks:

> If [Brother] had his way I wouldn't be up here to concede, telling that [Petitioner] shot [Victim] and telling y'all what you already know, the fact you know, they were there and that [Petitioner] shot [Victim] and that [Brother] 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. When I sit down which I'm about to do, I have no more control over it. And I have to give whatever control that I have of that defense to y'all, and now y'all have the power. This is probably the most power you're ever gonna have unless one of y'all get a (inaudible) in some kind of phone calls. What I'm asking you to do is use that power wisely and exercise it justly, do the right thing. Find [Brother] not guilty 'cause that's the right thing to do;

> that's what the law says. Send him home with his mother and his family and son. It's the right thing to do. It may not be the easiest thing, but it's the right thing to do. Thank you.

(App'x pp. 638-639).

Following those remarks, the trial judge instructed the jury on the applicable law. (App'x pp. 641-665). In instructing the jury on the law, the trial judge specifically explained both defendants were presumed to be innocent until their guilt was proven by the State beyond a reasonable doubt, thoroughly defined reasonable doubt, and indicated the jurors *must* consider only the testimony presented from the witness stand along with any exhibits or stipulations introduced when deciding the case. (App'x pp. 643-647). Furthermore, the trial judge specifically advised the jurors they must considered the charges of each of the defendants separately and could convict one and not the other, acquit both, or convict both. (App'x pp. 656-657).

Subsequently, at the conclusion of trial, the jury convicted Petitioner as indicted while acquitting Brother of the charged offenses. (App'x pp. 678-679). The trial judge then sentenced Petitioner to life without parole in light of the evidence establishing Petitioner sought out and callously executed his victim. (App'x pp. 692-693).

**<u>Summary of the Post-Conviction Relief Proceedings</u>**

Following an unsuccessful appeal, Petitioner sought post-conviction relief on a number of grounds, including on the basis his defense attorneys were allegedly ineffective for failing to seek a severance and for failing to object or move for a mistrial based on statements made by Brother's defense counsel during trial. (App'x pp. 721-722; p. 733). During the ensuing evidentiary hearing, both of Petitioner's defense attorneys testified about the circumstances of Petitioner's trial. (App'x pp. 742-753; pp. 755-767). Specifically, Julie Rochester, Esquire, who

assisted Petitioner's primary defense counsel with the trial, indicated she believed Brother's defense counsel, whom she characterized as "credible, charming, [and] convincing," "stepped into [Brother's] shoes" through his remarks to the jury but could not be cross-examined on those remarks. (App'x pp. 744-745; pp. 748-751). Based on that, Rochester opined her and her co-counsel's failure to object to Brother's defense counsel's remarks or seek a severance was prejudicial to Petitioner. (App'x p. 749). Meanwhile, J. Richard Jones, Esquire, Petitioner's highly-experienced primary defense counsel, affirmed he believed the defense's biggest problem during trial was not Brother's defense but, instead, was the fact three eyewitness who observed the shooting in broad daylight testified against Petitioner. (App'x p. 755; p. 762). Beyond that, Jones indicated "perhaps" Brother's defense counsel's remarks could have been construed as him "becoming a witness." (App'x p. 757). However, Jones stated he personally interpreted Brother's defense counsel's remarks to be a reaffirmation of what the witnesses were already saying and an argument on facts that had been introduced into evidence through the witness testimony. (App'x p. 757; p. 760). Moreover, Jones asserted he did not believe Brother's defense counsel's remarks would have warranted the grant of a mistrial under the circumstances in which they were made. (App'x p. 761).

