

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Mark Hayes, Circuit Court Judge

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JAN 20 2017

S.C. SUPREME COURT

BOYD RASHAEEN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001287

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Whether the PCR court erred in finding that Petitioner was not prejudiced by trial counsel's deficient examination of Cherise Evans regarding Petitioner's alibi defense?

- II. Whether the PCR court erred in finding that trial counsel rendered effective assistance where he failed to locate and call Yacia Montgomery as an additional alibi witness to testify in Petitioner's defense at trial?

STATEMENT OF THE CASE

Indictments and Trial

On November 26, 2007, the Lexington County Grand Jury returned indictments against Petitioner Boyd Rashaen Evans for armed robbery, possession of a firearm during a crime of violence, two counts of kidnapping, and possession of a pistol by a person under twenty-one. App 729 – 736. These charges related to a robbery of a convenience store in Lexington County by four masked black males. App. 181, l. 6 – 182, l. 20. The state subsequently *nolle prossed* the charge of a possession of a pistol by a person under twenty-one.

On January 11 – 14, 2010, Evans and his co-defendant, Lywone Capers, appeared jointly for trial before the Honorable R. Knox McMahan and a jury. App. 1. Evans was represented by David Miller and the state was represented by assistant attorney generals Robert Maldonado and Joshua Underwood. App. 1; App. 15.

At the close of the state's case, the trial judge directed a verdict on one count of kidnapping for both defendants. App. 459, ll. 15-18. The jury found Capers not guilty as to all remaining charges but found Evans guilty. Judge McMahan sentenced Evans to concurrent terms of twenty-one years for armed robbery, twenty-one years for kidnapping, and five years for the weapons offense.

Direct Appeal

On direct appeal, Evans was represented by appellate defender Katherine Hudgins, who filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on June 14, 2011. App. 625. On May 16, 2012, the Court of Appeals dismissed the appeal pursuant to the Anders procedure. App. 638.

Post-Conviction Relief Application and Evidentiary Hearing

On February 20, 2013, Evans filed an application for post-conviction relief (“PCR”). App. 640. The state filed its return on April 28, 2015. App. 647. On September 28, 2015, Evans, through counsel, filed an amended PCR application. App. 653. On January 15, 2016, an evidentiary hearing was held before the Honorable J. Mark Hayes. App. 655. Evans testified, along with alibi witness Yacia Montgomery and trial counsel David Miller. App. 656.

Trial counsel Miller testified that Evans always maintained his innocence and said he was in Charlotte the entire day. App. 692, l. 11 – 693, l. 3; App. 703, ll. 13-19. Though trial counsel initially said that Evans did not provide any witness to corroborate his alibi, he admitted that Evan’s sister, Cherise Evans (hereinafter “Cherise”), was an alibi witness. Compare App. 693, ll. 8-10 and App. 705, ll. 15-16, with App. 696, ll. 17-20, App. 699, l. 9 and App. 705, l. 19 – 706, l. 2. Trial counsel said that Evans provided some information about other witnesses but it was difficult to find them because Evans used nicknames and some of the family relationships were confusing. Trial counsel used an investigator from Lexington and found it much easier to find people in the Columbia area than in Charlotte, where Evans said he was during the incident. App. 692, ll. 4-19; App. 693, ll. 8-22; App. 695, l. 9 – 696, l. 20.

Cherise Evans was called by the defense as an alibi witness at Evans’ trial. App. 532, l. 17 – 535, l. 1; App. 537, ll. 10-16. Trial counsel asked Cherise whether she recalled who picked her up from work over July 25th and 26th of 2007, to which she responded “my brother Boyd,” and whether Evans had left the Charlotte, North Carolina area over those dates, to which she responded “no.” App. 534, l. 4 – 535, l. 1. Trial counsel admitted that his notes reflected that Cherise worked “at Church’s [Chicken], the 21st thought the 18th, until close” and Evans picked her up at 1:00 a.m. App. 702, l. 14 – 703, l. 4; Tr. 708, l. 25 – 709, l. 6. Trial counsel further

admitted that the sole purpose of calling Cherise to testify was as an alibi witness. App. 705, l. 19 – 707, l. 15. Yet, trial counsel did not question Cherise in front of the jury regarding what **time** Evans picked her up. App. 668, ll. 5-13; App. 707, l. 16 – 708, l. 2.

