

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Clarendon County  
Jocelyn J. Newman, Post-Conviction Relief Judge

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Appellate Case No. 2017-002000

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VICTOR MCCOY WELDON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**BRIEF OF RESPONDENT**

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### **PETITIONER'S ISSUE PRESENTED**

Did the PCR Court err in denying Petitioner relief, where trial counsel failed to present alibi witnesses who were prepared, available, and present at trial, where counsel had spoken with the witnesses in advance and was aware of the substance of their proposed testimony, where counsel likewise failed to put Petitioner on the stand, and where counsel conceded that he was unaware of any strategic reason as to why he would not have called any of them to testify?

### **RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE**

Did the post-conviction relief court err in finding Trial Counsel was not ineffective in choosing not to call Petitioner or alleged alibi witnesses he had investigated to testify at trial where their testimony was inconsistent and incredible and did not support an alibi defense, where it was ultimately Petitioner's sole decision not to testify, and where Trial Counsel articulated a trial strategy of choosing to not present the inconsistent and incredible witnesses so that he could have the final closing argument?

## STATEMENT OF THE CASE

### Procedural History

Petitioner Victor Weldon is presently confined in the South Carolina Department of Corrections. During its January 2011 term, the Clarendon County Grand Jury indicted Petitioner for first-degree burglary, attempted murder, armed robbery, grand larceny (\$2000-\$10000), kidnapping, and possession of a weapon during a violent crime (2011-GS-14-0068). John Knobloch, Esquire, represented Petitioner on the charges. On May 14-16, 2012, Petitioner proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr, after which the jury convicted him as indicted. Judge Cothran sentenced Petitioner to thirty years' imprisonment for armed robbery, running consecutively to a sentence of thirty years' imprisonment for first-degree burglary. Judge Cothran further sentenced Petitioner to five year's imprisonment for grand larceny, twenty years for kidnapping, and five years for possession of a weapon during a violent crime, all running concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf. Chief Appellate Defender Robert M. Dudek, Esquire, represented him on appeal. Petitioner filed a brief challenging the trial court's denial of his directed verdict motion. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Weldon, 2014-UP-463 (Ct. App. filed December 17, 2014). Petitioner filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Petition was denied via order filed April 8, 2015. The Remittitur was issued on May 8, 2015.

Petitioner filed a timely application for post-conviction relief on January 5, 2016 (2016-CP-14-00002). In his application, Petitioner alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. "Attorney file a motion to be relieved of case."

- b. “None of my alibi’s were called to testify on my behalf.”
  - c. “I was never called to the stand to testify.”
  - d. “Lack of communication.”
  - e. “Force me into a joint trial.”
  - f. “offer a joint plea instead of independent plea.”
2. Due process violation
  - a. “denied my motion for a change of venue.”
  - b. “gave me a joint trial.”
3. Prosecutorial misconduct
  - a. “offer me a joint plea instead of independent plea.”
4. Judicial Bias
  - a. “Judge and victim were acquaintance.”
5. Jury violation
  - a. “charge the jury when proven clearly of a lesser included offense.”
  - b. “the charge of the jury made me look guilty.”

Respondent submitted its Return on April 11, 2016. An evidentiary hearing was convened on July 27, 2016, at the Sumter County Courthouse before the Honorable Jocelyn J. Newman. Petitioner was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General’s Office.

At the PCR hearing, Petitioner orally amended his application to add an additional allegation of ineffective assistance of counsel for failing to object to the State’s question on direct examination about destroying evidence. See App. 319, line 15 - 21. During the hearing, Petitioner testified on his own behalf and presented testimony from his mother, Debra Weldon, his sister, Jessica Weldon, and John Knobloch, Esquire (“Trial Counsel”). Judge Newman denied and dismissed the application with prejudice in an order signed July 28, 2017 and filed August 3, 2017.

Following the denial of relief, Petitioner timely filed a notice of appeal. On October 9, 2019, this Court granted Petitioner’s petition for a writ of certiorari.

### **Factual History**

Small businessman Edward “Slick” Gibbons (Victim) was about to leave for his auto parts store on the morning of May 15, 2010, a Saturday, when three men hidden in his carport jumped him, beat him, robbed him, and stole his El Camino. (App. p. 96-99, p. 102, l. 12).

