STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOVAN T. MULL,

Defendant-Appellant.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

This is an intensely fact-dependent appeal presenting nothing more than the routine application of settled precedents governing ineffective assistance of counsel claims. After years of litigation, the court of appeals recently reversed and remanded for a new trial, concluding that trial counsel had acted unreasonably in failing to adequately defend Jovan. The resulting decision is unpublished and uncitable; it creates no precedent and cannot feasibly have any impact on any case other than this one.

A careful review of the voluminous record, the multiple trial and appellate briefs, and the decision of the court of appeals makes clear that the outcome of the litigation below is not only supported by well-settled, binding precedent, but is also defensible under an equally forceful authority—plain commonsense. Jovan was convicted of murder following a trial which omitted numerous pieces of evidence tending to suggest not only that someone else committed the crime, but that this person was a key witness for the State—Vashawn Smith. As a result, Jovan is serving a lengthy prison sentence without any jury ever considering, for example, the fact that Vashawn was identified as the shooter by an uncalled eyewitness.

The State, for its part, largely failed to adequately litigate this case in the court of appeals. The State made bizarre and inconsistent arguments, misstated the record evidence, and wholly failed to

respond to key portions of Jovan's brief. Based on the record evidence and the governing law, the court of appeals therefore acceded to precedent and commonsense, reversing and remanding for a new trial.

However, instead of accepting that outcome, the State has now asked this Court for the legal equivalent of a do-over. Unhappy with the result below—and unwilling to admit its own errors—the State has contrived a tendentious reading of the lower court decision and the underlying facts. It invents reasons for this Court to grant review which, when closely examined, are merely undeveloped requests for "error" correction.

This Court should therefore reject the State's petition for review and allow Jovan a second opportunity to prove his innocence before a jury of his peers. If, however, it disagrees and opts to grant review, Jovan would ask this Court to consider granting a new trial in the interest of justice.

STATEMENT OF FACTS

Shooting and Initial Investigation[1]

[1] The decision of the court of appeals is noteworthy for its deep dive into the complex record evidence and careful delineation of the evidentiary picture. Jovan believes that this Court can fully rely on that account. However, in the interest of total clarity, he presents these additional factual assertions for the Court's consideration.

Jovan was convicted, following a jury trial, of the reckless homicide of Ericka Walker. Ericka was, by all accounts, an unintended victim of an essentially random crime. According to the police reports now in the appellate record, Ericka did not even know her home was going to be the site of a raucous party for LGBT teens until partygoers literally began lining up outside her door. (82:40; 83:7). Unbeknownst to Ericka, her home had been volunteered as the relocated venue for a reoccurring house party after police shut down that gathering at a different location earlier that night. (84:11).

While Ericka had previously hosted parties for the young LGBT crowd, this party was unique—and uniquely dangerous—because it was a "mixed" party which both gay *and* straight partygoers were welcome to attend. (82:40). Such parties were notable, according to one attendee, for the way in which they usually degenerated into fights between the two groups of partygoers. (82:40).

On this occasion, it did not take long for things to become heated. A fight erupted between some of the LGBT attendees and was watched, with interest, by a group of straight partygoers which included Vashawn Smith and his friend Menjuan Bankhead. (135:64). After the first fight was broken up, tensions continued to build. Davion Crumble, one of the participants and a houseguest at Ericka's residence, was "still mad and wanted to continue to fight." (83:59).

At this point, Davion bumped into Vashawn. (135:65; 82:34). Davion, who Vashawn later described as possibly intoxicated, angrily told Vashawn not to bump into him. (135:65). At around the same time, a straight partygoer was heard to call the LGBT attendees "bitch ass fags." (83:5). A second fight broke out, with Davion on one side and Vashawn and 3-4 of his friends on the other. (82:34).

