STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
Roger M. Young, Trial Judge
R. Lawton McIntosh, Post-Conviction Relief Judge

Appellate Case No. 2018-001425

MALCOM BRABHAM, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF ISSUE

I.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was deficient for failing to request an alibi jury charge when witness Reah Gonsalves did not provide Petitioner with an absolute alibi and even if she had Petitioner was not prejudiced by trial counsel's failure to request an alibi charge because the trial judge was unlikely to grant such a request?

STATEMENT OF THE CASE

Petitioner Malcom Brabham is presently confined in the South Carolina Department of Corrections following his conviction in Beaufort County. Petitioner began dating Chadwick Mitchell's sister, Reah Gonsalves, in 2003. Petitioner and Gonsalves eventually had three children and lived together on the same land that Mitchell lives on. On July 15, 2013, Petitioner was drinking with Mitchell in the yard. Petitioner and Mitchell then decided to go to a place called "The Hole." (App. 142-43, 164).

At The Hole, Petitioner and Mitchell met up with Elaine Blake, who was Petitioner's cousin, and Norman Singleton, who was Blake's boyfriend. Mitchell believed Petitioner was flirting with Blake and then began arguing with everyone at The Hole. (App. 143, 157-58, 176-78). After dark, Petitioner and Mitchell decided to leave The Hole. (App. 143-44). Blake joined Mitchell and Petitioner in the car because Blake and Mitchell planned to go out later. (App. 142-43)

During the ride, Mitchell continued to accuse Petitioner and Blake of improprieties, including asking them if they are "kissing cousins." (App. 145). This created an argument between the three of them. Blake then demanded to be let out of the car. Petitioner stopped the car and allowed Blake to get out. (App. 145-48). Mitchell and Petitioner continued to argue. Finally, Petitioner insisted Mitchell get out of the car too. (App. 148). Here, the evidence differed concerning what transpired next. Mitchell initially told the responding officer that Petitioner reached into the open driver's door, retrieved a gun, and shot him. (App. 169-70). However, at trial, Mitchell claimed that Petitioner also got out of the car, closed the driver's door, and the two "started throwing more obscenities at each other." Then, Petitioner "kind of pulled the gun like a - - it was like a western movie. I didn't even really see it coming. Between us arguing, he just

pulled out and, boom, shot me, you know." (App. 149, lines 4-11). Mitchell claimed that Petitioner "looked around," "jumped in the car and just peeled out," leaving Mitchell on the side of the road. (App. 150, lines 13-20).

After being shot in the chest, Mitchell walked to the first house with lights on, which was almost a mile from the incident location, and asked the residents to call for help. (App. 128, 153, 255). Mitchell arrived at the house between ten and fifteen minutes after the shooting. (App. 154). Deputy Chad Seronka, was dispatched to the house at 9:15 p.m. and arrives at approximately 9:23 p.m. (App. 134). Nancy Harvey, was at that house for a dinner party when Mitchell appeared. (App. 125-26). She testified at trial that Mitchell was coherent but afraid and in a lot of pain; Harvey then proceeded to call 911. When asked at trial if the victim appeared intoxicated, she answered "he did smell of alcohol but he did not come across as inebriated, no." (App. 128 lines 22-23).

Mitchell told the residents and the police, who subsequently arrived, that his brother-in-law, Petitioner, had shot him. (App. 125-26, 132, 153-54). Mitchell later admitted he had alcohol and cocaine in his system the day of the shooting and agreed he used cocaine that day. Asked where and when he used cocaine, Mitchell responded, "I was probably in [Petitioner's] car." The prosecutor again prompted Mitchell to tell the jury when he used cocaine, and Mitchell responded, "Maybe right before we got to The Hole." (App. 156, lines 22-25). According to the treating physician in the emergency room, Mitchell had high levels of alcohol and cocaine in his system. (App. 297, 300-02).