Evans testified that he told trial counsel about several alibi witnesses, including Yacia Montgomery.¹ App. 664, l. 10 – 665, l. 17. Yacia Montgomery testified at the PCR hearing that she did not learn of Evans' arrest and conviction until New Year's Eve of 2014. She would hang out with Evans when she came to Charlotte for the summers to stay at her aunt's house. On July 25, 2007, Montgomery met Evans at a store and later went to his house where she cooked dinner for everyone. She was not sure of the exact time but recalled that Evans left to pick his sister up from work in the late evening of the 25th or early morning hours of the 26th, around midnight. She was confident in her recollection of the events from that day because it was the last time she was in Charlotte until 2014. Montgomery was never contacted by an attorney or investigator for Evans at the time of his trial. App. 685, l. 4 – 689, l. 23. Trial counsel claimed that he had never heard of Yacia Montgomery until the day of the PCR hearing. App. 699, ll. 18-23.

Order of Dismissal

On May 25 2016, Judge Hayes issued an Order of Dismissal denying Evans' PCR application. App. 719. **Judge Hayes found that trial counsel was deficient** in failing to elicit testimony from Cherise Evans (hereinafter "Cherise") that Petitioner Evans was picking her up from work in Charlotte, North Carolina *at roughly the same time* that armed robbery occurred in Lexington County, South Carolina. Trial counsel had information in his file regarding the time that Cherise got off work, which would have strengthened Evan's alibi defense. App. 723. However, Judge Hayes found that Evans did not prove that, but for counsel's deficient

¹ Witness Montgomery's first name is spelled "Yaci" in the PCR hearing transcript and "Yosea" in the Order of Dismissal.

performance, there was a reasonable probability that the outcome of the proceeding would have been different. App. 724. Judge Hayes noted that Evans' co-defendant was acquitted despite very similar identification testimony from Glynessa Evans (hereinafter "Glynessa") and Michael Rhaney. However, he found that Glynessa had a closer relationship with Evans than the co-defendant and that Evans had "an identifiable scar, which was visible in the video of the armed robbery." App. 725. He noted that the identification testimony was "attacked by aggressive cross-examination at trial." App. 725. Thus, he ruled:

As a result, this court is not convinced that even with the extra alibi information, the defense would have overcome the identification testimony presented by Ms. [Glynessa] Evans and Mr. [Rhaney]. Applicant's claim was not that he came to Lexington and returned to Charlotte, but, rather, that he was in Charlotte the entire day. Accordingly, Applicant has failed to show a reasonable possibility that but for counsel's error the outcome of his proceeding would have been different. This allegation is therefore denied and dismissed.

App. 725.

Regarding Yacia Montgomery, Judge Hayes found that she "was not known to trial counsel until the day of the PCR hearing." App. 723. He found that "[c]ounsel offered credible testimony that he went through every alibi witness Applicant gave to him, but that Ms. Evans was the only one who could actually provide an alibi." App. 723 – 724. Though contradicted by the PCR hearing transcript, he further found that "Applicant did not list Ms. Montgomery as one of the alibi witnesses he told counsel about." App. 724; see App. 664, 1. 10 – 665, 1. 3. The Court ruled that there was "nothing in the record to suggest Applicant identified Ms. Montgomery to counsel as a potential alibi witness[, n]or is there anything in the record to indicate counsel did not otherwise conduct a reasonable investigation." App. 724. Thus, while Judge Hayes said Montgomery's testimony would have benefited the alibi defense, he was "not persuaded that trial counsel erred in not calling her." App. 724.

ARGUMENT

I. The PCR court erred in finding that Petitioner was not prejudiced by trial counsel's deficient examination of Cherise Evans regarding Petitioner's alibi defense.