At some point, Davion retreated into a nearby bedroom, most likely after first attacking Vashawn's friend Menjuan with a taser. (82:43; 83:8). A witness then saw the "straight man" who had been "arguing" with Davion, accompanied by two other men, trying to enter the bedroom into which Davion had retreated. (82:38). The witness' account was corroborated by Alphonso Carter, who noticed that two of those men were armed. (135:124; 83:21). He heard one of the men say, "Shoot in there." (135:124). Police eventually spoke with another eyewitness, Jalyn Lynch, who told police that this individual was Vashawn's close friend Menjuan, and asserted that they heard "Bankhead yelling shoot, shoot into the door, after seeing him with the gun." (84:52). Eventually, they heard Menjuan state, "Shoot through that motherfucker." (84:52). At this point, someone did just that, fatally wounding Ericka. (83:60).

Vashawn was then identified as the shooter, by an eyewitness named Keshawna Wright, shortly after the crime occurred. (82:56). Police also knew that Cheyenne Pugh, the ex-girlfriend of the victim, had received text messages informing her that Vashawn

had shot and killed Ericka while intending to hit one of the "fags" inside. (82:54). While Casie James, a friend of Vashawn's, initially told police that Vashawn was with her outside when the shots were fired, she later changed her story and placed him inside when the murder occurred. (83:23-25).

Vashawn was therefore arrested, at his probation agent's office, as the suspected killer. (82:57-58). Although Vashawn admitted to being involved in the fight and, by virtue of his statement, placed himself at the scene of the crime, he responded to the probing questions of law enforcement by pointing the blame toward Jovan (not yet identified as a suspect), telling police that he saw Jovan pointing a gun after the shots were fired. (83:8). His decision to blame Jovan is an interesting one; according to his statement to police, there was animus between the two men. (83:7).

Despite Vashawn's statement inculpating Jovan, police kept pushing. Vashawn was confronted with Facebook photos suggesting he had committed the crime of possessing a firearm as a felon. (83:9). Police also continued to interrogate him multiple times, telling him at one point that he had not been "honest" with them. (83:14). In response to this continued pressure, Vashawn caved, and told police that he had been withholding information inculpating his friend, Tyler Harris. (83:15). According to Vashawn, Tyler had actually admitted to committing the crime shortly after it occurred. (83:15).

Police therefore continued to investigate Vashawn and his two friends. Tyler was identified by an additional witness as possessing a gun at the party. (84:21-22). Although Vashawn's friend Menjuan would later try to distance himself from Tyler, Tyler told police that he went out that evening in the company of both men. (84:21-22; 83:34).

Menjuan, for his part, admitted that he was wearing clothing matching that of the shooter. (83:32). He told police he could not account for Vashawn's whereabouts when the actual shots were fired and told police that his friend had been "stressed out and laying low" after the shooting. (83:33-34). However, Menjuan ultimately asked police to talk to his friend Sanchez Harris, who would allegedly corroborate the claim that it was Jovan who committed the crime. (83:35).

Sanchez told police Jovan "had to be" the shooter and identified him as such in a photo lineup. (83:43: 84:1). Likewise, at least two other partygoers also identified Jovan as the shooter, although one—Desmand Butler—would recant that identification during his trial testimony. (84:5; 84:8). At least three other witnesses— Keshawna Wright, Charles Cantrell and Elicia Burrows—failed to identify Jovan as the shooter. (83:48; 84:25; 84:27). Likewise, Jalyn Lynch told police they did not see Jovan at the party after having been shown a photograph of him. (83:50).

In addition to witness statements, law enforcement also utilized a snitch—Jovan's codefendant in another felony case. (83:53). That

individual told police—after having been arrested for numerous serious felonies—that Jovan had admitted to the shooting. (83:54).

The Trial

Notably, despite the significant investigation into Vashawn and his friends, Jovan was the only person charged with any crime stemming from the shooting. While Vashawn was charged with possession of a firearm as a felon based on conduct prior to this shooting as a result of the evidence developed in this investigation, that charge was dismissed prior to his testimony against Jovan by the same prosecutor who represented the State at Jovan's eventual trial. (84:58).