Victim testified he was leaving his house around 6:00 to 6:30 a.m. when he bent over to put on his shoes outside his garage. (App. p. 89, l. 11-25). Victim was jumped by three men who were hiding in the storage room in his carport. (App. p. 90, l. 1-9). They took approximately \$840 and beat him, asking where the rest of the money was. (App. p. 95, l. 19; p. 100, l. 14-20). The men sat on him, kicked him, stomped on his chest and stomach, and wrapped duct tape around his face. (App. p. 96-100). Victim saw one man with what he thought was a gun and he heard one of the robbers ask if they were going to shoot him. (App. p. 96-100). He heard the men leaving and rose to see what kind of car they had. One of the robbers said, “He’s up, he’s up,” and a robber jumped out of the back of Victim’s El Camino, beat Victim back down, and knocked him out. (App. p. 102, l. 16-20; p. 106-107).

Victim testified his El Camino was worth approximately \$6,500. (App. p. 110, l. 3-20). He travelled by ambulance to the Clarendon Memorial Hospital and by helicopter to Columbia where he was in intensive care for a week and a rehabilitation center for another week. (App. p. 113). Victim’s hip was bruised and the “bone where the hip hooks together” was cracked. (App. 101, 20-23). Victim testified his doctor asked him if wanted to replace the hip or let it heal. (App. 102, l. 1-3). His doctor told him he was “going to always limp. But [the doctor] said that’s your option and [Victim] told him just to try to let it heal because I knew I had to go back to work.” (App. 102, l. 1-5).

Victim's wife, Kay Gibbons, testified she was in bed that morning when she heard the doorbell ring. She opened the door to find her husband bloodied and wrapped in tape, struggling to stand. (App. p. 148-149). She called her daughter, who called 911 and came to their house. An ambulance and law enforcement arrived and Victim was taken to the hospital. (App. p. 150-151).

Cecil "Mac" Eaddy, Jr., testified he found the El Camino in the road near his farm. (App. p. 169). The car was running and the passenger door was open at 6:40 a.m., a mile and half from Victim's store. Eaddy knew Victim and knew it was Victim's car. (App. p. 172, l. 1-6). Eaddy pulled the car off the road and took the keys to Victim's store. An employee went with him back to the car to retrieve it. (App. p. 172, l. 17-19).

Investigator Ricky Richards from the Clarendon County Sheriff's Office testified he processed the vehicle after it was found. (App. p. 180-181). Investigator Richards found fingerprints on the rear quarter on the driver's side of the car, and also on the driver's side door jamb. (App. p. 181-183). He sent the prints to Marie Hodge, a fingerprint technician with the Sumter Police Department. (App. p. 181-183). Hodge testified she examined the latent print sent by Investigator Richards and determined it matched Co-Defendant Pearson's right thumb. (App. 187; 191, 194-195.)

Investigator Thomas "Lin" Ham, also from the Clarendon County Sheriff's Office, testified he was called to the scene on May 15, 2010. (App. p. 193). He knew Victim all his life. (App. p. 193). Ham testified that his assignment was to assist and oversee Investigator Kenneth Clark's investigation because Clark was a new investigator. (App. p.194, lines 9-19.) Ham identified photographs from the crime scene showing black duct tape, blood spots, and Victim at the hospital with the tape still wrapped around his head. (App. p. 197). After removing the tape from Victim,

Ham testified that he put it in a bag and turned it over to Investigator Clark as evidence so it could be taken to SLED and processed. (App. p. 198, 20-25.)

Co-Defendant Pearson, was interviewed by Investigator Kenneth Clark. (App. 205, l. 19-24). Investigator Ham testified he was present for the interview. (App. 205, l. 19-24). Pearson adamantly denied knowing Victim and claimed he did not know where Victim lived. (App. 206, l. 14-20). He claimed to never been to Victim's home or place of business and never came into contact with Victim's vehicle. (App. 206, l. 14-20).

Investigator Kenneth Clark testified Victim described the robbers as three black males, of mid-age and medium build, who wore dark clothing and masks. (App. p. 258-259). The first big break was a phone call about three individuals that were spending a lot of money. (App. 262, l. 16-18.) Investigator Clark testified he interviewed Co-Defendant Pearson and he denied being around Victim's property or vehicle. (App. 265.)

