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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari from Spartanburg County
Honorable William A. McKinnon, Circuit Court Judge

Holmes Simpson-Davis,

Petitioner,

vs.

State of South Carolina,

Respondent.

Appellate Case No. 2022-001496

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner Simpson-Davis was indicted for murder and possession of weapon during a violent crime, and two counts of attempted murder and two accompanying charges of possession of a weapon during a violent crime. The jury found Petitioner guilty of all the charges following trial on September 5-8, 2017. The presiding judge, the Honorable J. Durham Cole, sentenced Petitioner to life imprisonment for murder and did not sentence Petitioner for the weapons charge accompanying it. Judge Cole sentenced Petitioner to thirty years' imprisonment for attempted murder and five years' imprisonment for those two weapon charges. One of the attempted murder sentences and one of the weapons sentences were run consecutive to all the other sentences.

Petitioner appealed and his conviction was affirmed by the Court of Appeals. State v. Simpson-Davis, Op. No. 2020-UP-138 (S.C. Ct. App. filed May 20, 2020). Petitioner filed his PCR application on September 14, 2020. The Honorable William A. McKinnon held an evidentiary hearing on June 2, 2022. Judge McKinnon issued an order dated October 14, 2022 denying relief.

Petitioner appealed the denial of relief and filed his Petition for Writ of Certiorari. The

State's return to the petition follows.

STATEMENT OF FACTS

James Hull Kilgore testified he went to the Liquor House, a drinking spot, on July 24, 2015. Bruce Brewton and Robert Hull were there. Kilgore, Brewton, and Hull would be the three shooting victims – Hull died that night. Kilgore vaguely a series of arguments occurring at the Liquor House that led to the shootings. Kilgore stepped outside the Liquor House and entered into an altercation with Little Man (Felshunti Clark) and Pee Wee. Afterwards, Kilgore went back into the Liquor House and later walked to the car parked nearby with Bruce Brewton and Red (Travious Young). Another person known as Boobee (later determined to be a nickname for Brannon) was already sitting in the car. App. pp. 115-19; p. 131.

Hull (the murder victim), was also catching a ride in the car, he first walked from the Liquor House to a neighbor's house to retrieve some belongings. At that time, Brewton got out of the car and Kilgore noticed a group of five people gathered behind the car. App. pp. 119-20. One the men, Felshunti Clark, indicated he wanted to fight. Kilgore testified Petitioner was one of the five men. Petitioner held a gun and said something to the effect of "this ain't happening." App. p. 121. Kilgore explained he has known Petitioner his whole life. He further testified one of the other men also had a gun. App. pp. 122-23. Hull walked into the standoff and said, "F all of y'all guns." Then Petitioner shot Hull in the face. App. p. 124. On cross-examination, Kilgore admitted Hull told Petitioner they were not the only ones with guns. App. p. 133. Kilgore also admitted Hull was right in Petitioner's face. App. p. 144.

Kilgore saw Petitioner pointing his gun before Kilgore started running and he heard multiple shots as he fled. Kilgore called 911. Kilgore was shot in the foot. He admitted he told the 911 caller he did not know who the shooter was because he wanted to the handle the matter on his own,

but when he realized Hull died, Kilgore decided to seek justice for Hull's murder. Kilgore explained he watched Petitioner shoot Hull, but Kilgore does not know who shot him in the foot since he was shot while he was running away. App. pp. 127-29.

Bruce Brewton was the third shooting victim. He testified he parked across from the Liquor House and saw Kilgore, Hull, and Young inside the Liquor House. He also saw Felshunti Clark. Brewton never saw the fight that broke out outside. But later he let Kilgore and Hull know he was ready to leave – he previously promised them a ride home. App. pp. 279-82. Kilgore, Young, and Brannon all got in the car. They waited on Hull who went over to a neighbor's house, Anitra Geter, to get his things. Hull would never make it to the car. Brewton pulled his car forward some. Then Brewton got out to smoke a cigarette and that is when he saw Clark, Petitioner, and some other guys. App. pp. 282-84.