In its opening statement, counsel for the State personally assured the jury that Vashawn, while an initial suspect, was innocent of the underlying allegation. (134:27). Likewise, defense counsel referenced Vashawn's arrest, but did not mention that he had been identified as the shooter by an eyewitness. (134:31).

The State's case included Cheyenne Pugh, who told the jury that Ericka's girlfriend, Shaquita, had told her, "everybody going around saying it's a young dude that's light skinned with dreads named Woadie." (135:36).[2] She described showing Shaquita a photo of Vashawn and Shaquita telling her that this was not Ericka's killer. (135:36). She testified that multiple

[2] Shaquita was not called as a witness.

people were claiming the shooter was a light-skinned man with dreadlocks. (135:45). According to Cheyenne, "they" said "Woadie" (Jovan's nickname) was the shooter. (135:45). Cheyenne also testified that she had received Jovan's picture from yet another out-of-court speaker and that a woman named Kia Wade had told her that Jovan "was in the hood bragging about it." (135:46).[3]

Not only did counsel fail to object to these hearsay statements, he then asked further open-ended questions on cross-examination which prompted Cheyenne to tell the jury that she had been told, by yet another out-of-court speaker, that Jovan had admitted to killing the victim, who he allegedly referred to as a "bitch." (135:54).

Vashawn testified about seeing Jovan pointing a gun, but denied that he ever saw the shots being fired. (135:69). Vashawn was hostile to cross-examination and was asked only a single question about his status as a suspect. (135:74-75). Although counsel made a clumsy attempt to elicit Tyler's confession through Vashawn, the State's objection was sustained and this information was never communicated to the jury. (135:78).

Vashawn's friend Sanchez Harris also testified, although he required prompting at key points in his story inculpating Jovan. (135:90-91; 135:98). He was inconsistent as to whether he was involved in the fight

[3] Kia Wade was not called as a witness.

leading up to the shooting. (135:93-94). Sanchez identified Jovan—in a photo lineup that he remembered as having only two photographic options—as "the person who probably did it." (135:102). However, Sanchez appeared to recant his testimony about actually seeing the shooting and, later in his testimony, admitted in response to being shown a photo of Jovan, "I ain't really see the face like that." (135:117).

Alphonso Carter testified about seeing two men in front of the door with guns. (135:124). After seeing three photo arrays, he eventually picked out Jovan as the shooter because "everybody else didn't look anything like that person at all." (135:127). Likewise, the only remaining eyewitness—Desmand Butler—recanted his identification after seeing Jovan in person. (137:62). The State also called its snitch witness, Vachune Hubbard, who was candid that he was receiving consideration for his helpful testimony against Jovan, a codefendant in another pending case. (137:94).

There was no defense case presented and Jovan was then found guilty of the charged offense of first-degree reckless homicide. (64).

Postconviction and Appellate Proceedings

Jovan eventually filed a motion for a new trial. (82). Relevant to this petition, the motion alleged that counsel was ineffective for failing to present a third-party perpetrator defense and for eliciting the hearsay "confession" of his client during his cross-examination

of Cheyenne. The motion also argued that counsel had unreasonably failed to present any evidence supporting his so-called "reasonable doubt defense."

While the motion was initially denied without a hearing,[4] the court of appeals ultimately remanded the case for a limited hearing on these issues. *State v. Mull*, Appeal No. 2018AP349-CR, unpublished slip op. (Wis. Ct. App. July 23, 2019). (App. 26).

At that hearing, counsel for Jovan testified that he did not present a third-party perpetrator defense because he did not believe he could locate any witnesses to support it. (142:13; 142:23; 142:27). With respect to the hearsay statement of Cheyenne Pugh, counsel testified that he did not move to strike or move for a mistrial because he was more focused on attacking Cheyenne's credibility. (142:35-36).