Law enforcement went to Gonsalves's home looking for Petitioner. (App. 190-92). Petitioner contacted Blake to say he was on his way to his mother's home in Ridgeland around 9:15 p.m. (App. 183). When law enforcement arrived at 10:05 p.m., Gonsalves stated "Malcolm

had been here at the house with me and the kids this evening, and then he left from our home about 45 minutes ago." (App. 245, lines 11-14). However, at trial, Gonsalves testified that Petitioner got home around 9:48 or 9:50 pm. (App. 235). Gonsalves also testified that she spoke to the Petitioner around 12:00 or 1:30am in the morning but did not know what occurred. (App. 240). When asked by the prosecutor if she had ever seen Petitioner with a gun, she replied "um-hmm" and that "it was a revolver." (App. 242). The following day, the police arrested Petitioner. When law enforcement questioned Petitioner regarding his alleged involvement in Mitchell's shooting, Petitioner informed the officer he did not shoot Mitchell, but did admit leaving him on the side of the road. (App. 211-12, 264-65, 266-69).

On September 20, 2013, a Beaufort County grand jury indicted Petitioner for attempted murder and possession of a weapon during the commission of a violent crime. App. 380. Petitioner proceeded to trial before the Honorable Roger M. Young and a jury on April 21, 2014. The State was represented by Mary Jordan Lempesis and Mary Concannon while Petitioner was represented by Trasi Campbell. The jury found Petitioner guilty as charged. Judge Young sentenced Petitioner to twenty years' imprisonment for attempted murder and five years' imprisonment for the weapon charge. He ordered the sentences to be served concurrently.

Petitioner filed a notice of appeal, which was perfected by Susan B. Hackett. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal on October 21, 2015. State v. Brabham, 2015-UP-498 (S.C. Ct. App. filed Oct. 21, 2015).

On May 2 2016, Petitioner filed an application for post-conviction relief (2016-CP-07-1092), alleging ineffective assistance of trial counsel for failing to communicate a favorable written ten year plea offer made to Applicant by State. Petitioner then filed an amended

application on July 10, 2017 through his counsel James Falk. On August 3, 2017, Respondent served its return and requested an evidentiary hearing on the application. An evidentiary hearing into the matter convened on January 29, 2018, before the Honorable R. Lawton McIntosh, circuit court judge. Petitioner was present alongside counsel, James Falk, Esquire. Assistant Attorney General DeShawn Mitchell represented the State. Petitioner testified on his own behalf and Respondent presented testimony from trial counsel.

On June 13, 2018, Judge McIntosh issued a written order denying the application in full. Petitioner filed his notice of appeal to this Court on July 30, 2018. On appeal, Petitioner challenges the denial of the last ground raised in his amended post-conviction relief application: whether trial counsel was ineffective for failing to request an alibi charge.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). The questions presented to this Court in the current appeal are questions of fact.

ARGUMENT

I.

The post-conviction relief court properly denied relief for the allegation that trial counsel was deficient for failing to request an alibi jury charge when witness Reah Gonsalves did not provide Petitioner with an absolute alibi and even if she had Petitioner was not prejudiced by trial counsel's failure to request an alibi charge because the trial judge was unlikely to grant such a request.

Petitioner claims the post-conviction relief court erred in denying him relief because trial counsel was ineffective for failing to request an alibi jury charge when Reah Gonsalves indicated in testimony at trial that Petitioner was home during the shooting. Petitioner argues this error is pronounced in light of trial counsel's closing argument that Petitioner could not be in two places at once. Petitioner's argument is without merit. The post-conviction relief court properly found that Reah Gonsalves did not provide Petitioner with an alibi and therefore an alibi charge was not appropriate and if one had been requested it would have been denied. Not only has Petitioner failed to prove that Counsel was deficient as to this matter, but Petitioner has also failed to demonstrate any prejudice suffered as a result of the alleged deficiency. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner 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. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

This Court has previously held the propriety of an alibi charge is contingent upon evidence of a complete alibi. State v. Baker, 411 S.C. 583, 591, 769 S.E.2d 860, 865 (2015). The test for determining whether an alibi defense is appropriate was articulated by this Court as follows:

> [B]y an alibi, an accused attempts to prove that he was at a place so distant that his participation in the crime was impossible. To be successful, his alibi must cover the entire time when his presence was required for accomplishment of the crime. To establish an alibi, the accused must show that he was at another

> specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime. It is not enough for the accused to say that he was not at the scene and must have been elsewhere. The latter statement does not constitute an alibi. And since 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.

State v. Baker, 411 S.C. 583, 591, 769 S.E. 2d 860, 865 (2015). (quoting State v. Robbins, 275 S.C. 273, 275, 271 S.E.2d 319, 320 (1980)).

