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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeal

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2016-002186

DARRELL L. GOSS, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the Court of Appeals correctly upheld the PCR court's ruling where the record contains probative evidence to support the PCR court's finding that trial counsel was not ineffective for failing to investigate or present an alibi defense?

STATEMENT OF THE CASE

Procedural History

Petitioner Darrell L. Goss ("Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Petitioner was indicted at the September 2007 term of the Charleston County Grand Jury for armed robbery (2007-GS-10-10805), assault and battery with intent to kill (ABWIK) (2007-GS-10-10806), and kidnapping (2007-GS-10-10807). (App. p. 703-08). James W. Smiley, IV, Esquire ("Counsel"), represented Petitioner. Trip Lawton, Esquire and Kevin Hales, Esquire, prosecuted the case. Petitioner proceeded to trial before the Honorable J.C. Nicholson, Jr. on February 23-26, 2009, after which a jury found him guilty as indicted. Judge Nicholson sentenced Petitioner to confinement for twenty years for each offense. The sentences were to run concurrently. (App. p. 709-711).

Petitioner filed a timely notice of appeal and an appeal was perfected by Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. Following briefing, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentence. State v. Goss, Op. No. 2011-UP-214 (Ct. App. filed May 17, 2010). (App. p. 598). The Remittitur was issued on June 9, 2011.

On May 27, 2010, Petitioner filed his *pro se* application for post-conviction relief ("PCR"), alleging trial counsel was ineffective in failing to present an alibi, properly investigate the facts and circumstances of the case, present witnesses, or provide Petitioner with discovery. (App. p. 591). The State filed a Return requesting that an evidentiary hearing be held. (App. p. 616). On September 16, 2011, an evidentiary hearing was convened at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Petitioner was present at the hearing and

represented by Charles T. Brooks, III, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office, represented the State. At the outset of the hearing, Petitioner requested that Judge Jefferson allow him to proceed pro *se*. However, Judge Jefferson appraised Petitioner of the pitfalls of self-representation and suggested that Petitioner allow PCR counsel to represent him. Petitioner testified on his own behalf. Counsel also testified at the hearing. During the hearing, Petitioner entered into evidence a visitor's log from the jail, memorandum of law, and two letters addressed to Counsel. Present at the hearing were alibi witnesses, Angelique Gaskins, the mother of Petitioner's child, Lucretia Douglas, a friend, Bernard Godfrey, Petitioner's uncle, and Felicia Henderson, a friend. Also, present were Clifford Hartwell, Petitioner's brother, and Sharon Goss, Petitioner's cousin. Judge Jefferson took judicial notice of each witness's testimony.

On December 1, 2011, Judge Jefferson signed an Order of Dismissal finding that Petitioner did not establish any constitutional violations or deprivations. Specifically, Judge Jefferson found Counsel's testimony credible while also finding Petitioner's testimony not credible. Regarding Petitioner's claims of ineffective assistance of counsel, the court found Petitioner failed to meet his burden of proof, and Counsel's representation did not fall below an objective standard of reasonableness. (App. p. 696). Additionally, the court found Counsel had a valid strategic decision to only call Petitioner's mother as a witness at trial, and was not ineffective for failing to call Sharon Goss or other named witnesses. (App. p. 697). Similarly, the Court found Counsel was not ineffective for failing to pursue the alibi witnesses where neither Applicant nor Petitioner's mother informed counsel of a potential alibi defense. (App. p. 698). Lastly, the court found Petitioner failed to prove the prejudice prong of <u>Strickland</u>. (App. p. 689).

Petitioner filed a timely notice of appeal on December 5, 2011. On July 23, 2012, Petitioner filed his petition for writ of certiorari and accompanying appendix with this Court. Thereafter, this Court transferred Petitioner's case to the Court of Appeals pursuant Rule 243(1), SCACR. On November 21, 2014, the Court of Appeals granted certiorari. (App. from Ct. App. 1). Following briefing and oral argument, the Court of Appeals affirmed the PCR court's decision in an unpublished opinion. State v. Goss, No. 2016-UP-382 (July 27, 2016). Petitioner filed a petition for rehearing. On September 26, 2016, the petition for rehearing was denied. (App. from Ct. App. 11).