The circuit court, the Honorable Joseph Wall presiding, denied the motion in yet another written order. (159:1).

The court of appeals then reversed, identifying two specific deficiencies which prejudiced Jovan. First, the court of appeals agreed that counsel was ineffective for not presenting a third-party perpetrator defense that Vashawn, Menjuan, or Tyler—or some combination thereof—committed the murder "and his trial counsel should have presented the testimony of

[4] The motion was denied by the Honorable Jeffrey A. Conen. (97:9). Judge Conen was the calendar successor to Judge J.D. Watts, who presided over the trial. (97:1).

several additional witnesses to support this defense." *State v. Mull*, Appeal No. 2020AP1362-CR, unpublished slip op., ¶ 21, (Wis. Ct. App. February 1, 2022). (App. 13). The court of appeals carefully analyzed the evidence over the span of several pages and concluded "there were a number of witnesses who were interviewed during the police investigation who provided information that could have been used to present a defense that Smyth, Bankhead, or Tyler Harris was the shooter that night." *Id.*, ¶ 33. (App. 18).

Although counsel testified that he did not pursue this defense because he did not believe he could find witnesses to support it, the court of appeals concluded that this was an unreasonable excuse because: (1) testimony of witnesses called at trial would have supported the defense; (2) counsel did not make any efforts to obtain these witnesses by use of a subpoena or a material witness warrant; and (3) counsel could have used hearsay exceptions to present the testimony of truly unavailable witnesses who would support the defense. *Id.,* ¶ 35 (App. 19). While counsel testified that he was pursuing a reasonable doubt defense, the court of appeals noted that counsel's efforts were not substantial and that the omitted evidence would have, in fact, directly furthered that defense. *Id.*, ¶¶ 37-38. (App. 20-21).

Moreover, the court of appeals concluded that omission of this evidence undermined confidence in the verdict. *Id.*, ¶ 42. (App. 22-23). The jury was simply never given an opportunity to assess the credibility of

witnesses which, if believed, would have supported an acquittal. *Id.* (App. 22-23).

With respect to the second issue, the court of appeals likewise found that counsel acted unreasonably in eliciting damaging testimony about his client and for not moving to remedy the error by moving to strike, asking for a cautionary instruction, and/or asking for a mistrial. *Id.*, ¶ 45. (App. 23). While counsel explained that he did not want to highlight the statement and wished to discredit Pugh's testimony in other ways, the court was not persuaded that any of the proffered legal maneuvers would have been inconsistent with those aims. *Id.* (App. 23). Examination of counsel's actual questioning revealed an "incautious" strategy reliant on open-ended questions that invited the problematic testimony. *Id.*, ¶ 46. (App. 24). This deficiency prejudiced Jovan because it directly allowed the jury to consider an alleged hearsay confession from Jovan showing that he was proud of killing Ericka, a tragic victim he denigrated as a "bitch." *Id.*, ¶ 48. (App. 24-25).

The court of appeals therefore remanded for a new trial. This petition follows.

ARGUMENT

I. The State has failed to demonstrate that review is warranted under Wis. Stat. § 809.62(1)(r).

A. This Court does not accept petitions for review which are based on nothing more than a dissatisfaction with how well-settled ineffectiveness principles are applied to a particular set of facts.

In its petition, the State claims that review is warranted "because the court of appeals opinion is flawed." (State's Petition at 15). In the State's view, this case "conflicts with controlling opinions" as the court of appeals failed to properly defer to the strategic choices of trial counsel. (State's Petition at 15).

Notably, the State cannot plausibly claim that review will impact any cases beyond this one as the underlying decision of the court of appeals is an unpublished *per curiam* decision which is categorically incapable of modifying or altering the present state of the common law. *See* Wis. Stat. § 809.23(1)(b)5. In essence, the State is frustrated with how the ineffectiveness principles were applied in this particular case and is asking this Court to reapply these settled precedents and reassess the "reasonableness" of counsel's conduct.