Introduction

The PCR court properly found that trial counsel was deficient in his representation of Evans where he failed to ask Cherise Evans, the sole witness called to support Evans' alibi, what time Evans picked her up from work on the date of the incident. App. 723. The robbery of the gas station in Lexington, South Carolina occurred at approximately 12:30 a.m. on July 26, 2007. App. 219, ll. 2-18; App. 454, ll. 16-22. Trial counsel's notes reflected that Evans picked Cherise up at 1:00 a.m. on July 26, 2007 at the Church's Chicken in Charlotte, North Carolina. Without any information regarding the time when Evans picked up Cherise, her trial testimony did not rule out the possibility that Evans could have also been in Lexington that day. The PCR court accordingly found that trial counsel erred in failing to present that information, which was contained in his file, to the jury. App. 723.

However, the PCR court erred in finding that Evans failed to prove he was prejudiced by trial counsel's deficient conduct. App. 702, l. 14 – 703, l. 4; App. 708, l. 25 – 709, l. 6. Without the time of the pick-up in evidence, Cherise's testimony at his trial did not provide an "alibi." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am.Jur.2d Criminal Law § 136 (1980)) ("[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all."). The only other evidence against Evans was unreliable "identification" testimony and some similarity between a scar on his shoulder and one of the perpetrators. Had the jury been presented with a true alibi defense on behalf of Evans, there is a reasonable probability that the jury would have found him not guilty,

as it did Capers, Evans' co-defendant who was "identified" by the same witnesses but presented an alibi defense.

Relevant Facts from Trial

The robbery involved four black males, all with their faces covered by a mask or shirt. The incident was captured on video surveillance, which showed the men enter at 12:34:41 a.m. and leave at 12:35:24 a.m. App. 454, ll. 15-24. The detective produced still photographs from the video. App. 398, ll. 8-18; State's Trial Exhibits 30-32 (still photographs from video), on file with this Court.² Neither of the clerks who were working at the gas station during the robbery recognized the men. Evans' step-sister, Glynessa, and her fiancé, Michael Ramey learned of the robbery when they went to fill their car with gas after the robbery occurred. Ramey also worked at the gas station but had gotten off his shift at 11:00 p.m. When detective Prestigacombo came to the store the next day, Rhaney pulled him aside and claimed that his fiancé's cousins committed the robbery – identifying them by first names only as Lywone, Boyd, and John. Though Rhaney told the detective that he did not know the fourth person, he listed four names during his trial testimony. Boyd admitted that he did not know Capers or Evans very well and had not seen them since 2005, save his allegation that he saw them at 2:45 p.m. on July 25th in a blue and tan Ford Explorer. Notably, Rhaney did not give the detective the story about seeing Evans in the Explorer until after the officer showed him the picture of the vehicle involved in the incident. App. 255, l. 14 – App. 266, l. 11; App. 401, l. 12 – 404, l. 14.

Rhaney then took the detective to see Glynessa, Evans' step-sister and Capers' cousin. The detective told her that some of her family members were suspects in the robbery of the gas station. Glynessa was embroiled in a years long battle to win back custody of her daughter

² The Order of Dismissal indicates the PCR judge's review included "the transcripts and documents from the prior proceedings." App. 721.

from Evans' aunt and adoptive mother, Emma Evans. Emma Evans had taken in Glynnessa's daughter while Glynnessa was incarcerated for voluntary manslaughter from 1999 to 2002. Glynnessa lived in the same household as Evans from his birth in 1989 until her father's death in 1992. She reunited with that side of the family before her daughter was born in 1998, at which time Evans would have been approximately nine years old. Glynnessa and Evans both resided with Emma Evans for a brief time in 2005. Glynnessa had not seen Evans again until the day he allegedly came to her trailer unannounced on July 25, 2007 and left after spending approximately fifteen minutes in the area visiting other friends. Glynnessa admitted that she had even less prior interaction with Capers and would "not really" be able to pick him out of a crowd. While she said she would recognize Evans if she saw him, it is notable that the person alleged to be Evans in the surveillance footage had their face covered. App. 305, l. 19 – 330, l. 5; App. 346, l. 12 – 351, l. 14; App. 372, l. 18 – 392, l. 5.

