

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County  
Court of Common Pleas  
The Honorable John C. Hayes, III, Circuit Court Judge

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Appellate Case No. 2016-002304

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EUGENE THOMAS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**BRIEF OF RESPONDENT**

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S.C. SUPREME COURT

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## **RESPONDENT'S STATEMENT OF ISSUE**

Did the PCR court correctly found Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for failing to call Petitioner's alibi witnesses?

## STATEMENT OF THE CASE

Petitioner is presently confined with the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court of Greenville County. During its May 2010 term, the Greenville County Grand Jury indicted Petitioner for third-degree burglary (2009-GS-23-9349), armed robbery (2009-GS-23-9350, count 1), and possession of a weapon during commission of a violent crime (2009-GS-23-93580, count 2). Scott D. Robinson, Esquire, represented Petitioner. On September 10, 2012, Petitioner proceeded to trial before the Honorable R. Markley Dennis, Jr. and a jury. The jury convicted Petitioner of third-degree burglary, possession of a weapon during the commission of a violent crime, and the lesser included offense of attempted armed robbery. Judge Dennis sentenced Petitioner to life imprisonment without the possibility of parole for attempted armed robbery pursuant to S.C. Code Ann. §17-25-45. He received a concurrent five years' imprisonment for the third degree burglary and weapon convictions.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. Applicant raised three issues on appeal. First, did the circuit court err in denying Applicant's motion for directed verdict because the State's circumstantial evidence was not substantial enough to create any more than a mere suspicion of guilt? Secondly, did the circuit court err in denying Applicant's motion to suppress the pre-trial photo lineup identification because it was unduly suggestive and unreliable under the totality of the circumstances? Lastly, did the circuit court err in refusing to charge the lesser included offense of strong armed robbery because no proof of a weapon or threat of a weapon was ever presented? The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Thomas, Op.

No. 2014-UP-360 (S.C. Ct. App. filed October 15, 2014). The Remittitur was sent on November 3, 2014.

On May 7, 2015, Petitioner filed an application for post-conviction relief. Respondent made its return on November 30, 2015 requesting an evidentiary hearing be convened. An evidentiary hearing was held initially on August 24, 2016, at the Greenville Courthouse before the Honorable John C. Hayes III. At the conclusion of the hearing, the record was left open because Petitioner's alibi witness were not available to testify. The hearing reconvened on August 27, 2016. Petitioner was present at the hearing and was represented by Brian P. Johnson, Esquire. Respondent was represented by Patrick L. Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. Petitioner testified at the hearing. Additionally, trial counsel Scott D. Robinson, Esquire, Demeco Thomason and Yvonne McBee also testified. Thereafter, Judge Hayes denied Petitioner's PCR application by written order filed November 4, 2016.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner submitted a Petition for Writ of Certiorari and Appendix on June 27, 2017. Respondent filed a return to Petitioner's petition for writ of certiorari on November 13, 2017. On May 24, 2018, this Court granted certiorari. This brief of Respondent follows.

### **STATEMENT OF FACTS**

Michael Gordon ("the victim"), a truck driver from Mauldin, also moonlighted as a painter. (App.p.122-23). On the afternoon of Wednesday, July 22, 2009, the victim was painting alone inside an apartment complex on Forrest Street in Greenville. (See State's Exhibits 4-8). The complex contains four units. (App.p.213). The victim had been painting in Apartment A for about a week. The apartment was vacant. (App.p.123-25, 127-28). After finishing up for the day, at "approximately 3:00, 3:30," the victim went into Apartment D, which was also vacant, to

wash his hands. Apartment A did not have running water, but the victim had permission to use the sink in Apartment D. (App.p.128-29, 213-16).

The victim went to the sink to wash his hands. (App.p.129-34; see State's Exhibits 9-12). Although there was no electricity inside the apartment, the victim explained there were no curtains on the windows and that the apartment was "well lit." (App.p.134).<sup>1</sup> The victim did not notice anyone inside the apartment at the time. (App.p.135). The victim recalled that although he thought the front door was "kind of closed," it did not latch behind him. (App.p.135).

As the victim washed his hands in the sink, out of the corner of his eye he noticed the door move. He thought it was the wind. He continued to wash. Then, "the door come open." The victim testified that he turned and observed a black male, whom he later identified as Thomas, standing in the doorway. The victim asked Thomas what he wanted. At that point, Thomas produced a gun from his pocket, pointed it at the victim, and told him to get on the floor. (App.p.136-37, 145-46, 153). The victim testified the weapon was a black, automatic pistol. (App.p.146, 153). The victim explained that he was familiar with guns. (App.p.146).

