

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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ORIGINAL

Certiorari to Supreme Court County  
Honorable John C. Hayes, Circuit Court Judge

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JUN 25 2016

S.C. SUPREME COURT

EUGENE THOMAS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002304

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BRIEF OF PETITIONER

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**ISSUE PRESENTED**

Whether defense counsel was ineffective in failing to call alibi witnesses at petitioner's trial?

## STATEMENT

Petitioner was convicted of third degree burglary, armed robbery, and possession of a weapon after a jury trial held before the Honorable Markley Dennis, Jr. on September 10-11, 2012, in Greenville County. He was sentenced to five (5) years for burglary in the third degree, to life imprisonment without parole for armed robbery, and to five (5) years for possession of a weapon. Scott D. Robinson, Esq. was defense counsel. Jennifer Tessitore, Esq. was the assistant solicitor. (App. p. 1- p. 352).

Petitioner appealed his convictions and they were affirmed by the Court of Appeals on October 15, 2014. State v. Thomas, Op. No. 2014-UP-360. (App. p. 370)

Petitioner filed an application for post-conviction relief on May 7, 2015, along with attachments and a memorandum in support of the application. (App. p. 353- p. 368). Respondent filed a return dated November 30, 2015. (App. 369- p. 372). An evidentiary hearing was held on October 24 and 27, 2016, before the Honorable John C. Hayes, III. Petitioner was present and was represented by Brian P. Johnson, Esq. Respondent was represented by Patrick L. Schmeckpeper, Assistant Attorney General. Petitioner, trial counsel, Demeco Thomason, and Yvonne McBee testified at the hearing. (App. 373- p. 481). On October 27, 2016, Judge Hayes issued an order denying and dismissing the application for post-conviction relief. (App. p. 487- p. 492)

A petition for writ of certiorari was filed on June 28, 2017. The petition was granted on May 24, 2018. This brief of petitioner follows.

## **STANDARD OF REVIEW**

### **Post-Conviction Relief**

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

## ARGUMENT

### Defense counsel was ineffective in failing to call alibi witnesses.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

In some instances counsel may be held ineffective without a showing of prejudice when he fails to subject the prosecution's case to a meaningful adversarial testing. In such cases prejudice is presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E.2d 878 (2006).

In this case petitioner testified that defense counsel was ineffective in failing to call alibi witnesses. Petitioner had two witnesses who would have provided an alibi for him. They actually

showed up for trial. Defense counsel told petitioner he did not need the witnesses because he wanted to have the last argument. (App. p. 395, line 21- p. 396, line 22) Petitioner admitted he'd told the trial judge that he agreed with defense counsel's decision not to call the witnesses because defense counsel told him he could win the case if he got last argument. (App. p. 403, line 23- p. 404, line 17; app. p. 406, line 21- p. 407, line 7).

Defense counsel's explanation for not calling alibi witnesses was "you know, you have to be very careful when you put witnesses up there because sometimes it backfires and if it backfires you lose the last argument..." (App. p. 422, lines 19-21).

Both potential alibi witnesses testified at the evidentiary hearing. Both were consistent and provided an alibi for petitioner. Demeco Thomason testified that he was playing cards with petitioner over at Ms. Vicky's house from early in the morning all day until the next morning. Petitioner said he was accused of robbing someone but Thomason said he could not have robbed anyone because they were playing cards. (App. p. 465, line 10- p. 466, line 12; app. p. 467, lines 14-21).

Yvonne Dee McBee who goes by Vicky testified next. She said they were having a cookout at her house. Petitioner was there in the morning and was there all day and they were playing cards. (App. p. 470, lines 3-20).

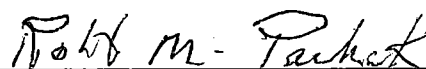
The above two alibi witnesses could have made a difference in petitioner's case. In Martinez v. State, 304 S.C. 39, 403 S.E. 2d 113 (1991) an attorney was held ineffective in failing to subpoena a witness to testify as to the defendant's whereabouts on the day of the crime. In Walker v. State, 407 S.C. 400, 756 S.E. 2d 144 (2014) an attorney was held ineffective in failing to interview the defendant's former girlfriend as a potential alibi witness. Furthermore, failure to request an alibi

charge when an alibi defense is presented may constitute ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E. 2d 312 (1995).

Defense counsel's explanation for not calling the alibi witnesses did not articulate a valid reason to avoid a finding of ineffectiveness. Putting up alibi witnesses is a defense and it also entitles a defendant to an alibi charge. Putting up no defense just to get the last argument was no help in petitioner's case.

**CONCLUSION**

Defense counsel was ineffective and petitioner's convictions should be reversed.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

EUGENE THOMAS,

PETITIONER

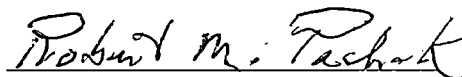
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

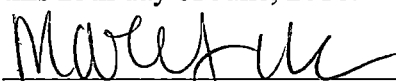
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Eugene Thomas, #222351, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 25th day of June, 2018.



Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 25th day of June, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.