After that testimony was presented, post-conviction relief counsel argued Brother's defense counsel purportedly spoke for Brother through the remarks he made and, therefore, maintained he effectively created an issue somehow akin to a Bruton v. United States, 391 U.S. 123 (1968), violation. (App'x p. 775). Additionally, he argued Petitioner did not have "any sort of defense" based on Brother's defense counsel's comments and position. (App'x p. 775). Furthermore, post-conviction relief counsel contended Petitioner's case should have been severed from Brother's case despite the fact both were tried for crimes they were accused of

committing jointly. (App'x p. 775). In rebuttal, the State asserted Petitioner had no defense due to the testimony of the eyewitnesses to the crime as opposed to any comments made by Brother's defense counsel. (App'x p. 776). Furthermore, the State contended relief should be denied because a severance was not warranted under the circumstances of Petitioner's case and because nothing improper occurred in regard to Brother's defense counsel. (App'x pp. 776-777). At that point, the post-conviction relief judge took the matter under advisement. (App'x p. 777).

Thereafter, upon considering the matter, the post-conviction relief judge issued an order denying and dismissing Petitioner's application. (App'x pp. 780-792). In declining to grant relief, the post-conviction relief judge found Petitioner failed to establish either deficiency or prejudice in regard to his claims related to his defense counsel's failure to seek a severance or to challenge Brother's defense counsel's remarks in some manner. (App'x pp. 787-791). Additionally, the post-conviction relief judge found no specific trial right of Petitioner was violated by the joint trial and defense counsel's inability to cross-examine Brother's defense counsel following his closing argument remarks did not constitute a Bruton violation. (App'x pp. 790-791). Furthermore, the post-conviction relief judge found the evidence against Petitioner was overwhelming and not impacted in any manner by Brother's defense counsel's remarks. (App'x p. 791).

## ARGUMENT

**The post-conviction relief judge correctly determined Petitioner failed to establish his ineffective assistance of counsel claim because Petitioner's defense counsel did not provide objectively unreasonable representation by failing to seek an unwarranted severance or by failing to raise a challenge to appropriate remarks made by Petitioner's brother's defense counsel and because Petitioner suffered no actual prejudice as a result of his defense counsel's purported deficient representation in light of the overwhelming evidence of Petitioner's guilt that was presented to the jury.**

Petitioner contends the post-conviction relief judge erred by finding his defense counsel was not constitutionally ineffective. In support of that contention, Petitioner maintains Brother's defense counsel purportedly "spoke outside the record," vouched for the credibility of the eyewitnesses, conveyed he "knew what really happened," and implied Brother had "apparently" told him Petitioner was the person who shot Victim through his remarks to the jury. Based on that particular interpretation of Brother's defense counsel's remarks, Petitioner alleges his defense counsel was constitutionally ineffective for failing to take action and either move for a severance, object, or move for a mistrial in an effort to prevent or respond to the "improper strategy" employed by Brother's defense counsel. Importantly though, Brother's defense counsel did none of the things alleged by Petitioner on certiorari through his remarks to the jury. Instead, when his remarks are given a logical and reasonable interpretation and viewed in the proper context, Brother's defense counsel merely commented on the evidence presented *through testimony of the eyewitnesses* that unanimously established Petitioner—and not Brother—murdered Victim along with the reasonable inferences that could be drawn from that evidence in a legitimate effort to convince the jury Brother was not personally responsible for the charged crimes. Likewise, since Petitioner and Brother were jointly accused and indicted for the charged crimes based on the eyewitness testimony placing them together during the incident and no evidence was introduced during the joint trial that would have otherwise been inadmissible in an

individual trial of Petitioner, there were no proper or logical grounds necessitating a grant of a severance under the circumstances of Petitioner's case. Moreover, none of the asserted deficiencies could have resulted in any actual prejudice to Petitioner in light of the overwhelming evidence of Petitioner's guilt presented during trial. As a result, Petitioner's defense counsel did not render constitutionally ineffective assistance by failing to seek an unwarranted severance or by failing to raise a challenge to permissible remarks made by Brother's defense counsel, Petitioner wholly failed to meet his burden of establishing deficiency and prejudice, and the post-conviction relief judge correctly denied and dismissed Petitioner's application for post-conviction relief. Petitioner's petition for a writ of certiorari should also be denied.