A month later, a positive DNA hit was found which made Petitioner a suspect. (App. 271, l. 22-25). Investigator Clark subsequently interviewed Petitioner, who prior to the DNA match had not been a suspect. (App. 272, l. 21-34). Petitioner denied knowing Victim, denied being around the scene, denied knowledge of the robbery, and denied knowing Pearson. (App. 273, l. 4-7). Petitioner was arrested and a DNA sample was taken. Testing once again matched Petitioner's DNA to the DNA left on the duct tape wrapped around Victim's head. (App. 275, l. 17-20).

Investigator Clark discovered from landscaper Richard Gamble that Pearson had been to Victim's house when he did landscaping work for Victim. (App. 276-277). While Pearson and Petitioner claimed to not know each other, Investigator Clark discovered that both men worked at the South Carolina Vocational Rehabilitation Center (Voc Rehab) in Sumter for an overlapping period of time. (App. 278-279).

John Hornsby testified that Pearson and Petitioner worked at Voc Rehab during an overlapping time period of December 9-12, 2008. (App. 337-339). He described the facility as a metal warehouse about 150 feet by 250 feet facility with an open floor plan split into two sides. About 25 people work at the facility from 8:30 a.m. to 2:30 or 3:00. (App. 337-339).

Gamble testified he took Pearson with him to Victim's house to do yard work. Pearson worked with Victim doing landscaping projects at Victim's home and next door, where Victim's son lived. Gamble estimated they worked at both homes for about a week during the spring of 2010. Gamble recalled that Pearson went into Victim's garage to retrieve tools when working. (App. 324-328).

The duct tape removed from Victim's head was tested and a DNA profile found on the tape matched Petitioner. The probability of randomly selecting an unrelated individual having a profile matching the major contributor to the mixture was approximately 1 in 670 billion. (App. 347-348; p. 352).

## STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo and appellate courts will reverse the PCR court decision only if its decision is controlled by an error of law. Id., Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). For questions of fact, the standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the post-conviction judge's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237,238, 314 S.E.2d 839, 839 (1984).

In post-conviction relief proceedings, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an allegation of ineffective assistance of counsel exists, 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. at 442, 334 S.E.2d at 814. The proper standard for review of counsel's performance is whether the attorney provided representation within the range of competency required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Judicial scrutiny of counsel's performance follows a strong presumption that counsel's conduct falls within the wide range of adequate and reasonable professional assistance.

The court uses a two-pronged test set forth in Strickland when evaluating allegations of ineffective assistance of counsel. Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 116, 386 S.E.2d 624, 625 (1989). Under this prong, attorneys are held to an objective standard of "reasonably effective

assistance” under “prevailing professional norms”. Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland 466 U.S. at 690). Second, the applicant not only has to show that counsel’s assistance was constitutionally deficient, but also that they were prejudiced by this deficiency so severely that it produced a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625.

## ARGUMENT

**The PCR court did not err in finding Trial Counsel was not ineffective in choosing not to call Petitioner or the witnesses he had investigated to testify at trial where their testimony was inconsistent and incredible and did not support an alibi defense, where it was ultimately Petitioner's sole decision not to testify, and where Trial Counsel articulated a trial strategy of choosing to not present the inconsistent and incredible witnesses so that he could have the final closing argument.**

Petitioner asserts the PCR court erred in finding Trial Counsel was not ineffective for failing to present alibi witnesses at trial where the PCR court inferred a reasonable trial strategy from the record, and where the witnesses were inconsistent and incredible and did not support an alibi defense, and where it was ultimately Petitioner's decision not to testify at trial. However, the PCR court did not err in finding Trial Counsel was not deficient in this decision and the alibi witnesses would not have changed the outcome of the trial. Therefore, this Court should affirm the PCR Court's denial of post-conviction relief.

