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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001496

Holmes Simpson-Davis,

Petitioner,

vs.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding trial counsel was not ineffective in failing to present an alibi defense.

STATEMENT OF CASE

Petitioner Holmes Simpson-Davis was indicted for murder and possession of a weapon during the commission of a violent crime, and two counts of attempted murder and possession of a weapon during the commission of a violent crime. App. 474–81. He proceeded to a jury trial before the Honorable J. Derham Cole during September 5-8, 2017. App. 6. The jury convicted Petitioner as charged and Judge Cole sentenced him to life without the possibility of parole for murder (LWOP), thirty years' imprisonment for each count of attempted murder, and five years' imprisonment for two of the weapons charges. App. 462–63. Judge Cole did not sentence Petitioner on third weapons charge in light of the LWOP sentence. App. 562. He ordered that one of the thirty-year sentences and one of the five-year sentences both run consecutive to the other sentences. App. 462–63, 480, 481.

Petitioner timely appealed. His conviction was affirmed in *State v. Simpson-Davis*, Op. No. 2020-UP-138 (S.C. Ct. App. filed May 20, 2020). Petitioner filed a *pro se* application for post-conviction relief (PCR) September 14, 2020 and filed an amended application with assistance of counsel March 15, 2022. App. 555–67, 568–70. An evidentiary hearing was held before the Honorable William A. McKinnon on June 2, 2022. Judge McKinnon ultimately denied relief and dismissed the application in an order filed October 14, 2022. App. 637–54.

Relevant Facts

During the early morning hours of July 25, 2015, gunfire resulted in the death of James Hull and the injury of James Kilgore and Bruce Brewton. App. 88, 196, 128, 293. Petitioner was charged

with the murder and two counts of attempted murder, with weapons charges included in each indictment. App. 474–81.

At trial, the State presented testimony from the two attempted murder victims, Kilgore and Brewton. Both testified they had been drinking for hours prior to the incident at a liquor house. App. 130 (Kilgore testifying he was drinking at the liquor house from 10:00 until an altercation erupted at 12:40); 281 (Brewton testifying he was "getting wast[ed]" that night and was at the liquor store throughout the night). The murder victim, Hull, was drinking with them. App. 115. Kilgore testified an altercation had occurred between two of the patrons and Kilgore ended up escorting one to the men, "Junior", outside. App. 118. While outside, Felshunti Clark and "Pee Wee" approached him because they were there with Junior. App. 118. After a brief confrontation, Clark, Pee Wee, and Junior left the liquor house and Kilgore returned inside. App. 118. Shortly after, Brewton told Kilgore he was ready to leave, and they left with two other men, walking toward Brewton's car. App. 118–19. Brewton drove the men down to pick up Hull, who had walked to a neighboring house to get his belongings. App. 120. Kilgore testified that once they arrived, he saw five men outside the car including Clark who had been joined by Petitioner. App. 121. Kilgore stated he walked towards Clark, who wanted to fight him, at which point Petitioner showed his gun. App. 121. He testified both Petitioner and another man with Clark had guns on them, but no one else did. App. 154–55.

Brewton testified he intervened at this point and asked to just let him take his cousins home and they could fight next time they saw each other if they wanted. App. 288–89. He stated everyone seemed to be backing off until Hull came over and indicated he was not afraid of the men or the guns, and he advanced toward Petitioner, who then shot him. App. 289–90. Brewton said

he started running away, but ended up shot through the leg and across the foot. App. 292–94. Kilgore testified he was shot in foot. App. 128.

Immediately following the shooting, both Kilgore and Brewton offered different statements than their testimony at trial. Although Kilgore testified at trial that Petitioner had shot Hull, following the incident he had repeatedly stated he did know who the shooter was. *Compare* App. 124 (indicating Petitioner shot Hull), *with* 127 (admitting he told 911 he did not know who shot him), *and* 127–28 (admitting he told the police he did not know who shot). Brewton identified Petitioner by name at trial but admitted he had never met him before. App. 285. He also admitted he initially told law enforcement he did not know who was shooting. App. 297. However, several days later (and after Kilgore gave him the name) he informed officers Petitioner had killed Hull. App. 300.

After the State rested, defense counsel indicated his intention to call three witnesses to establish a timeframe for the night: the mother of Petitioner's child, Patrice Posey; Petitioner's father, Thomas Davis; and Petitioner's sister, Brittany Davis. The solicitor objected to the presentation of an alibi defense because proper notice at not been given. App. 340. The court repeatedly asked defense counsel exactly what he intended to elicit from the witnesses, and counsel indicated he was not presenting them as alibi witnesses, but just creating a timeline, stating, "They're not going to testify that he wasn't at the scene. I mean, they're going to testify that he was at home until a certain time." App. 341. The court finally just told him to go outside with the solicitor and explain what the witnesses would testify about. App. 341. Each witness then testified as to seeing Petitioner the evening of the crime, but trial counsel never asked whether they knew where he was during the commission of the crime. App. 354, 358, 360.

