ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Alexander S. Macaulay, Circuit Court Judge

RECEIVED
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S.C. Supreme Court

EDWARD THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

DAYNE C. PHILLIPS
Appellate Defender

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ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR court properly grant Petitioner relief pursuant to *Austin v. State*[1] when there was ample evidence that Petitioner's original PCR counsel failed to perfect Petitioner's PCR appeal?

[1] *Austin v. State*, 305 S.C. 453, 246 S.E.2d 395 (1991).

STATEMENT

Indictment and Jury Trial

On September 13, 2001, Petitioner Edward Thompson was indicted by the Lexington County Grand Jury for: (1) two counts of armed robbery; (2) two counts of kidnapping; (3) assault and battery of a high and aggravated nature (ABHAN); and (4) criminal conspiracy. App. 448–466.

On October 22, 2001, Petitioner's case proceeded to trial before the Honorable Marc H. Westbrook in his absence, where he was represented by John T. Mobley. App. 3–439. The State was represented by assistant solicitor A. Tav Swarat, II. App. 3. Trial counsel only called two witnesses to testify, Officer Clifton Scott Franklin of the Irmo Police Department, and Petitioner's Aunt, Adell Thompson.

At trial, Petitioner's cousin, Jedediah Thompson, who had already pled guilty to the same charges and testified as a State's witness, that Petitioner was involved in the robbery. App. 309, l. 1 – 350, l. 19. As a defense witness, although Officer Franklin admitted that eyewitnesses make mistakes, his testimony reiterated that Petitioner was identified in court prior to trial by one of the victims, John Rhodes. App. 353, l. 19 – 374, l. 5. Petitioner's Aunt testified that Petitioner was not the person presented in a photograph of one of the robbers because Petitioner did not have dreadlocks when the robbery occurred; instead, Petitioner had "corn rows . . . since the summer of 2000." App. 377, ll. 2 – 379, l. 8.

After Petitioner's aunt testimony, trial counsel told the Judge Westbrook that he had "one additional witness" and asked for a recess until the next day because he "didn't think we would get this far today." App. 383, l. 20 – 384, l. 4. However, trial counsel never presented any additional witnesses for Petitioner's defense.

Furthermore, during jury deliberations, Judge Westbrook stated, "*For the record, . . . we have a question from the jury . . . It says that, 'Does Ed Thompson have an alibi for the night of the robbery?' . . . Obviously that's an issue that was not raised and I will instruct the jury that [is] something they cannot consider.*" App. 428, l. 24 – 429, l. 2. (emphasis added). Trial counsel objected to "the portion where the jury was told the issue was not raised and to expressly not consider it," and requested that the jury "receive a general charge to base their decision on all the evidence in the case." App. 429, l. 23 – 430, l. 7. Trial counsel never instructed Judge Westbrook to also charge the jury on the State's burden of proving Petitioner's guilt beyond a reasonable doubt.

On October 24, 2001, the jury found Petitioner guilty on all charges, and Judge Westbrook sealed Petitioner's sentence. App. 438, ll. 15-22.

On December 19, 2001, Judge Westbrook read Petitioner his sealed sentence: (1) Thirty years imprisonment for each count of armed robbery; (2) Thirty years imprisonment for each count of kidnapping; (3) Ten years imprisonment for ABHAN; and (4) Five years imprisonment for criminal conspiracy. App. 441–446. The armed robbery, kidnapping, and ABHAN convictions were all to run concurrently, and the criminal conspiracy conviction was to run consecutively for a total of thirty-five years imprisonment. Trial counsel never filed a motion to reconsider Petitioner's sentence, despite Petitioner's testimony at the PCR hearing that his absence was due to his daughter being born and his father being diagnosed with cancer. App. 552, ll. 10-15.

A timely Notice of Appeal was filed.