Detective Prestigacombo said that when he told Glynnessa why he was there, he "learned that she was aware of the robbery that had taken place." App. 405, ll. 6-16. She said that her brother and cousins had visited her the day before. App. 405, l. 18-19. At trial, Glynnessa claimed that the boys arrived as the sun was going down but later agreed that in order for Rhaney to have seen them before he left at work she must have been incorrect about the time. App. 346, ll. 12-25; App. 383, l. 9 – 384, l. 22. Prestigacombo said that "after a brief conference," he showed Glynnessa one still picture from the surveillance footage that had all four individuals in the same frame. She identified them as Boyd Evans, Lywone Capers, John Sosa, and "Ton" based on their clothing and build. App. 406, ll. 10-19; App. 407, ll. 17-21. Like Rhaney, the detective showed Glynnessa the picture of the Explorer before asking for a description of the kind of car the boys were in when they allegedly arrived. App. 406, l. 20-25. Rhaney and

Glynessa alleged that the Explorer belonged to Emma Evans, though the detective later determined it was actually owned by Frederick Neal.³ App. 273, ll. 7-11; App. 406, ll. 21-25; App. 408, ll. 1-17.

When shown copies of other still photographs from the surveillance footage, Glynessa said she recognized a cut or scar on the person's shoulder as belonging to Evans. App. 322, l. 13 – 323, l. 18; App. 1-15. The jury was shown photographs taken of Evans following his arrest and again while he was in jail. The detective characterized Evans' scars on his shoulder and elbow as "similar" to those of the suspect seen at the cash register. App. 434, l. 4 – 435, l. 6; State's Trial Exhibits 40-50 (photos of Evans), on file with this Court. The judge also granted the solicitor's request to display a portion of Evans' body to the jury in the courtroom. App. 428, l. 12 – 433, l. 7; App. 436, l. 25 – 437, l. 23.

Glynessa claimed that the manager of the mobile home park, Rosa Lugo, had ordered the boys to leave the area that day, after which Glynessa did not see them again. Despite the solicitor's representation that a Biggers hearing was unnecessary because Lugo would not give identification testimony, detective Prestigacomio improperly testified that Lugo identified Evans as the driver the Ford Explorer she saw that day. App. 245, l. 17-23; App. 408, l. 3 – 409, l. 23; see also App. 294 – 300. While trial counsel's failure to object to this testimony was not raised as a separate allegation of ineffective assistance at Evans' PCR hearing, it is relevant to the PCR court's prejudice analysis because the jury's verdict was likely influenced by this improper testimony that Lugo saw Evans in Lexington on the afternoon prior to the incident.

³ Neal was not a suspect in the armed robbery investigation. App. 410, l. 7 – 412, l. 9.

Discussion

A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRPC). To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Strickland v. Washington, 466 U.S. 668 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Strickland, 466 U.S. at 694.

"[A] movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice." Black v. State, 151 S.W.3d 49 (Mo. 2004). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 694. Moreover, the Court ruled that: "The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id. at 696 (emphasis added).

In Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995), the applicant presented the testimony of the two witnesses who he claimed would have testified that he was in Florida at 8:30 *a.m.* on the day when the crimes were committed. A majority of this Court found

that the witnesses' testimony did not foreclose the possibility that Glover could have committed the crimes at 8:30 *p.m.* in light of testimony that Williamsburg County was a six and a half hour drive from the witness' home in Florida. 318 S.C. at 498, 458 S.E.2d at 540. Thus, the witnesses did not provide an alibi. Id. With respect to other witnesses who the applicant claimed could provide an alibi defense but did not call to testify, this Court wrote:

In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing **or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence.** The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.

Id. at 498-99, 458 S.E.2d at 540 (emphasis added).