On November 14, 2016, Petitioner filed his petition for writ of certiorari and accompanying appendix with this Court. On October 19, 2017, this Court granted certiorari and ordered additional briefing. The brief of petitioner was filed on November 20, 2017. The brief of respondent follows.

Factual History

On June 14, 2007, at approximately 7:30 p.m. five African American males entered the Urban Wear clothing store in North Charleston armed with weapons. (App. p. 155). The store owner, Andy Ayazgok and his assistant David[1] were in the back of the store when the men entered. One of the men later identified as Joy Mack ("Mack") entered the store first armed with an AK 47. When Mack encountered Andy, he removed the AK 47 from his pants and ordered Andy to the ground. Mack then proceeded to beat Andy over the head repeatedly. The men tied rope from a banner around the hands and feet of Andy and David. Andy had $1,000 in cash in his pocket that he had just removed the cash register to deposit in the bank later that evening. (App. p. 156). The money from Andy's pocket was taken along with his wallet and clothing from the store. (App. p. 173).

[1] David was in Illinois at the time of the trial and did not testify.

Andy and David were able to escape from the ropes and called 911. When the Charleston County Police arrived on the scene and began collecting evidence. (App. p. 314). Fingerprints and a partial palm print that appeared to be wet were taken from the exterior glass window and front door. (App. pp. 315-316). Pieces of the string and rope that were used to tie the victims were also collected for evidence. (App. p. 320). The print collected from the exterior of the door matched those of Petitioner. (App. p. 334). Officers were able to establish Petitioner as a suspect though the fingerprints that were collected because they were positively identified as Petitioner's fingerprints. (App. p. 363).

A search warrant was executed to search Petitioner's family home and any vehicle that was parked in the yard. Officers searched the home and a vehicle that was parked in the yard. (App. p. 370). The results of the search yielded several pieces of clothing with tags attached, baseball caps, Nike tennis shoes, a pair of sunglasses, and a revolver containing the DNA of one of the victims. (App. pp. 314-326). The tags on some of the clothing and baseball caps were consistent with the tags from the Urban Wear store. (App. p. 339) Petitioner was located during the search hiding behind a dryer and was taken into custody. (App. p. 323). Several weeks' later police arrested a second suspect, Joy Mack. (App. p. 366). The remaining three men were never found. (App. p. 156).

STANDARD OF REVIEW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his 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 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 v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the 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. 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.

This Court must affirm the post-conviction relief court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C.

578, 589, 690 S.E.2d 73, 79 (2010). This Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)). Further, on review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)).

ARGUMENT

The Court of Appeals correctly upheld the PCR court's ruling where the record contains probative evidence to support the PCR court's finding that trial counsel was not ineffective for failing to investigate or present an alibi defense.

Petitioner contends this Court should reverse Petitioner's convictions and grant a new trial because the Court of Appeals erred in affirming the PCR court's denial of Petitioner's PCR application. Specifically, Petitioner asserts that Counsel's performance was ineffective in that Counsel failed to investigate or present an alibi defense. However, the PCR court found that Counsel "conducted a proper investigation" and was "thoroughly competent in his representation." (App. p. 688). The PCR court also found that Counsel made "a valid strategic decision" by only calling Petitioner's mother as a witness at trial. However, Petitioner maintains the PCR court only reached its conclusion by speculating about potential trial strategies. Yet, such a contention is refuted by Counsel's testimony at the PCR hearing. Therefore, the Court of Appeals correctly upheld the PCR court's denial of relief because probative evidence exists to support its finding that Petitioner failed to carry his burden of proving ineffective assistance of Counsel. Accordingly, this Court should affirm the decision of the PCR court and the Court of Appeals.