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On February 24, 2003, Petitioner's appellate counsel, Eleanor D. Cleary, of the South Carolina Office of Appellate Defense submitted an *Anders* brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Petitioner submitted a *pro se* brief on March 11, 2003. App. 468–496.

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Edward Thompson (Petitioner)

At the evidentiary hearing, Petitioner testified that at a meeting prior to trial, he told trial counsel that he was innocent and "informed him of alibi witnesses and what we were doin[g] at the time." App. 521, ll. 1-11. Petitioner further testified that on the night of the robbery, he was at his mother's house with his two brothers, Anthony and Elvin, and a friend, Raymond Robinson. App. 521, ll. 14-23. Petitioner also testified that his brother Elvin was present during the meeting with trial counsel. App. 521, ll. 24-25.

Furthermore, Petitioner explained the reason why he was not present at his trial:

> Well, at the time the trial came about, I was undergoin' a [lot of] different things. I had a [lot of] different things that were happenin' at the time of trial. For one, my daughter was just born, my first child. My father was diagnosed with cancer. And all this stuff just landed at once. All of it [became] a part of reality at once, and . . . I never thought this was [going to] even make trial . . . .

App. 522, ll. 10-15. Petitioner testified that he turned himself in after he was convicted. App. 522,

ll. 20-25.

PCR counsel asked Petitioner if his alibi defense was presented at trial, and Petitioner replied, "No, sir, it was not, but it was a [jury] question [during deliberation] about that defense, I'd like to direct the Court's attention to page 42[8] lines 22 through 25." App. 523, ll. 5-10. More specifically, Petitioner testified that "*the jury sent out a note to the Court* [during] *the final deliberations asking if I had an alibi for the night of the robbery . . . And the judge instructed the jury that they couldn't consider it because it wasn't raised by the defense.*" App. 523, ll. 9-13. (emphasis added). Petitioner also testified that trial counsel provided ineffective assistance of counsel for his failure to present an alibi defense and that "*[i]f the alibi [defense] was raised there's a reasonable probability the outcome of the trial could've been different . . . .*" App. 523, l. 18 – 524, l. 10. (emphasis added).

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At the evidentiary hearing, Elvin Thompson, Petitioner's twin brother, testified that he only met with trial counsel one time and told him that Petitioner "was home with us . . . on the back deck just chillin' havin[g] a good time." App. 533, l. 9 – 534, l. 5. Elvin further testified that he knew Petitioner was home at midnight because they "shared a room" that night. App. 534, l. 22 – 536, l.

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However, Elvin maintained that he couldn't recall whether he told trial counsel the names of everyone who was at the house that night. App. 534, ll. 16-21. Elvin also maintained that he went to sleep around "12:30 or 1:00" a.m., so he did not know for sure where his brother was after that time. App. 536, ll. 20-24.

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PCR Counsel

After the presentation of his evidence, PCR counsel noted that "the Blockbuster was robbed at midnight on the night of July 5th early morning of July 6th 2000." App. 551, ll. 8-11.

John Mobley (Trial Counsel)

At the evidentiary hearing, John Mobley, Petitioner's trial counsel, admitted that Petitioner initially told him he was playing playstation with his twin brother, Elvin, until 12:30 to 1:00 a.m. on the night of the robbery, and that he did have notes where Petitioner's older brother "Tony" was

mentioned. App. 558, ll. 6-9; 561, ll. 16-18. Trial counsel also stated that according to his handwritten notes, Elvin told him that he went to bed at 11:30 p.m., so Elvin could not account for Petitioner's whereabouts at midnight. App. 554, l .5 – 555, l. 3.

Furthermore, trial counsel maintained that he was never told about "this whole everybody on the back porch thing" and that "had [he] been given any information regarding alibi witnesses, [he] would've followed up on [them] . . . ." App. 562, l. 15 – 563, l. 21. Trial counsel also stated that he was only given Elvin's name as a possible alibi, and Elvin could not say where Petitioner was at the time of the robbery. App. 564, ll. 11-14.