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), this Court reversed the Court of Appeals' holding that the applicant was not prejudiced by trial counsel's failure to interview the defendant's former girlfriend as a potential alibi witness. Walker was accused of kidnapping and sexual assault. 407 S.C. at 403, 756 S.E.2d at 145. The Victim reviewed surveillance footage from the gas station where she alleged that she met her assailant, who offered to help her when her car would not start. Id. A gas station employee identified Walker as the man pointed out by the Victim on the video. Id. When interviewed by police, Walker admitted going to the gas station but denied offering any help to anyone there or any involvement with the alleged victim. Id. He said he spent the afternoon and evening at a friend's home and then returned to his girlfriend's, Robina Reed's, home around 9:30 or 10:00 *p.m.* for the remainder of the night. Id.

Following his conviction, Walker filed for PCR, alleging that his trial counsel was ineffective in failing to conduct an adequate investigation. Id. at 403, 756 S.E.2d at 146. Walker's trial counsel admitted reviewing video of the police interview and had "Robina Reed" in her notes to interview but never did. Id. Though she said that her investigator spoke with or

tried to speak with Reed, trial counsel never followed up with her investigator. Id. at 403-04, 756 S.E.2d at 146. Reed testified that she was never contacted about Walker's case and did not know why he disappeared in May 2002 until his PCR attorney contacted her. Id. at 404, 756 S.E.2d at 146. Though she could not provide specific dates and times, she testified that she and Walker spent every weekend together prior to his arrest. Id. The PCR court granted Walker's application, but the Court of Appeals reversed, finding that Walker's trial counsel was deficient but that they Walker was not prejudiced. Id.

This Court recognized that Reed's testimony at Walker's PCR hearing vacillated but finally settled on an answer that "prior to Walker's arrest, she and Walker spent every weekend together." Id. at 406, 756 S.E.2d at 147. This Court found that there was evidence to support the PCR court's conclusion that Reed's testimony reasonably could have resulted in a different outcome at trial. Id. "If true and construed as meaning at least that Walker and Reed spent every night together on the weekends prior to his arrest, it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. "In other words, unlike *Glover* where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed's testimony to be true and for Walker to have committed the crime." Id. at 406-07, 756 S.E.2d at 147.

Here, like Walker, had the jury been presented with and believed Cherise's testimony that Evans picked her up at 1:00 a.m. in Charlotte, North Carolina, it would have been physically impossible for Evans to have committed the armed robbery in Lexington, South Carolina just thirty minutes earlier at 12:30 a.m. While the PCR judge characterized this as "*extra* alibi information," the fact is that without the information regarding the time, Cherise's testimony at trial did not provide an alibi. App. 725 (emphasis added). "[S]ince an alibi derives its potency

as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Robbins, 275 S.C. at 375, 271 S.E.2d at 320. This error in evaluating the importance of the alibi information, which was essentially non-existent at trial, informed the remainder of the PCR court's prejudice analysis.

The PCR judge further focused on the identification testimony at trial and Evans' supposed "identifiable marks." The judge recognized that the jury found Evans' co-defendant, Lywone Capers, with whom he was tried jointly, not guilty. App. 725. The acquittal was despite "identification" testimony from Glynessa Evans and Michael Rhaney, who claimed to have seen Capers in town earlier that day with Evans and to recognize him in the surveillance footage by his build, skin tone, nose, eyes, and voice. Capers presented four alibi witnesses – his mother, younger brother, aunt, and cousin, who all said that Capers was at home in Charlotte that day and at the time of the robbery. They recalled that Capers was sick and that his aunt brought over some soup and medicine for him. App. 482 – 529. Though not discussed by the PCR judge, another difference in the evidence was that the lead detective in the case improperly testified that Rosa Lugo identified Evans as the individual she saw driving a Ford Explorer in the mobile home park where Glynessa resided on the afternoon before the incident. App. 245, l. 17-23; App. 408, l. 3 – 409, l. 23; see also App. 294 – 300. There was no such testimony that Lugo identified Capers.