This exact scenario was presented to the Court in *State v. Gajewski*, 2009 WI 22, 316 Wis. 2d 1, 762 N.W.2d 104. There, the Court correctly recognized that it was being asked to do no more than "clarify and put a gloss on longstanding principles for evaluating the effectiveness of a defendant's counsel at trial." *Id.*, ¶ 10. This Court accurately surmised that the case was more about error correction than it was about law development. *Id.*, ¶ 11. The Court therefore dismissed the petition as improvidently granted. *Id.*

A similar result should obtain here. As will be shown below, the court of appeals did not improperly apply the law. While the State disagrees with the outcome, it fails to persuade that resolution of this case will add anything meaningful to an already-voluminous body of case law setting forth the well-worn principles of attorney ineffectiveness.

Accordingly, review is not warranted.

B. The court of appeals did not improperly fail to defer to the strategic choices of trial counsel.

The crux of the State's argument is that the court of appeals failed to give the proper level of deference to trial counsel's explanations for his strategic choices. (State's Br. at 15). The State claims that the court of appeals "ignored" this precedent and instead merely reweighed the evidence. (State's Br. at 15). There are several problems with this line of argument.

First, it is poorly developed and not supported by proper legal citation. For example, the State claims that the court of appeals failed to abide by two cases--"*Gordon* and *Breitzman*." However, "*Gordon*" does not appear in the table of authorities and is never summarized or explained; there is not even a citation or a full case name included in the text of the State's petition. To the extent that the State believes this decision "conflicts" with *Gordon*, it has failed to explain how or why. Likewise, its argument regarding the alleged incongruity with *State v. Breitzman*, 2017 WI 100, 378 Wis. 2d 431, 904 N.W.2d 93 consists of only two cursory sentences, several pages apart. This is a fatal flaw and should not entitle the State to obtain review in this Court.

Similarly, the State persistently claims that there is a "misinterpretation" of *State v. Kimbrough*, 2001 WI App 138, 246 Wis. 2d 648, 630 N.W.2d 752 present in the court of appeals decision. However, in this case, the court of appeals cited that decision one time, for the uncontroversial principle that the strategic choices of trial counsel must be objectively reasonable. *Mull*, Appeal No. 2020AP1362-CR, ¶ 36. (App. 20). The State does not explain why this statement of the law—which is accurate—is in any way a misinterpretation. At best, the State seems to think *Kimbrough* was "misinterpreted" because, in that case, application of this settled principle led to the defendant losing and, in this case, it led to the defendant winning. The State's argument reflects a bizarre misunderstanding of how precedent works. A court does not "misinterpret" the law simply because

it fails to reach a desired outcome while properly citing the applicable precedent. These arguments are, frankly, unworthy of review by this Court.

The second, glaring problem is that the State's "deference" argument does not accurately depict or represent the reasoning of the court of appeals. It is not at all accurate to represent that the court of appeals merely "reweighed" the evidence, as the State does. Instead, the court of appeals acknowledged that the main dispute in this case centered on the "reasonableness" of trial counsel's allegedly strategic choices. The court of appeals therefore undertook a searching review of the choices made by trial counsel, as well as the subsidiary judgments undergirding these ultimate strategic decisions. This is the exact procedure outlined in *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984). While that case mandates deference, the United States Supreme Court has also made clear that it is prima facie unreasonable to make strategic choices that are not adequately supported by equally reasonable investigation and analysis. *Id.* Here, the court of appeals carefully considered the arguments of the State, but simply found those arguments unpersuasive.