However, trial counsel maintained that he was "really surprised" when the jury asked whether Petitioner had an alibi for the night of the robbery. App. 565, ll. 18-24. Trial counsel also admitted that the jury's question infers that they had a question about Petitioner's identification and whereabouts on the night of the robbery. App. 566, ll. 1-5.

Trial counsel also admitted that he never attempted to contact Petitioner's mother or his older brother Anthony. App. 567, l. 16 – 568, l. 16. However, trial counsel maintained that Anthony could not have testified an alibi witness according to what Elvin had told him. 568, l. 16 – 569, l. 13.

Additionally, trial counsel maintained that Petitioner's cousin, Jedediah Thompson, was arrested several days after the robbery and gave a confession, which also implicated Petitioner. App. 552, ll. 3-7. Trial counsel also maintained that Petitioner had a distinctive look, which matched a witness statement from the robbery. App. 552, ll. 9-18. Trial counsel stated that Petitioner living less than a mile away from the Blockbuster did not help prove Petitioner could not have committed the armed robbery, and that he was never told about Petitioner's friend Raymond being a possible alibi witness. App. 555, ll. 3-15.

Furthermore, trial counsel stated that Petitioner began to not to show up to scheduled meetings and would not return his phone calls. App. 555, l. 17 – 556, l. 7. However, trial counsel testified that "you don't know when the trial's go[ing to] be so there's really – while you try to be thorough, interviewing witnesses is not an everyday sense of urgency . . . you expect the client's go[ing] to come back in [on] another date." App. 556, ll. 10-12.

Trial counsel maintained that as the trial date became closer, he began leaving voicemails, sending emails, and a certified letter notifying Petitioner that his "failure to respond" has "severely impaired [his] ability to represent [him]." App. 557, ll. 1-3. Trial counsel also maintained that the surveillance camera video "was undeniable" that it looked like Petitioner; however, trial counsel put Petitioner's aunt on the stand because she did not believe Petitioner was the person depicted in a still photo taken from the surveillance camera. App. 557, ll. 7-16.

Order of Dismissal (2004-CP-32-4128)

On April 18, 2007, in his Order of Dismissal, Judge Keesley found that Petitioner "failed to prove that counsel was deficient in failing to present alibi witnesses in his case and has further failed to establish counsel's performance prejudiced him . . . Accordingly, this application is denied and dismissed." App. 576–584.

Specifically, Judge Keesley found that Petitioner "initially told trial counsel that his brother Elvin could serve as his alibi for the time of the crime[;] Evlin, however, was unable to account for [Petitioner's] whereabouts during the time of the robbery and ruled out his parents and Anthony as alibi witnesses." App. 582. Judge Keesley also found that "neither [Petitioner] nor Elvin ever told counsel about Robinson." App. 582.

Furthermore, Judge Keesley found that "[Petitioner's] mother could not account for his whereabouts at the time of the robbery and that none of [Petitioner's] other alibi witnesses

[presented at the PCR hearing] offered credible testimony that he was with them rather than at the Blockbuster on the date and time in question." App. 582–583. Judge Keesley stated, "Certainly none of these witnesses were known as viable alibi witnesses to counsel, who diligently represented [Petitioner] as best as he could despite [Petitioner's] refusal to assist in his defense."

Additionally, Judge Keesley found that "counsel did consult with the one alibi witness [Petitioner] told him about–Elvin–and that Elvin was unable to cover [Petitioner] for the critical time of the crime[, and Petitioner's] family knew [trial counsel] was trying to reach [Petitioner] and was trying to get information to help with his case, but they did not volunteer to serve as alibi witnesses or otherwise assist counsel." App. 583.

Unperfected PCR Appeal (2004-CP-32-4128)

Petitioner filed his *pro se* notice of appeal; however, PCR counsel failed to perfect Petitioner's PCR appeal.