While the scar seen in the still photographs taken from the surveillance footage are similar to that of Evans, it cannot be said that they are identical. Glynessa agreed that there may be others in the Lexington area with a similar scar, mole, or cut. App. 387, l. 22 – 388, l. 10. Further, while Glynessa admitted that she could not pick Capers out of a crowd, her prior

interactions with Evans were also limited. She lived in the same household with Evans until he was three years old, then saw him again when he was eight or nine years old. After she was released from prison in 2001, Glynessa had some contact with the family and spent some time in 2005 living in the same household with Evans again. However, she admitted that she had not seen him again until he allegedly came to visit unannounced on the afternoon prior to the incident. Had the jury found Cherise's testimony credible, it could have disbelieved the identification testimony, just as it did for Capers.

In summary, the PCR court properly found that trial counsel's representation was deficient. His omission of the time that Evans picked Cherise up from work on the date of the incident was such that she was not even a real alibi witness. While the evidence against Evans was sufficient to overcome a motion for directed verdict and the post-trial motion for new trial, the standard for proving prejudice at a PCR hearing is not nearly so high. Evans needed only to prove by a preponderance of the evidence that there is a reasonable probability that the result of his trial would have been different. Strickland, 466 U.S. at 694; Rule 71.1(e), SCRCP. The PCR court in finding that Evans failed to meet this burden.

II. The PCR court erred in finding that trial counsel rendered effective assistance where he failed to locate and call Yacia Montgomery as an additional alibi witness to testify in Petitioner's defense at trial.

Trial counsel was further deficient in failing to locate and call Yacia Montgomery as an alibi witness at Evans' trial. Evans was prejudiced in that his sole defenses were misidentification and alibi. Certainly, his sister Cherise's alibi testimony, if properly presented, would have been supported by Montgomery's consistent alibi testimony. It is also notable that the jury acquitted Evans' co-defendant, against whom much of the same evidence was presented but who provided a strong alibi defense.

At the time of his arrest, Evans was eighteen years old and had no significant contact with the criminal justice system. See App. 375, ll. 1-13; App. 475, ll. 13-22. Evans remained in custody at the jail until his trial. App. 663, ll. 6-12. Evans said that he told trial counsel about Yacia Montgomery but was unsure if the investigator ever located her and she was not at his trial. App. 664, l. 10 – 665, l. 17; App. 667, ll. 15-24. Montgomery testified at the PCR hearing that she recalled seeing Evans at a store in Charlotte on July 25, 2007 and went to his house later that night to cook dinner for everyone there. She also recalled Evans going to pick up his sister from work late that night. She was never contacted by trial counsel or an investigator about Evans' case before his trial and only learned of his incarceration at the end of 2014. App. 685, l. 4 – 689, l. 23.

Trial counsel admitted that Evans gave him many names of witnesses related to his case, though sometimes he could only provide nicknames. Despite Evans' defense that he was in Charlotte during the incident, trial counsel hired an investigator in the Lexington area, who was good at finding witnesses in the Columbia area but had trouble finding anyone in Charlotte. App. 692, l. 4 – 693, l. 22; App. 695, l. 9 – 696, l. 20; App. 703, ll. 13-19. Trial counsel made a

self-serving claim that he had never heard of Yacia Montgomery before the PCR hearing. App. 699, ll. 18-23. The following exchange occurred:

Mr. Schmeckpeper: Did you ever hear of Yacia Montgomery before?

Trial Counsel: I have never heard of her before today.

Mr. Schmeckpeper: So Mr. Evans never gave you her name as a potential witness?

Trial Counsel: No. She apparently had not heard of it before this year, so.

App. 699, ll. 18-23. Trial counsel seemed to imply that Montgomery's lack of knowledge regarding Evans' arrest and incarceration supports his claim that he had never heard of her. On the contrary, the failure of trial counsel or his investigator to contact Montgomery is equally reflective of his failure to investigate. Further, it is not as if trial counsel reviewed a list of names provided by Evans and said Montgomery was not on it. Rather, he relied upon his "pretty good memory" what occurred in preparation of the case nearly ten years prior. See App. 691, ll. 2-15.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 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." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (citing Grooms v. Solem, 923 F.2d 88, 90 (8th Cir.1991)).

