

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

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S.C. Supreme Court

RICHARD DEAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001761

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did trial counsel's failure to present evidence of Petitioner's alibi at his murder trial violate Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel?

## STATEMENT

On April 7, 2008, a Charleston County grand jury indicted Petitioner for murder (2008-GS-10-3339) and possession of a firearm during the commission of a violent crime (2008-GS-10-3340). App. 883-884; App. 886-887. The state called the case to trial before the Honorable Deadra L. Jefferson and a jury on January 26-30, 2009. Jennifer Shealy and Christopher Neely represented the state, and Mary Ford and Andrew Grimes represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 714, line 17 – App. 715, line 6. Petitioner filed a direct appeal which was perfected by Robert M. Dudek. App. 730 – 745. On November 21, 2012, the Court of Appeals affirmed Petitioner’s convictions and sentences in an unpublished opinion. App. 782; State v. Deas, 2012-UP-615 (Ct. App. filed Nov. 21, 2012).

On April 22, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 786-792. The matter proceeded to an evidentiary hearing on April 17, 2014 before the Honorable R. Markley Dennis. Rodney Davis represented Petitioner, and Ashleigh Wilson represented the state. App. 799. By an order filed on July 16, 2014, Judge Dennis denied Petitioner relief. App. 868-882.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

## ARGUMENT

Violating Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. trial counsel failed to present evidence of Petitioner's alibi at his murder trial.

### **Relevant facts**

#### Facts from the trial

At 2:32 a.m. on October 19, 2007, the shots spot activation system alerted the Charleston Police Department that gunshots had been fired on Line Street. App. 210, line 11 – App. 211, line 10; App. 220, lines 23-24. The police arrived at the scene to find the deceased, shot and lying on the ground. App. 219, lines 10 – 22; App. 220, lines 5 – 11. Although the deceased was conscious at the scene, he later died. App. 220, lines 12 – 17.

After being arrested for obstruction of justice, Shrod “Fish” Young told the police that he was with the deceased shortly before his death. App. 242, lines 14 – 21; App. 250, lines 21 – 25; App. 251, lines 1 – 3.<sup>1</sup> The deceased was standing on the side of the road waiting on a taxicab. App. 243, lines 19 – 22. Young was standing on a nearby corner smoking cigars and marijuana. App. 243, lines 1 – 9; App. 244, lines 20 – 22. Young admitted that his eyes were “blurry” because he “was loaded at the time” and unable to tell “the real full deal.” App. 247, lines 16 – 18. Young claimed that Petitioner approached the deceased and produced a gun. Due to Young’s intoxicated state, he then “dozed off.” App. 244, lines 20 – 24. When Young awoke, he walked around the

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<sup>1</sup> The investigating officer threatened Young that if he did not cooperate, he would not get a bond. App. 259, lines 13-15. After identifying Petitioner as the assailant, Young received a personal recognizance bond. App. 267, lines 2-12. Furthermore, the charge was dismissed at Young’s preliminary hearing. App. 267, lines 16-24. Young was aware that Petitioner had been charged with murder at the time he gave a statement to police. App. 263, lines 22-24. When Young selected Petitioner from the line-up, Young knew whom the officer wanted him to select. Young testified he would have done whatever the officer wanted in order to get a bond. App. 268, line 19 – App. 269, line 2. Young also believed that he would be charged with murder if he did not talk to the police. App. 269, lines 6-8.

corner. He then heard three gunshots and ran to get help. When Young returned, he found the deceased on the ground. Young then called for an ambulance. App. 245, lines 2 – 8.