Thus, the court of appeals ultimately concluded that counsel's strategic choices were objectively unreasonable. This reading of the evidence should not be controversial. For example, counsel said he was pursuing a reasonable doubt defense, but did not present any of the copious evidence available to assist in the presentation of that defense—including

evidence that someone other than Jovan committed the crime. Moreover, counsel did not make a reasonable investigation before abandoning his efforts to present such evidence. While counsel claimed he did not present the evidence highlighted in the postconviction motion because of the difficulties in calling witnesses to get it in the record, counsel did not actually exhaust legal mechanisms available before reaching that conclusion. Counsel did not recognize that evidence already in the record would have supported the defense, did not make use of legal process, and failed to appreciate that the evidence code would allow the testimony of unavailable witnesses.[5]

Likewise, with respect to the elicitation of a hearsay confession that depicted Jovan calling the tragic victim a derogatory epithet, the court of appeals found counsel's excuses unreasonable in light of his actual conduct at trial. *Mull*, Appeal No. 2020AP1362-CR, ¶ 45. (App. 23).

Thus, this case demonstrates that, while deference is required, the deference standard is not absolute. The mere giving of an excuse does not categorically insulate the attorney's conduct from scrutiny; to hold otherwise would eviscerate the defendant's right to the effective assistance of counsel.

[5] It should be noted that the State never responded to this evidentiary argument in its brief, thereby conceding it in Jovan's favor, as the court of appeals properly concluded. *Mull*, Appeal No. 2020AP1362-CR, ¶ 36. (App. 19-20).

Accordingly, when the actual text of the opinion is carefully considered, it is simply misleading to argue that the court of appeals abandoned the requirements of deference and that it failed to apply standard legal principles governing ineffectiveness claims. The court of appeals appears to have worked hard at taking counsel's excuses seriously, trying to justify his conduct even in the face of these serious accusations of deficient representation. However, after an exhaustive review of the entire record, the court of appeals simply concluded that it could not label that conduct as reasonable—a highly case-specific holding that is not clearly erroneous given the glaring omissions in this case.

Accordingly, review is not warranted.

C. The State's arguments that the court of appeals misapplied *Denny*[6] are patently frivolous based on this record. In addition, the State has failed to clearly develop a meaningful argument in its petition.

The State also claims that it was unreasonable to grant a new trial for failure to present a third-party perpetrator defense because "that defense includes three elements and required evidence [trial counsel] did not have." (State's Petition at 19). The State cites several cases for general legal principles, but never explains in its petition *why* the third-party perpetrator defense was unavailable and what specific legal errors

[6] *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

the court of appeals made by concluding otherwise. The State also does not explain why reviewing this case will help to develop or clarify the well-settled principles for admission of third-party perpetrator evidence.

Moreover, any assertion that the third-party perpetrator defense was legally unavailable is frivolous. With respect to Vashawn Smith: (1) the person who was the target of the shooting was in a violent brawl with Vashawn moments before the shooting; (2) Vashawn testified he was present when the shots were fired and other evidence places him in front of the door when the crime occurred; (3) an eyewitness identified him as the shooter. With respect to Menjuan; (1) he was also involved in the fight and the person who was shot at—Davion—attacked Menjuan with a taser before retreating into the room; (2&3) a witness places him in front of the door, with a gun, talking about shooting into the door before shots were fired into the door. With respect to Tyler: (1) Tyler was friends with Menjuan and Vashawn and was present at the party when they were fighting with Davion, the person shot at; (2) Tyler was seen with a gun, at the party; (3) Tyler admitted that he shot his gun at the party.

Based on this record evidence, it strains credulity to assert that a third-party defense was not legally available. The State's claim is that proof someone actually saw a person commit a crime is somehow insufficient to argue that this person may have, in fact, committed a crime. This is a perverse and

nonsensical argument that ought not to be seriously considered by this Court.

D. The State misrepresents the record evidence to claim that trial counsel "presented the jury with essentially the same evidence Mull now argues should have been used."

Next, the State tries to make an argument similar to one already rejected by the court of appeals—that counsel could not be ineffective for not presenting bombshell evidence showing that someone else killed Ericka because, in fact, that information was already presented to the jury. (State's Petition at 22).