The testimony presented at the evidentiary hearing shows Trial Counsel filed a notice of an alibi defense before Petitioner's trial. Trial Counsel investigated and interviewed the potential alibi witnesses, and instructed them to appear at trial and be prepared to testify. However, Trial Counsel opted not to call these witnesses at trial. At the PCR evidentiary hearing, which took place more than four years after the trial, Trial Counsel could not specifically recall his definite strategy or his decision making process in choosing not to call these witnesses. However, after hearing the testimony of the alleged alibi witnesses, the PCR court found Trial Counsel's decision not to call these witnesses was neither deficient nor prejudicial. (App. 573.)

### *1. Witness Testimony Would Not Have Satisfied Either Prong of the Walker Analysis*

Trial Counsel's choice not to present alibi witnesses was not deficient and there was no resulting prejudice because the testimony did not constitute an alibi and would not have changed

the outcome of the trial. “When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel’s deficient performance constitutes prejudice under Strickland. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012) (reversed on other grounds). “First, the court must find as a matter of law whether the witness’s testimony meets the legal definition of an alibi. Second, the court must assess the witness’s credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant.” Id.

To qualify as an alibi, a witness’s testimony must account for the defendant’s whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker, 397 S.C. at 238, 723 S.E.2d at 616. 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). “[S]ince 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.” Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). See United States v. Thomas, 58 F. App’x 952, 958 (4th Cir. 2003) (unpublished) (“Defense counsel could have reasonably determined that he could not present a viable alibi defense based on discrepancies in testimony concerning the timing of events”).

Petitioner testified about his alibi and presented two alibi witnesses at the evidentiary hearing. First, Petitioner testified he had been accused of committing this crime between 6:00 and 6:30 a.m. on May 15, 2010. (App. 509, l. 4-7). He stated he told Trial Counsel that he was at home with his sister and his girlfriend between 6:00 and 6:30 that morning, and they were waiting for his mother to get home from work around 7:00 or 7:15. (App. 509-510). He testified that he went to bed around 11:00 p.m. the night before, and he did not wake up until 6:40 or 6:45 on the day of the crime, and his sister was there when he got up and he spoke to her. (App. 510, l. 9-12 – 511, l. 3). He testified that he did not see his mother until she came home from work and walked in the door around 7 or 7:15. (App. p. 511, l. 12-15.)

Debra Weldon, Petitioner's mother, testified that her son was accused of committing a crime between 6 and 7 a.m. on May 15, 2010. (App. 523, l. 8-11). She testified that on the evening of May 14, the day before the crime, she got off work at the Barbecue Hut at 8:30 p.m. and went home, until she left her home at 10:30 p.m. She testified that she probably left to go to the store or "somewhere else." (App. 524-525). Debra Weldon testified she did not work on the weekends at that time, so she did not go to work that evening when she left. (App. 524, l. 21- 525, l.2). She stated she returned home, and she went to sleep around midnight that evening. (App. 526, l. 2). She testified Petitioner was home with her when she went to bed at midnight. (App. 526, l. 6-8). Debra Weldon testified she did not wake up until 8:00 a.m. the next morning, on the day of the crime, and Petitioner was home when she got up. (App. 526, l. 9-13). She testified Petitioner does not have a car and did not have access to a car at that time. (App. 526, l. 23-24.)

Jessica Weldon, Petitioner's sister, testified that she lived with Petitioner and her mother at the time of the crime. (App. 534, l. 19-23). She testified that on the night of May 14, the day before the crime, she got out of school around 4:00 p.m. (App. 535, l. 1-2). She stated Petitioner

was outside her house when she got off the bus. She testified she stayed up late because it was a Friday night, and she went to sleep around midnight that evening. (App. 535). Jessica Weldon testified that when she went to sleep at midnight, Petitioner was there, as well as his girlfriend Rell, her other brother's girlfriend Kathy, and her mother. (App. 535, l. 8-11). She testified she woke up at 5:00 a.m. on the day of the crime and went into Petitioner's room to sneak a cigarette from his girlfriend. (App. 536, l. 2-6). She stated that Petitioner was in his room asleep at that time. (App. 535, l. 12-13). She then opened the door and went outside to smoke the cigarette, and she saw Petitioner peeking at her out the window. (App. 536, l. 15-17). She stated Petitioner stayed in his room with his girlfriend that morning until around 9:00 a.m., when he opened the door to let his two cats outside. (App. 537, l. 3-4). Jessica Weldon testified that she recalls the details so well because after her brother got "locked up" it is all she and her family talk about. (App. 537, l. 19-20).