Brewton admitted he did not know Petitioner, although he would make an in-court identification of Petitioner as the one who shot Hull. App. pp. 284-85. Brewton admitted on cross-examination that he learned Petitioner's name when discussing the shooting later with Kilgore. App. pp. 299-300. Clark acted as if he wanted to fight Kilgore, although Brewton did not know why. Meanwhile, Petitioner brandished his gun out and one of the other men in the group also had a gun. App. pp. 285-86.

Kilgore and Clark were facing each other, and a fight seemed eminent, but Brewton told them, "I don't know what is going on but you need to let my cousins go home." Clark said, "Alright Bruce." However, Hull, who Brewton admitted would take up anybody's fight in the family, came from the porch and said, "Forget y'alls guns, y'all don't mean nothing." Hull was face to face with Petitioner. Brewton opined Petitioner must have tired of Hull bumping up against Petitioner because Petitioner shot Hull. Hull fell straight to the ground without bracing himself. App. pp. 288-91.

Brewton was in shock for a bit but then ran and tried to dive behind his car as more shots were fired. Brewton was shot in the calf and the bottom of his ankle. App. pp. 292-93. Brewton did not want to tell law enforcement what happened while he was in the hospital because Brewton would not be able to protect his family. But once Brewton was released, he was ready to cooperate with law enforcement and identify Petitioner. Brewton testified Petitioner shot Hull. App. pp. 295-97.

Brewton admitted on cross-examination it was dark and hard to see the faces of the other accomplices. Tr. p. 311. Counsel's cross-examination put closer focus on the nature of Hull's aggressive actions: Brewton admitted Hull insinuated he had a gun after confronting Petitioner and the members of the group about them having a gun, admitted Hull had no fear at all, and admitted Hull bumped right up against Petitioner two or three times. App. p. 308.

Ariel Moore-Herring, a college student, helped the investigation with quick thinking. She was driving through the area when she saw a man on the ground with blood and people running in different directions. She then saw a couple of men run and get in a Lexus. She and her friends took down the license plate number. The Lexus drove towards the city (Spartanburg) and Herring turned around and stopped for police before providing their information to law enforcement. App. pp. 184-88; pp. 170-74 (officer testifying about interview with Moore-Herring).

Officer Hutchins testified the license plate tag Moore-Herring provided originally came back to a Mercury. But Hutchins explained in his professional experience, often when people take down tag numbers, they will think a Q is actually a D, the type for the license plates makes the two letters look similar. Hutchins substituted a Q for a D, and it came back as a Lexus registered to Chandra Underwood. App. pp. 195-98. Underwood's daughter, Brianna Woodruff, was the one who drove the Lexus. App. p. 204.

Investigator Gary interviewed Woodruff, twice. In the first interview, Woodruff claimed she

went to the Liquor House alone and no one got in her car. However, after being confronted by law enforcement that they had eyewitnesses that saw people get in Woodruff's car, Woodruff, in her second statement, admitted Appellant got in her car by the Liquor House. App. pp. 204-05; p. 234; App. p. 473 (State's Exhibit 60).

Investigator Gary also seized Clark's phone, which analysis later showed Clark called Petitioner at 1:12, and 1:17 a.m. App. pp. 212-15.

Investigator Gary testified about four phone calls recorded at the jail between Petitioner and Woodruff. In one of the calls, Petitioner tells Woodruff to say that they were not together. App. pp. 223-24.

Brianna Woodruff was a reluctant witness, clearly being forced by the State to testify. Woodruff claimed the second statement, the one that incriminated Petitioner, was not true, she only said it because Officer Gary told her she was looking at one to three years prison. App. p. 254. In this second statement, Woodruff told law enforcement she was drinking at a friend's house when Petitioner received a phone call. Then Woodruff and Petitioner left together. Woodruff let Petitioner out before she arrived at the Liquor House. After she left the Liquor House, Petitioner jumped in her vehicle. Then they went back to a friend's house. App. pp. 258-59. Petitioner again received a phone call and they left together again. Petitioner asked to take her to the North, which is the part of town where the Liquor House is located. App. p. 259; p. 473.

Woodruff agreed it was her voice and Petitioner's voice in the jail phone call in which Petitioner tells her to tell the police the second statement is not true and Petitioner tells her to plead the Fifth. App. pp. 259-60.

Woodruff was a more cooperative witness for Counsel. She testified that the second statement was the product of stress by Investigator Gary. Woodruff claimed he wanted Simpson-

Davis's name in the statement. App. pp. 263-64.

