 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County

Edgar W. Dickson, Circuit Court Judge  
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**RECEIVED**

APR 18 2014

**S.C. Supreme Court**

MAURICE SHAUNDELL HOPE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002013  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

BENJAMIN JOHN TRIPP  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred in concluding Petitioner did not suffer prejudice from trial counsel's deficient failure to secure an alibi charge where the only factual issue in dispute was whether Petitioner was present at the robbery; where Petitioner produced numerous witnesses to testify he was elsewhere at the time of the robbery; and where the only direct evidence of Petitioner's presence at the robbery was the testimony of two deal-making codefendants.

## STATEMENT

On June 12, 2008, the York County Grand Jury indicted Petitioner Maurice Shaundell Hope for armed robbery, criminal conspiracy to commit armed robbery, kidnapping, and possession of a firearm during the commission of a violent crime. App. 352-359. On September 9, 2008, Petitioner proceeded to trial before The Honorable John C. Hayes, III and a jury. David Sample represented Petitioner, and E.B. Springs, IV and Christopher Epting represented the State. App. 1.

The State alleged that early on January 1, 2008, Petitioner and a co-defendant armed themselves, donned ski-masks, and entered a local Bi-Lo. Petitioner stopped at an office inside and held an employee at gunpoint while the codefendant went to a bookkeeper's station, pointed his gun at another employee, and demanded access to a cash drawer. After emptying the drawer, the two fled the scene. App. 37, ln. 14—App. 39, ln. 23.

The only direct evidence the State presented of Petitioner's involvement was the testimony of codefendants, both of whom received deals for dropped charges and shorter sentences in exchange for their testimony. Corey Spruell testified that his brother, Jarrod Heath, drove him and Petitioner to the Bi-Lo and waited while they committed the robbery inside. Jarrod Heath testified to the same. App. 102, ln. 2—App. 114, ln. 24.

Petitioner produced numerous witnesses who testified that he was elsewhere at the time of the robbery. Christian Hope, Petitioner's wife, testified that they had a party at their residence on the eve of January 1, 2008. Petitioner was there during most of the morning hours and was with her in her bedroom at the time of the robbery. Also testifying to being at the party with Petitioner during the time of the robbery were the couple's roommates Kendra Gordon, Calvin Whitlock, Jennie Smith, and Warren Pressler. App. 123, ln. 3—App. 128, ln. 20. App. 144, ln. 9—150, ln.

19; App. 156, ln. 12—App. 161, ln. 9; App. 175, ln. 4—App. 178, ln. 24; App. 189, ln. 13—App. 192, ln. 9.

At the conclusion of the trial, the jury found Petitioner guilty on all counts. App. 279, ln. 19—App. 280, ln. 9. The trial judge sentenced Petitioner to thirty years imprisonment for the kidnapping and armed robbery charges and five years for the conspiracy and firearm charges, all to run concurrently. App. 285, 17—App. 286, ln. 2.

On September 1, 2011, Petitioner filed an application for post-conviction relief claiming ineffective assistance of counsel. App. 288-294. The State filed a return on April 6, 2012. App. 295-301. On October 10, 2012, Petitioner attended a PCR hearing before The Honorable Edgar W. Dickson. Phillip Jamieson represented Petitioner and Rutledge Johnson represented the State. App. 303.

Petitioner testified that trial counsel failed to request an alibi charge at the conclusion of the trial. App. 315, ll. 2-7. Trial counsel also testified, admitting that the only defense he presented was based on alibi. He conceded that no direct physical evidence linked Petitioner to the robbery. Pp. 325, ln. 18—App. 326, ln. 7. He ultimately stated that he should have requested the alibi charge:

Q: So, did you not request an alibi charge from the judge?

A: I did not.

Q: Can you tell me or tell the Court rather, why you didn't request an alibi charge?

A: Well, I say I believe I should have. But the only thing I can recall looking back at the record is that things were kind of chaotic. For whatever reason I did not request the alibi charge. I was a little bit concerned about the credibility of the alibi's testimony because there were a lot of inconsistencies with the time and so forth. In retrospect I should have requested an alibi charge.

App. 327, ll. 15-25. Trial counsel also agreed three separate times that an alibi instruction could have made an impact on the jury's decision. App. 328, ll. 1-9; App. 330, ll. 2-4; App. 333, ll. 3-5.

On August 28, 2013, the PCR court issued an order of dismissal. The order stated counsel was ineffective for failing to secure an alibi charge. App. 347. However, it stated that Petitioner suffered no prejudice because both sides discussed the alibi evidence in their closings, and the trial court charged the jury that the State had the burden to prove each element of each offense beyond a reasonable doubt. Thus, the jury charge as a whole was sufficient to inform the jury that the State had to prove beyond a reasonable doubt that Petitioner was at the scene of the robbery. App. 347-349.