In its Order of Dismissal, the PCR court noted the discrepancies in the three witnesses' testimony. Although it did not make a specific credibility finding about these witnesses, it made an implicit credibility finding by pointing out the differences in their stories and found Trial Counsel was not ineffective for choosing not to present "conflicting alibi witnesses" which could have "hurt his case rather than help." (App. 574.) The PCR court address this testimony as follows:

At the PCR hearing, [Petitioner] testified about his alibi and presented two witnesses which corroborated his alibi testimony. However, the testimony presented did not exactly match up. All three recollections of the morning in question differed slightly in time and detail. For example, [Petitioner] testified that his mother was at work the morning of the crime and he woke up between 6:00 and 6:45 a.m. to wait for her when she came home at 7:15 a.m. However, [Petitioner's] mother, Debra Weldon, testified that she did not work that day because it was Saturday morning and she did not work on weekends at the time; she stated she was home and did not wake up until 8:00 a.m. Jessica Weldon, [Petitioner's] sister, testified that [Petitioner] was in his room with his girlfriend that morning and did not wake up until around 9:00 a.m., which contradicts Applicant's testimony that he woke up around 6:00 a.m.

When asked about the discrepancies in the alibi stories, Trial Counsel agreed that presenting all three of these different stories at trial would have hurt his case. He stated that using only one of these stories would have helped his case, but agreed that the State could have presented testimony from the other two alibi witnesses to contradict his witness had he only used one.

The South Carolina Supreme Court has held that an attorney cannot be ineffective if there is evidence to support his decision not to call witness with credibility issues. “A witness’s credibility and demeanor is crucial to an attorney’s trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility I questions, even if that witness is a co-defendant.” Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (citing Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768,771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the codefendant’s credibility was a concern and the same evidence would be presented through another witness)). Trial Counsel testified that having conflicting alibi witnesses would have hurt his case rather than help, and it is reasonable to think that he considered this as part of his strategy in not calling these witnesses.

(App. 573-574.)

In applying this two part test to the testimony of these witnesses, the testimony does not hold up as a valid, credible alibi that would have changed the outcome of the trial.

First, Debra Weldon’s testimony does not constitute a complete alibi defense. While her testimony does corroborate parts of the other witnesses’ testimony, such as the detail that Petitioner lived with her and his sister, Debra Weldon cannot actually account for Petitioner’s whereabouts during the time of the crime, or immediately before the crime, because she was asleep. She testified that she went to bed around midnight the night before, and saw Petitioner at the house. She then stated that she did not wake up until around 8:00 the next morning, and Petitioner was at the house then, as well. However, according to her testimony, she does not have the ability to account for Petitioner’s location at any time in the eight hours she was asleep, which is when the crime occurred. Petitioner could easily have left the house in the early morning hours, committed the crime around 6:00 a.m., then come back to his home before his mother woke up two hours later.

Even if a jury believed Petitioner's testimony that his mother was at work that morning, which differed from her testimony that she was not at work but rather at home asleep, Petitioner testified his mother was gone until she got home from work at 7:15 a.m. No matter which version, Debra Weldon was not home and consciously able to testify as to whether Petitioner was there. Therefore, her testimony does not constitute an alibi defense and does not meet the first prong of the analysis under Walker.

As to the second prong of the analysis of Debra Weldon's testimony, her testimony is inherently incredible. Although the PCR court did not make a specific credibility finding, it did point to factors which make her testimony not credible. Given the fact that the testimony comes strictly from family members, in addition to the fact that there are discrepancies in their testimonies, their testimonies would not have been helpful to Petitioner's defense. See Bergman v. Tansy, 65 F.3d 1372, 1380 (7th Cir. 1995) (concluding trial counsel was not ineffective for failing to call family members who would easily have been impeached for bias); McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th Cir. 1996) (finding no prejudice from failure to call three witnesses, and noting that credibility problems of the uncalled witnesses and the witness' close relationship to the defendant along with strong prosecution evidence may undercut the impact of these witnesses); Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir. 1995) (proposed alibi testimony by a defendant's family members is of significantly less exculpatory value than the testimony of an objective witness); Woods v. Schwartz, 589 F.3d 368, 377-78 (7th Cir. 2009) (counsel was not ineffective in failing to present defendant's brother as alibi witness, where the brother's alleged alibi testimony was ambiguous and inconclusive).

