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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

TASHON HURELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-001172

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for waiving a mistrial motion when Petitioner's sister inadvertently testified before the jury that Petitioner had served time in prison?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to call Petitioner's mother, Janah Hurell, and brother, Tramaine Hurell, as alibi witnesses?

STATEMENT

In March of 2015, the Dorchester County Grand Jury indicted Petitioner, Tashon Earl Hurell, for attempted murder, kidnapping and armed robbery, indictments #2015-GS-18-85, 86 and 87. (App. pp. 368-373). On February 8, 2016, Petitioner proceeded to jury trial before the Honorable Edgar W. Dickson. This was a second trial as the first trial ended in a mistrial based on a hung jury. (App. p. 410, line 22 – p. 411, lines 1-6). John Loy represented Petitioner at trial. Glenn Justis and Kyle Ward prosecuted the case. The jury returned verdicts of guilty. Judge Dickson sentenced Petitioner to three concurrent thirty (30) years sentences for each charge. (App. pp. 374-376). A timely notice of intent to appeal was filed and the direct appeal perfected. After hearing oral argument, the South Carolina Court of Appeals affirmed the convictions and sentence. State v. Hurell, 424 S.C. 341, 818 S.E.2d 21 (S.C. Ct.App. 2018). (App. pp. 445-456).

On September 25, 2018, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 457-463). The State filed a return on February 20, 2019. (App. pp. 464-479). An amended PCR application was filed on September 3, 2019. (App. pp. 480-481). On September 11, 2019, an evidentiary hearing was held before the Honorable Diane Shafer Goodstein. Leslie T. Sarji represented Petitioner at the PCR hearing. Benjamin H. Limbaugh represented the State. In a written order filed April 23, 2020, Judge Goodstein denied relief and dismissed the application. (App. pp. 596-618). Petitioner filed a *pro se* Rule 59(e) motion. (App. pp. 619-620). Judge Goodstein denied the motion in a form order on June 30, 2020. (App. pp. 621-622). A timely notice of intent to appeal was served on August 21, 2020. This petition for writ of certiorari follows.

FACTS

The jury found Petitioner guilty of charges arising from the robbery of a Kangaroo convenience store in Summerville, South Carolina on April 23, 2014. The clerk was working the third shift from 11:00 PM to 7:00 AM when the robber came into the store with a bat and struck her. (App. p. 53, lines 1-17). The clerk was unable to identify the robber but she described him as, "He was about 5'10'', 5'11"; he had on a ski mask and a bandana, and he had on a jacket with a hood on it. He had on gloves and red shoes." (App. p. 54, lines 19-21). Officer Hobie Williams, formerly with the Summerville Police Department, and his canine partner, Vox, were called to the scene and followed a track to a nearby apartment complex. (App. p. 92, line 14 – p. 93, 94, 95, lines 1-7). Officer Williams walked around the apartment complex and saw a white male smoking on the upper level of building G. (App. p. 95, lines 13-19). The man told Officer Williams that he saw "a black male with a baseball bat running from the fence line around the F building to apartment below his, which would have been G-4. And he advised that the black male was wearing a dark tee shirt, baseball cap and dark shorts." (App. p. 96, line 22 – p. 97, line 1). As Officer Williams was talking with the man, he noticed a dollar bill laying on the ground of the balcony of the lower apartment. (App. p. 97, lines 4-6).

Officer Williams met with the occupant of the lower G-4 apartment, Petitioner's sister, Tashima Jones. (App. p. 97, line 6 -p. 98, 99, lines 1-13). Ms. Jones gave the officer permission to conduct a protective sweep of the apartment. (App. p. 99, lines 14-21). One of Petitioner's brother's, Traquan Hurell, was also in the apartment at the time. (App. p. 99, lines 22-25). The officer collected the dollar bill from the balcony. (App. p. 102, line 6 – p. 103, lines 1-3). The dollar bill was later tested for DNA by a forensic scientist and compared to a known sample from

the store clerk. (App. p. 259, lines 19-22). The scientist testified that the DNA from the dollar bill matched the DNA profile from the clerk. (App. p. 262, lines 1-5).

Lucas Hartman was the white male who Officer Williams spoke with at the apartment complex soon after the robbery. Hartman testified that sometime between 1:30 and 2:00 in the morning of April 23, 2014, he was on his balcony when he saw a man with a baseball bat and a backpack wearing black clothes jump over the balcony of the apartment below and go inside. (App. p. 113, lines 9-19). Hartman testified that the man came out the same way, went to a white car, "possibly a Mustang," drove off for a few minutes returned and again jumped over the balcony, went inside and after a few minutes returned to his car and left. (App. p. 113, line 20 – p. 114, lines 1-2).