At the PCR hearing, Petitioner was prepared to call alibi witnesses Angelique Gaskins, Lucretia Douglas, Bernard Godfrey, and Felicia Henderson. However, the PCR court took judicial notice that those individuals were present and would testify that Petitioner was at his son's baby shower between the hours of 7:00 p.m. and 9:00 p.m. on the night of the crime, which occurred at approximately 7:30 p.m. (App. pp. 644-45). The Court also took judicial notice of the testimony of two other witnesses who were also present at the PCR hearing: (1) Clifton Hartwell, Petitioner's younger brother, who would have testified that he witnessed his mother,

Thomasina Goss, and his cousin, Sharon Goss, purchase the stolen clothing from guys who were selling the clothing in front of the family's home, and (2) Sharon Goss, Petitioner's cousin, would have testified he was with Petitioner's mother when she bought the stolen clothes and that he purchased a gun from the same group that was selling the clothes and placed it in his car. (App. p. 639-40, 645). Counsel testified he did not recall any information about Sharon Goss purchasing the pistol and placing it in the car, and that if he had known about it, he would have elicited that testimony from Goss's mother. (App. pp. 656-57). Counsel testified he knew there were others who could have testified about the clothes being sold on the street, but that he used Thomasina Goss because, even though she had a record, he felt she was "persuasive and told the event very well." (App. p. 657).

Counsel testified he did not know about an alibi and the first time he heard about it was after trial. (App. p. 656). Counsel also acknowledged that he and Petitioner had trouble communicating, but that he did review discovery with him and discussed with him his theory of the case. (App. p. 665). Counsel testified he remembered going over discovery with Petitioner. (App. p. 658). Counsel testified that as a general policy when he has a client that is incarcerated he does not give them a copy but he goes over every page of discovery with his client. (App. p. 658). Counsel testified that he was unable to hire an investigator because Petitioner could not afford it. (App. p. 672).

Counsel testified it was a circumstantial case, (App. p. 659), and that there were three major pieces of evidence: a palm print on the glass door of the store, a gun containing the victim's DNA evidence in it that was recovered from an automobile in the Goss family's front yard, and many items of clothing with tags still attached that were found inside the Goss family home. (App. p. 653). He testified he felt they had "defeated" each piece of evidence through

cross-examination and the testimony of Thomasina Goss. (App. pp. 659-60.). He testified he felt they had "defeated the gun", and if he had known or heard about Sharon purchasing the gun, it would have been something to consider, but he did not know if he would have called him regardless. (App. p. 659). He stated he would have probably asked the question of Thomasina while she was on the stand, but that it was hard to overcome that there was a gun with the victim's DNA on it in a car in the yard of the residence, even though he felt he had established the vehicle was not in Petitioner's possession or control. (App. p. 659). Counsel further testified he used Thomasina to explain all the clothes. (App. p. 659).

Counsel stated he and Petitioner did not have a discussion about any potential alibi defense and that he thought they "could defeat the case with circumstantial evidence." (App. p. 660). He stated he told Petitioner his theory of the case and felt he was prepared for trial. Counsel also testified:

> As far as putting up other people to testify to the same thing that Thomasina had, strategically, to put her up there, she actually had a little bit of a record, but [she] speaks very well, and she came through. The other people were bolstering, to a certain degree, but that's not why I didn't put them up. It's my belief the more you put out there, they start pitting your people against each other, and I had a strong . . . witness who testified. So I didn't call—again . . . if I had known about the alibi, and if it was my fault of not knowing—and I can tell you, we had difficulty communicating. . . .
> I felt like, because it was circumstantial, and the three points that we had put up good, solid defense to each of those circumstances, and so even if I had had the alibi, unless it was airtight, I don't know if I, strategically, would have put it up there because you live and die by your alibi, and I thought we had a pretty . . . good case in defense[.]

(App. pp. 660, 662). Finally, Counsel testified he could not speculate as to whether he would have raised an alibi defense because "[he] thought [they] had what [they] needed to beat the circumstantial elements of the case[,]" and that he "tend[s] not to put up an alibi unless [he] really [has] to." (App. p. 667). Counsel also stated that he thinks "there is always skepticism

when a family member testifies," but that, with respect to Thomasina Goss's testimony, she spoke well and was convincing, and that when he went over the testimony with her, he felt confident in what she was going to testify to and that it was going to be convincing. (App. p. 668). He further testified that she never mentioned the purchase of the gun by Sharon Goss, and that would have been very significant to him, but that even if he had known, putting Sharon on the stand would have given him "a little concern." (App. p. 668). He also agreed it was possible it still would have implicated Petitioner due to the fact they were related. (App. p. 669). Counsel stated that he very rarely uses an alibi because the jury "only listen[s] to the rest of the case if your alibi fails, and we had a good circumstantial defense." (App. p. 671). Counsel also testified that based on his knowledge of the potential alibi witnesses who were also members of the Goss family had criminal records but he could not testify as to whether their records would have discounted their testimony. (App. p. 671).