The victim immediately dropped face-down on the floor. Thomas then walked to the victim, straddled his legs, and grabbed his wallet and cell phone. (App.p.138-39). The victim testified he turned his head when Thomas said something he did not understand. At this point, Thomas "poked" the gun between his shoulder blades as he rummaged through the wallet. The victim said he begged for his life. Thomas responded that he was there for money and did not intend to kill him. (App.p.139-40). Thomas placed the wallet on the counter and said he was "wiping stuff down." He told the victim not to look up for a few minutes. Thomas then left the apartment. (App.p.140).

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<sup>1</sup>The police investigating the scene shortly after the incident also testified the inside of the apartment was "very well lit." It was a "bright" day outside with very few clouds. (App.p.172, 185).

After a short while, the victim left the apartment and telephoned the police. (App.p.140). The victim testified that he had “like 26 bucks . . . tucked away” inside the back of his wallet and a debit card, but that the only thing stolen from his wallet was a \$3 lottery ticket. (App.p.141-43, 165). He recalled that the robber went through his wallet “pretty quick.” (App.p.142).

When the police arrived, the victim gave a description of the robber. (App.p.144-45, 167-68). The victim was visibly shaken, but he was able to communicate with the police “very clearly.” (App.p.168-70). The victim gave another description to the police a few days later. (App.p.155). Six days after the incident, the victim identified Thomas in a photograph line-up. (App.p.155-59; see State’s Exhibit 2). The victim testified he was “almost a hundred percent certain” in his identification. (App.p.159, 165). The victim explained that he “was well aware, you know. I got a gun pointed at me, I’m paying attention to what’s going on.” (App.p.160). At trial, the victim identified Thomas as the person who robbed him. (App.p..159-60).

The police lifted several latent fingerprints from the interior and exterior of the front door of Apartment D. (App.p..188-90, 206; see State’s Exhibits 15 & 16). No other fingerprints were removed from the scene. (App.p.192-93). Thomas’s fingerprints were then compared with the fingerprints on the door, and one fingerprint matched a latent print lifted from the inside of the front door above the handle. (App.p.207-08; see State’s Exhibit 20).

Jennifer Hallex, the property manager at the apartments, testified the apartments remained locked. The keys to the apartments were retained inside a coded lockbox, which she would access to show an apartment to prospective tenants. (App.p.14, 223-24, 232).<sup>2</sup> Apartment D was previously painted and repaired in March 2009, but Thomas did not work in there. (App.p.219-21, 230-31). Thomas had not rented an apartment in the past. (App.p.218-19). Hallex stated that she never showed Apartment D to Thomas. The apartment was rented out on July 21

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<sup>2</sup>The victim had access to the lockbox so that he could work at the apartment complex. (App.p.129).

to a woman from Washington, D.C. (App.p.223-24). Hallex testified that Thomas had no reason to be in Apartment D. (App.p.226).

Several months after the victim identified Thomas, he was arrested at a Greenville motel. (App.p.248-51, 258-59). Incident to Thomas's arrest, the police seized a loaded, semi-automatic pistol (State's Exhibit 14) from inside a zipper bag on the bed in his room. There were also two men's watches and a dice game inside the bag. (App.p.260-61, 264-66). A latent fingerprint belonging to Thomas was found on the dice game. (App.p.276). At trial, the victim identified State's Exhibit 14 as a gun "similar" to the one wielded by Thomas, although he was unable to testify that it was the same gun used during the robbery. (App.p.153-54). No lottery ticket was recovered in the case. (App.p.272).

## STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the reviewing court. It will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

In a PCR proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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 v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

## ARGUMENT

### **I. The PCR court correctly found Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for failing to call Petitioner's alibi witnesses.**

Petitioner asserts the PCR judge erred in holding trial counsel was not ineffective for failing to call his alibi witnesses during trial. Here, the PCR court properly denied Petitioner's application for post-conviction relief as there was evidence of probative value to support the court's findings on this issue as trial counsel articulated a valid trial strategy and Petitioner agreed with that trial strategy.

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. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

During the evidentiary hearing, the PCR judge heard testimony from Petitioner, his trial counsel and Petitioner's alibi witnesses Demeco Thomason and Yvonne McBee. Petitioner testified prior to his case being called for trial he had provided his attorney a list of alibi witnesses. (App.p.392) However, once the trial started Petitioner testified trial counsel had not complied with Rule 5(e)(1), SCR CrimP. (App.p.488). Petitioner testified his trial was continued because trial counsel had failed to notify the state about the existence of the alibi witnesses. (App.p.482). Once Petitioner's case was called for a second time, trial counsel had the alibi witnesses available and notice was not an issue. (App.p.488). Petitioner testified during his trial,

his two alibi witnesses did not testify. (App.p.398). Petitioner indicated his alibi witnesses' testimony at trial would have been they were with him at one of their homes playing cards during a cookout. (App.p.398). Petitioner testified trial counsel informed him he did not need the alibi witnesses to testify as trial counsel wanted the last argument. (App.p.395). Petitioner's two alibi witnesses, Demeco Thomason and Yvonne McBee, also testified at the hearing. Both testified Petitioner was with them during the day of the robbery from five or six that afternoon until around 3:00 a.m. the following day. (App.p.488). Demeco Thomason testified he and Petitioner were playing cards during this time at Yvonne McBee's house. (App.p.465-466). Yvonne McBee testified she was having a cookout the day of the robbery and Petitioner came to her house between eight thirty and nine o'clock that morning. (App.p.470). She further testified Petitioner was in her yard all day and up until five o'clock the next morning. (App.p.470).