This argument is nonsensical. Comparison of the two evidentiary narratives—the information presented at trial, which included a personal assurance from the State that Vashawn was innocent against the evidence in the overall appellate record now in existence—demonstrates that there was a broad body of highly relevant evidence that someone other than Jovan fired the fatal shots that evening. The jury was simply never told about, for example, evidence that Vashawn was seen committing the crime, that Tyler admitted to it, or that Menjuan was seen talking about shooting into a door before shots were, in fact, fired into the door.

The State's attempts to bring this distorted factual argument as a basis for review should therefore fail.

E. The State's prejudice argument is unpersuasive and insufficient to merit review by this Court.

Finally, the State claims that Jovan was not prejudiced by counsel's omissions. (State's Petition at 22). It is patently unclear why this issue would merit review by this Court; the State has not shown why reassessment of the court of appeals' application of the prejudice requirements would mandate review in this instance.

In any case, the record is clear that Jovan was, in fact, prejudiced by counsel's failures. If, for example, a jury believed the account of Keshawna Wright that it was Vashawn, and not Jovan who fired the gun, then an acquittal is more than a theoretical possibility. Likewise, evidence that Jovan was not identified as the shooter by other eyewitnesses or evidence that Tyler Harris actually admitted to the crime equivalently undermine confidence in the ensuing verdict.

Accordingly, this Court should decline to grant review.

II. If this Court accepts review, it should consider granting Jovan a new trial in the interest of justice.

While Jovan believes that the State's petition should be rejected due to its manifold failures as well as the intensively fact-dependent nature of this case, if this Court disagrees and opts to grant review, Jovan

will ask this Court to grant a new trial in the interest of justice pursuant to Wis. Stat. § 809.62(3)(d).

As the statement of facts shows, there is copious evidence in this record which undermines the fairness and integrity of Jovan's conviction. The jury was never told several important facts, including but not limited to:

- The person who was fired at—Davion—had attacked Vashawn's friend, Menjuan, with a taser shortly before retreating to the bedroom. (83:28).
- Jalyn Lynch told police that Menjuan was seen in front of the door with a gun and was telling his friend to shoot into the door. (84:52).
- The group of men in front of the door included the man who had been arguing with Davion—a clear reference to Vashawn Smith. (82:38).
- Keshawna Wright identified Vashawn Smith as the shooter. (82:56).
- Casie James, Vashawn's friend, could place Vashawn in the house when the shooting occurred. (83:23-25).
- Multiple eyewitnesses failed to identify Jovan as the shooter. (83:48; 84:25; 84:27).

Careful review of the overall record—as well as the decision of the court of appeals highlighting evidence in this record which problematizes the jury's verdict—makes it clear beyond any doubt both that the real controversy was not fully tried and that justice has miscarried.

After all, what rational person could conclude that this trial was fair or reliable when the jury was never presented with credible evidence that Vashawn, Tyler or Menjuan pulled the trigger? What of the evidence that Vashawn withheld Tyler's admission of guilt? And wouldn't a reasonable jury want to know about Vashawn's manifold credibility issues before choosing to send a man to prison based on his testimony?

In this case, the trial transcript is in many ways divorced from the messy reality portrayed in the police reports. While the jury was pointedly told to examine whether the "wrong person" was on trial for this homicide, (139:7), their ability to do so was handicapped by the deficient presentation of substantial evidence. This fundamentally impaired the jury's truth-seeking function. A jury asked to solve a whodunit, without ever being told that more than one person has been identified as the killer, is operating from a place where truth can only be incidentally stumbled upon, and not meaningfully uncovered.

Our justice system—and Jovan—deserves better. Accordingly, should this Court decide to accept

the petition for review, Jovan will ask this Court to grant a new trial under its discretionary authority.

CONCLUSION

For all of the reasons set forth herein, Jovan asks this Court to deny the State's petition for review. However, if the Court grants the petition, Jovan will ask this Court to grant a new trial in the interest of justice.

Dated this 16th day of March, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,190 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 16th day of March, 2022.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender