STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Darlington County

Roger E. Henderson, Circuit Court Judge

JOSHUA A. REED,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000555

BRIEF OF PETITIONER

JOANNA K. DELANY
Appellate Defender

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

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Rules

ISSUE PRESENTED

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

During the January term of 2013, a Darlington County Grand Jury indicted Joshua Reed, Petitioner, for the murder of Milton Hunter and for possession of a weapon during the commission of a violent crime. App. 793 – 796. Petitioner's brother, Johnathan Reed, was identically charged. On October 21 – 24, 2013, Petitioner and his codefendant brother were tried jointly before the Honorable Howard P. King, and a jury. App. 1; App. 566, ll. 15-16. Julie Wooten Rochester and Richard Jones represented Petitioner. Matthew Swilley represented Petitioner's codefendant. John Holt, IV, and Patti Parker represented the State. App. 1.

Petitioner was convicted as indicted and he was sentenced to life imprisonment for murder and to a concurrent five year term for the weapons charge. App. 678, ll. 16-25; App. 693, ll. 4-12. Petitioner's codefendant was found not guilty. App. 679, ll. 8-13.

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) 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. An evidentiary hearing was held on the matter January 16, 2018, before the Honorable Roger E. Henderson. App. 735. Lance Boozer represented Petitioner and Johnny James, Jr., represented the State. App. 735. The PCR court heard testimony from Petitioner's trial counsel, Julie Rochester and Rick Jones, and from the solicitor, John Holt. App. 736.

On March 21, 2018, the PCR court issued an order of dismissal. App. 780. On November 3, 2020, this Court granted the petition for writ of certiorari.

This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018) (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)). "We review questions of law de novo, with no deference to trial courts." *Id*. (citing *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527; *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

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.

Johnathan Reed's attorney, Swilley, told the jury that he, Swilley, personally knew Petitioner Joshua Reed was guilty and Johnathan Reed was not. Swilley represented this was based on his insider knowledge of Johnathan's side of the story—knowledge which he obtained due to his role as Johnathan's lawyer. These were facts not in evidence. Defense counsel's failure to respond to Swilley's improper remarks was ineffective assistance of counsel.

Relevant facts

Around two-o'-clock in the afternoon of February 15, 2012, Milton "Wop" Hunter was eating Yogi Bear's fried chicken in a Hartsville park with his sister when two men walked up and one of the men shot Hunter in the head and killed him. App. 204, l. 2 – 208, l. 22; App. 290, ll. 19-23; App. 115, ll. 12-14. Hunter's sister Asia Gregg (Gregg) initially told police officers she did not know who shot the decedent but a day or two later she told officers the two men were the "Rail" brothers. App. 518, l. 4 – 519, l. 2; App. 226, l. 14 – 228, l. 1.

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. Gregg told police officers that Johnathan Reed was the shooter. Later said she had a "mix-up" and claimed Petitioner was the shooter. App. 208, ll. 13-14; App. 226, l. 25 – 227, l. 17; App. 248, l. 17 – 249, l. 8. Gregg said

she knew Petitioner and Johnathan Reed because they attended Hartsville High School together; Gregg was "two grades above" Petitioner. App. 70, l. 24 – 71, l. 5; App. 225, ll. 5-9.

Petitioner and his brother Johnathan Reed both denied involvement in the crime when questioned by police. App. 391, l. 23 – 393, l. 5. Petitioner and Johnathan Reed were tried jointly for murder and possession of a weapon during a violent crime. App. 1; App. 6, ll. 1-9. The State alleged that Petitioner was shooter. App. 575, ll. 12-14. Richard Jones and Julie Wooten Rochester represented Petitioner. App. 1; App. 736, l. 3. Matthew Swilley represented Johnathan Reed. App. 1; App. 205, ll. 15-16.

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.

Defense counsel did not make any objection or motion in response to this statement by Swilley. Co-counsel Rochester later recalled that she had realized the codefendant would probably 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.

The decedent's sister, Gregg, alleged for the very first time at trial that both Petitioner and Johnathan Reed had guns, and she denied attempting to mislead police officers when she told them only one brother had a gun during their investigation. 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 Washington, he was at the park with Gregg because Gregg was his "baby momma." App. 253, ll. 9-24. Washington was impeached with prior burglary convictions. App. 264, ll. 23-25. The other man, Anthony Wingate, said 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. Johnny Lee Washington claimed he and Anthony Wingate were cousins, but Wingate denied the men were related. App. 262, ll. 3-5; App. 290, ll. 8-14.