Additionally, her story differed from the other witnesses' testimony. She claimed she was at home from sometime after 10:30 p.m. on the night before through to the next morning, but

Petitioner testified she was at work during the night and did not return until 7:15 the next morning. She testified she fell asleep on the couch the night before and was woken up by Petitioner around midnight so she could go to her bed, but Petitioner testified he went to sleep at 11:00 that night. Furthermore, as previously discussed, Debra Weldon is Petitioner's mother and has an obvious interest in protecting her son from a conviction. Based on these factors, she is not a credible witness, and her testimony would not have changed the outcome of the trial.

Second, Jessica Weldon's testimony does not constitute an alibi defense. She claims that Petitioner was at home asleep on the morning of the crime, and she saw him in his room with his girlfriend at 5:00 a.m. when she went in to steal a cigarette. She mentioned that when she went outside to smoke it, she saw Petitioner's looking out at her through the window. Jessica Weldon did not specifically account for her actions and whereabouts from 6:00 to 6:30 a.m., which is the time the crime occurred. She claimed that from 6 to 7 she was "at the house," and Petitioner was also "[i]n the house... [i]n the room with his girlfriend." (App. 536, line 18-23.) But she testified at the PCR hearing that she did not see Petitioner again until he got up at 9:00 a.m. to let the cats outside. She did not explain whether she was awake or asleep during those hours between, and she was not in the room with Petitioner to confirm his presence. It is possible that Petitioner left his room sometime between 5:00, when she saw him in his room and in the window, and 9:00 when she saw him next. Her testimony cannot, therefore, constitute a valid alibi defense.

Jessica Weldon also lacks credibility based the same factors as her mother—mainly because she is a direct relative and has an interest in protecting her brother. She testified that she recalls the details of the day so vividly because "[a]fter my brother got locked up, that all we talk about." App. 537, line 19-20. She and her family had obviously discussed the alibi at length, and it is likely that a jury would find her testimony unbelievable.

Petitioner's testimony is also not credible given the inconsistencies described above, and because Petitioner had an incentive to manufacture an alibi defense, particularly in light of the fact that his DNA was found on the exact piece of duct tape used on the victim. Therefore, it is likely that a jury would not find his testimony believable.

Because the alibi witnesses had major inconsistencies in their testimony and likely were not credible, Trial Counsel was not deficient in choosing not to present them at trial. He had clearly investigated, spoken with, and subpoenaed these witnesses to attend the trial. He was aware of what they would have said on the stand and how they would have appeared to a jury. However, he made a calculated decision not to call them at trial, regardless of whether he can now remember precisely what the reasoning behind the decision was more than four years later. Trial Counsel thoroughly cross-examine the State's witnesses and challenged the DNA evidence tying Petitioner to the crime, and presented a full defense at trial. His actions here were not deficient and were reasonable under professional norms.

As to the prejudice prong of Strickland, it should be noted that the PCR court made a finding of overwhelming evidence of guilt, which precludes a finding of prejudice or of ineffective assistance of counsel. The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the defendant's trial. Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 U.S. 1114, (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C.

245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

In this case, Petitioner's DNA was found on the duct tape that was taken from the victim's face after the robbers attacked him and attempted to tie him up with tape. The DNA profile found on the tape matched Petitioner, and the probability of randomly selecting an unrelated individual having a profile matching the major contributor to the mixture was approximately 1 in 670 billion. (App. 347-348.) The DNA was found not on a random object outside the victim's home, but rather on the exact piece of duct tape which the robbers had forced onto the victim's head during the crime. Even though there was no other physical evidence tying him to the crime, this DNA evidence is extremely strong, especially when taken with the other evidence presented at trial of Petitioner's connection to his co-defendant, and his co-defendant's connection to the victim's property. See Factual History, pg. 6-7.