Detective Weaver ran an address check with the South Carolina Department of Motor Vehicles and discovered that, in addition to Petitioner's sister, Tashima Jones, and Petitioner's brother, Traquan Hurell, Petitioner also listed the G-4 apartment as his residence. (App. p. 142, lines 2-17). Detective Weaver went to the apartment and found that nobody was home. (App. p. 143, lines 15-23). The detective obtained and executed a search warrant of the G-4 apartment, obtaining a key from the apartment manager. (App. p. 143, line 25 – p. 144, lines 1-24). The detective removed a bat, a bandana and some red shoes that were later returned because the items did not match with the suspect captured on video surveillance and were of no evidentiary value. (App. p. 144, line 19 – p. 145, lines 1-8). After the detective returned the key to the apartment manager and was about to leave the apartment complex, he noticed a white Pontiac Grand Am in front of apartment G-4. (App. p. 145, lines 11-21). The detective returned to apartment G-4 and knocked on the door. (App. p. 145, line 22 – p. 146, line 1). Janah Hurell, answered the door. (App. p. 146, lines 1-2). Janah Hurell is the mother of Tashima Jones, Traquan Hurell, Tramaine

Hurell, another brother who lived with the mother about two or three miles from the G-4 apartment, and Tashon Hurell, the Petitioner. (App. p. 146, lines 1-15). Petitioner was also in the apartment at this time. (App. p. 147, lines 3-7). The detective later confirmed that the Janah Hurell drove a white Pontiac. (App. p. 193, lines 22-23).

While the detective was at the apartment, he showed Petitioner a still shot from the video of the incident at the convenience store depicting the robber wearing a sweatshirt with unique colors. (App. p. 158, lines 9-20). According to the detective Petitioner laughed and "asked why someone would wear a white and green sweatshirt during something like this." (App. p. 158, lines 21-22). Traquan Hurell testified at trial that when the detective showed him the still shot of the robber he did not recognize the person but recognized the graphic on the hoodie as the Warner Brothers Tasmanian Devil character. (App. p. 232, lines 12-19). Traquan testified that he told the detective that he did not own a hoodie like the one the robber was wearing. (App. p. 232, lines 19-20). Detective Weaver and Detective Santana claimed that Traquan told them that a friend gave him a similar sweatshirt in the eighth grade. (App. p. 234, line 12 – p. 235, lines 1-7; p. 237, line 14 – p. 238, lines 1-13).

Detective Weaver testified about Petitioner's cell phone records. (App. pp. 168-175). The detective testified that around the time of the robbery, between 12:55 and 1:10 in the morning, there was no activity on the phone. (App. p. 169, lines 3-5). He testified that the phone was in use at 1:10 AM. (App. p. 169, lines 6-7). The detective then testified, over objection, about cell tower cites around the convenience store, apartment G-4, and Petitioner's mother's house, which was only about two or three miles away. (App. pp. 173-175). Investigator Derek Cheek testified that he found pictures on Facebook showing Petitioner wearing red and black shoes. (App. p. 241, lines 14-21).

ARGUMENTS

1. **The PCR judge erred in refusing to find trial counsel ineffective for waiving a mistrial motion when Petitioner's sister inadvertently testified before the jury that Petitioner had served time in prison.**

At trial Petitioner's sister, Tashima Jones, was called as a witness by the State. She testified that Petitioner did not stay at her G-4 apartment and did not have a key. (App. p. 214, line 23 – p. 215, lines 1-24). The prosecutor then asked, "Ms. Jones, were you aware that Tashon [Petitioner] had listed your address as his address with the department of motor vehicles?" (App. p. 217, lines 18-20). The witness answered, "prior to him getting out from serving some time, yes, I am. Because at the time my mom was still there." (App. p. 217, lines 21-22). Trial counsel moved for a mistrial. (App. p. 218, lines 9-20). Trial counsel then asked to consult with Petitioner and then withdrew the motion for a mistrial. (App. p. 219, line 20 – p. 221, lines 1-21). Trial counsel specifically told the judge, "We will not be seeking a mistrial at this stage without waiving any cumulative effects of, you know, down the road. I mean renew it if it became necessary." (App. p. 221, lines 14-17). Trial counsel then questioned Petitioner, on the record, about the decision to withdraw the mistrial motion. (App. pp. 221-224).

