

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Lee County

R. Ferrell Cothran, Jr., Circuit Court Judge

---

DORIAN J. CAIN,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

---

RETURN TO PETITION FOR WRIT OF CERTIORARI

---

KATHRINE H. HUDGINS  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR RESPONDENT

# INDEX

INDEX .....	1
QUESTIONS PRESENTED .....	2
STATEMENT OF THE CASE .....	3
ARGUMENT .....	6
CONCLUSION .....	19

## QUESTIONS PRESENTED

1. In an armed robbery case, did the PCR judge correctly find that trial counsel was ineffective in failing to procure expert medical testimony supporting respondent's alibi defense and corroborating respondent's trial testimony in regard to his medical condition? (Petitioner's question #4)
  
2. Did the PCR judge abuse his discretion by allowing supplemental evidence in the form of a deposition from respondent's medical doctor explaining respondent's medical condition at the time of an armed robbery that took place 18 days after respondent had undescended testicle surgery? (Petitioner's question #3)
  
3. Did the PCR judge correctly find that counsel was ineffective in failing to present at trial corroborative testimony from respondent's mother as to his medical condition at the time of the armed robbery?
  
4. Did the PCR judge correctly find that trial counsel was ineffective by inadequately preparing for trial when he failed to procure expert medical testimony to support the alibi defense and corroborate trial testimony in regard to respondent's medical condition and failed to present corroborative testimony from respondent's mother as to his medical condition at the time of the armed robbery? (Petitioner's question #2)
  
5. Did the PCR judge correctly find that trial counsel was ineffective in failing to call additional alibi witnesses? (Petitioner's question #1)

## STATEMENT OF THE CASE

In February of 2004, the Lee County Grand Jury indicted Cain for two counts of armed robbery, indictment #2004-GS-31-0006. On April 6, 2004, Cain proceeded to jury trial before the Honorable Clifton Newman. On April 8, 2004, the jury returned verdicts of guilty and Judge Newman sentenced Cain to 10 years concurrent for each count. Attorney Charles Brooks represented Cain at trial. On April 16, 2004, Cain filed a motion to set aside the verdict and for a new trial based on after discovered evidence pursuant to Rule 29, SCRCrimP. A hearing was held on June 23, 2004, and the motion for a new trial was denied.

A timely notice of intent to appeal was filed and the direct appeal perfected. Attorneys Desa Ballard and Jason B. Buffkin represented Cain for the direct appeal. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Cain, Op. No. 2006-UP-387 (S.C. Ct.App. filed November 28, 2006). The petition for rehearing was denied on January 29, 2007.

On January 29, 2008, Cain filed an application for post conviction relief, #2008-CP-31-0021. The State filed a return on September 5, 2008. On October 26, 2009, an evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. Attorney Hemphill P. Pride II represented Cain at the PCR hearing. In a written order signed December 22, 2009, Judge Cothran denied relief and dismissed the application.

On January 6, 2010, Cain, through counsel, filed a motion to reconsider the order of dismissal. The motion was amended on January 7, 2010. The State filed a return on January 7, 2010. In a letter dated April 8, 2010, counsel for Cain requested a deposition be taken. In letters dated April 8, 15, 2010, the State objected. On April 21, 2010, counsel for Cain filed a motion to compel the deposition of Pickens K. Moyd, MD. On April 29, 2010, the State filed a return. On May 11, 2010, Judge Cothran, over the State's objection, ordered the deposition of Pickens K.

Moyd, MD to be taken. The parties deposed Dr. Moyd on June 2, 2010. On September 13, 2010, following the submission of proposed orders from the parties, Judge Cothran signed an order granting Cain a new trial. The State appealed. On March 30, 2011, the State filed a petition for writ of certiorari. This return follows.

## STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether any evidence of probative value exists to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). In performing this analysis, the appellate court is to give great deference to the PCR court's findings of fact and conclusions of law. Id.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro, supra.; Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

## ARGUMENT

1. In an armed robbery case, the PCR judge correctly found that trial counsel was ineffective in failing to procure expert medical testimony supporting respondent's alibi defense and corroborating respondent's trial testimony in regard to his medical condition.