Additionally, even if this case does not constitute overwhelming evidence, Petitioner has not shown and cannot show that the outcome of his case would have been different if Trial Counsel had presented the witness testimony because any alibi testimony presented would not have negated the validity of the DNA evidence contained on the tape. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011) (emphasis added); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). As discussed above, the alibi witness testimony was inconsistent and incredible, and importantly, could not refute or explain the highly-inculpable DNA evidence found on the tape. Petitioner's DNA evidence was found on the exact piece of tape placed around the victim's head during the crime, and it was determined that the probability of randomly selecting an unrelated individual having a profile matching the major

contributor to the mixture was approximately 1 in 670 billion. Therefore, even if Counsel had presented the supposed alibi testimony, it would not explain or refute the incriminating DNA evidence which was found to match Petitioner. Therefore, Petitioner cannot show he was prejudiced by any alleged failure to present alibi testimony.

Because Trial Counsel was not deficient in choosing not to present the testimony of these alibi witnesses, and because their testimony would not have changed the outcome of the trial, Trial Counsel is not ineffective. Therefore, this Court should affirm the PCR court's decision denying Petitioner post-conviction relief.

## *2. It Was Petitioner's Sole Decision Whether to Testify*

Additionally, Trial Counsel was not and cannot be deemed ineffective for failing to force Petitioner to testify on his own behalf regarding his alibi, or for merely advising Petitioner against testifying on his own behalf, as it is ultimately Petitioner's decision whether to testify on his own behalf.

As an initial matter, if Trial Counsel advised Applicant not to testify, it coincides with the trial strategy he articulated to have the final word in closing arguments by not putting up a defense. As the PCR court properly found, this is a reasonable strategy that should not be questioned in hindsight.

Moreover, it is ultimately solely Petitioner's decision whether to testify on his own behalf. See U.S. Const. Amend. V (“[n]o person ... shall be compelled in any criminal case to be a witness against himself”); See generally Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). The trial court conducted a thorough colloquy with Petitioner regarding his decision not to testify at his trial. When the trial court asked if he understood that he had a right to testify, but that he did not have to testify, Petitioner responded, “Yes, Sir.” (App. 375, l. 1.16-21). Petitioner also indicated

he understood that if he did testify on his own behalf, he would be subject to cross-examination. (App. 375, l. 22- 376, l. 6). When the trial court asked Petitioner if he had enough time to discuss whether he was going to testify with his attorney, he replied, “Yes, Sir.” (App. 376, l. 2-6). Importantly, when the trial court asked Petitioner if he understood that it was ultimately up to Petitioner to decide whether or not he would testify, and *not* his attorney’s decision, Petitioner responded, “Yes, sir.” (App. 376, l. 10-14). Ultimately, Petitioner had a choice: (1) to testify in his own defense, present his alleged alibi, and subject himself to cross-examination, during which he would have to explain the DNA evidence found on the duct tape, or (2) exercise his right not to testify and avoid having to explain the DNA evidence found on the tape, while also having the opportunity to present the last argument. Accordingly, Petitioner has not and cannot prove that Trial Counsel was deficient because Petitioner did not testify at his trial.

As to the prejudice prong of Strickland, Petitioner has not shown and cannot show that the outcome of his case would have been different had Petitioner testified. As previously discussed, Petitioner would have been subject to cross-examination had he testified, which would have required him to explain why his DNA was found on the exact piece of tape used on Victim during the robbery. Additionally, any attempt he would have made to prove his alibi would not have negated the presence of his DNA. This is particularly crucial considering Petitioner denied ever having contact with Victim or his property. Accordingly, Petitioner has not proven that he was prejudiced by the fact that he did not testify at his trial.

Because Trial Counsel was not deficient as it relates to Petitioner’s decision not to testify, and because Petitioner’s testimony would not have changed the outcome of the trial, Trial Counsel was not ineffective. Therefore, this Court should affirm the PCR court’s decision denying Petitioner post-conviction relief.

### *3. Trial Counsel Testified to a Possible Trial Strategy for Not Calling Witnesses*

Trial Counsel's decision not to use the alibi witnesses presented at the PCR hearing was part of a valid trial strategy and was neither deficient nor prejudicial.