**Standard of Review**

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the post-conviction relief judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the post-conviction judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## Analysis

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly, effective assistance of counsel does *not* mean perfect representation. See Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."); see also Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would

have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the burden of establishing both deficiency and prejudice in order to be entitled to post-conviction relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001). Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Id.; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to post-conviction relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[2] Strickland, 466 U.S. at 691. In order to for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112 (emphasis added).

In the case at bar, Petitioner failed to meet his burden of establishing his defense counsel's performance during trial fell below the prevailing standard of professional norms. Likewise, Petitioner further failed to establish he suffered any actual prejudice based on his defense counsel's performance that would have entitled him to a grant of post-conviction relief. Therefore, just as the post-conviction relief judge determined, Petitioner did not—and could not—meet his burden of establishing his defense counsel was constitutionally ineffective, and Petitioner's post-conviction relief application was properly denied.

Demonstrating that fact, Petitioner's defense counsel initially did not provide deficient representation by failing to seek a severance at any point before or during trial because a joint

[2] Notably, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective assistance of counsel claim on the grounds of lack of sufficient prejudice "[i]f it is easier" to do so. Id.

trial was wholly proper and warranted under the circumstances of Petitioner's case. Looking to the specific circumstances involved, the eyewitnesses reported Petitioner and Brother jointly came to the scene of the crime together, the two brothers jointly engaged in a conversation with Victim before Petitioner shot Victim while Brother stood nearby, and the two then fled from the scene together after the killing. Based on that, the allegations against Petitioner and Brother were highly related and connected, and the two were jointly implicated in the charged crimes. See Kansas v. Carr, __ U.S. __, 136 S. Ct. 633, 645 (2016) ("Joint proceedings are not only permissible but are often preferable when the joined defendants' criminal conduct arises out of a single chain of events."). Beyond that, no improperly or unfairly prejudicial evidence was admitted during the course of the joint trial that would have been inadmissible against either one of them during a separate trial. Likewise, neither Petitioner nor Brother was prevented from introducing essential exculpatory evidence that would have only been available if they had been tried individually. Finally, the trial judge presented proper jury instructions to ensure the jurors considered the charges against each of the defendants separately, which the jurors unquestionably did in light of the fact they convicted Petitioner of the indicted offenses while acquitting Brother. Under those circumstances, a joint trial was the most efficient and practical way to try Petitioner and his brother for their jointly-committed crimes, was fully warranted, and was necessary to avoid the needless repetition of identical evidence, including the testimony of each of the eyewitnesses to the shooting, in multiple trials. See State v. Dennis, 337 S.C. 275, 282-283, 523 S.E.2d 173, 176 (1999) (finding the trial judge properly denied a severance motion despite the fact Dennis's defense involved accusing his co-defendant of the charged crime where the State was alleging Dennis and his co-defendant jointly participated in the crime, the trial judge gave a cautionary instruction, and neither defendant was able to identify a specific trial

right prejudiced by the joint trial); see also Zafiro v. United States, 506 U.S. 534, 539 (1993) (instructing joint trials are preferred and recognizing situations in which one might be improper typically occur when prejudicial evidence that would not be admissible against one defendant is admitted against a co-defendant, when there is a marked difference in the degrees of culpability between different defendants, or when essential exculpatory evidence would be available to a defendant only if he or she was tried alone); cf. State v. Stuckey, 347 S.C. 484, 497, 556 S.E.2d 403, 410 (Ct. App. 2001) ("[H]ad the court granted the motions, the result would been multiple presentations of the State's entire case, including the lengthy testimony of the two primary witnesses[.]"). As a result, Petitioner's defense counsel was not ineffective for failing to seek a severance that was not justified for any apparent reason appearing in the record and that the trial judge had no logical reason to grant. See Hughes, 346 S.C. at 558, 552 S.E.2d at 317 (instructing criminal defendants in South Carolina indicted for connected crimes are not entitled to separate trials as a matter of right and ordinarily may be jointly tried together); see also United States v. Chorman, 910 F.2d 102, 114 (4th Cir. 1990) ("Barring 'special circumstances,' the general rule is that defendants indicted together *should be tried together*." (emphasis added and citation omitted)).