James Reames and Edward Scott testified that on December 18, 2003, just before 11:00 AM, three young black men robbed them at gunpoint and took their wallets. Both men testified that the robbers ran away from the building where the robbery took place. Scott testified, "They ran out the door, went to the right, ran down the hill, went to the left and went on around up there to the other street up there." (App. p. 133, lines 22-24). When asked if the young men were running fast, Scott answered, "As fast as they could go." (App. p. 134, lines 14-21).

At trial, Cain testified that on the morning of December 18, 2003, he went to his friend LeQuint Johnson's house about 9:00 AM. (App. p. 283, lines 24 – p. 284, lines 1-10). Cain testified that sometime after 11:00 AM he, Demetrius, LeQuint and Donnie Jeffords got in Demetrius' aunt's car and were going to the hardware store to have an extra house key made. (App. p. 284, lines 19 – p. 285, lines 1-21). The young men were stopped by police before they arrived at the hardware store.

Officer Ernest Mosely with the Bishopville Police Department testified that between 11:15 and 11:30 he received a call from dispatch about an armed robbery involving three black males who were running from the scene. (App. p. 183, lines 6-14; p. 200, lines 1-11). After receiving the information from dispatch, the officer observed a car with black male occupants about two blocks from where the armed robbery took place. (App. p. 185, lines 3 – p. 186, lines 1-5). According to the officer, he stopped the car because of the "unusual" rate of speed and the fact that the driver and

a passenger were looking back at him. (App. p. 185, lines 3 – p. 186, lines 1-21). Upon cross examination, the officer admitted that the vehicle was not exceeding the 30 mph speed limit but then added, as an additional reason for stopping the vehicle, that the vehicle failed to come to a complete stop at a stop sign. (App. p. 196, lines 1- p. 197, lines 1-25).

Reames and Scott were brought to the traffic stop and identified Cain as one of the robbers. Reames testified that Cain was the only one of the four who was handcuffed. (App. p. 25, lines 18 – p. 26, lines 1-10). None of the other young men in the car were identified as being involved in the armed robbery. (App. p. 109, lines 7-10; p. 128, lines 10-12). No guns or wallets were recovered. (App. p. 165, line 23 – p. 166, lines 1-3).

At trial Cain testified that he was unable to run at the time of the robberies. (App. p. 289, lines 22 – 25). Cain testified that he could not run because of a surgical procedure performed on December 1, 2003, 18 days before the armed robbery. (App. p. 289, lines 22 – p. 290, lines 1-16). Cain's trial testimony in regard to the surgery was brief. Over the State's objection, Cain entered in evidence a report from Carolina Pines where the surgery had been performed. Upon cross examination, the State emphasized the fact that the report from Carolina Pines did not state that Cain could not run as a result of the surgery. (App. p. 308, lines 15 – p. 309, 310). No other evidence was introduced in regard to Cain's medical condition at the time of the robberies.

During the PCR hearing trial counsel admitted that he did not introduce any other evidence to corroborate Cain's testimony that he was unable to run at the time of the robberies as a result of surgery. (App. p. 613, lines 18 – p. 614, 615, lines 1-16). When asked about the possibility of using corroborating testimony, trial counsel simply stated that he did not use any and believed that Cain's mention of the testicle surgery was strong enough. (App. p. 615, lines 3-16). At the time of trial, Cain was sixteen years old. (App. p. 283, lines 13-14). At the close of the PCR case counsel for

Cain argued that medical testimony in regard to Cain’s ability to run at the time of the robberies was critical. (App. p. 634, lines 23 – p. 635, lines 1-5).

The PCR judge initially signed an order of dismissal on December 22, 2009. (App. pp. 639 – 648). In that order of dismissal the judge wrote, “Applicant offered no expert testimony on the issue of Applicant’s physical limitations from the surgery. Therefore, it is merely speculative as to whether expert testimony on the subject would have aided the defense. Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005).” On January 6<sup>th</sup> and 7<sup>th</sup> 2010, PCR counsel for Cain filed a motion to reconsider the order of dismissal and filed an amended motion to reconsider the order of dismissal. (App. pp. 649 – 654). The motions raised trial counsel’s failure to corroborate Cain’s medical condition. (App. p. 650, 653). While the motion to reconsider was still pending, PCR counsel filed a motion to compel the deposition of Pickens K. Moyd, M.D. (App. p. 659). Judge Cothran granted the motion and on June 2, 2010, the parties took the deposition of Dr. Moyd. (App. pp. 666 – 727).