At the charge conference, trial counsel requested a charge on self-defense, which was denied. App. 362, 365–66. He did not ask for a charge on alibi, nor did he argue Petitioner was at home the whole night. The jury convicted Petitioner on all counts. App. 456–57.

ARGUMENT

The PCR court's order parses Petitioner's claim into four parts, but the argument is not one of bits and pieces.[1] Although trial counsel's deficient representation is multifaceted, the overarching claim is that trial counsel provided ineffective assistance in failing to pursue an alibi defense. Trial counsel failed to call Clark, who would testify he never spoke to Petitioner on the night in question and did not call him into the fray as the State argued. He failed to develop the testimony of the witnesses he called at trial about whether Petitioner was at home the entire night, he did not ask for a charge of alibi, and he did not argue an alibi defense to the jury. Although trial counsel suggested he thought the self-defense defense was stronger, the reasonableness of this conclusion is belied by the fact that the judge refused to charge self-defense because the was no evidence presented supporting that defense. Trail counsel was deficient and the prejudice to Petitioner is clear. The PCR court's order includes multiple errors in addressing this claim and must be reversed.

[1] The unhelpful nature of this framing is apparent in the PCR court's discussions of prejudice, which offer myopic analyses of each error it chose to delineate. No doubt this was the only way to try to write around the very clear prejudice, but the result is reductive reasoning that excuses one error by blaming another. For instance, in addressing whether "Counsel was ineffective for failing to request an alibi jury instruction," the PCR court finds Petitioner was not prejudiced because "the evidence was weak and almost entirely related to times outside of the time frame during which the shooting itself took place." App. 652. This holding ignores the fact that it is counsel's fault that the evidence was weak and the testimony was addressed to times outside the time of the shooting. He was deficient in failing to include the testimony of Mr. Clark and adequately question the witnesses he did call, which is the subject of the application for PCR.

"In a PCR case, this Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Mack v. State*, 433 S.C. 267, 272, 858 S.E.2d 160, 162 (2021). Conversely, the Court "will not uphold the findings when there is no probative evidence to support them[and] will reverse the PCR judge's decision when it is controlled by an error of law." *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

Under the Sixth Amendment of the United States Constitution, the "'right to counsel is the right to effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. "The constitutional right to counsel contemplates 'effective aid in the preparation and trial of the case.'" *Powell v. State of Ala.*, 287 U.S. 45, 71 (1932).

"Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "Where counsel articulates a strategy, it is measured under an objective standard of reasonableness." *Id.* Thus, "counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound." *Stone v. State*, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017).

To establish prejudice, the defendant is required "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different." *Smith v. State*, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error." *Riddle v. State*, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992).

The PCR court's conclusion that trial counsel was not deficient for failing to develop Petitioner's alibi defense, request that charge, and make that argument to the jury is not supported by the record. The court's order leans entirely on deference to trial strategy and trial counsel's testimony that he thought self-defense was a better defense. App. 651 ("Counsel testified that he thought Applicant's strongest defense was not an alibi defense, but rather that Applicant acted in self-defense. . . .. Counsel is not deficient for failing to call a witness with a built-in conflict to testify to a defense that undermines Counsel's chosen defense at trial."); *id.* at 652 ("Counsel testified that his chosen defense at trial was a self-defense defense and that an alibi defense would have undermined that defense because they are inconsistent with one another. Counsel acted reasonably in not requesting a request that would undermine his client's case"); *id.* at 653 ("Counsel acted reasonable in not pursuing an alibi defense in greater detail when a competing defense was preferable and Counsel, in his professional judgment, thought the other theory had a higher chance of success at trial.").

This was error. The order fails to mention that the trial court refused to charge self-defense stating "that there's **no evidence to support any of the four prongs** necessary to a defense of self-defense." App. 365 (emphasis added). The trial court specifically found there was no evidence supporting that strategy. The jury was therefore given no legal basis on which it could excuse Petitioner's alleged conduct and find him not guilty. Trial counsel should have

realized from the start that he should present an alibi defense, but even so, he at least should have come to that conclusion at the charge conference. He could have asked for an alibi charge after the trial court rejected his other request and then argued alibi in his closing. It cannot be a sound strategy to pursue a defense unsupported by the evidence where a viable one plainly exists.