Trial Counsel testified at the PCR hearing that he spoke to each alibi witness prior to the trial and had filed notice of an alibi defense. He had prepared to use their testimony at trial, but did not. Trial Counsel initially stated that he could not specifically recall why he did not use their testimony, he later suggested that he decided not to utilize the testimony so that he could have the last closing argument. This trial strategy was corroborated by Petitioner himself during the same PCR hearing. (App. 512, l. 20-25; 545, l. 8-10).

At the PCR hearing, Petitioner testified about his alibi and presented two witnesses, which, according to Petitioner, corroborated his alibi testimony. However, the testimony presented was inconsistent. All three recollections of the morning in question differed in time and detail. For example, Petitioner testified that his mother was at work the morning of the crime and he woke up between 6:00 and 6:45 a.m. to wait for her when she came home at 7:15 a.m. However, Petitioner's mother, Debra Weldon, testified that she did not work that day because it was Saturday morning and she did not work on weekends at the time; she stated she was home and did not wake up until 8:00 a.m. Jessica Weldon, Petitioner's sister, testified that Petitioner was in his room with his girlfriend that morning and did not wake up until around 9:00 a.m., which contradicts Petitioner's testimony that he woke up around 6:00 a.m.

When asked about the discrepancies in the alibi stories, Trial Counsel agreed that presenting all three of these different stories at trial would have hurt his case. He stated that using only one of these stories would have helped his case, but agreed that the State could have presented

testimony from the other two alibi witnesses to contradict his witness had he only used one. (App. 562, l. 23- 563, l. 10).

The South Carolina Supreme Court has held that an attorney cannot be ineffective if there is evidence to support his decision not to call witness with credibility issues. “A witness’s credibility and demeanor is crucial to an attorney’s trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions, even if that witness is a co-defendant.” Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (citing Jackson v. State, 329 S.C. 345, 351–52, 495 S.E.2d 768, 771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the co-defendant's credibility was a concern and the same evidence would be presented through another witness)). Trial Counsel testified that having conflicting alibi witnesses would have hurt his case rather than help, and it is reasonable to think that he considered this as part of his strategy in not calling these witnesses.

As the PCR properly determined, the decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel’s trial strategy. 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 at 688-89. “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, “[j]udicial scrutiny of counsel’s performance must be highly deferential.” Id. at 689. In proving a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id.

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. "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). See also McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Even though Trial Counsel did not recall his specific reasoning for choosing not to call alibi witnesses, his trial strategy can be inferred from the basis of his overall strategy, which he testified was to attack the State's DNA evidence against Petitioner.

Furthermore, the testimony at the PCR hearing reflected Trial Counsel's intention to have the final closing argument at trial, which is accomplished by not presenting the alibi witnesses. Not only did Trial Counsel testify about his plan to have the final word during closing argument, but Petitioner testified that Trial Counsel told him this plan at the time of the trial, thus indicating his trial strategy in not calling these witnesses. (App. 512, l. 20-25).

Finally, at the PCR hearing, Trial Counsel testified that, had he thought the alibi witnesses were necessary at the time of trial, he would have called them. (App. 556, l. 17-20). He stated that, in hindsight, he had no idea why he did not call them to testify, but at the time of the trial he

would have weighed the pros and cons and, if he believed their testimony would have been helpful, he would have used them.

Petitioner fixates on a hindsight argument, cherry-picking phrases in Trial Counsel's testimony, indicating that, knowing the outcome of Petitioner's case, he believed it could have benefited Petitioner to call the witnesses. However, as this Court has established, PCR relief is not granted solely based on hindsight thoughts of defense counsel. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Trial Counsel's decisions at the trial were clearly made with a tactical strategy in mind and his actions were carefully chosen, even if he disagreed with them looking back in hindsight knowing the outcome of the trial. Trial Counsel was at least reasonably competent in his decisions at the time of trial, and therefore, was not deficient.

As to the prejudice prong of Strickland, as previously discussed, Petitioner has not shown and cannot show that the outcome of his case would have been different if the witness testimony had been presented because the testimony would not have negated the validity of the strong DNA evidence contained on the duct tape. Accordingly, Trial Counsel's representation was not ineffective.

## CONCLUSION

For the foregoing reasons, this Court should affirm the PCR court's decision denying the Petitioner post-conviction relief.

Respectfully submitted,

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