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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Walton J. McLeod, IV, Circuit Court Judge

ANTONIO JORDAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000149

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Counsel's performance was constitutionally deficient for failing to investigate and produce Petitioner's brother as an additional alibi witness where Counsel acknowledged the only defense was alibi, and that he would have called additional alibi witnesses had he known of them to bolster and support the trial testimony of the other two alibi witnesses?

STATEMENT

Petitioner Antonio Jordan was indicted by the York County Grand Jury on December 11, 2014, for possession of a handgun by a person convicted of a violent crime, and possession of a stolen handgun. On January 22, 2015, he was further indicted for first-degree burglary, and possession of a handgun by a person convicted of a crime of violence. The charges originated from an incident occurring on November 8, 2013. App. 448-55.

On November 8, 2013, at around 1:30 pm, Derek Clark (Clark) returned to his home on Country Manor Lane in Rock Hill, South Carolina, after being away for about three hours. Upon entry, he noticed his home was burglarized. App. 120-22. Clark called 911 shortly after, and Deputy Edward Covert of the York County Sheriff's Office arrived at approximately 1:45 pm. App. 117; App. 121. Missing items from Clark's home included four (4) handguns, for which he provided serial numbers to police. App. 122; App. 136. Deputy Randy Clinton also arrived at Clark's home, and began a K-9 track based upon items in the back corner of Clark's yard. The track led through wooded areas and ultimately ended in the parking lot of a nearby church. Along the track, several items from Clark's home were recovered, as well as a black toboggan hat that did not belong to Clark. App. 147-49; App. 154-55. No suspect was seen or apprehended. App. 158.

Petitioner was riding his moped on November 14, 2013, and was stopped by Deputy Travis Shealy (Dep. Shealy) for failing to stop at a stop sign. App. 213-14. Dep. Shealy physically moved Petitioner's moped to a "safer distance" closer to the ditch on the roadside "for [his] safety," and looked for the VIN. App. 217. He noticed a gun on the ground where the moped was originally standing before he moved it. Upon examination of the handgun, Dep.

Shealy determined it matched the description of a handgun from the prior burglary. Petitioner denied the gun was his; he was nonetheless taken into custody. App. 217-18.

Petitioner's case proceeded to trial on January 26, 2015, before the Honorable Roger L. Couch (Trial Court) and a jury. David Cook (Counsel) represented Petitioner,[1] while Christopher Epting and Ryan Newkirk represented the State. Before the jury was struck, Petitioner pled guilty to the three gun charges. App. 35-36; App. 40. The Court accepted Petitioner's guilty pleas, and imposed concurrent sentences of three (3) years with credit for time served. App. 46-47; App. 55; App. 457-459.

On January 27, 2015, Petitioner proceeded to trial on his remaining charge of first-degree burglary. App. 56; App. 59-60. The State's case-in-chief primarily relied upon Clark and the aforementioned officers involved in the case, as well as DNA results from the black toboggan indicating a mixture of DNA; however, although Petitioner's DNA was included, it was not suitable for comparison because of the complexity of the mixture. App. 229-34.

During the defense's case-in-chief, Counsel called two alibi witnesses: (1) Petitioner's mother, Maryann Jordan (Mother); and (2) Petitioner's girlfriend, Eddielena Boyd (Girlfriend). Mother testified that on November 8, 2013, Petitioner left from Girlfriend's house, and walked into her house around 8:02 am. They then left together around 8:30 am for work at their family-owned store, Five Star Customs, off of Cherry Road. In the car was Mother, her husband, her other son Brandon, and Petitioner. They then left work sometime between 10:30 to 11:00 am. Petitioner was taken back to Girlfriend's home in Fort Mill, South Carolina. App. 274-76.

Girlfriend's testimony confirmed that Petitioner left her house to go to his mother's house at the same time she left for her job, which was around 8:00 am. App. 281. Girlfriend returned

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[1] Petitioner was first represented by the Office of the York County Public Defender until his family hired Counsel on December 10, 2014, to represent Petitioner. App. 380.

home at about 10:45 am, Appellant arrived there shortly after at around 11:15 am, and the two watched The Price is Right on television. When Girlfriend left for work again at 3:15 pm, Appellant was still at her house with her son. App. 382-83.