In the Order of Dismissal, the PCR judge found that "Applicant did not list Ms. Montgomery as one of the alibi witnesses he told counsel about" and "there is nothing in the record to suggest Applicant identified Ms. Montgomery to counsel as a potential alibi witness."

App. 724. Those findings are not supported by the transcript of the PCR hearing, which reflects the following testimony from Evans:

PCR Counsel: In your discussions with Mr. Miller, did you tell him that you had an alibi?

Boyd Evans: Yes.

PCR Counsel: Did you give him names of witnesses you wanted him to talk to about the alibi?

Boyd Evans: Yes.

PCR Counsel: What names?

Boyd Evans: I gave him -- okay. One witness I gave him, but he was looking for somebody wrong. I don't have the paper today.

PCR Counsel: What was the name that you gave him or intended to give him?

Boyd Evans: Kiandra Lovett.

PCR Counsel: Okay. Who else?

Boyd Evans: Cherise Evans. A Garren Sawyer.

PCR Counsel: Who else?

Boyd Evans: Aiesha Lov -- Aiesha Scott.

PCR Counsel: Uh-huh?

Boyd Evans: **And Yacia Montgomery.**

App. 664, l. 10 – 665, l. 3 (emphasis added). Thus, Evans did testify that Montgomery was one of the alibi witnesses about whom he told trial counsel and his testimony was sufficient evidence in the record upon which to find trial counsel deficient.

The PCR court's finding that "[c]ounsel offered credible testimony that he went through every alibi witness Applicant gave to him, but that Ms. Evans was the only one who could actually provide an alibi" was similarly contradicted by the PCR hearing transcript. App. 723 –

724. Rather, trial counsel testified that Evans provide no witnesses to corroborate his alibi, though he agreed with PCR counsel that Cherise was indeed an alibi witness. App. 693, ll. 8-10; App. 705, l. 15 – 706, l. 2.

Therefore, the findings by the PCR judge are not supported by the record and thus not entitled to deference by this Court. See, e.g., Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010) (“Even considering the PCR judge's credibility findings, there is no probative evidence that: (1) Petitioner knowingly waived his right to a direct appeal, and (2) Thompson made certain Petitioner was fully aware of his right to appeal.”); Miller v. State, 379 S.C. 108, 115–16, 665 S.E.2d 596, 599 (2008) (“Although we are cognizant of our deferential standard of review, we find there is no probative evidence to support the PCR court's findings of fact and conclusions of law regarding trial counsel's effectiveness. We believe the record established that trial counsel's performance was deficient and that, but for counsel's error, there was a reasonable probability that the result of Miller's trial would have been different.”). Trial counsel was deficient in not hiring an investigator capable of finding Montgomery, whose testimony supported Evans' alibi defense. As discussed *supra* in Issue I, the alibi testimony of Montgomery would likewise establish, if believed by the jury, that it was physically impossible for Evans to have committed the armed robbery in Lexington. The PCR judge erred in denying the allegation of ineffective assistance of counsel related to the failure to locate and call Montgomery as a witness.

CONCLUSION

Based on the foregoing, Petitioner Boyd Rashaeen Evans respectfully requests that this Court grant the petition for writ of certiorari and allow for further briefing on the issues raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Mark Hayes, Circuit Court Judge

BOYD RASHAEEN EVANS,

PETITIONER.

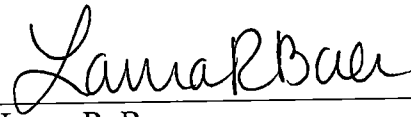
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

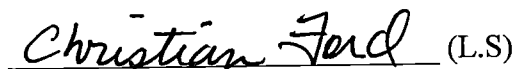
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johanna C. Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Boyd Rashaeen Evans, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 20th day of January, 2017.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of January, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: March 1, 2026