"[F]ailure to request an alibi charge is deficient representation where there is evidence presented the defendant was in another place at the time the crime was committed." Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Trial counsel must articulate a valid reason for not requesting an alibi instruction to avoid a finding of deficiency. Id.

"A charge on the defense of alibi is not required when an accused person merely denies committing the criminal act." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). "Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission." Id. Further, an alibi which makes it only less likely the accused is the guilty party is no alibi. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012) "To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime." State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984) (quoting State v. Robbins. 275 S.C. 273, 271 S.E.2d 319 (1980)). "A simple denial of one's presence at the scene does not constitute an alibi." Id.

Here, Petitioner failed to present a complete alibi defense at trial. Reah Gonsalves, Petitioner's only attempted alibi witness, did not establish there was a physical impossibility that

he was not involved in the crime. Police were dispatched to the house where Mitchell called 911 around 9:15pm and later arrived at Reah Gonsalves' house to look for Petitioner around 10:05pm. (App. 190-93). Petitioner contacted Blake to say he was on his way to his mother's home in Ridgeland around 9:15 p.m. (App. 183). Gonsalves testified Petitioner arrived at her home around 9:48 pm or 9:50 pm. This evidence would be consistent with Petitioner being absent from the Gonsalves' home around 9:00 pm when the shooting occurred. Gonsalves did give a statement to police in which she said: "Malcolm had been here at the house with me and the kids this evening, and then he left from our home about 45 minutes ago." (App. 245, ll. 11-14). On cross-examination, Gonsalves said she didn't give the officers any times but said he left about 30 to 45 minutes ago. (App. 235, lines 15-18; App. 245, lines 7-22). Gonsalves inconsistent statements certainly do not show a physical impossibility of Petitioner's guilt. Gonsalves does not conclusively place Petitioner at her home during the time the shooting occurred. Indeed trial counsel recognized this difficulty at the posti-conviction relief hearing. Trial counsel testified:

> Well, Rhea originally gave what I consider to be evidence that could've put [Petitioner] somewhere else at the time Mr. Mitchell is making the accusation that [Petitioner] had shot him in the chest. But when she testified at trial, she did not testify accordingly. She placed [Petitioner] with her about forty-five minutes after the shooting occurred. It was unfortunate that she changed her version, and I challenged her on that, on cross-examination, but she didn't budge. And so, her sworn testimony at trial was that he was not with her at the time that Mr. Mitchell had been shot in the chest, which was unfortunate for [Petitioner]

(App. 448, lines 8-19).

Therefore, the lower court properly found trial counsel was not deficient in failing to request an alibi charge because no evidence for an absolute alibi was offered. Trial counsel testified at the post-conviction relief hearing that she did not ask for a charge on alibi because she didn't have an alibi for him. (App. 450). Moreover, Counsel testified:

> There was no one that could testify, or did testify, that they were with him or knew, you know about his location at the time that Mr. Mitchell, you know was shot in the chest. I tried, you know again, in closing, and argued some things like that, but we were not in the position to get a charge on it.

(App. 450, lines 9-15). Counsel further explained that she did not have any witnesses who could place Petitioner anywhere other than the location of the shooting. (App. 450-51). Therefore, Petitioner was not at a place so distant that his participation in the crime was impossible. For that reason, his alibi defense was an imperfect one and counsel was not deficient for failing to request an alibi charge.

Petitioner also failed to establish that he was prejudiced by trial counsel's failure to ask for an alibi charge. Because Gonsalves did not provide Petitioner with a complete alibi defense, the trial judge was unlikely to grant a request to charge the jury with an alibi defense. Even if an alibi charge were given to the jury, Petitioner has failed to show the outcome of the trial would have been any different in light of the weak nature of his alibi defense. Trial counsel did argue to the jury in closing that Petitioner could not be in two places at once, but the evidence presented at trial did not support trial counsel's argument. Gonsalves failed to provide an alibi for Petitioner, and therefore the jury was unlikely to find Petitioner had been anywhere other than the location of the shooting. The post-conviction relief court properly determined Petitioner failed to establish a claim of ineffective assistance of counsel sufficient to warrant relief, and the record supports these findings. This Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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April 19, 2019

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MALCOLM BRABHAM, #359777, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 19th day of April, 2019

TAMIEKA RUSSELL-BROWN
LEGAL ASSISTANT