## ARGUMENT

**Petitioner suffered prejudice from trial counsel's deficient failure to secure an alibi charge because based on the inconclusive witness testimony presented, the jury needed a specific instruction that the State had to prove Petitioner was at the scene of the robbery beyond a reasonable doubt.**

Petitioner suffered prejudice from trial counsel's deficiency because based on the inconclusive witness testimony presented, the jury needed a specific instruction that the State had to prove Petitioner was at the scene of the robbery beyond a reasonable doubt. 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 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant 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." *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The law to be charged is determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). An alibi charge instructs the jury that the defendant has no burden to prove he was elsewhere during the commission of the crime; rather, the jury should consider evidence that he was elsewhere in determining whether the State has proved beyond a reasonable doubt that he was present at the commission of the crime.

Alibi is not an affirmative defense imposing upon the accused the burden of its proof. It does not require testimony of the accused or of witnesses produced by him. It may be established as well by the testimony of witnesses for the prosecution. If the nature of the crime is such that the presence of the accused at the place and time of its

commission is essential to his guilt, the burden is upon the State to prove beyond a reasonable doubt that he was then and there present. Where the evidence, taken as a whole, whether adduced by the prosecution or by the accused, is sufficient to raise in the minds of the jury a reasonable doubt as to his presence at the scene of the crime, he is entitled to acquittal.

*State v. Mayfield*, 235 S.C. 11, 25, 109 S.E.2d 716, 724 (1959); *see also Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (“An alibi charge places no burden on a criminal defendant but emphasizes that it is the State’s burden to prove the defendant was present and participated in the crime.”).

“It is well settled that counsel’s rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness.” *State v. Ford*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994). “In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed in its entirety and not in isolation.” *Gibbs v. State*, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013) (internal quotations omitted). Counsel’s failure to request an alibi charge is not prejudicial when a reasonable probability that the result of the trial would have been different is not supported due to overwhelming, direct evidence of the defendant’s guilt. *Ford* at 248, 442 S.E.2d at 606. Alternatively, an alibi charge becomes more crucial as the strength of the State’s evidence decreases. *See Roseboro* at 294, 454 S.E.2d at 313 (“An alibi charge is considered especially crucial when the evidence is entirely circumstantial as in this case.”).

In this case, no overwhelming, direct evidence put Petitioner at the robbery. Alibi was the only issue of ultimate fact in dispute. The State had the burden to prove Petitioner was at the scene during the robbery beyond a reasonable doubt. The State merely adduced the inherently questionable testimony of two deal-making codefendants to put Petitioner at the Bi-Lo. In contrast,

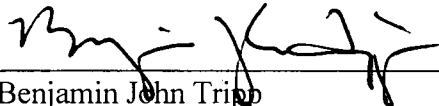
Petitioner produced five witnesses who testified that Petitioner was at his residence. Because the witness testimony was inconclusive and because no direct physical evidence existed in the record, the State's evidence was weak, and an alibi charge was crucial. The jury needed a specific instruction that the State had to prove Petitioner was at the scene of the robbery beyond a reasonable doubt.

Without the alibi instruction, a considerable danger existed that the jury would readily find that the State had proved all elements beyond a reasonable doubt *except Petitioner's involvement*. The jury would then view its final decision as whether the State's witnesses or Petitioner's witness were more credible. However, finding the State's witnesses more credible is not a sufficient basis on which to determine guilt. Rather, the jury had to find the State had proved Petitioner's presence beyond a reasonable doubt, independent of the relative credibilities of the parties' witnesses. Accordingly, the PCR court erred in concluding that the jury's verdict would have reasonably likely been the same had it received a specific alibi instruction.

### CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court reverse the decision of the PCR court and remand for a new criminal trial.

Respectfully submitted,

  
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Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of April, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO YORK COUNTY  
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

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MAURICE SHAUNDELL HOPE,

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APPELLATE CASE NO. 2013-002013

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PETITION TO BE RELIEVED AS COUNSEL

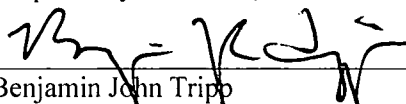
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Counsel for Maurice Shaundell Hope states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 28, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Maurice Shaundell Hope.

Respectfully submitted,

  
\_\_\_\_\_  
Benjamin John Tripp  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 18th day of April, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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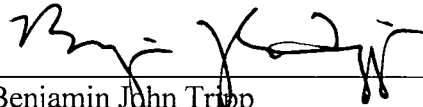
RESPONDENT

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CERTIFICATE OF SERVICE

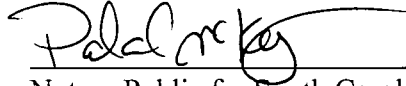
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Maurice Shaundell Hope, #292285, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 18th day of April, 2014.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of April, 2014.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.