

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County

J. Mark Hayes, II, Circuit Court Judge  
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S.C. SUPREME COURT

MARQUIS JAERIS SANTONI ROBINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000785  
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PETITION FOR WRIT OF CERTIORARI  
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**ISSUE PRESENTED**

Did trial counsel provide ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution by failing to present an alibi witness from an available witness?

## STATEMENT

In June 2011, Petitioner and Kayla Higgs were living together along with their young daughter. App. 1295, ll. 4-8. Petitioner and Higgs developed a routine as most couples do. App. 1295, ll. 9-17. Both Petitioner and Higgs worked during the day. App. 1295, ll. 12-13; App. 1296, ll. 14-18. In the evenings, they would eat dinner with their daughter and then bathe her and put her to bed by 8:30 p.m. App. 1295, ll. 18-19; App. 1295, ll. 22-24. Thereafter, the two would spend some time alone together before going to bed between 10 and 10:30 p.m. App. 1295, ll. 20-21; App. 1295, l. 25 – App. 1296, l. 7.

On June 8, 2011, Petitioner and Higgs were sharing one car because Higgs' car was broken down. App. 1295, ll. 9-14. As a result, Petitioner took Higgs to work that morning and picked her up that evening at 6 p.m. App. 1295, ll. 9-14. Thereafter, the two went home and enjoyed their routine – dinner, bath time with their daughter, alone time with each other, followed by the two of them going to bed by 10:30 p.m. App. 1295, ll. 9-15; App. 1295, l. 19; App. 1295, ll. 20-21.

Ernest Jordan and Jared Crane worked at Five Star Customs. They were working late on June 8, 2011, when two men entered the shop. App. 617, l. 16 – App. 618, l. 12; App. 825, l. 19 – App. 826, l. 5. Jordan claimed that he first heard a door slam and then saw Petitioner point a gun at him. App. 618, ll. 23-24; App. 619, ll. 6-21. He also saw Dantonyo Heath run through the shop. App. 619, ll. 12-14; App. 619, ll. 22-215.<sup>1</sup>

Jordan claimed he and Petitioner fought over the gun. App. 235, l. 9. While the two struggled, two shots were fired. App. 235, ll. 9-12. One of the shots grazed Jordan's face. App.

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<sup>1</sup> The shop had video surveillance cameras showing multiple angles, but the identities of the perpetrators were not apparent on the video. App. 626, l. 6 – App. 634, l. 10.

620, l. 22 – App. 621, l. 4. Oddly, during this struggle, Jordan, completely unprompted, claimed he told Petitioner that he had money in his truck, which ended the struggle. App. 623, ll. 2-15.

According to Jordan, Petitioner and Heath took him outside to the truck to get the money. App. 623, ll. 21-22. While walking outside, they saw Crane's wife, Amanda Crane, sitting in her car. App. 623, l. 23 – App. 624, l. 2. Heath went to Crane's wife, asking to use her phone. App. 624, ll. 2-7. Jordan claimed the men took a sum of money from his truck. Initially, he said \$5000 in cash was stolen. App. 635, ll. 2-4. Later, Jordan changed his story and insisted that over \$10,000 was stolen. App. 681, ll. 13-25.

Crane claimed he saw Petitioner run by with his face partially covered. App. 826, ll. 20-22. Shortly thereafter, Crane was hit in the back of the head by an unknown individual. App. 827, ll. 6-15. Crane and the unknown individual then fought with Crane pulling a knife. App. 827, l. 19 – App. 444, l. 14; App. 865, l. 19 – App. 866, l. 4. When Crane stopped fighting, the men tied him up and left him in the bathroom. App. 829, ll. 4-24. Crane claimed the men took \$1150 and marijuana from his pocket. App. 831, ll. 15-19.

On September 15, 2011, a York County grand jury indicted Petitioner for armed robbery (2011-GS-46-2905), attempted murder (2011-GS-46-2906), criminal conspiracy (2011-GS-46-2907), kidnapping (2011-GS-46-2908), and possession of a firearm during the commission of a violent crime (2011-GS-46-2909). App. 1340-1341; App. 1343-1344; App. 1346-1347; App. 1349-1350; App. 1352-1353. The state first called the case to trial on January 28-30, 2013, before the Honorable John C. Hayes, III, and a jury. App. 1. Misti Horton-Shelton represented the state. App. 1. John Freeman represented Petitioner. App. 1. Petitioner's co-defendant, Dantonyo Heath's case was called simultaneously for a joint trial. App. 1. Phil Smith represented Heath. App. 1.