Shoreka Miles claimed that she was sitting underneath a tent<sup>2</sup> across from the deceased during the early morning hours on October 19, 2007. App. 296, lines 7 – 14. Young was standing just beyond the tent speaking on his phone. App. 299, line 18 – App. 300, line 13.<sup>3</sup> Miles saw the deceased outside as well speaking on his phone and waiting for a cab. App. 300, lines 13 – 16. Then, Miles “noticed two people coming up on a bicycle, and [the] guy on the handlebars he jumped off the bicycle and started fighting with [the deceased].” App. 300, lines 19 – 22. She then saw the deceased fall to the ground. When he got back up, “the guy pulled out a gun and shot him three times and he jumped back on the bicycle and they left.” App. 302, lines 2 – 8. Miles identified Petitioner as the person who jumped off the bike and fought with the deceased. App. 303, line 20 – App. 304, line 9. After the shooting, Miles ran from the tent and used her bandanna to apply pressure to the deceased’s wound. App. 308, lines 2 – 9. When the police arrived, Miles denied having any information regarding the shooting and claimed she was inside when she heard the shots. App. 311, lines 1 – 15. However, Miles decided to speak with the police after talking to the deceased’s father. App. 311, line 22 – App. 312, line 15.

The testimony of these witnesses was the only evidence against Petitioner. As the solicitor told the jury, this was not a case where the state had a murder weapon or “a bunch of forensic evidence.” Instead, this was “a case with eyewitnesses.” App. 199, line 20 – App. 200, line 1. The solicitor informed the jury again in closing that the case was about “eyewitnesses.” App. 635, lines 13-14. In light of the state’s weak case, the jury deliberated for over eight hours on one day and

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<sup>2</sup> Young denied being familiar with a nearby “tent area.” App. 244, lines 3 – 6.

<sup>3</sup> Young denied seeing Shoreka Miles outside. App. 243, line 25 – App. 244, line 2.

then resumed deliberations the following day for approximately an hour before arriving at a verdict. App. 705, line 10 – App. 712, line 8.

Facts from the PCR hearing

Petitioner testified that he discussed a potential alibi defense with trial counsel. App. 807, lines 5-7. According to Petitioner, trial counsel did not want to call his alibi witnesses because she wanted the last argument. App. 807, lines 8 – 17. Petitioner testified that he received no information from trial counsel regarding an investigation into his alibi defense. App. 808, lines 5 – 9. According to Petitioner, he was with Tiana Lee at the time of the shooting, and Petitioner wanted Lee called as a witness to testify regarding his alibi. App. 810, lines 3 – 9. Petitioner testified that he told trial counsel he was with Lee at the time of the shooting and that Lee would say this as well. However, trial counsel failed to investigate this alibi. App. 820, lines 19 – 24.

Trial counsel testified that she was aware that Petitioner claimed he had an alibi for the time of the shooting. Trial counsel recalled that Petitioner's statement to police indicated that he was with his girlfriend, Shaniqune Williams. Trial counsel was also aware of Petitioner's claim that he was with Tiana Lee and/or Leopold Dickson at the time of the shooting. App. 825, lines 11 – 19. According to trial counsel, the police spoke with Williams and Lee who verified that Petitioner was with them at some point but not at the time of the actual shooting. App. 825, line 20 – App. 826, line 2. Specifically, Lee indicated that Petitioner arrived at her house around 11:00 p.m. and the two fell asleep. When Lee awoke at 4:00 a.m. the following morning, Petitioner was not there. Lee was not aware of the time that Petitioner left her home. App. 826, lines 2 – 7.

Trial counsel hired an investigator who interviewed Williams. Williams told the investigator the same thing she told the police – Petitioner was at her home, but that she was not sure what time and it was not for a long period of time. App. 826, lines 8 – 13. Trial counsel spoke

to Lee who confirmed that Petitioner arrived at her house at 11:00 p.m., but that when she awoke at 4:00 a.m. he was no longer there. App. 826, lines 13 – 18. According to trial counsel, the shooting occurred around 2:00 a.m. App. 826, lines 19 – 21. Trial counsel’s investigator also interviewed Dixon who stated that he and Petitioner were together on and off all day, but he was unable to recall exact times. App. 826, line 23 – App. 827, line 6. Therefore, trial counsel concluded Petitioner did not have “a solid alibi to present.” App. 827, lines 7 – 8.