Petitioner had a substantial alibi defense that trial counsel should have pursued, and his contrary strategy was unreasonable. Notably, the evidence of alibi was so apparent that everyone else appeared to assume trial counsel intended to make that defense—including the trial court and the solicitor. Prior to calling his witnesses, the trial court tried to suss out what exactly trial counsel was trying to prove and ordered him to discuss the proposed testimony with the solicitor during a break "since they were not notified of any alibi defense." App. 341. Later, anticipating an alibi argument, the solicitor argued in his closing that "we know that Holmes Simpson-Davis is there, unlike what his father, sister, and mother of his children say." App. 380; *see id.* at 375 ("Why would his sister lie about having his cell phone at 1:30 in the morning, the day of the shooting? . . . She's trying to not put him there. If she has his cell phone and she's the one that receives the calls, then [Petitioner] doesn't know to be there.").[2] The PCR court similarly erroneously believed an alibi defense was presented at trial. App. 644 ("Applicant used alibi as a defense, though he had not disclosed his alibi defense to the State as required by Rule 5 of the South Carolina Rules of Criminal Procedure. Judge Cole found the defense was alibi and granted

[2] The State also characterized his defense as alibi on appeal. *See* App. 528 ("Appellant's defense at trial was alibi, even though he claimed it wasn't. . . . Judge Cole found the defense was alibi and granted a short recess in which defense counsel was required to inform the Solicitor of what his witnesses would testify to."); *id.* at 550 ("Appellant's defense at trial was that he was not the perpetrator of the crimes. Appellant's defense was that he was at home at the time of the crimes and could not have committed the offenses." (footnote omitted)).

a short recess in which defense counsel was required to inform the Solicitor of what his witnesses would testify to.").

The trouble is that although it can be agreed the evidence at trial shows an alibi defense was the appropriate strategy, trial counsel did not actually present that defense–to the State, the trial court, or the jury. Trial counsel never disclosed he would pursue an alibi defense to the State as required by Rule 5, SCRCrimP. When asked by the trial court whether the defense witnesses were going to provide an alibi that he was not present when the crimes occurred, he answered "Well, I'm - - I'm not - - - they don't know that. They're not going to testify that he wasn't at the scene. I mean they are going to testify he was at home until a certain time." App. 340–41. So although he called Ms. Posey, Mr. Davis, and Ms. Davis at trial, he literally only questioned them about whether they saw Petitioner up until the moments just before the incidents, not whether they knew where he was at the time of the incidents.[3] App. 354, 358, 360. Trial counsel never argued to the jury that Petitioner was actually at home when the crimes were committed and instead qualifies the testimony of the defense witnesses by stating "[he] just wanted [the jury] to see that [Petitioner] comes from a good family." App. 408. So to the extent the jury would have been inclined to infer from the testimony that Petitioner was at home during

[3] The PCR court's finding "that these witnesses were primarily presented to show that Applicant did not have a long-premediated [sic] plan to shoot but, instead, that decision was instant[, which] supported the self-defense argument" ignores that such evidence is of little persuasion. App. 653. First of all, the trial court specifically found that *nothing* supported the self-defense argument. App. 365 Furthermore, the jury charge on malice stated that it can arise instantly: "[t]he law does not require that malice must exist for any appreciable length of time before the commission of an act proximately causing a fatal result. In fact, it may be conceived at the very moment that the fatal act is committed." App. 436. Lack of lengthy premeditation does not negate malice or murder and the jury was charged on that law, not the law of self-defense.

the incident, trial counsel undercut that by clarifying he only wanted to show he has nice family members.

Trial counsel further clarified his intent *not* to present an alibi defense at the PCR hearing, testifying that he only called Patrice Posey, Thomas Davis, and Brittany Davis "to nail down that [Petitioner] was definitely home at 12:30," and that to show that "[Petitioner would have to make a decision to go and shoot someone in a split second," which trial counsel did not think Petitioner would do, so that would indicate "he was shot at." App. 615. Trial counsel stated he was not confident in the alibi defense, so he did not fill out the proper Rule 5, SCRCrimP paperwork and did not request an alibi charge even though he admitted at the hearing there was evidence to support it. App. 609, 617. Therefore contrary to the PCR court's finding, the record shows trial counsel did not present an alibi defense, he only sought to show that Petitioner was home until moments before the time of the incidents.