Moreover, Petitioner's defense counsel similarly did not provide deficient representation by failing to raising any challenges to Brother's defense counsel's remarks to the jury because those remarks were not improper and, instead, were permissible and reasonable comments on the evidence along with the reasonable inferences that could be drawn from it. See State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (recognizing counsel must stay "within the record and its reasonable inferences" when making remarks to the jury but "may argue with reference to any matters which the jurors may properly consider in arriving at their verdict" and "may point

out as well the matters which they should not consider" (citations and internal quotations omitted)). Looking to Brother's defense counsel's remarks during his opening statement, Brother's defense counsel argued to the jury he believed Brother was on trial for Victim's murder merely because he had not implicated—and was not planning on implicating—his brother, Petitioner. Critically, that was a logical inference that could be drawn from the circumstances of the case since the eyewitnesses had all unanimously identified Petitioner—and not Brother—as the shooter while Brother had denied involvement in the incident. Similarly, looking to Brother's defense counsel's closing argument remarks, Brother's defense counsel reiterated the evidence presented established Petitioner and not Brother had shot Victim while explaining to the jury Brother would have preferred he not make that particular evidence-based concession. Once again, those remarks were fully supported by the evidence presented, and it was reasonable under the circumstances to infer Brother, who had neither testified against Petitioner nor offered any incriminating evidence against him, would not have wanted his own brother to be blamed for or convicted of the killing. See Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (finding an argument to the jury was not improper and did not warrant a grant of post-conviction relief where it was based on evidence in the record). Thus, those remarks were entirely proper and, when given a logical interpretation and viewed in the proper context, in no way implied Brother's defense counsel was somehow alluding to out-of-court information he had received from Brother regarding Petitioner's culpability.[3] See

[3] Notably, even assuming Brother's defense counsel's remarks somehow could have been construed as referring to something other than the evidence presented and the reasonable inferences that could be drawn from it, the jurors were repeatedly instructed the arguments of counsel were not evidence, which ensured the jurors would not have incorrectly treated the arguments of Brother's defense counsel as evidence during their deliberations. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.").

Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (instructing courts "should not lightly infer" a jury will draw the most damaging meaning from closing argument remarks); see also State v. Brown, 333 S.C. 185, 191, 508 S.E.2d 38, 41 (Ct. App. 1998) (explaining any alleged impropriety regarding counsel's remarks to the jury must be examined in light of the entire record). Accordingly, even though Brother's defense counsel unquestionably attempted to shift the blame for the crimes to Petitioner as was warranted by the evidence, Brother's defense counsel's remarks were not objectionable or improper and certainly would not have justified a grant of the extreme remedy of a mistrial. See Dennis, 337 S.C. at 282-283, 523 S.E.2d at 176 (recognizing mutually antagonistic defenses generally involve each defendant accusing the other of the charged crime); State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."); see also Zafiro, 506 U.S. at 538 ("Mutually antagonistic defenses are not prejudicial per se."); United States v. Dinkins, 691 F.3d 358, 369 (4th Cir. 2012) ("[M]utually antagonistic defenses are not necessarily prejudicial. Hostility among defendants, and even a defendant's desire to exculpate himself by inculpating others, do not of themselves qualify as sufficient grounds to require separate trials." (citations omitted)). As a result, Petitioner's defense counsel was not ineffective for failing to challenge Brother's defense counsel's permissible and appropriate remarks to the jury. See State v. Lunsford, 318 S.C. 241, 247, 456 S.E.2d 918, 922 (Ct. App. 1995) (recognizing the burden is on the party seeking relief to establish remarks made to the jury resulted in material prejudice to such an extent the party was denied a fair trial); see also 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."); cf. State v. Spears, 393 S.C. 466, 477, 713 S.E.2d 324, 329 (Ct. App. 2011) ("Spears . . . argues severance was warranted because he suffered prejudice during [his co-defendant]'s closing argument, which emphasized the plethora of evidence against Spears in contrast to the scant evidence against [the co-defendant]. We disagree. South Carolina law provides that mutually antagonistic defenses, or the possibility that codefendants may accuse each other of the crime, does not necessarily warrant a severance.").