On June 22, 2007, the South Carolina Supreme Court issued an Order of Dismissal due to Petitioner's failure to provide proof of service on opposing counsel. App. 585–586. The Remittitur was issued on July 9, 2007. App. 587.

Second PCR Application and Evidentiary Hearing (2008-CP-32-4821)

On November 18, 2008, Petitioner filed his second PCR application requesting relief. App. 588–594. The Respondent filed its Return on May 18, 2010. App. 595–597.

On May 18, 2010, an evidentiary hearing was held at the Lexington County Courthouse before the Honorable Alexander S. Macaulay. App. 598–611. Petitioner was represented by Ely Grote, and the State was represented by A. West Lee of the South Carolina Attorney General's Office. Although Petitioner did not testify at the evidentiary hearing, "testimony was presented by [Petitioner's] original PCR counsel which indicated that he did, in fact, fail to perfect [Petitioner's]

first PCR appeal." App. 615.

Order of Dismissal and Grant of Belated Appeal (2008-CP-32-4821)

On July 12, 2010, in his Order of Dismissal and Grant of Belated Appeal, Judge Macaulay found that "there is ample evidence to support [Petitioner's] claim, and further finds that [Petitioner] should be awarded a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991)." App. 612–617.

ARGUMENT

The PCR court properly grant Petitioner relief pursuant to *Austin v. State*[2] when there was ample evidence that Petitioner's original PCR counsel failed to perfect Petitioner's PCR appeal.

The PCR court properly granted Petitioner belated appellate review of his initial PCR application because Petitioner was denied his right to appeal the dismissal of his first PCR application (2004-CP-32-4128). App. 612–617; *See Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

The South Carolina Supreme Court has held that "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application. *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). "Under the PCR rules, an appellant is entitled to a full adjudication on the merits of the original petition, or 'one bite of the apple.' This 'bite' includes an applicant's right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal." *Id.* 337 S.C. at 261, 523 S.E.2d at 755-56 (internal citations omitted).

Furthermore, a petitioner is denied his right to appellate review when either: (1) he requested, yet was denied an opportunity to seek appellate review; or (2) his right to appellate review was not knowingly and intelligently waived. *Id.* (citing *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992)). Accordingly, when a petitioner is denied his right to appeal under either of the two circumstances, then he is entitled to belated appellate review of his initial PCR application. *See Austin*, 305 S.C. at 454, 246 S.E.2d at 396.

In this case, although the Petitioner filed his *pro se* notice of appeal, the South Carolina Supreme Court dismissed Petitioner's first PCR appeal based on Petitioner's failure to provide proof of service on opposing counsel. App. 585–586. At the PCR evidentiary hearing for Petitioner's

[2] *Austin v. State*, 305 S.C. 453, 246 S.E.2d 395 (1991).

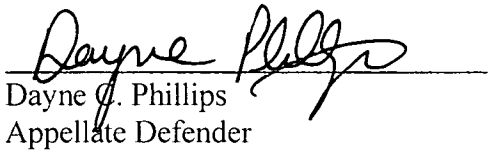
second PCR application on May 18, 2010, "testimony was presented by [Petitioner's] original PCR counsel which indicated that he did, in fact, fail to perfect [Petitioner's] first [PCR] appeal." App. 598–611. Accordingly, Judge Macaulay correctly found that "there [was] ample evidence to support [Petitioner's] claim, and further finds that [Petitioner] should be awarded a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991)." App. 612–617.

Under these circumstances, the second PCR court's decision granting Petitioner belated appellate review of his first PCR application should be upheld. *See Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) ("The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings."). Simply stated, Petitioner is entitled to his one fair bite at the apple. *See Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002).

CONCLUSION

For the foregoing reasons, Edward Thompson respectfully requests this Court to grant his petition for certiorari, and affirm the PCR court's grant of belated review of Thompson's original PCR petition.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Kaelon E. May, Esquire this 19th day of January, 2012.