Even though Gregg and Washington knew the Reeds prior to the shooting, neither immediately identified the suspects as the Reeds to responding officers. Wingate did not initially identify the suspects as the Reeds either although Wingate claimed he only knew the Reeds through their grandfather. App. 225, ll. 2-7; App. 267, ll. 5-8; App. 517, l. 21 – 521, l. 7; App. 454, l. 15 – 455, l. 19; App. 289, ll. 13-22. Nevertheless, Gregg, Washington, and Wingate picked Petitioner and Johnathan Reed out of photographic lineups. App. 213, ll. 13-23; App. 257, ll. 7-16; App. 288, ll. 6-14.

A tailpipe that fell off the assailants' 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 Anthony 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 Johnny Lee 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 Asia 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** [you] **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.

As seen, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel and a hearing was held on the matter January 16, 2018, before the Honorable Roger E. Henderson. App. 735. Lance Boozer represented Petitioner and Johnny 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 explained 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 counsel Julie Rochester agreed the defense should have moved to sever, objected, or moved for a mistrial. App. 749, ll. 7-25; App. 750, ll. 10-17. As seen, Rochester said she realized the codefendant could likely present an "adverse defense" during pretrial motions. 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.

Trial counsel 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 three eyewitnesses did not immediately identify the Reed brothers, even though they knew the Reed brothers. 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,

[1] *Bruton v. United States*, 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.

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 Rick Jones'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 [Johnathan Reed] 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.

In its order of dismissal, the PCR court found that Swilley's "remarks that he was arguing contrary to his own client's wishes **did comprise an unusual comment on his own client's silence**, **and offered an explanation not otherwise in evidence**." App. 791 (emphasis added). Nevertheless, 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 initially avert the situation by moving for severance. App. 787 – 791. The PCR court found no prejudice, ruling the remarks "did not serve to impugn or inculpate [Petitioner], but only explained why Johnathan did not testify." App. 791. The order of dismissal also stated that the "evidence against [Petitioner] was overwhelming, in the form of three eyewitnesses and a positive test for GSR on [Petitioner]." App. 791.

Discussion

Counsel was deficient in failing 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, although Swilley was not subject to cross-examination.

i. Deficiency

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 the 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).

Here, counsel provided ineffective assistance by failing to secure Petitioner's right to confront the witnesses against him. Swilley essentially testified, claiming that he knew Petitioner was guilty and Johnathan was not guilty by virtue of his insider knowledge as Johnathan's lawyer. PCR counsel correctly argued that counsel's performance was deficient since counsel "fail[ed] 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.

Counsel had several avenues available he could have taken in response to, or in anticipation of, Swilley's remarks. Counsel could have moved for a severance. Counsel could have objected and moved to strike, based on the Confrontation Clause, based on the Rules of Professional Conduct, or based on vouching. Counsel could have moved for a mistrial. But, counsel did nothing.

Counsel could have objected pursuant to the Sixth Amendment and *Crawford*, since Petitioner was unable to cross-examine Swilley, who was not a witness. "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. "[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).

Counsel could have also objected based on the Rules of Professional Conduct, since 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).

Counsel could have objected to Swilley's comments as vouching. 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*.

"Typically, vouching occurs when the prosecution comments on a witness's credibility in its opening statement or closing argument." *State v. Kelly*, 343 S.C. 350, 369, 540 S.E.2d 851, 860 (2001), *rev'd on other grounds by Kelly v. South Carolina*, 534 U.S. 246 (2002). *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); *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (granting new trial where solicitor vouched for the credibility of the victim in closing argument and where the solicitor's statements "misrepresented the evidence at trial.")

The improper bolstering and vouching in *Kelly* occurred when the solicitor asked a witness, "What did **I** tell you that **I** absolutely required regarding your testimony to this jury today?" and "Did **I** tell you to tell the truth to this jury." *Kelly*, 343 S.C. at 368, 540 S.E.2d at 860 (emphasis added). Because the solicitor linked himself to the witness' credibility, the Supreme Court "found the jury could have perceived the assistant solicitor held the opinion the witness was, in fact, telling the truth." *Shuler*, 344 S.C. at 630, 545 S.E.2d at 818. In *Shuler*, the Supreme Court explained that in *Kelly*, the solicitor "improperly phrased his questions in the first person." *Id*. Here, as in *Kelly*, Swilley's use of the first person was improper. Swilley said, "If Johnathan had his way **I** wouldn't be up here to concede, telling [you] that Joshua shot [the

decedent] . . . 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).