As noted in the order granting relief, Dr. Moyd testified in detail about the surgery he performed on Cain. (App. pp. 669- 676). In the order granting relief, the PCR judge quoted Dr. Moyd’s testimony from the deposition:

The testicle is up in the inguinal canal. Its up above the scrotum, the sac, see, and you have to go up and surgically dissect it free and bring it down from up here into his sac, see. And then if you remember, we make a little tiny opening in the bottom of that sac and attach a rubber band—its sterile and all that—attach it to the testicle and fix it in such a way when the time comes to take it loose, you just clip it and it slides back out.

And you recall that he had the little rubber band attaching to the opposite thigh. Once you bring it down—the cremasteric muscle is the little muscle that pulls the testicle up in the sac. If a person gets real cold, there’s a tendency for that testicle to go back up high in the scrotum, but there’s a tendency for it to pull back up.

Once you've gone through all this trouble to get it down just exactly the way you want it, by all means, do something to keep it from going back up again, and so that's what the little rubber band was, see and the little 16-year-old boy he's going to be up and down and about no matter what you do to him, but as long as that rubber band is putting a little tension on it—and it will hurt if he pulls it too hard, see. That just holds it down in the scrotum in the sac until it sort of fixes itself there because we have the fixing sutures to hold it there.

But that rubber band—at the big medical center in Virginia they—we always demanded that we do that. Its just double safety to reduce down into the scrotum once you get it down there. So that's what that's about.

(App. p. 741; p. 675, lines 1- p. 676, lines 1-10).

When asked if Cain would have been able to run as the witnesses described the robbers running, Dr. Moyd testified:

Following an undescended testicle operation, could he – it would be possible but I think not probable that he would run real hard 18 days after surgery. But he could run seven days after surgery, but 14 days he could run, 18 days, but can he run hard? I don't know. That's what I told you is the honest truth.

It would be unlikely that a boy would do anything that was strenuous 18 days after an – essentially the same as a hernia – a hernia repair. But did – does this mean that it could not have been him? That is really what your question is.

(App. p. 692, lines 18 – p. 693, lines 1-5).

In the order granting relief the PCR judge outlines his conclusions of law writing:

2. Considering all the circumstances, Attorney Brooks did not “articulate a valid reason” for failing to investigate; obtain and offer the expert witness testimony of Dr. Moyd; for failing to offer corroborating testimony of Applicant's mother as to Applicant's physical condition; nor, for failing to offer additional witnesses' testimony corroborating Applicant's alibi. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

3. Considering all the circumstances, “reasonable professional judgment” does not support Attorney Brooks’ failure to investigate the availability of, and to offer, additional evidence to refute the Prosecution’s main theory of the case that Applicant fled the robbery scene running. McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008)
4. Attorney Brooks’ failure to procure favorable expert medical testimony supporting Applicant’s claim that he could not run on the date of the robberies; and, failure to present additional witness testimony corroborating his alibi was unreasonable under all the circumstance of this case.
5. Attorney Brooks’ failures to investigate and elicit available favorable testimony from Dr. Moyd as an expert, from Applicant’s mother in corroboration of Applicant’s condition, and from additional alibi witnesses, combined with Attorney Brooks’ admission of having spent only two hours and forty-five minutes with Applicant in preparation for trial, represent his inadequate preparation for trial rather than a valid trial strategy; and, Attorney Brooks’ assistance was, thus, deficient and unreasonable.

(App. pp. 743-744).

The record contains evidence of probative value to support the PCR judge’s finding that trial counsel was ineffective in failing to offer at trial the expert medical testimony of Dr. Moyd. The sixteen year old defendant’s brief testimony about a surgical procedure involving his testicle and the medical notes introduced without explanation are not adequate to properly convey to the jury Cain’s medical condition.

In McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008), the South Carolina Supreme Court wrote, “A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State. Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (quoting Wiggins, 539 U.S. at 524-25, 123 S.Ct. 2527).”

Cain asserted an alibi defense at trial. The victims of the robbery testified that the robbers ran way from the scene. Expert medical testimony corroborating Cain’s testimony about

his medical condition was critical in supporting the alibi defense. Evidence supporting the fact that Cain could not run at the time of the robbery lends credibility to his alibi defense and the conclusion that Cain was not one of the robbers. While Dr. Moyd could not conclusively testify that Cain would not have been able to run as the witnesses described the robbers ran, the jury should have heard his expert testimony that it was not probable Cain could have run. Trial counsel had a duty to rebut the State's theory that it was Cain who participated in the robbery and ran from the scene. Cain's testimony alone and the unexplained medical records were insufficient and trial counsel did not articulate any reasonable strategy for his failure to present Dr. Moyd's testimony.

The record supports the fact that Cain was prejudiced by counsel's deficient performance. Dr. Moyd's expert medical testimony about the surgical procedure and Cain's medical condition is not simply cumulative to Cain's testimony, as argued by the State. (Brief of petitioner p. 17). Cain's testimony at trial consists of less than three transcript pages and is vague, as one would expect a sixteen year old boy's testimony to be about his own testicle surgery. In contrast, Dr. Moyd's deposition is 41 pages and very detailed. While medical notes were admitted, they were admitted without the explanation provided by Dr. Moyd. Instead, the State was able, through cross examination of Cain, to establish that the medical notes, without the explanation from Dr. Moyd, did not state that Cain could not run as a result of the surgery. (App. p. 308, lines 15 – p. 309, 310).

The present case is distinguished from Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008), where the Court found counsel was not ineffective for failing to call an expert witness to challenge the testimony of the State's expert witness. First, in Lorenzen the petitioner failed to call a defense expert witness to testify at the PCR hearing. The expert's testimony in the present case was before the PCR court. Second, the Court found that there was no prejudice because the trial

attorney was able to vigorously cross examine the State's witness. In the present case, the State did not offer expert testimony. Expert testimony was needed in the present case to explain Cain's medical condition rather than counter testimony presented by a State's expert. There was no such scenario here as there was no State's expert.

The present case is also distinguished from Legare v. State, 333 S.C. 275, 509 S.E.2d 472 (1998), where the Court found that counsel was not ineffective in failing to call an identification expert because counsel articulated a valid reason for not using a particular expert. In the present case, trial counsel did not articulate any reasonable strategy for his failure to present Dr. Moyd's testimony.

The State's case was based on a show up eye witness identification. The State did not produce overwhelming evidence of guilt. Cain presented an alibi defense. Dr. Moyd's testimony supported the alibi defense and gave credibility to Cain's testimony that he was unable to run as the witnesses described the robbers ran from the scene. Cain was prejudiced by trial counsel failure to call Dr. Moyd as an expert witness.

2. The PCR judge did not abuse his discretion by allowing supplemental evidence in the form of a deposition from respondent's medical doctor explaining respondent's medical condition at the time of an armed robbery that took place 18 days after respondent had undescended testicle surgery.

The PCR judge allowed the deposition of Dr. Moyd after the evidentiary hearing and after he signed an order of dismissal but while a post trial motion was still pending. The State argues that the PCR judge erred in accepting new additional witness testimony relying on State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct.App. 1999) and SCDOT v. First Carolina Corp. of S.C.,

372 S.C. 295, 641 S.E.2d 903 (2007). In the order allowing the deposition of Dr. Moyd, the PCR judge wrote:

For purposes of preservation, the Respondent objects to the supplementation of additional testimony from an additional witness. Respondent claims that a motion to alter or amend may not be used to present to the court ‘an issue the party could have raised prior to judgment but did not.’ Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (Ct.App. 2009); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct.App. 1990). This court notes Respondent’s objection. However, after review of the testimony at trial, this court finds that the issue of the Applicant’s testicular surgery, and its affect on him, was raised during trial. Thus, the supplementation of testimony is not improper.

(App. p. 666). The issue of Applicant’s medical condition following testicular surgery was not a new issue as it was raised at trial and at the PCR hearing. The PCR judge correctly allowed the supplementation of evidence through the deposition of Dr. Moyd.

The cases cited by the State address issues of error preservation. In Hamilton, a probation revocation case, the defense raised during the revocation hearing was that the defendant violated a condition of probation by not reporting because he thought that his probation had ended. When the judge revoked probation, Hamilton filed a motion to reconsider arguing that the violation was not willful. Addressing the question of whether the willfulness issue was preserved, the Court of Appeal wrote, “Nevertheless, it is clear that the essence of defense counsel’s argument at the revocation hearing was that the violation was not willful because Hamilton believed his probationary period had terminated. The circuit judge ruled that the violation was “intentional.” Thus, we find the issue is properly preserved even though counsel did not expressly argue lack of willfulness at the revocation hearing.” Hamilton, 333 S.C. at 648, 511 S.E.2d at 97.

Error preservation was an issue decided in SCDOT v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007), where the objection to a special verdict form made at trial

varied from the objection made in the motion for judgment notwithstanding the verdict. The South Carolina Supreme Court found the issue preserved.

The issue regarding Cain's medical condition was clearly preserved for review. The PCR judge's decision to allow the deposition of Dr. Moyd simply re-opened the record to allow supplementation to evidence already presented. The PCR judge in the present case correctly re-opened the record to allow supplemental evidence. The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Wright v. Strickland, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct.App.1991). The trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case. Spinx Oil Co., Inc. v. Fed. Mut. Ins. Co., 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993), overruled on other grounds, Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997). The judge's decision to allow the deposition of Dr. Moyd did not constitute an abuse of discretion.

3. The PCR judge correctly found that counsel was ineffective in failing to present at trial corroborative testimony from respondent's mother as to his medical condition at the time of the armed robbery.

Cain's mother, Gina Cain Davis, testified at the PCR hearing. Ms. Cain Davis testified that she was present for her son's trial but was not asked to testify on her son's behalf. (App. p. 569, lines 24 – p. 570, lines 1-12). The mother testified that she could have told the jury about her son's medical condition on the day of the robbery and his inability to run as a result of his surgery. (App. pp. 568 – 571). The mother also testified that her son had a learning disability which may have limited his ability to testify. (App. p. 570, lines 21 – p. 571, lines 1-9).

The PCR judge correctly found that trial counsel was ineffective in failing to present the testimony of respondent's mother. (App. pp. 743-744). Trial counsel did not articulate any reasonable strategy for his failure to present the mother's testimony. The State argues that Cain cannot show prejudice from trial counsel's failure to call the mother as a witness because her testimony is cumulative to Cain's testimony. (Brief of petitioner p. 17). As argued above in regard to Dr. Moyd's testimony, the mother's testimony is not merely cumulative as it further corroborates, in greater detail, Cain's condition after testicular surgery. In contrast to Dr. Moyd, who did not see Cain on the day of the robbery, the mother could testify to Cain's condition and as she observed him on the day of or very close to the time of the robbery.

Testimony from the mother that Cain could not run at the time of the robbery corroborates Cain's testimony and lends credibility to his alibi defense and the conclusion that Cain was not one of the robbers. Cain was prejudiced by trial counsel's failure to call the mother as a witness. In Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), the Court, reversing a finding of ineffective assistance of counsel for failure to call a witness, found that the record did not support the finding when the witness's testimony was not presented at the PCR hearing. The Court, however, did note, "Assuming Ms. James would have testified as speculated by respondent, her testimony would have been crucial to the defense as it would have corroborated respondent's version of the events on the morning of May 30, 1993." Bannister, 333 S.C. at 303, 509 S.E.2d 809-10). In the present case, the mother testified at the PCR hearing. Her testimony would have been crucial to the defense because it corroborated Cain's testimony in regard to his medical condition at the time of the robbery.

4. The PCR judge correctly found that trial counsel was ineffective by inadequately preparing for trial when he failed to procure expert medical testimony to support the alibi defense and corroborate trial testimony in regard to respondent's medical condition and failed to present corroborative testimony from respondent's mother as to his medical condition at the time of the armed robbery.