However, the PCR court makes the unclear holding that "[a]ll PCR hearing witnesses, except for Clark, were presented at trial and their testimonies were duplicative in nature, let alone could have successfully been presented at trial." App. 653. Perhaps it misunderstood the deficiency alleged. Had trial counsel properly explored the witnesses' testimony, they would have placed Petitioner in his home during the commission of the crimes. At the PCR hearing, Ms. Posey testified Petitioner was with their son the whole night. App. 599. Mr. Davis testified he, Petitioner, and a friend had helped his sister move that day, which lasted into the evening. App. 601. He stated he and his friend sat outside on the porch until around 1:30, when Ms. Davis came home. App. 601. He stated he walked in the house with his daughter once she arrived and told Petitioner, who had been at home the entire time, he was going to bed. App. 601. Ms. Davis

testified she had taken Petitioner's phone around 12:30ish because her phone had died, and she was going to pick up her boyfriend. App. 605. She testified she talked to Mr. Clark that evening because he called Petitioner's phone, and she told him Petitioner was at home in bed. App. 605–606. She stated after picking up her boyfriend, she returned Petitioner's phone and spoke to him when she did. App. 607. She stated she did not really remember what time it was since the PCR hearing was seven years after the event, but she agreed with the State that her answers were pretty much the same as at trial, where she testified she returned his phone at 1:30. App. 607.

Furthermore, it is significant that trial counsel failed to present the testimony of Mr. Clark, who would have testified that he did not see or speak to Petitioner the night of the incident. The prejudicial failure to call a witness advantageous to the defense presented is ineffective assistance of counsel. *Martinez v. State*, 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991). Clark testified at the PCR hearing that he was at the liquor house July 25, 2015 when Kilgore "got into it" with his friend and they almost had an altercation there, but it was prevented. App. 592. Clark said that when he was leaving, he also "got into it" with Kilgore and Brewton also entered the altercation. App. 593. Hull came outside around this time talking about somebody having a gun and shots were fired. App. 593. Clark testified that Hull fired the initial shot, but he did not see anyone else there with a gun. App. 593.

Clark testified he called Petitioner's phone but spoke to Petitioner's sister and did not speak to Petitioner at all that night. App. 593–94. He stated he was also charged after the incident, but he pled guilty the day before his trial. App. 596. Clark stated he was at the courthouse the day of trial but was told he did not need to testify. App. 594. The PCR court minimized the importance of Clark's testimony stating "Clark's only testimony was that he did not see

Applicant the night of the incident[and therefore t]his is not an alibi defense and does not exculpate Applicant because of Clark's inability to positively identify who the shooter was." App. 651. This conclusion ignores the other evidence and arguments presented. Assuming Petitioner was present even though Clark neither saw nor spoke to him would require the jury to conclude that Petitioner *sua sponte* decided to leave his house after moving all day and putting his baby to bed, show up randomly at the scene, and shoot the victims. The theory of the State's case is that Clark called Petitioner and told him about the row he had gotten in and Petitioner, armed with a gun, came to defend Clark. Clark's testimony wholly refutes that narrative and corroborates the testimony of the other defense witnesses who testified he was not at the scene but was in fact at home.

Still, the PCR court seemed to excuse these failures by holding trial counsel simply chose not to put forth a robust alibi defense, concluding "Counsel acted reasonably in not pursuing an alibi defense *in greater detail* when a competing defense was preferable and Counsel, in his professional judgment, thought the other theory had a higher chance of success at trial." App. 653 (emphasis added). So the PCR court determined trial counsel presented an alibi defense, just not a very good one because he preferred the self-defense defense—and that was not deficient performance, but "professional judgment." An alibi defense does not have degrees—it means no less than that he was elsewhere and therefore could not have committed the crimes. *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("[A]libi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all."). A halfhearted alibi defense is not a defense. Even generously construing trial counsel's strategy as

including an alibi defense, he was certainly deficient in not arguing it at all to the jury and in failing to request a jury charge on that defense. *See Ford v. State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) ("It is well settled that counsel's rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness."). The jury was not put in the position where it knew it could consider Petitioner might not have been present.

So the prejudice from trial counsel's deficient representation is readily apparent. By failing to advance the alibi defense, Petitioner had effectively *no* defense. The jury had no invitation to consider the possibility that the State had the wrong man, and Petitioner was at home when all this took place. Had trial counsel offered the alibi defense testimony presented at the PCR hearing and ensured the jury was charged that it could conclude Petitioner was at home, there is a reasonable probability that the result of the proceeding would be different.

The PCR court does not venture to claim there was overwhelming evidence of guilt, but Petitioner notes that would not be a ground for affirmance. "[F]or the 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). The only direct evidence against Petitioner was inconsistent statements primarily by witnesses who had spent the night drinking. The State did not produce conclusive evidence of his guilt and therefore the evidence

was not so overwhelming that it categorically precluded a finding of prejudice. *See Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 280 (2019).

CONCLUSION

Petitioner was denied his constitutional right to effective assistance of counsel and his trial was constitutionally defective because of it. Petitioner therefore asks that this Court grant his petition.

Respectfully submitted,

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