Investigator Gary was recalled after Woodruff's testimony to explain he did not threaten or insinuate Woodruff would be charged or be facing any prison time, and to explain that the reason he did not Mirandize Woodruff was she was not a suspect. He denied threatening Woodruff with one to three years' of prison and testified he did not know of any offense that carried that penalty. He noted Woodruff would never say who the friend was she and Petitioner were visiting that night. App. pp. 270-71.

During closing arguments, the prosecutor refers to the jail phone calls between Woodruff and Petitioner:

> Now, on the jail phone calls, she talks about he threatened her with one to three. Actually, I don't believe she ever says that. Who says that? Holmes Davis says that. Remember when they threatened you with one to three? Remember when they coerced you into writing that statement?

App. p. 379, lines 5-10. So it appears Petitioner is the one who invented the story that Investigator Gary threated Woodruff with one to three years imprisonment for some unnamed offense.

The above witnesses were the witnesses critical to establishing Petitioner's identity as the triggerman for the murder charge and as one of the shooters that attempted to kill Kilgore and Brewton. But other witnesses provided testimony corroborating the confrontation. For instance, sisters Angela and Anitra Geter were on the porch during the confrontation. They confirmed Hull stopped by and changed his shoes on the porch before becoming involved in the confrontation. Previously, they saw two men walking by, calling out Kilgore's name. Three more men joined them. App. pp. 86-87. Angela corroborated much of the ensuing confrontation and heard the shots, but did not provide any identification testimony. App. pp. 87-88. Anitra provided generally the same testimony. She told the men to get out of the driveway and went inside the house to call 911

when she heard gunshots outside. App. pp. 107-09.

Christopher Bryson was drinking at a friend's house nearby the shooting, and saw two men, later joined by an additional three men. He later saw the men split up, with the original two men shooting behind them as they ran away. The three men fleeing the area in a different direction. App. pp. 45-47.

Naturally, law enforcement witnesses discussed gathering of evidence at the scene. Six .45 casings were recovered that were fired by the same gun (no guns were recovered). There was also 9mm ammunition found at the crime scene was likewise consistent with being fired by the same gun. App. p. 31; pp. 60-61; pp. 72-75; 98-101; pp. 164-66. State's exhibit 49 was a spent bullet found nearby that was either a .40 Smith and Wesson caliber or a 10-millimeter auto caliber. There was no way of knowing how long the bullet had been outside. App. pp. 100-01; pp. 105-06. Dr. Wren, the pathologist, testified the cause of death was the gunshot wound to the left manible area. The firearm was fired from more than 14" away based on the lack of stipling. Tr. pp. 318-22.

Counsel called Jennifer Nates from SLED who testified that trace amounts of gun powder residue were found on Hull's hands. App. pp. 347-48. However, Nates also explained approximately 80% of gunshot victims will have gun powder residue on their hands. App. 348-49.

Counsel called all three witnesses that Petitioner claims are alibi witnesses. Patrice Posey is the mother of Petitioner's children and lived with Petitioner at the time. She went to bed at 12:00 a.m. with Holmes and fell asleep. She never shared this information with the police. App. pp. 352-55.

Thomas Davis, Petitioner's father, testified Petitioner and Davis helped someone with moving and they returned home at 11:30 p.m. He admitted he last saw Petitioner at sometime between 12:30 a.m. and 1:00 a.m. He claimed he sat out on the front porch until 1:30 a.m. and

testified that "to his knowledge," he never saw Petitioner leave. Tr. pp. 357-58.

Brittany Simpson-Davis, Petitioner's sister, lived nearby. She testified she fetched Petitioner's phone from Petitioner between 12:00-12:15 a.m. On cross-examination, she testified she kept the phone until 1:30 a.m., but did not say whether she returned the phone directly to Petitioner or whether she saw Petitioner again that night. App. pp. 359-60. She did not mention receiving a phone call from Clark, something she would later claim at the PCR hearing.

STANDARD OF REVIEW

Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40.

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

"A fair assessment of attorney performance requires that every effort be made to eliminate

the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland at 689. "Judicial scrutiny of counsel's performance must be highly deferential." Id., at 689. In order to prove a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. "[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." Id. at 689.

Under Strickland's second prong, Petitioner is required to prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

ARGUMENT

Counsel did not render ineffective assistance of counsel by declining to pursue an alibi defense that counsel thoroughly investigated, but did not believe would be successful, and the trial testimony was insufficient to require an alibi instruction. Further, because the State provided direct evidence, rather than circumstantial evidence, to establish Petitioner's identity, Petitioner was not prejudiced by the lack of an alibi instruction.

Petitioner argues trial counsel was ineffective for not "robustly" pursuing an alibi defense that Counsel simply did not believe was strong but instead felt was inadequate to overcome the State's direct evidence showing Petitioner's participation in the crimes. As discussed below, Counsel found, based on his discussion with the three family member witnesses, that the information

was inadequate to support an alibi and therefore insufficient to fill out the Rule 5 paperwork. Counsel presented the three family member witnesses anyway, and their trial testimony was indeed inadequate to support an alibi charge, had Counsel requested the instruction. Counsel chose to focus his strategy on self-defense and voluntary manslaughter, and challenging the State's evidence in a vigorous defense. Because Counsel made the kind of informed strategic choice based on a thorough investigation that Strickland considers virtually unchallengeable, the PCR court's finding that Counsel was not ineffective is supported by probative evidence and should be affirmed.

Counsel's PCR testimony

At the PCR hearing, Counsel testified, "We discussed an alibi defense. I spoke with the family members. It seemed like that they went to bed and he was home. But the hours whereby the incident occurred kept me from filing paperwork on an alibi. I wasn't confident that was going to be a valid defense." App. p. 608, line 25 – p. 609, line 4.

Counsel explained he called the three witnesses to establish Petitioner was already home for the night at around 12:30 a.m. to set up an argument that Petitioner was unlikely to, at a moment's notice, leave the house and shoot someone minutes later. App. 609, lines 14-18. Counsel described Petitioner's sister and father as "honest folks." App. p. 609, lines 16-18. Counsel explained the shooting was only two or three miles from Petitioner's residence, a "few-minutes" drive away. He did not think the alibi was strong when the family members were going to bed at 12:30 a.m. and the shooting was at 1:30 a.m. App. p. 612, line 17 – p. 613, line 7. Later, when asked if he believed in his client's alibi defense, Counsel answered, "I thought it was pretty clear he was there." App. p. 617, line 25.

Counsel found Woodruff, who he recalled as being Petitioner's girlfriend, to be a damaging witness for Petitioner. App. p. 609, lines 19-22. Counsel described Woodruff as a reluctant witness,

but counsel considered Woodruff's second statement to law enforcement to be damaging. App. pp. 613; p. 618, lines 3-12. Counsel summarized the hurdle for an alibi defense, "[W]e had two people directly saying that Holmes was present, and then Ms. Woodruff's statement and testimony." App. p. 620, line 25 – p. 621, line 2.

Felshunti Clark testified at the PCR hearing that Petitioner was not with him the night of the shooting. Clark admitted he tried to call Petitioner but got Petitioner's sister instead, and never spoke to Petitioner that night. Clark claimed he was available to testify and actually at the courthouse, but Counsel told him Counsel did not need him to testify. App. pp. 593-94. Clark agreed he was facing charges from the shooting and pled the day before Petitioner's trial. App. p. 596.

Counsel testified Clark was a codefendant represented by counsel and therefore Counsel could not merely talk to Clark directly. Counsel recalled that Clark pled the day before Petitioner's trial. App. pp. 610-11. Counsel discussed Clark participating at trial at one point with Clark's attorney, but Clark's attorney did not want him to testify. Counsel did not remember Petitioner talking about Clark as a potential witness. App. pp. 623-24. Counsel noted there was an alert about Petitioner's associates being around the courthouse that might cause trouble. Obviously Clark was an associate of Petitioner. However, Counsel testified he did not ask Clark to come to the courthouse and he never talked to Clark. App. p. 624.

Counsel's performance was not deficient for failing to call Clark as a witness.

Counsel's testimony supports the finding that his performance was not deficient. Clark was a codefendant represented by an attorney. So Counsel could not talk to Clark directly. Rule 4.2 Professional Conduct. Counsel explained that Clark's attorney did not want Clark to participate in Petitioner's trial. Petitioner never discussed Clark testifying at his trial. No evidence supports the

idea that Counsel would know Clark could provide potentially helpful testimony. In fact, Counsel believed there was a conflict because "they were codefendants and continuing to point at one another." App. p. 615, lines 1-2. Whether Clark would really be willing to put himself on the stand at the time of trial is an open question; whether his testimony would have been the same at trial yet another uncertainty; and further, Clark's version of why he was at the courthouse was refuted by Counsel. Counsel did not invite him as a potential witness at trial and did not talk with Clark at all. Clark's alternate version of facts, compared to Counsel's, in this regard certainly calls into question whether he would be a credible trial witness since he was not a credible PCR witness. In the petition for certiorari, the claim is Clark would buttress the alibi defense. In actuality, Counsel was unable to talk to Clark since he was represented by another attorney and was unaware of any potentially beneficial testimony. See generally Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) (finding plea counsel was not ineffective for failing to interview the burglary victim because plea counsel would need to be clairvoyant to expect any benefit would accrue to his client). The evidence supports the PCR court's finding that Counsel was not ineffective in this regard.

Counsel made a reasonable strategic decision not to file Rule 5 paperwork, to pursue other defenses, and to not seek an alibi instruction.

In the instant case, the three family members failed to provide a sufficient alibi since none of them testified as to Petitioner's whereabouts at 1:30 a.m., the time of the shooting. Counsel's decision not to file the alibi notice was based on reasonable professional judgment. For one thing, sending an alibi notice for imperfect alibi witnesses carries a downside. Under Rule 5, SCRCrimP, the defendant is required "to serve written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to

establish such an alibi." So submitting the notice of alibi and listing these witnesses and their addresses would have only invited scrutiny of the family witnesses from the prosecution without really having the benefit of an actual legitimate alibi defense. Instead, Counsel was free to call these witnesses without advance notice to the prosecution.

Further, following a reasonable investigation, Counsel made a reasonable strategic choice not to pursue an alibi defense because Counsel reasonably determined the alibi defense was weak and made a reasonable assessment of the strength of the State's case, which relied on direct evidence to establish Petitioner's identity as the shooter. Strickland v. Washington, 466 U.S. 668, 690-91 (1984) requires extreme deference to counsel's strategic judgments that are adequately investigated; as Strickland explains: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." Counsel's strategic choice is in the category of virtually unchallengeable.

In the present case, counsel prepared an alibi defense, one he did not ultimately believe in. So he declined to submit a notice of alibi and he utilized the family members to help create the narrative to further his defense, without using the term alibi.

Although not mentioned at the PCR hearing, the weakness in the alibi defense starts first with the problem that it was presented by interested family members, whose bias was patent. See Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir. 1995) ("Finally, we must consider the potential value to the defense of the evidence that might have been discovered in assessing the reasonableness of counsel's failure to conduct further investigation; alibi testimony by a defendant's family members is of significantly less exculpatory value than the testimony of an objective witness."); Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) ("Nor will we second-guess trial counsel's decision not to call Bergmann's step-father . . . to testify that Bergmann's guns were at

home at the time of the crime. As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias").[1]

At the PCR hearing, Counsel testified he thought the family witnesses were honest, but noted they only could say he was there when they went to sleep at 12:30 a.m. A charge on the defense of alibi "should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). "To be successful, [a defendant's] alibi must cover the entire time when his presence was required for accomplishment of the crime. To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime." Id. "[Because] an alibi 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 guilty person is no alibi at all." Id.

In the instant case, the evidence showed the shooting was at 1:30 a.m. Counsel noted Petitioner was only a few minutes of driving time away from the murder scene. At trial, Patricia Posey, the quondam girlfriend with whom he had children, testified she went to bed with him at 12:00 a.m., and she went to sleep. She did not provide any testimony claiming he did not leave at some later point. Tr. pp. 353-54. She admitted she never told the police about this supposed alibi. Tr. p. 355.

Thomas Davis, Petitioner's father, admitted the last time he saw Petitioner was when

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[1] The prosecutor's closing argument highlights the inherent credibility problem: "Why would his sister lie about having his cell phone at 1:30 a.m. in the morning, the day of the shooting? It's pretty simple. She's trying to not put him there. If she has his cell phone and she's the one that receives the calls, then Holmes Simpson-Davis doesn't know to be there." App. p. 375, lines 21-24. Of course, Petitioner not having his phone is not an alibi, but the jury was free to decide if the sister's testimony was sufficiently credible to leave reasonable doubt.

Petitioner went to bed at 12:00 a.m., shortly after they both helped somebody move and arrived home at 11:30 p.m. Davis claimed he was on the front porch until between 1:00 and 1:30 a.m. Davis then changed his testimony to suggest the last time he saw Petitioner was between 12:30 a.m. - 1:00 a.m., which still falls short of 1:30 a.m. App. pp. 356-58. At the PCR hearing, Davis changed his story again, claiming Petitioner and Davis helped a family member move, and they did not return to the house until 1:30 a.m., a whole two hours later than he testified to at trial. App. pp. 601-03. So Davis was not only inherently biased as Petitioner's father, but patently biased as shown by his willingness to contort his story the second time he testified in order to help Petitioner.

Petitioner's sister, Brittany Simpson-Davis, arguably gets closest to a technical alibi. But she does not get there. His sister testified she went into Petitioner's bedroom and retrieved his phone somewhere between 12:00 a.m. and 12:45 a.m. On cross-examination, she claimed to have kept the phone until "about" 1:30 a.m., but she did say if she saw Petitioner when she returned the phone. She did not testify about returning the phone at all. App. pp. 359-60. At the PCR hearing, she claimed she had the phone until, "2:30 or 3:00 o'clock, something like that. I can't remember." App. p. 606, lines 10-17. The impossibility of having his phone does not constitute an alibi for Petitioner as he could have simply been at the crime scene without his phone. So she did not supply a real alibi either. The sister also testified at the PCR hearing that after she retrieved the phone from Petitioner, Clark called Petitioner's phone and the sister answered, when Clark asked where Petitioner was, she told Clark Petitioner was in bed and Clark replied just to have Petitioner call him. App. pp. 605-06. Note she testified to only one phone call and there were two outgoing calls from Clark to Petitioner's phone and one incoming call from Petitioner's phone to Clark. App. pp. 214-15. So his sister's testimony makes little sense. Importantly, Petitioner's sister did not testify that she ever told Counsel about the call from Clark.

In the instant case, trial counsel exercised reasonable professional judgment to determine that the three witnesses were not providing a true alibi. Even if counsel requested an instruction for alibi, the evidence at trial does not support alibi. Counsel decided that an alibi instruction and alibi defense conflicted with his self-defense and voluntary manslaughter defenses, explaining, "I didn't want to be in a situation saying, well, he wasn't there but if he was, then we have a self-defense argument. It was – I don't think that's a bit of a reach to pursue both." App. p. 621, lines 20-25.

More importantly, Counsel simply did not believe an alibi defense was going to be successful in light of the direct evidence the State was presenting. Counsel made a strategic choice to focus on other potential defenses.

In United States v. Olson, 846 F.2d 1103, 1109 (7th Cir. 1988), the defense attorney interviewed two prospective alibi witnesses who failed to adequately answer his questions. The defense attorney told his client it would be a mistake to present the two witnesses and he refused to present what he believed to be a "questionable or possibly improper alibi defense." The Seventh Circuit explained, "This is precisely the kind of strategic choice made by a competent and well-trained lawyer that a court should not second guess, and this Court will not." Id.

Likewise, the defense attorney in Johnson v. Lockhart, 921 F.2d 796, 799 (8th Cir. 1990), declined to present alibi witnesses based on credibility issues. The Eighth Circuit found, "While different lawyers could reasonably arrive at different conclusions based on the same interview, the decision to call Johnson's alibi witnesses was clearly a matter of trial strategy." The Eighth Circuit then noted its prior admonishments against second guessing an attorney's strategy in evaluating claims of ineffective assistance of counsel. Id.; see Pina v. Maloney, 565 F.3d 48, 55 (1st Cir. 2009) ("'[St]rategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. Strickland, 466 U.S. at 690, 104 S.Ct. 2052.' Because Pina concedes

his counsel was aware of both Vailles and the substance of her proposed testimony, he faces a high hurdle in challenging counsel's performance.").

In Lusk v. Ratke, 593 F.Supp.3d 862 (E.D.Wisc. 2022), the district court noted among the "sound" reasons for Lusk's attorneys declining to pursue an alibi defense was that several witnesses identified Lusk as present at the crime scene. The district court noted that Lusk's family member alibi witnesses "would be flatly inconsistent" with the testimony of those witnesses, one of which in particular would be difficult to impeach and likely credible. Id. at 873-74. The district court ultimately concluded that it was reasonable strategy for counsel to focus on creating reasonable doubt as to Lusk's involvement rather than pursuing the alibi defense. Id. at 874.

In the present case, Counsel presented all three supposed alibi witnesses. None of the witnesses actually presented sufficient testimony to require an alibi instruction as none of the witnesses testified as to Petitioner's whereabouts at 1:30 a.m. So the reality is Counsel did not fail to present an alibi defense so much as the supposed alibi witnesses failed to provide testimony sufficient to establish an alibi or to require an alibi charge.

Petitioner attempts to blame Counsel for the lack of better facts by arguing he should have presented a more "robust" alibi defense. However, missing is evidence of sufficient facts to elevate this imperfect and faulted alibi defense to make it more robust. Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial); Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (finding the PCR court erred in granting relief on the basis counsel was ineffective in adequately preparing the case because Jackson failed to "present any evidence of what counsel could have discovered or

what other defenses [Jackson] would have requested counsel pursue had counsel more fully prepared for trial.").

Counsel recognized the inadequacies of their testimony well in advance of trial and made a deliberate choice, based on his professional judgment, to not seek an alibi notice. Counsel sought to present other defenses and put his energy in presenting other challenges to the State's evidence. Counsel did not render deficient performance. Petitioner attempts to compare the strength of the alibi defense to the strength of self-defense and voluntary manslaughter defenses.[2] However, Petitioner misses the danger of an alibi defense: if the alibi defense fails because the jury perceives the lack of credibility, then the natural inclination is to believe these incredible witnesses are covering for the defendant because the defendant is guilty. See Wong v. Belmontes, 558 U.S. 15, 25 (2009) ("The type of 'more-evidence-is-better' approach advocated by Belmontes and the Court of Appeals might seem appealing – after all, what is there to lose? But here there was a lot to lose."); Id. at 26 ("[T]he reviewing court must consider all the evidence – the good and the bad – when evaluating prejudice. . . . Here, the worst kind of evidence would have come in with the good.").

On the other hand, the risk from the self-defense and voluntary manslaughter challenges, which was primarily derived from the State's witnesses, is minimal. Counsel showed that the tension for the standoff dissipated and there was a period of calm until Victim arrived and challenged Petitioner and his group, claimed to have a gun, and chest bumped Petitioner. Although this only presented an imperfect self-defense case with no self-defense instruction and something that ultimately fell short of requiring a voluntary manslaughter instruction, Counsel was able to present these challenges and the other challenges to the State's evidence as well.

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[2] Petitioner's appellate defender submitted a merits brief arguing the trial court erred in declining Counsel's request for a voluntary manslaughter instruction.

Counsel's most notable challenge was to the three witnesses providing harmful direct evidence that Petitioner was the murderer. Counsel challenged Kilgore, whose identification testimony was powerful because he knew Petitioner and would be motivated to identify the people responsible for shooting him. But Counsel countered this evidence by referencing the evidence that Kilgore was drunk and it was dark where the shooting occurred. Counsel pursued what he felt was an ambiguity in Kilgore's recorded statement where, to Counsel's ears at least, Kilgore said "I shot first." The prosecution, Kilgore, and the interviewing officer insisted that what Kilgore said instead was, "I was shocked." Nonetheless, Counsel pursued this line to the end, in closing argument:

> Mr. Kilgore says, oh, I was in shock. No. Listen to him. He doesn't use shock in that context. Then I shot first. Then I shot first. The State wants you to make sure you don't believe what you hear. Okay. He shot first. Mr. Gary wants us to gloss over that, too.

App. p. 394, lines 16-20.