During the trial, the judge learned of problems related to the selection of the jury. Based upon the information available, it appeared the juror list did not include all eligible citizens. App. 347, l. 14 – App. 348, l. 16; App. 348, l. 22 – App. 351, l. 8. Based upon this error, Judge Hayes granted a mistrial. App. 358, ll. 7-8.

Thereafter, the state, represented by Horton-Shelton, called the case for trial on July 22, 2013, before the Judge Hayes and a jury. App. 386. Twana Burris represented Petitioner. App. 386. Again, Petitioner was tried jointly with his co-defendant, Dantonyo Heath, who was represented by Phil Smith. App. 386.

Following the three-day trial, the jury found Petitioner guilty of armed robbery, kidnapping, assault and battery in the second degree as a lesser-included offense of attempted murder, criminal conspiracy, and possession of a firearm during the commission of a violent crime. App. 1196, l. 25 – App. 1197, l. 21. Judge Hayes sentenced Petitioner to thirty years' imprisonment for kidnapping, thirty years' imprisonment for armed robbery, five years' imprisonment for criminal conspiracy, and three years' imprisonment for assault and battery in the second degree. App. 1208, ll. 14-21; App. 1342; App. 1345; App. 1348; App. 1351; App. 1354.

On appeal, Petitioner was represented by Kathrine H. Hudgins. App. 1214-1225. Petitioner challenged the trial judge's refusal to grant a mistrial when the solicitor failed to disclose evidence favorable to Petitioner and material to his guilt. App. 1214-1225. On October 14, 2015, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished *per curiam* opinion. App. 1258-1259; State v. Robinson, 2015-UP-486 (S.C. Ct. App. Oct. 14, 2015). Remittitur was sent on November 4, 2015. App. 1260.

On April 13, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 1261-1267. Through counsel, Ashley A. McMahan, Petitioner amended his application. App. 1274-1275. On January 29, 2018, the matter proceeded to a hearing before the Honorable J. Mark Hayes, II. App. 1276. McMahan represented Petitioner, and Justin Hunter represented the state. App. 1276. By an order filed April 12, 2018, Judge Hayes denied Petitioner relief. App. 1329-1339.

On April 24, 2018, Petitioner served his notice of appeal. This petition follows.

## ARGUMENT

Trial counsel provided ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution by failing to present an alibi witness.

### **Relevant facts**

During the PCR hearing, Petitioner explained his girlfriend, Kayla Higgs, was his alibi for the night of the crime. App. 1286, ll. 8-15. Higgs affirmed that on the night of June 8, 2011, she and Petitioner were together. App. 1295, ll. 6-8. As Higgs explained, Appellant took her to work that day and picked her up at 6 p.m. App. 1295, ll. 9-14. Afterward, they "went home" and continued with their "same routine as every other night, dinner, bath time for [their] daughter and bed time." App. 1295, ll. 9-15. They put their daughter to bed at 8:30 p.m. App. 1295, l. 19. Then, she and Petitioner would go to bed between 10 and 10:30 p.m. App. 1295, ll. 20-21. Higgs explained that Petitioner never left the bed during the night. App. 1296, l. 24 – App. 1297, l. 6. Higgs was a light sleeper and she would have heard if Petitioner got out of the bed. App. 1297, ll. 1-14. When Higgs woke the following morning at 6 a.m., Petitioner was in bed beside her. App. 1298, ll. 16-20.

Prior to trial, Higgs told trial counsel that Petitioner was with her on the evening of the alleged robbery. App. 1299, ll. 15-16; App. 1300, ll. 1-5. Higgs was listed as a witness and attended the trial, but she was never called to testify. App. 1297, ll. 15-19. Higgs explained that trial counsel informed her that she did not need to call her as a witness at the trial. App. 1298, ll. 1-6; App. 1300, ll. 6-10.

Trial counsel admitted that Higgs asked her to meet with Petitioner regarding representation shortly before his case was called to trial for the second time. App. 1301, l. 19 –

App. 1302, l. 3. After trial counsel met with Petitioner, he retained her. App. 1302, ll. 1-3. Additionally, trial counsel admitted she communicated frequently with Higgs during her representation of Petitioner. App. 1307, l. 13 – App. 1308, l. 18. Trial counsel explained Higgs visited her office often – including during scheduled appointments and unscheduled meetings. App. 1308, ll. 11-18.

Incredibly, trial counsel claimed neither Petitioner nor Higgs ever mentioned Higgs was his alibi witness. App. 1307, ll. 17-18. When asked why she included Higgs on the witness list if she were unaware of Higgs' ability to provide an alibi for Petitioner, trial counsel asserted that she lists "all potential witnesses" because a witness not listed may be excluded. App. 1308, ll. 19-25. Trial counsel denied any conversation with Higgs regarding not calling her as a witness. App. 1309, ll. 1-12. Although trial counsel denied releasing Higgs from her subpoena, she was forced to admit she had done so at the start of trial when confronted by the transcript. App. 1315, ll. 1-16.