Swilley 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 special position as Johnathan Reed's attorney, knew what really happened, and it happened as the State's witnesses claimed. This was vouching and it was an improper assertion by Swilley that in his independent judgment, Petitioner was guilty and the State's witnesses were telling the truth when they testified that Petitioner shot the decedent.

As co-counsel Rochester admitted, hearing this "evidence" from Swilley was much more effective than hearing it from Johnathan Reed would have been because Swilley was "credible, charming, [and] convincing." App. 750, l. 21 – 751, l. 1. To boot, Swilley was not subject to cross-examination.

Defense counsel might have also anticipated the codefendant's adverse defense and moved for severance. In *Bruton v. United States*, 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. A severance should therefore be granted "when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." *State v. Garrett*, 350 S.C. 613, 620, 567 S.E.2d 523, 526 (Ct. App. 2002), quoting *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001). Here, the joint trial

compromised Petitioner's right to confrontation and Swilley's comments prevented the jury from reliably determining Petitioner's guilt.

Counsel could also have objected and moved for a mistrial given Swilley's comments that Swilley knew from insider information not offered in evidence that Petitioner shot the decedent and his client, Johnathan Reed, merely ran away. "Whether a mistrial is manifestly necessary is a fact specific inquiry." *State v. Rowlands*, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000). *See State v. Johnson*, 390 S.C. 600, 606-07, 703 S.E.2d 217, 220 (2010) (where "*Bruton*-type" error violated hearsay rules and defendant's Confrontation Clause rights, trial court committed reversible error when it refused to grant mistrial); *State v. Jackson*, 410 S.C. 584, 609, 765 S.E.2d 841, 854 (Ct. App. 2014) (evidence admitted in violation of defendant's Confrontation Clause rights required new trial). Here, as in *Johnson*, a "*Bruton*-type" error violated Petitioner's confrontation rights, a factual scenario under which the grant of a mistrial would have been proper.

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. Counsel's failure to act was deficient performance. *Strickland*, 466 U.S. at 687-88.

ii. Prejudice

"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).

Here, defense counsel's errors undermine confidence in the outcome of the trial since Swilley, who was not subject to cross-examination, remarked on evidence not in the record—that Johnathan Reed did not testify because he was a good brother, even though Johnathan knew Petitioner was guilty. Swilley said that although Johnathan Reed refused to testify, he, Swilley, would tell the jury what Johnathan Reed told him—that Petitioner shot the decedent. These comments were devastatingly prejudicial given Petitioner's inability to cross-examine Swilley.

The evidence against Petitioner was not overwhelming. For evidence to be "overwhelming" such that it categorically precludes a finding of prejudice: "the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability the factfinder would have had a reasonable doubt' cannot possibly be met." *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) (alterations omitted).

The credibility of the three eyewitnesses (Gregg, Wingate, and Washington) was suspect. Although all three claimed to know Petitioner and Johnathan Reed, none of them initially identified the Reeds as the assailants to police officers. Gregg initially told police she did not know who shot the decedent. Then she told officers she did know who shot the decedent—the "Rail" brothers. Gregg then told officers the shooter was Johnathan Reed, before next claiming the shooter was Petitioner. These "mix-ups" were despite the fact that Gregg claimed she knew both Petitioner and Johnathan Reed because they had attended small-town Hartsville High School together. The jury heard Gregg was a convicted arsonist. Gregg also either lied to the police when she told them only one assailant had a gun, or she lied to the jury when she testified

at trial that both assailants had guns. Of the remaining two eyewitnesses, Wingate was drinking vodka in the public park at two-o'-clock on a Wednesday afternoon and Gregg's boyfriend Washington was a convicted burglar. Wingate and Washington disputed whether they were related to each other—one man claimed they were, the other man claimed they were not.

Gunshot residue particles were found on the hands of both Petitioner and Johnathan Reed. The murder weapon was never found. Petitioner denied involvement in the crime when questioned by police. The PCR court's finding that prejudice was precluded by overwhelming evidence here was in error. *Smalls v. State*, 422 S.C. at 191, 810 S.E.2d at 845. Under these circumstances, there was a reasonable probability the result of the trial would have been different absent counsel's deficient performance. *Tappeiner v. State*, 416 S.C. at 251, 785 S.E.2d at 477.

Swilley's improper strategy was extraordinarily effective—his client was acquitted and Petitioner was convicted. Counsel's failure to prevent or respond in any way to Swilley's objectionable misrepresentation of evidence was ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 687.

CONCLUSION

Based on the foregoing argument, this Court should reverse the PCR court and grant Petitioner a new trial.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of November, 2020.