Furthermore, trial counsel testified he subpoenaed six witnesses for Petitioner. (App.p.421). Trial counsel testified Petitioner's case was a purely circumstantial case. (App.p.422). He testified he talked to Petitioner about presenting his alibi witnesses and how putting up witnesses could backfire and it also came with losing the last argument. (App.p.422). Additionally, trial counsel testified he did not know how the witnesses would have held up under cross-examination. (App.p.424). Trial counsel testified it was Petitioner's decision to not call his alibi witnesses. (App.p.424). Trial counsel testified he presented the pros and cons of the witnesses testifying but it was ultimately Petitioner decision to make. (App.p.424).

The PCR court found Petitioner had failed to prove trial counsel was ineffective with regard to this allegation. (App.p.492). The PCR court found trial counsel, with Petitioner's approval, utilized acceptable trial strategy to not present a defense to preserve his right to make the final closing argument. (App.p.488). The PCR court noted trial counsel testified he advised

Petitioner as to the pros and cons of preserving final argument and Petitioner agreed with trial counsel's strategy to not call witnesses. The PCR court found the record reflected Petitioner's satisfaction with this strategy. (App.p.488).

There is evidence of probative value to support the PCR court's finding trial counsel did not render Petitioner ineffective assistance of counsel by not calling two alibi witnesses. As discussed above, trial counsel testified he talked to Petitioner about presenting his alibi witnesses and how putting up witnesses could backfire and how it also came with losing the last argument. Additionally, the PCR court found trial counsel exercised trial strategy that was well within the trial strategy which a reasonable competent attorney would have exercised under the same or similar circumstances. (App.p.489). Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

Here trial counsel articulated a trial strategy of not calling Petitioner's alibi witnesses and preserving last argument for Petitioner. Furthermore, as evidenced by the record Petitioner was asked by the trial judge if he had talked to his lawyer about strategy with regard to his case and about presenting and not presenting evidence. (App.p.283). Petitioner responded "yes sir". (App.p.283). Moreover, the trial judge asked Petitioner if he was comfortable with the strategy that his trial counsel had articulated. (App.p.284). Petitioner responded "yes sir". (App.p.284). It is clear from the record trial counsel articulated a valid trial strategy during Petitioner's trial. Moreover, the record conclusively shows Petitioner was in agreement with this trial strategy during the actual trial. Accordingly, the PCR court correctly found Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for failing to call Petitioner's alibi witnesses.

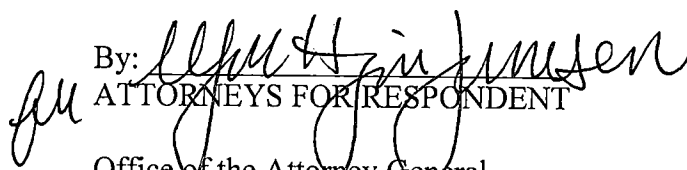
**CONCLUSION**

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Attorney General

DESHAWN H. MITCHELL  
Assistant Attorney General  
SC Bar No. 101813

By:   
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EUGENE THOMAS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,


Respondent.

\_\_\_\_\_  
**CERTIFICATE OF SERVICE**  
\_\_\_\_\_

I, Judy A.C. Carey, certify that I have today served the within **Brief of Respondent** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Wanda H. Carter, Esquire**  
**SC Commission on Indigent Defense**  
**Division of Appellate Defense**  
**Post Office Box 11589**  
**Columbia SC 29211-1589**

I further certify that all parties required by Rule to be served have been served. This 24<sup>th</sup> day of October, 2018.

  
\_\_\_\_\_  
JUDY A.C. CAREY  
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ALAN WILSON  
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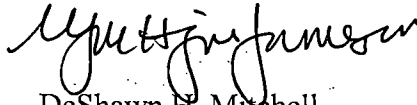
The Honorable Daniel E. Shearouse  
Clerk of Court — SC Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Eugene Thomas v. State of South Carolina**  
**Appellate Case No. 2016-002304**  
**Lower Court Case No. 2015-CP-23-2998**

Dear Mr. Shearouse:

Attached are the original and fourteen (14) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

  
for DeShawn H. Mitchell  
Assistant Attorney General  
SC Bar #101813

DHM/jacc

cc: Wanda H. Carter, Esquire  
Victim Advocacy Division (without enclosure)