Petitioner testified that he met with Counsel one time prior to his trial and that he never talked to Counsel about his case prior to trial. (App. p. 632). Petitioner testified that he gave Counsel the names of several potential witnesses during the jury selection process of the trial. (App. p. 633). He testified had Counsel interviewed him prior to trial, he would have given him the names of Sharon Goss, Benny Goss, Clifford Hartwell, and Angelique Gadsden (App. p. 633). He testified that Benny Goss, Clifford Hartwell, and Angelique Gadsden would have testified that they witnessed individuals selling clothes on the street to his mother Thomasina Goss. (App. p. 633). He testified that Sharon Goss would have testified that he purchased the gun found in the car outside of the Petitioner's home that contained the victim's DNA from the individuals selling clothes on the street. (App. p. 640). Petitioner said he never discussed his alibi defense with Counsel. (App. p. 651-52). Lastly, Petitioner testified he would have told

Counsel that he was at his son's baby shower on the day of the crime. (App. p. 634). To further corroborate his testimony, Petitioner attempted to enter into evidence a picture of the club where the baby shower was held. (App. p. 646). However, Petitioner was not in the photograph, and the Court ruled that the photo had no relevance. (App. p. 647).

In denying Petitioner's relief, the PCR court found Counsel made a valid strategic decision to only call Petitioner's mother, Thomasina Goss, as a witness at trial, and that he was not ineffective for not calling Sharon Goss or other named witnesses at trial. (App. p. 696-97). The court also found that neither Petitioner nor Petitioner's mother informed Counsel of a potential alibi defense. (App. p. 697). In addition, the court found Counsel's testimony credible that he had trouble communicating with Petitioner, and that it was "implausible" that neither Petitioner nor any of his family members found a way to inform Counsel of a potential alibi if one in fact existed. (App. pp. 697-98). Moreover, the PCR court found credible Counsel's testimony that "even if he knew about a potential alibi, he would not have presented an alibi defense unless it was airtight." (App. p. 698). The record unambiguously supports the PCR court's finding.

The record contains ample evidence of probative value to support the PCR court's finding that Counsel effectively investigated the Petitioner's case, was never informed of the alibi defense or the purchase of the gun by Sharon, and made a strategic decision to only call Petitioner's mother to testify because he felt her testimony was convincing. A strategic or tactical decision does not have to be articulated by counsel on the record; counsel does not have to personally identify his or her thinking. It is enough that the record shows a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290 (2010). To establish counsel failed to adequately prepare for trial, an applicant must present evidence of

what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). 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). Counsel is not required to interview every potential witness if he can articulate reasonable grounds for not doing so. Edwards v. State, 710 S.E.2d 60, 64–65, 392 S.C. 449, 457 (2011). 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).

Counsel gave credible testimony that he investigated Petitioner's case, and believed he could defeat each piece of circumstantial evidence presented by the State. At trial, Counsel attempted to defeat the fingerprint evidence by showing that the State's expert witness could not testify as to the specific location and age of the fingerprint or that the substance characterized as sweat was ever tested for DNA evidence. (App. pp. 481-482). Concerning the gun found in the car located at the Goss family home, Counsel attempted to defeat this evidence by establishing that there was no connection between Petitioner, the car, or the gun. (App. pp. 483-484). Counsel also attempted to defeat the State's evidence regarding the stolen clothing by establishing that the clothing were found in a room that was not Petitioner's, and with testimony from Petitioner's mother that she purchased the items from some unidentified males on the street. (App. p. 484). Counsel also gave credible testimony that he reviewed the discovery and was able to put together a defense he felt was very strong.