After closing arguments, the Trial Court instructed the jury on the defense of alibi. App. 328. On January 28, 2015, the jury found Petitioner guilty of first-degree burglary, and the Court imposed a sentence of twenty-five (25) years to run concurrently with his prior sentences. App. 346; App. 351; App. 456. Petitioner filed a direct appeal, but it dismissed by the South Carolina Court of Appeals pursuant to Anders v. California;[2] the case was remitted January 17, 2018. App. 354; App. 361; App. 436.

On April 9, 2019, Petitioner filed his Post-Conviction Relief (PCR) Application, and the State filed its Return on June 25, 2019. App. 353; App. 360. An amended PCR Application was filed on August 3, 2020, alleging *inter alia* that Counsel failed to properly investigate and present another potential alibi witness on Petitioner's behalf. App. 371-73. The matter proceeded to a hearing on December 8, 2022, before the Honorable Walton J. McCleod, IV (PCR Court). Tommy A. Thomas represented Petitioner, while Zachary Jones represented the State. App. 376. Three witnesses were called at the PCR hearing: Counsel; Petitioner; and Petitioner's brother, Neil Jordan (Brother). App. 377.

Counsel affirmed that the defense's theory of the case was that Petitioner was not involved with the burglary, and that was alibi the only defense. App. 384; App. 431. Counsel acknowledged that he spoke with Brother often, but did not recall Brother asking to be an alibi witness. However, he claimed he would have called additional alibi witnesses had he known

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[2] 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

about them in order "to bolster . . . and support the testimony of the other alibi witnesses," because alibi "was the only defense [he] had."[3] App. 394; App. 404-05; App. 431.

Brother testified as well at Petitioner's PCR hearing in 2022. He recalled picking up his brother—Petitioner—the morning of the incident from Girlfriend's house, being with him that day, and dropping off Petitioner at Mother's home. App. 428. On cross-examination, he recalled picking up Petitioner at 8:45 am, and dropping him off around 5:00 pm. Brother also confirmed that he was the family member who retained Counsel for Petitioner, spoke with Counsel several times—including conversation about being an alibi witness. Specifically, he confirmed that he was willing to testify, and spoke with Counsel about being an alibi witness. App. 426-28.

On February 5, 2024, the PCR Court filed its Order dismissing Petitioner's PCR Application. App. 435. As to the issue of Counsel's failure to investigate and present Brother as an alibi witness, the PCR Court found Counsel's performance was not deficient, and Petitioner was not prejudiced for failing to call Brother. Specifically, the Court held the timeline provided by Brother was inconsistent with those provided by Mother and Girlfriend, and that neither Mother nor Girlfriend mentioned Brother. App. 445-46.

This petition for writ of certiorari follows.

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[3] It is notable that, despite his acknowledgement at PCR that alibi was Petitioner's only defense, Counsel failed to even mention either alibi or the witnesses supporting it in his opening statement or closing argument to the jury at Petitioner's trial. App. 110-15; App. 294-97; App. 431.

ARGUMENT

Counsel's performance was constitutionally deficient for failing to investigate and produce Petitioner's brother as an additional alibi witness where Counsel acknowledged the only defense was alibi, and that he would have called additional alibi witnesses had he known of them to bolster and support the trial testimony of the other two alibi witnesses.

Plainly stated, Counsel's failure to investigate and call Brother as a witness critical to Petitioner's defense "clearly shows that [Counsel] inadequately prepared for trial." Lounds v. State, 380 S.C. 454, 462, 670 S.C. 646, 650 (2008). The standard is whether Counsel's performance fell below an objective standard of reasonableness, and the performance prejudiced Petitioner to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

"Without a doubt, a criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)) (internal quotations omitted). "[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Lounds, 380 S.C. at 460, 670 S.C. at 649 (quoting Ard, 372 at 331-32, 642 S.E.2d at 597); see also Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'") (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)). "One component of that duty is to

investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (citing Grooms v. Solem, 923 F.2d 88, 90 (8th Cir.1991)).

In the present case, Counsel conducted only a limited investigation into Petitioner's alibi, and called only two witnesses to establish it: Mother, and Girlfriend. After speaking with Mother and Girlfriend by telephone prior to trial, Counsel admitted he only "put them forward because [Petitioner] was adamant about putting them forward...." App. 404. In other words, despite Counsel's statement acknowledging that Petitioner's only defense was alibi, he only utilized these two alibi witnesses because Petitioner insisted upon it. App. 404; App. 431.