#### Order denying relief

In the order denying relief, Judge Dennis found Petitioner’s allegation that trial counsel was ineffective for failing to investigate or call an alibi witness at trial was without merit. Judge Dennis found that trial counsel “adequately investigated” the alibi and discussed the alibi defense with Petitioner. App. 877. According to the order, “[t]o qualify as an alibi, a witness’s testimony must account for the defendant’s whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime.” App. 877 (citing Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012)). Additionally, the order cited Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995), for the proposition that a PCR applicant must produce an alibi witness at the PCR hearing or otherwise introduce the witness’s testimony to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses. App. 877 – 878.

Judge Dennis found trial counsel was credible in her testimony that she investigated the two alibi witnesses presented by Petitioner and that she discussed the alibi defense with Petitioner prior to trial. App. 878. Judge Dennis recounted trial counsel’s testimony that after her investigation she concluded the witnesses would not establish a complete alibi. App. 878. Therefore, the PCR court found Petitioner had failed to carry his burden of proving trial counsel was deficient. Additionally,

the PCR court found Petitioner had failed to produce the testimony of any alleged alibi witness to carry his burden of proving prejudice. App. 878.

### **Discussion**

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Id. at 688. Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

Without question, a trial attorney “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting Strickland, 466 U.S. at 691). “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.” Id. This Court has held that if trial counsel articulates a valid reason for employing certain strategy and the strategy used satisfies an objective standard of

reasonableness, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

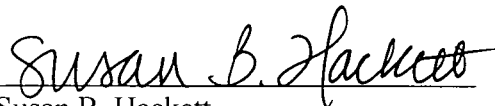
In Walker, 407 S.C. at 407, 756 S.E.2d at 147, this Court held trial counsel rendered ineffective assistance by failing to interview Walker's girlfriend regarding Walker's whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker's girlfriend testified that when she was dating Walker, which included the time of the alleged kidnapping and sexual assault, the two spent every weekend together. Id. at 406, 756 S.E.2d at 147. This Court acknowledged that the girlfriend's "testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her." Id. at 407, 756 S.E.2d at 147. Thus, "it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. at 406, 756 S.E.2d at 147.

Although trial counsel interviewed the alibi witnesses given to her by Petitioner, trial counsel made a unilateral decision not to call those witnesses. According to trial counsel, the witnesses were unable to provide Petitioner with "a solid alibi." Nevertheless, the witnesses could have corroborated Petitioner's statement to police that he was somewhere else around the time the shooting occurred. The testimony of the alibi witnesses combined with the inconsistencies in the statements and testimony of the two alleged eyewitnesses would have bolstered Petitioner's defense and challenged the state's evidence. Trial counsel's failure to present Petitioner's alibi witnesses was deficient performance prejudicial to Petitioner due to the state's weak case against him and the ability to present corroborating evidence through the witnesses.

CONCLUSION

Petitioner respectfully requests this Court grant full briefing on the issue presented. In the alternative, Petitioner respectfully requests this Court reverse the PCR court's decision, find trial counsel ineffective, and order a new trial.

Respectfully submitted,

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO CHARLESTON COUNTY  
R. MARKLEY DENNIS, JR., CIRCUIT COURT JUDGE

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RICHARD DEAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

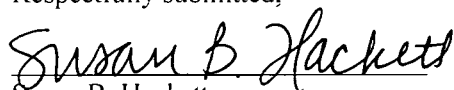
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Counsel for Richard Deas states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 17, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Richard Deas.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 5th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

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RICHARD DEAS,

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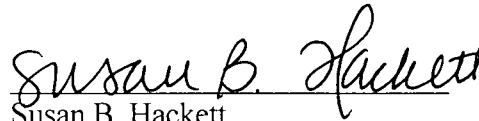
RESPONDENT

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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 Ashleigh R Wilson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Richard Deas, #332943, at Lee Correctional Institution 990 Wisacky Highway, Bishopville, SC 29010, this 5th day of January, 2015.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day  
of January, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.