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of January, 2012.

Julia K. Berry (L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020

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ISSUE PRESENTED

Did the PCR court err in finding that trial counsel provided effective assistance of counsel where trial counsel failed to interview and call potential alibi witnesses at Petitioner's trial when the jury sent a note during deliberations inquiring whether Petitioner had an alibi defense for the night of the robbery?

STATEMENT

Indictment and Jury Trial

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Trial counsel also admitted that he never attempted to contact Petitioner's mother or his older brother Anthony. App. 567, l. 16 – 568, l. 16. However, trial counsel maintained that Anthony could not have testified an alibi witness according to what Elvin had told him. 568, l. 16 – 569, l. 13.

Additionally, trial counsel maintained that Petitioner's cousin, Jedediah Thompson, was arrested several days after the robbery and gave a confession, which also implicated Petitioner. App. 552, ll. 3-7. Trial counsel also maintained that Petitioner had a distinctive look, which matched a witness statement from the robbery. App. 552, ll. 9-18. Trial counsel stated that Petitioner living less than a mile away from the Blockbuster did not help prove Petitioner could not have committed the armed robbery, and that he was never told about Petitioner's friend Raymond being a possible alibi witness. App. 555, ll. 3-15.

Furthermore, trial counsel stated that Petitioner began to not to show up to scheduled meetings and would not return his phone calls. App. 555, l. 17 – 556, l. 7. However, trial counsel testified that "you don't know when the trial's go[ing to] be so there's really – while you try to be thorough, interviewing witnesses is not an everyday sense of urgency . . . you expect the client's go[ing] to come back in [on] another date." App. 556, ll. 10-12.

Trial counsel maintained that as the trial date became closer, he began leaving voicemails, sending emails, and a certified letter notifying Petitioner that his "failure to respond" has "severely impaired [his] ability to represent [him]." App. 557, ll. 1-3. Trial counsel also maintained that the surveillance camera video "was undeniable" that it looked like Petitioner; however, trial counsel put Petitioner's aunt on the stand because she did not believe Petitioner was the person depicted in a still photo taken from the surveillance camera. App. 557, ll. 7-16.

Order of Dismissal (2004-CP-32-4128)

On April 18, 2007, in his Order of Dismissal, Judge Keesley found that Petitioner "failed to prove that counsel was deficient in failing to present alibi witnesses in his case and has further failed to establish counsel's performance prejudiced him . . . Accordingly, this application is denied and dismissed." App. 576–584.

Specifically, Judge Keesley found that Petitioner "initially told trial counsel that his brother Elvin could serve as his alibi for the time of the crime[;] Evlin, however, was unable to account for [Petitioner's] whereabouts during the time of the robbery and ruled out his parents and Anthony as alibi witnesses." App. 582. Judge Keesley also found that "neither [Petitioner] nor Elvin ever told counsel about Robinson." App. 582.

Furthermore, Judge Keesley found that "[Petitioner's] mother could not account for his whereabouts at the time of the robbery and that none of [Petitioner's] other alibi witnesses

[presented at the PCR hearing] offered credible testimony that he was with them rather than at the Blockbuster on the date and time in question." App. 582–583. Judge Keesley stated, "Certainly none of these witnesses were known as viable alibi witnesses to counsel, who diligently represented [Petitioner] as best as he could despite [Petitioner's] refusal to assist in his defense."

Additionally, Judge Keesley found that "counsel did consult with the one alibi witness [Petitioner] told him about–Elvin–and that Elvin was unable to cover [Petitioner] for the critical time of the crime[, and Petitioner's] family knew [trial counsel] was trying to reach [Petitioner] and was trying to get information to help with his case, but they did not volunteer to serve as alibi witnesses or otherwise assist counsel." App. 583.