Finally, notwithstanding Petitioner's failure to establish deficiency on the part of his defense counsel, Petitioner additionally failed to establish he suffered any actual prejudice because his defense counsel's alleged deficient performance could not have had any impact on the outcome of the proceedings under the circumstances of the case. Critically, three separate eyewitnesses identified Petitioner as the person who murdered Victim shortly after the shooting from a photographic line-up, and all three of those witnesses identified Petitioner as the shooter without any hesitation during trial. Beyond the eyewitnesses' identifications and testimony, Petitioner was arrested in close proximity to the scene of the shooting shortly after it was committed near a green truck parked outside his residence that was confirmed to have been the vehicle connected to the incident through a broken exhaust pipe that was inadvertently abandoned at the scene when the shooter and his accomplice fled. Finally, gunshot residue and particles associated with it were found on Petitioner's shirt and hands after he was arrested in connection to the killing. In light of that overwhelming evidence of guilt, neither Petitioner's defense counsel's failure to seek an unwarranted severance, which would not have prevented the introduction of any of the evidence introduced during trial, nor the failure to challenge Petitioner's defense counsel's remarks, which did not alter the strength of the evidence presented, could have had any impact on the outcome of Petitioner's trial. See Rosemond v.

Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (concluding Rosemond was not prejudiced by his defense counsel's improper remarks to the jury in light of the overwhelming evidence of guilt presented during the guilt phase of trial). Accordingly, Petitioner did not—and could not—satisfy his burden of establishing there was a substantial likelihood the outcome of his trial would have been different had his defense counsel attempted to seek an unwarranted severance or to challenge Brother's defense counsel's permissible remarks. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Because Petitioner's defense counsel's failure to seek an unwarranted severance or challenge Brother's defense counsel's evidence-based remarks did not constitute objectively unreasonable representation falling below a standard of professional norms and because Petitioner did not suffer any actual prejudice as a result of his defense counsel's representation, the post-conviction relief judge correctly concluded Petitioner failed to meet his required burden of establishing both deficiency and prejudice, and his ruling was neither unsupported by the evidence appearing in the record nor clearly erroneous. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (instructing a post-conviction relief judge's factual finding will be upheld if supported by any evidence and a post-conviction relief's judge's decisions will only be reversed where controlled by an error of law). Accordingly, Petitioner's application for post-conviction relief was properly denied and dismissed. See Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Petitioner's petition for a writ of certiorari should likewise be denied.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: ______________________
Mark R. Farthing

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ATTORNEYS FOR RESPONDENT

April 12, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
APR 12 2019
S.C. SUPREME COURT

On Writ of Certiorari to Darlington County
Honorable Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2018-000555

JOSHUA A. REED,

Petitioner,

vs.

THE STATE,

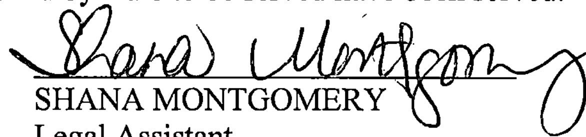
Respondent.

## PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Return to Petition for Writ of Certiorari on Petitioner by sending two copies of the same to:

Joanna K. Delany, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 12th day of April, 2019.



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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 12 2019
S.C. SUPREME COURT

April 12, 2019

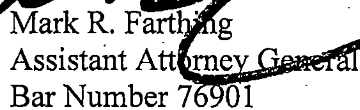
Joanna K. Delany, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: Joshua A. Reed v. State – Appellate Case No. 2018-000555

Dear Ms. Delany:

I am enclosing two copies of the Return to Petition for Writ of Certiorari, along with proof of service, in the above-referenced case.

Sincerely,



Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Victim Services