In addition, Counsel clearly articulated a valid trial strategy for calling Thomasina Goss and not others to testify at trial. Counsel testified that he knew of others who witnessed the Petitioner's mother purchasing clothing from men on the street after the robbery, but that it was a part of his trial strategy to call Petitioner's mother to testify. He testified that he chose to call Thomasina as a witness at trial because she was very convincing, spoke very well, and would be able to tell the story of the event very well. In Jackson, the Court held that counsel's choice to call one witness over another because he believed his testimony would be more credible was a valid trial strategy. 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998). Here, Counsel articulated the same rationale for calling Thomasina Goss to testify over the other witnesses regarding the purchasing of the clothing.

Moreover, Thomasina Goss' testimony was the same as the potential witnesses presented by Petitioner at the PCR hearing and therefore would have been cumulative if presented at trial, and thus would not have affected the outcome. In Cherry, that Counsel's failure to ensure presence of defense witness did not constitute deficient performance or prejudice defendant so as to constitute ineffective assistance where the witnesses' testimony would have been cumulative. 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, the PCR court correctly found that Counsel was not ineffective for failing to investigate or call potential witnesses to give testimony that would have been identical to Thomasina Goss's testimony.

The PCR court correctly found Counsel was not ineffective for failing to call Sharon Goss to testify about his purchase of the gun found in a car outside of the Petitioner's home. "A fair assessment of attorney performance requires that every effort be made 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, Counsel gave credible testimony that he was not aware of the substance of Sharon Goss's testimony despite Counsel's close relationship and consultation with Thomasina Goss, and that regardless, had he known of such testimony prior to trial he would likely have elicited such testimony from Thomasina Goss instead. Counsel cannot be deemed ineffective for failing to call a witness whose testimony he was never informed of. Therefore, the record supports the PCR court's finding that Counsel was not ineffective for not calling Sharon Goss to testify.

Moreover, the PCR court's finding that Counsel was never informed of the alibi defense prior to trial is supported by ample evidence in the record.

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.

Strickland 466 U.S. at 691. Not only did Counsel give credible testimony at the PCR hearing that he was not informed of an alibi prior to trial, but *Petitioner also testified* during the PCR hearing that he never told Counsel of his alibi. Prior to trial, the Petitioner testified that he told Counsel of several potential witnesses that were present and could give testimony identical to that of his mother, Thomasina Goss. However, he never indicated to Counsel prior to trial that he was present at his son's baby shower during the crime. Petitioner had ample opportunity to communicate this significant fact to Counsel prior to trial. Counsel could not have further investigated an alibi defense that he was never informed of. Counsel's performance at trial was based on the information that he knew at the time of trial. Therefore, the PCR court's finding that it was "implausible" that neither Petitioner nor any of his family members found a way to inform Counsel of a potential alibi if one in fact existed, (App. pp. 697-98), is supported by the

record and not based on speculation. Furthermore, the Court of Appeals affirmed the PCR court's ruling finding that trial counsel was not ineffective.

Lastly, Petitioner was not prejudiced by Counsel's inability to pursue an alibi defense prior to trial because Counsel testified that even had he known of the existence of an alibi, strategically he would not have presented that defense to the jury unless it was airtight. (App. p. 661). Counsel further testified that the description of the alibi provided during the PCR hearing sounded "like a really good alibi but at the time [he] did not have that." (App. p. 667).

Petitioner compares his case to Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). In Walker, this Court reversed the judgment of the Court of Appeals and held that Walker was prejudiced by trial counsel's failure investigate and interview potential alibi witnesses. In that case, the defendant was charged with criminal sexual conduct in the first degree and kidnapping. During his interrogation, Walker stated that on the night of the crime he was at the home of his girlfriend, Robina Reed. Trial counsel viewed the videotape of the interview and noted Robina Reed's name as a person to interview. However, trial counsel never interviewed Reed.