Unperfected PCR Appeal (2004-CP-32-4128)

Petitioner filed his *pro se* notice of appeal; however, PCR counsel failed to perfect Petitioner's PCR appeal.

On June 22, 2007, the South Carolina Supreme Court issued an Order of Dismissal due to Petitioner's failure to provide proof of service on opposing counsel. App. 585–586. The Remittitur was issued on July 9, 2007. App. 587.

Second PCR Application and Evidentiary Hearing (2008-CP-32-4821)

On November 18, 2008, Petitioner filed his second PCR application requesting relief. App. 588–594. The Respondent filed its Return on May 18, 2010. App. 595–597.

On July 27, 2006, an evidentiary hearing was held at the Lexington County Courthouse before the Honorable Alexander S. Macaulay. App. 598–611. Petitioner was represented by Ely Grote, and the State was represented by A. West Lee of the South Carolina Attorney General's Office. Although Petitioner did not testify at the evidentiary hearing, "testimony was presented by [Petitioner's] original PCR counsel which indicated that he did, in fact, fail to perfect [Petitioner's]

first PCR appeal." App. 615.

Order of Dismissal and Grant of Belated Appeal (2008-CP-32-4821)

On July 12, 2010, in his Order of Dismissal and Grant of Belated Appeal, Judge Macaulay found that "there is ample evidence to support [Petitioner's] claim, and further finds that [Petitioner] should be awarded a belated PCR appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991)." App. 612–617.

ARGUMENT

The PCR court erred in finding that trial counsel provided effective assistance of counsel because trial counsel failed to interview and call potential alibi witnesses at Petitioner's trial when the jury sent a note during deliberations inquiring whether Petitioner had an alibi defense for the night of the robbery.

Because trial counsel failed to interview and call potential alibi witnesses at Petitioner's trial, especially when the jury sent a note during deliberations inquiring whether Petitioner had an alibi defense for the night of the robbery, trial counsel's performance was constitutionally deficient. App. 428, l. 24 – 429, l. 2; *See Ford v. State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (finding that "[i]t 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."); *see also Lounds v. State*, 380 S.C. 454, 462, 670 S.C. 646, 650 (2008) (finding that it "was not objectively reasonable given the defense theory of the case" for counsel not to call witnesses that were critical to his client's defense.).

Accordingly, the PCR court erred in holding that trial counsel provided effective assistance of counsel because Petitioner's right to a fair trial was adversely affected by trial counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668 (1984) (provides that a petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings); *see also Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992).

PCR Relief

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "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*, 466 U.S. at 692; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of

performance is whether the attorney provided representation within the range of competence required in criminal cases; courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Bulter*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Id.* at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficient Performance

In this case, Petitioner presented sufficient evidence at the PCR evidentiary hearing to establish that trial counsel had a duty to interview and call his brothers Anthony and Elvin, his friend Raymond, and his mother to testify as alibi witnesses at Petitioner's trial. *See Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (finding that defense counsel's failure to contact alleged alibi witnesses did not prejudice defendant when defense counsel did not prove that the witnesses' testimony would have established an alibi defense.); *see also Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP) (provides that in a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the

evidence.").

At the PCR evidentiary hearing, Petitioner testified that at a meeting prior to trial, he told trial counsel he was innocent and "informed him of alibi witnesses." App. 521, ll. 1-11. Petitioner's brother, Anthony, testified at the evidentiary hearing that Petitioner on the night of the robbery "was at the house on the back deck" with him, Elvin, and Raymond for "the whole evening." App. 525, l. 25 – 526, l. 25. Anthony also testified that Petitioner was home at midnight on the night of the robbery because Petitioner went to sleep before him and that trial counsel never contacted him regarding Petitioner's alibi defense. App. 527, ll. 4-8; 529, l. 24 – 530, l. 14.