Not surprisingly, Counsel found some success with Woodruff, who was testifying against her will. She freely disowned the second statement incriminating Petitioner and was willing to agree with Counsel that she did not remember if she was at the Liquor House on the 24th or some other night. App. p. 266. In the end though, her obvious bias in favor of Petitioner made the second statement powerful evidence, and the jail house calls were indicative of Petitioner's influence in Woodruff's trial testimony. It was harmful to the defense to hear Petitioner tell Woodruff to retract her statement and to plead the Fifth in the recorded jail house call.

Counsel also challenged Brewton's identification, noting after the incident Brewton learned who Petitioner was from Kilgore and Brewton did not know Petitioner before the incident. Tr. pp. 299-300. Brewton also admitted on cross-examination that it was dark and hard to see. Tr. p. 311.

Accordingly, Counsel presented a vigorous challenge to the State's evidence after making

reasonable strategic choices. Therefore, Counsel's performance was not deficient.

No prejudice from lack of an alibi instruction

Further, Petitioner was not prejudiced by the lack of a jury instruction. The trial court instructed the jury:

> You should, also , consider whether or not the testimony of a witness is consistent or is it inconsistent with that witnesses own testimony or with other statement made by that witness, whether in court or outside of court. And you should also consider whether or not the testimony of a witness is consistent or is inconsistent with other testimony or other evidence received during the course of trial.

App. p. 429, lines 15-22. The trial court also instructed the jury, "In this case, the State must not only prove that the crimes of murder and attempted murder have been committed by someone, but they must, also, prove that it was this Defendant who has committed that crime and not someone else." App. p. 441, lines 18-22.

In the instant case, what the three family witnesses did provide was impeachment evidence. Woodruff's testimony, including the testimony concerning her second statement to law enforcement, claimed Petitioner and Woodruff were together at a friend's house in the time prior to them leaving together. The family members' testimony at trial refutes this aspect of Woodruff's testimony because according to the family members, he was at home. The jury instruction discussing evaluating testimony inconsistent with another witnesses' testimony is the operative instruction for the jury's analysis. If the jury found their testimony sufficiently credible to impeach Woodruff's testimony and thus cause the prosecution to not meet its burden of proof, the jury was free to do so.

Important to the analysis is that the prosecution relied on direct evidence rather than circumstantial evidence to prove Petitioner's identity as the gunman who shot Hull. The function of an alibi instruction is to emphasize the State's burden to prove the defendant was present and

participated in the crime. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). The Roseboro Court explained that the alibi instruction is crucial when the State relies on circumstantial evidence to prove the defendant guilty. Id.

On the other hand, in Gibbs v. State, 403 S.C. 484, 495-96, 144 S.E.2d 170, 176 (2013), the Supreme Court found that the PCR applicant was not prejudiced by trial counsel's failure to request an alibi instruction because the trial court provided a jury instruction on identification that made clear the State bore the burden of proving identity. Likewise, in the present case, the jury instructions cited above made clear that the State bore the burden of proving Petitioner's identity as the perpetrator of the crimes.

Petitioner failed to meet his burden of prejudice

Petitioner's arguments regarding the alibi defense is that Counsel should have made more of the testimony presented, but in the end, Petitioner failed to show any additional testimony from the three witnesses that could have been presented to support an alibi defense. Petitioner argues Clark should have been called to testify. However, Counsel's testimony reflects that he was not available to Counsel. Had Clark testified at the time of trial as he did at the PCR hearing – a questionable proposition – his testimony is self-serving and his bias towards Petitioner would be a barrier with the jury. Therefore, Petitioner failed to meet his burden of prejudice because Petitioner failed to show that the three family-member witnesses had additional information that counsel was aware of at the time of trial that Counsel could have elicited from these three witnesses. The additional testimony from his codefendant (if there was ever a remote possibility he would be available to testify) is itself highly suspect and fails to create a likelihood that the jury would reach a different result.

Accordingly, the PCR court's finding that counsel did not provide ineffective assistance of counsel is supported by probative evidence. The reality is Counsel provided a vigorous defense on

several fronts and did not put all the eggs in the basket of a limpid alibi defense. This is the virtually unchallengeable trial strategy as discussed in Strickland. Petitioner failed to present any evidence to support the alibi defense so it would be "robust" as Petitioner would have this Court envision, thus Petitioner fails to show prejudice. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief he issues herein.

Respectfully submitted,

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