Petitioner also compares his case to Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), in that case the defendant was on trial for kidnapping and armed robbery, and faced a sentence of life without parole (LWOP). Trial counsel did not meet with the Lounds until the morning of trial. Lounds provided trial counsel with the names of witnesses but trial counsel did not investigate those witnesses or secure their presence at trial. At the PCR hearing, Lounds presented three witnesses who testified that they would have been willing to testify at trial. Trial counsel did not investigate or subpoena any of the witnesses. This Court held that the petitioner was prejudiced by counsel's failure to subpoena and call witness.

However, the present case is distinguishable because unlike the trial counsel in Walker and Lounds, Counsel here was unaware of an alibi defense or alibi witnesses until Petitioner's testimony at the PCR hearing. At the hearing, Petitioner testified that he told Counsel the names of several witnesses whose testimony would have been identical to that of Thomasina Goss. However, Petitioner also testified that he never discussed his alibi with Counsel. Petitioner here could not have been prejudiced by the failure to subpoena or call alibi witnesses when he never disclosed to Counsel the baby shower alibi nor the names of the witnesses whom would testify to his presence there.

Petitioner also seeks to make a comparison between the facts of Putnam v. State, 417 S.C. 252, 789 S.E.2d 594 (Ct. App. 2016) and Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991). In Putnam, the defendant was charged with homicide by child abuse. At her PCR hearing, Putnam alleged that trial counsel failed to interview her husband and children about the events that took place in the home on the day of the incident or to subpoena them as witnesses for trial. The Court of Appeals found trial counsel was deficient for failing to subpoena the witnesses; however, the court affirmed the ruling of the PCR court finding that Putnam failed to demonstrate prejudice. In Martinez, the defendant was charged with first degree–burglary and first degree–criminal sexual conduct. Prior to trial, Martinez advised trial counsel of the name of an alibi witness. However, trial counsel did not subpoena the witness. This Court found that trial counsel was ineffective for failing to subpoena the witness.

Petitioner likens the deficient performance of the trial counsel in those cases to the performance of Counsel here. Respondent respectfully disagrees with Petitioner's comparison. Counsel here differs from trial counsel in Putnam because he had a strategic reasoning for choosing his trial witness over the other potential witnesses, and he interviewed her and secured

her presence at trial. Unlike trial counsel in Martinez, Counsel here had no knowledge of a potential alibi defense nor was he aware of any potential alibi witnesses until the PCR hearing.

Petitioner maintains the PCR court here like the PCR court in Lounds improperly speculated that trial counsel would not have presented the alibi defense if he had known about it at the of trial. Respondent disagrees with Petitioner's contention. Counsel testified that if he had known about the alibi and felt it was "airtight" he would have presented it. Similarly, Petitioner contends that there was an error on the part of PCR court in regards to the prejudice prong and that such an error is similar to Walker. The PCR court did not err in finding that Petitioner could not satisfy the prejudice prong of the Strickland test. The PCR court took judicial notice of the alibi witnesses' testimony regarding Petitioner's presence at the baby shower. Petitioner attempted to enter a photograph of the venue where the baby shower was held into evidence but the court ruled the photo was not relevant. Petitioner did not appear in the photo nor was the photograph time stamped.

The record contains ample evidence to support the PCR judge's finding that Counsel was not ineffective for choosing to call Thomasina Goss to testify over Sharon Goss and other potential witnesses. The record also supports the PCR judge's finding that Counsel was not ineffective for failing to present an alibi defense that neither Petitioner nor Petitioner's mother informed him of. Therefore, the PCR court did not err in finding that Counsel was not ineffective and Petitioner could not demonstrate he was prejudiced.

CONCLUSION

For all the foregoing reasons, this Court should affirm the PCR court's denial of post-conviction relief.

Respectfully submitted,

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December 20th, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE SUPREME COURT

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2016-002186

DARRELL GOSS, Petitioner,

vs.

THE STATE SOUTH CAROLINA, Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

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December 20, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

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PROOF OF SERVICE

I, Deonna Rogers, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
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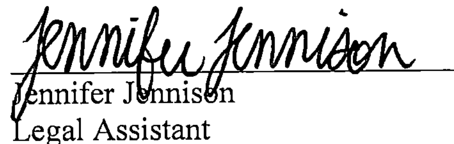
I further certify that all parties required by Rule to be served have been served.

This 20th day of December, 2017.



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