In the order granting relief the PCR judge wrote, "Attorney Brooks' failures to investigate and elicit available favorable testimony from Dr. Moyd as an expert, from Applicant's mother in corroboration of Applicant's condition, and from additional alibi witnesses, combined with Attorney Brooks' admission of having spent only two hours and forty-five minutes with Applicant in preparation for trial, represent his inadequate preparation for trial rather than a valid trial strategy; and, Attorney Brooks' assistance was, thus, deficient and unreasonable." (App. p. 744). The PCR judge correctly found that counsel was ineffective in failing to adequately prepare for trial. The State argues that Cain made no demonstration of what benefit additional trial preparation would have yielded. (Brief of petitioner p. 12). If trial counsel had adequately prepared for trial, he would have realized that the sixteen year old defendant's brief testimony about a surgical procedure involving his testicle and the medical notes that did not address Cain's ability to run were not adequate to properly convey to the jury Cain's medical condition. As a result of better trial preparation, counsel would have realized that he needed to call as witnesses, Dr. Moyd and Cain's mother.

In Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008), the South Carolina Supreme Court wrote, "A criminal defense attorney has a duty to perform a reasonable investigation. *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 597. '[W]hile the scope of a reasonable investigation depends upon 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.' *Id.* at 331-32, 642 S.E.2d at 597 (internal quotes and citation

omitted).” There is nothing in the record to indicate that trial counsel ever interviewed Dr. Moyd. The record supports the PCR judge’s finding that counsel was ineffective in failing to adequately prepare for trial and that Cain was prejudiced by counsel’s deficient performance.

5. The PCR judge correctly found that trial counsel was ineffective in failing to call additional alibi witnesses.

In the order granting relief the PCR judge wrote, “The record reflects that Attorney Brooks presented alibi testimony at trial to the effect that the Applicant was at the home of Mrs. Alphine Brooks [Johnson]<sup>1</sup> until after the time of the robberies, together with her son Lequint Johnson, and Donnie Jefferson; and, that they were joined by Demetrius McDonald who came to Mrs. Brooks’ [Johnson’s] home to pick up Donnie Jefferson and the Applicant<sup>2</sup> in a vehicle. However, only the testimony of Mrs. Brooks was offered as to this alibi.” (App. p. 736). The PCR judge correctly found that counsel was ineffective in failing to call the additional alibi witnesses. While counsel articulated a strategy for not calling LeQuint Johnson, the fact that LeQuint had a juvenile record, counsel did not articulate a reasonable strategy for failing to call Donnie Jefferson and Demetrius McDonald as alibi witnesses.

The State, citing Glover v. State, 318 S.C. 496, 498-499, 458 S.E.2d 538, 540 (1995), argues that Cain failed to demonstrate prejudice because neither Donnie Jefferson nor Demetrius McDonald testified at the PCR hearing. The cumulative effect, however, of trial counsel’s failure to call these two witnesses combined with his failure to call Dr. Moyd as an expert witness and failure to call the mother as a witness when these two witness’ testimony supported the alibi defense

---

<sup>1</sup> The witness Alphine Johnson’s name appears mistakenly as Brooks in the order.


<sup>2</sup> The trial record reflects that LeQuint Johnson was with the other three young men when they went to have a key made. (App. p. 285, lines 4-13).

and corroborated Cain's testimony about his medical condition constitutes prejudicial ineffective assistance of counsel. While the additional alibi witnesses were not called to testify at the PCR hearing, this issue, combined with the other meritorious issues presented above, warrants relief. See Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002).

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be denied and the case remanded for a new trial.

Respectfully submitted,

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 20th day of September, 2011

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Lee County

R. Ferrell Cothran, Jr., Circuit Court Judge

---

DORIAN J. CAIN,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

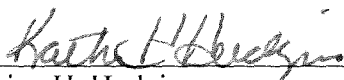
PETITIONER

---

CERTIFICATE OF SERVICE

---

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Mary Williams, Esquire, this 20th day of September, 2011.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 20th day  
of September, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.