STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

JOSHUA A. REED,

Petitioner,

vs.

THE STATE,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

Through an unpublished decision issued on March 2, 2022, this Court affirmed the post-conviction relief judge's ruling rejecting Petitioner Joshua A. Reed's claim his defense attorneys were constitutionally ineffective. Reed v. State, Op. No. 2022-UP-083 (S.C. Ct. App. filed Mar. 2, 2022). In doing so, this Court correctly concluded Reed was not sufficiently prejudiced by any of defense counsel's purported deficiencies during trial to warrant a grant of post-conviction relief. However, this Court further found defense counsel's performance was deficient because defense counsel failed to object to statements made by counsel for Reed's brother—and co-defendant—that allegedly: (1) explained why Reed's brother did not testify during trial; and (2) implied he possessed knowledge gained from Reed's brother that indicated Reed was the shooter. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent ("the State") respectfully petitions for rehearing because this Court appears to have overlooked and

misconstrued two important points when finding defense counsel's performance during trial was, in fact, deficient.[1]

First, this Court appears to have overlooked the fact it was not necessary to address the question of deficiency in Reed's case in light of this Court's resolution of the question of prejudice. Significantly, as the United States Supreme Court has explained, a court addressing an ineffective assistance of counsel claim "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 v. Washington, 466 U.S. 668, 697 (1984). Since this Court examined the question of prejudice and determined Reed failed to establish he suffered the requisite prejudice needed to warrant a grant of post-conviction relief, the post-conviction relief judge's ruling denying relief necessarily had to be affirmed. See Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001) ("[A] PCR applicant must show *both* error and prejudice to win relief." (emphasis added)). Under such circumstances, there was no need to also address the question of whether defense counsel's performance was deficient, and, thus, this Court should reconsider its decision to unnecessarily analyze the reasonableness of defense counsel's performance in light of the fact the resolution of such a matter would not—and did not—have any impact in Reed's case based on the conclusiveness of the absence-of-prejudice determination. See Strickland, 466 U.S.

[1] Although this Court correctly affirmed the post-conviction relief judge's ruling denying Reed's application for post-conviction, the State is currently seeking rehearing solely for the purpose of best ensuring its arguments concerning Reed's defense counsel's performance are not waived or foreclosed in any future proceedings that potentially may occur in Reed's case. See State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (instructing an unappealed ruling—regardless of whether it is right or wrong—becomes the law of the case); cf. State v. Humphries, 354 S.C. 87, 91, n. 2, 579 S.E.2d 613, 615, n. 2 (2003) (declining to address an additional sustaining ground raised by the State that was founded upon a contention the Court of Appeals incorrectly held the trial judge erred).

at 697 (explaining 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).

Second, this Court appears to have overlooked the fact Reed's defense counsel did not provide deficient representation by failing to raise any challenges to Reed's brother's defense counsel's remarks to the jury. That is true because Reed's brother's counsel's 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.[2] 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 closing argument remarks currently at issue in Reed's case, Reed's brother's counsel merely reiterated through those remarks the evidence that had been presented during trial established Reed and not Reed's brother had fatally shot the victim while explaining to the jury Reed's brother would have preferred he not make that particular *evidence-based* concession. Critically, those remarks were fully supported by the evidence presented, and it was reasonable under the circumstances to infer Reed's brother, who had neither testified against Reed nor—based on the testimony presented—offered any incriminating evidence against him at any point, 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

[2] Based on his testimony, Reed's highly-experienced primary defense counsel viewed Reed's brother counsel's remarks as being based on the evidence presented. (App'x p. 760). Notably, it would have been exceedingly reasonable for the jurors to have viewed those remarks in precisely the same manner since the trial judge explained to them the closing arguments were "not evidence" and, instead, "simply" reflected counsel's "views of what [counsel] thinks *the evidence shows*." (App'x p. 573) (emphasis added).

jury was not improper and did not warrant a grant of post-conviction relief where it was based on evidence in the record); cf. United States v. Sandini, 888 F.2d 300, 310-311 (3d Cir. 1989) ("There is no merit to Thomson's contention that Kost's attorney's remarks in closing argument were tantamount to a confession by Kost, inculpatory as to Thomson, within Bruton v. United States[.] . . . We have . . . never held that Bruton applies when the attorney for a co-defendant implicates a defendant during a closing argument and we perceive of no reason to do so because the arguments of counsel are simply not evidence. Bruton is directed toward preserving a defendant's right to cross-examination, and thus has *nothing to do with arguments of counsel based on their interpretation of the evidence*. Indeed, in this case, as is usual, the court . . . informed the jury that the arguments of counsel do not constitute evidence." (emphasis added and citation omitted)). Thus, those remarks were not improper and, when given a logical interpretation and viewed in the proper context, in no way implied Reed's brother counsel was somehow alluding to out-of-court information he had received from his client regarding Reed's culpability. See 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 Reed's brother's counsel unquestionably attempted to shift the blame for the crimes to Reed as was warranted by the evidence, Reed's brother's counsel's remarks were nonetheless not objectionable or improper. See State v. Dennis, 337 S.C. 275, 282-283, 523 S.E.2d 173, 176 (1999) (recognizing mutually antagonistic defenses generally involve each defendant accusing the other of the charged crime); see also Zafiro v. United States, 506 U.S. 534, 538 (1993) ("Mutually antagonistic defenses are not

prejudicial per se."). And, as a result, Reed's defense counsel's performance was not constitutionally deficient under the applicable standard based solely on defense counsel's failure to raise an unwarranted objection to those remarks. See Dunn v. Reeves, __ U.S. __, 141 S. Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that *no* competent lawyer would have chosen." (emphasis added and citation, internal quotations, and brackets omitted)). Under such circumstances, this Court should reconsider its finding of deficiency in Reed's case, which—as previously noted—was unnecessary to the resolution of the matter on appeal.

For all the foregoing reasons coupled with the reasons articulated in the State's brief and during oral argument before this Court, the State respectfully requests this Court reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, and issue a new opinion correctly affirming the post-conviction relief judge's ruling in total. In the alternative, the State respectfully asks this Court to reconsider this matter, vacate its prior opinion, issue a new opinion correctly affirming the post-conviction relief judge's ruling based on Petitioner's inability to establish prejudice, and avoid unnecessarily addressing the matter of whether trial counsel's performance was deficient.

Respectfully submitted,

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March 17, 2022

STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Respondent's Petition for Rehearing on Petitioner by sending an electronic copy via email to the address listed in AIS for the following individual:

Joanna K. Delany, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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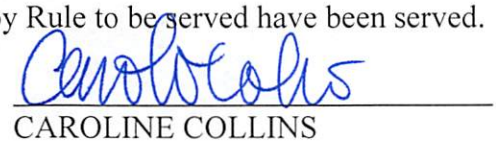
I further certify all parties required by Rule to be served have been served.
This 17th day of March, 2022.



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From: Caroline Collins
Sent: Thursday, March 17, 2022 4:41 PM
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Subject: Joshua A. Reed v. The State (2018-000555)
Attachments: Reed.Pet for Rehearing (02927770xD2C78).PDF

Good Afternoon Ms. Delany,

Attached please find the Respondent's Petition for Rehearing in Joshua A. Reed v. The State (2018-000555). This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt.

Thank you!

CAROLINE COLLINS, Administrative Coordinator
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