According to trial counsel, she learned through her conversations with Higgs that Petitioner and Higgs had a child together. When asked if Higgs told her about "him being there that night and her routine," trial counsel responded that "[i]n general she did. She talked about a small child, them having a small child together, but she never told [trial counsel] that he was at home during the time of the alleged incident, never." App. 1318, ll. 12-21.

In the order of dismissal, Judge Hayes found Higgs "appeared credible at the PCR hearing." App. 1333. Nevertheless, Judge Hayes found trial counsel's "testimony [was] also credible and more believable than Ms. Higgs' testimony." App. 1333. More specifically, Judge Hayes found trial counsel "provided credible testimony that she met with Ms. Higgs often, and was never told of a possible alibi defense involving Ms. Higgs." App. 1333. Then, Judge Hayes

determined Petitioner failed “to meet his burden of proving [trial counsel] acted unreasonably or that she failed to investigate something known to her at the time.” App. 1333. Thus, the PCR court found trial counsel “was not deficient where she never had any indication from [Petitioner] or Ms. Higgs that Ms. Higgs could provide alibi testimony for [Petitioner].” App. 1333.

Next, Judge Hayes found Petitioner failed to show prejudice from trial counsel’s failure to call Higgs as a witness. App. 1333. The PCR judge’s “review of the trial transcript” indicated “that even if the alibi witness had been called at trial, a strong likelihood exist[ed] that the alibi witness may not have been believed.” App. 1333-1334. Specifically, the judge pointed to testimony in the record indicating “[t]he t-shirt which was pulled up over [Petitioner]’s face fell down during the robbery, uncovering the face.” App. 1334. Therefore, the PCR judge concluded that even if trial counsel were deficient, then Petitioner had failed to meeting his burden of proving the outcome would have been different. App. 1334.

## **Discussion**

Criminal defendants are entitled to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. “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.

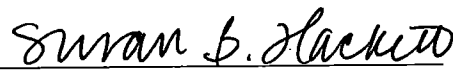
In Walker, 407 S.C. at 407, 756 S.E.2d at 147, this Court held trial counsel rendered ineffective assistance by failing to interview Walker’s girlfriend regarding Walker’s whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker’s girlfriend testified that when 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. This Court held Walker was entitled to relief based upon his counsel’s failure to interview his alibi witness. Id.

Trial counsel failed to call Higgs as an alibi witness at Petitioner's trial, despite her willingness and ability to testify that Petitioner was at home with her and their daughter at the time of the crimes. Trial counsel admitted she met often with Higgs and communicated regularly with Higgs. However, trial counsel claimed Higgs never informed her of the alibi for Petitioner. She offered no evidence to support her claim. Rather, the record showed trial counsel intended to call Higgs as a witness at the trial because she was listed as a witness and the judge questioned the potential jurors about her during voir dire. App. 430, l. 9. Higgs was present during the trial and even addressed the judge during sentencing. App. 1206, l. 20. At the start of the trial, trial counsel told the judge she was releasing Higgs from her subpoena. App. 1314, l. 24 – App. 1315, l. 17.

Trial counsel's failure to present the alibi defense prejudiced Petitioner as it denied Petitioner an opportunity to defend against the state's extremely weak case. Although trial counsel questioned the state's witnesses regarding perceived inconsistencies in their testimony with prior statements they had given, trial counsel failed to provide Petitioner with an affirmative defense – alibi. Had trial counsel provided the jury with the defense of alibi, there is a reasonable probability that the outcome would have been different in light of the prosecution's reliance upon scant evidence of guilt.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court, find trial counsel provided ineffective assistance, reverse Petitioner's convictions, and remand Petitioner's charges for a new trial.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to York County

J. Mark Hayes, II, Circuit Court Judge

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MARQUIS JAERIS SANTONI ROBINSON,

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S.C. SUPREME COURT

PETITIONER

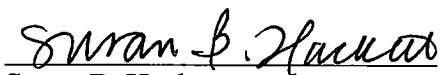
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STATE OF SOUTH CAROLINA,

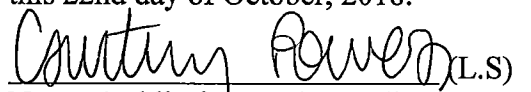
RESPONDENT

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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 Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Marquis Jaeris Santoni Robinson, #266341, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 22nd day of October, 2018.

  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 22nd day of October, 2018.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: May 2<sup>nd</sup>, 2027