Further, Counsel agreed that he did not investigate any other potential alibi witnesses because neither "applicant [n]or anyone else gave [him] any indication that there were other potential alibi witnesses." App. 404. If there were, Counsel claimed he would have called them. App. 404-05. However, Counsel's statement is belied by Mother's testimony at trial regarding Petitioner's alibi. Specifically, Mother referenced additional people in the car and at work with her and Petitioner, including Mother's husband, and Mother's "other son."[4] Yet Counsel did not investigate any of these potential witnesses for what they saw at the time, or if they had additional information that would have reasonably led to other alibi witnesses. Among the potential alibi witnesses Counsel apparently did not investigate was Brother.

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[4] Although at trial Mother used the name "Brandon" as her other son in the car with her, her husband, and Petitioner, there was neither an indication that Mother had more sons other than Petitioner and Brother, nor was there mention of Brother's middle name at PCR. App. 274-75; App. 425.

Counsel acknowledged he spoke with Brother multiple times, which is consistent with Brother's testimony as well. However, Counsel's story continued to say that Brother never mentioned being an alibi witness. Such a position flies in the face of multiple factors which would guide an attorney's reasonable investigation into additional alibi witnesses from Petitioner's family—especially Brother—including: (1) Petitioner's insistence on presenting alibi witnesses, all of whom appeared to be family members; (2) Mother's statement that additional family members were in the car together going to work at the family business, and were working together there on the date of the incident; (3) Brother's repeated communications with Counsel; and (4) Brother's PCR testimony confirming he spoke with Counsel about being an alibi witness and was willing to testify. App. 404; App. 274-76; App. 426-28. Any reasonable investigation by an attorney intent on raising an alibi defense, and who possessed even some of this information, should have at least spoken to all of Petitioner's family members as to Petitioner's whereabouts on November 8, 2013. Yet Counsel did not. As such, Counsel's performance fell below an objective standard of reasonableness due to his failure to follow through on an investigation into potential witnesses necessary to support Petitioner's only defense of alibi. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; Walker, 407 S.C. at 405, 756 S.E.2d at 147.

Furthermore, Petitioner was prejudiced by Counsel's failure to investigate and call Brother as an alibi witness. As established at Petitioner's PCR hearing, Brother's testimony readily indicated he was with Appellant during the time frame of the incident. App. 426-28. While his statements of time and location were not perfectly in sync with those of Mother and Girlfriend when he testified on December 8, 2022, his testimony at the PCR hearing was over six (6) years removed from Petitioner's trial in late January of 2015, and over nine (9) years after the

incident date of November 8, 2013. Perfect recollection cannot be expected after the passage of nearly a decade of time; however, what is critical is that (1) the time frame to which Brother testified covered the time of the incident; (2) the statement of picking up Petitioner—his family member—from Girlfriend's house on the morning of the incident was consistent with testimony from Mother and Girlfriend of Petitioner leaving Girlfriend's house that morning and riding to work with family members and working at the family-run business. Moreover, despite Brother's recollection that he was with Petitioner until 5:00 pm, the jury still would have had the option to believe his testimony if they indeed did not believe Girlfriend's. In other words, while Brother's testimony may not have matched that of Mother and Girlfriend verbatim, Brother's limited recollection nearly a decade after the incident date nonetheless buttressed the facts necessary to establish Petitioner's alibi. Additionally, it highlighted the need to focus a reasonable investigation into Petitioner's family members as potential alibi witnesses for his defense.

Counsel readily stated he would have called additional alibi witnesses if he was aware of them "to bolster . . . and support the testimony of the other alibi witnesses." App. 404-05. As such, had Counsel properly investigated and called Brother as a witness in Petitioner's trial, then it would have helped bolster the testimony of Petitioner's other two alibi witnesses. This was especially acute in a trial where the State admitted to the jury in closing arguments that "[t]he only question out of all those elements is who did this burglary. That's the only thing you need to consider back there in the jury room and deliberations." App. 302. In other words, identifying Petitioner as the burglar was the only element litigated at trial, and his only defense against it was alibi—Petitioner was with Girlfriend and apparently Brother at the time of the incident, so it could not have been him.

Brother's testimony would have provided the jury with a second person with Petitioner at the time of the incident on November 8, 2013. Such testimony would have been crucial to buttress Petitioner's alibi defense, especially where alibi "was the only defense [he] had." App. 431. Accordingly, Counsel's deficient performance prejudiced Petitioner to the extent that "there is 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, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; see also Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.").

CONCLUSION

For the foregoing reasons, Petitioner Antonio Jordan respectfully requests that this Court grant his Petition for Writ of Certiorari, reverse the PCR Court's Order of Dismissal, and grant him a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of June, 2024.