Furthermore, Petitioner's twin brother, Elvin, testified at the evidentiary hearing that he met with trial counsel once and told trial counsel he knew Petitioner was home at midnight on the night of the robbery because they "shared a room" and he did not go to sleep until "12:30 or 1:00 a.m.." App. 533, l. 9 – 536, l. 24. Petitioner's mother also testified at the evidentiary hearing that Petitioner, Anthony, Elvin, and Raymond were at her house on the night of the robbery and that she met with trial counsel once, but he did not ask her about Petitioner's whereabouts on the night of the robbery. App. 541, l. 14 – 542, l. 25. Similarly, Petitioner's friend, Raymond, also testified that Petitioner was at the house "on the back deck" until he left at 1:30 a..m. and that he was never contacted by trial counsel. App. 545, ll. 16-25.

Regardless of Petitioner's failure to return trial counsel's phone calls or show up to meetings, trial counsel had a duty to interview and call all potential alibi witnesses, particularly in light of the jury question inquiring about whether Petitioner had an alibi for the night of the robbery. App. 428, l. 24 – 429, l. 2 555, l. 17 – 557, l. 3; *See Ford*, 314 S.C. at 248, 442 S.E.2d at 606; *see also Glover*, 318 S.C. 496, 458 S.E.2d 538; *cf. Ard v. Catoe*, 372 S.C. 318, 331-32; 642 S.E.2d 590, 597 (2007) (finding that counsel has a duty to conduct a reasonable and independent

investigation and to interview potential witnesses). Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel because trial counsel's performance was constitutionally deficient, as it fell well below an objective standard of reasonableness. App. 576–584; *See Strickland*, 466 U.S. at 694; *see also Bulter*, 286 S.C. 441, 334 S.E.2d 813; *see also Cherry,* 300 S.C. 115, 386 S.E.2d 624.

Prejudice

As to prejudice, although trial counsel attempted to paint the picture that there was overwhelming evidence of Petitioner's guilt, the jury's question as to whether Petitioner had an alibi defense for the night of the robbery disproves that assertion, especially when the jury was instructed by the trial judge not to consider it since "*it wasn't raised by the defense.*" App. 428, l. 24 – 429, l. 2; 523, ll. 5-13. (emphasis added). Additionally, Petitioner testified at the evidentiary hearing that "*[i]f the alibi [defense] was raised there's a reasonable probability the outcome of the trial could've been different . . . .*" App. 523, l. 18 – 524, l. 10. (emphasis added). *See Cherry,* 300 S.C. 115, 386 S.E.2d 624.

Furthermore, trial counsel did not articulate a valid reason for his failure to interview or call Petitioner's brothers Anthony and Elvin, Petitioner's friend Raymond, and Petitioner's mother, to testify as alibi witnesses. *See Underwood v. State*, 309 S.C. 560 425 S.E.2d 20 (1992) (finding that counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.); *see also State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943) (finding that 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.).

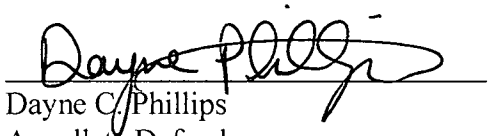
Trial counsel's deficient performance prejudiced Petitioner's right to a fair trial since it "undermine[d] confidence in the outcome of [his] trial." *See Johnson*, 325 S.C. at 186, 480

S.E.2d at 735 (citing *Strickland*, 466 U.S. at 694). Therefore, the PCR judge erred in holding that trial counsel provided effective assistance of counsel because there is a reasonable probability that but for trial counsel's deficient performance Petitioner would have received a fair trial. App. 576 –584; *See Strickland*, 466 U.S. at 694; *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

CONCLUSION

Based on the foregoing reasons, Edward Thompson's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Alexander S. Macaulay, Circuit Court Judge

EDWARD THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Kaelon E. May, Esquire this 7th day of January, 2012.

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of January, 2012.

Felicia K Berry (L.S.)
Notary Public for South Carolina

My Commission Expires: June 28, 2020