After the sister testified the State called five additional witnesses to testify. The State called one of the brothers, Traquan Hurell, and re-called Investigator Weaver and called Investigator Nick Santana both to attempt to impeach Traquan. Additionally, the State called Investigator Derek Cheek and the forensic DNA scientist, Samuel Stewart

During deliberation the jury sent two notes to the judge that were marked as Court's exhibits #5 and #6. Trial counsel stated, "Note number 5 says the jury would like to review the sister's testimony. Did she say when he got out he sometimes stayed with her? And, Your Honor, I think it's telling, that's the part they want to know about. Because they've got when he

got out in parenthesis." (App. p. 332, line 23 – p. 333, lines 1-3). Trial counsel moved for a mistrial. (App. p. 333, line 12). The prosecutor noted that Court's exhibit #6 noted to "please disregard the last request." (App. p. 334, lines 1-2). In ruling on the mistrial motion based on the jury's question, the trial judge stated:

> Mr. Loy when you, I think, very timely, in a very timely manner made your motion for a mistrial when the sister's testimony was actually - - when she actually made it. And then I gave you an opportunity to talk with your client. And I know you've had - - I think we brought him back out here at that time. Knowing the testimony that she had given he knowingly and intelligently waived that motion for mistrial, ok?[1]
>
> Now, they then sent Court's Exhibit No. 5 that questioned - - that wanted some more information about sister's testimony. And that was a concern to the Court and had that been a question the Court was going to have to resolve, I would have reconsidered your motion for a mistrial. But since they immediately came back and said, please disregard it, I am taking the position that they are disregarding that question as well, as we had originally hoped. Based upon that interpretation of the questions by the jury, I am going to deny your motion for mistrial. I'm going to note your objection to my ruling at this time because I think that - - I think you've made a compelling argument.

(App. p. 335, line 10 – p. 336, lines 1-5). The judge also stated, "You made a compelling argument that the situation has changed. And as I mentioned before, I think if we hadn't gotten Court's Exhibit No. 6 to say to disregard it, I might have a different take on your motion. But as it stands now, I'm going to deny it." (App. p. 336, lines 7-11). The denial of this second mistrial motion was raised on direct appeal. (App. pp. 401-404).

In the amended application for post-conviction relief Petitioner alleged that, "Trial counsel provided ineffective assistance of counsel in advising Applicant to waive his right to a mistrial." (App. p. 480). During the PCR hearing Petitioner testified that he felt pressure to agree to withdraw the mistrial motion because trial counsel told him that if the judge granted the

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[1] As will be discussed further below, this finding does not preclude PCR review when, as here, the purported waiver was the result of ineffective assistance of counsel.

mistrial he would go back to jail and a bond was uncertain. (App. p. 508, line 1 – p. 509, lines 1-2). In reference to the withdrawal of the mistrial motion trial counsel testified at the PCR hearing that:

> We discussed it. His presentation is not inaccurate that I would've advised him, "I still don't; think you're getting a bond with the history that you've got. You'll be back in jail. We can get the mistrial, I think. It's up to you."
>
> And as he indicated, I would have told him, you know, but – "Your call. What are we going to do?" I would have given him my best insight.

(App. p. 565, lines 10-18). Counsel noted that Petitioner had already been in jail for a "really long period of time." (App. p. 564, lines 14-15). Trial counsel testified, "Ultimately, I did tell him, 'You're the guy with your name at the top of the sheet, you know sitting in the hot seat. So it's your call. You can' -- but – and I would've given my opinion and my perspective." (App. p. 564, lines 9-12). Trial counsel testified that he had the impression that the mistrial would have been granted if it had not been withdrawn. (App. p. 564, lines 1-3).

Trial counsel testified that one of the reasons he advised against the mistrial was because the State had not moved to admit a recorded telephone call made by Petitioner to Detective Weaver during the second trial as they had done in the first trial. (App. p. 592, lines 4-19). Trial counsel believed the recording of the phone call was an important piece of evidence for the State's case because the voice sounded like the voice heard on the surveillance video of the robbery. (App. p. 571, line 21 – p. 572, lines 1-23). Earlier in the PCR hearing, however, trial counsel testified that during the first trial, which ended in a hung jury, he was able to argue that the recorded telephone call was of no evidentiary value because the FBI could not match the voice in the phone call to the voice heard on the surveillance video of the robbery. (App. p. 569, line 8 – p. 570, 571, lines 1-21).

In the order of dismissal the PCR judge wrote:

> Applicant has failed to show how counsel, after conferring with Applicant, was deficient for withdrawing the motion for mistrial. Applicant has failed to show that if the motion had not been withdrawn there would have been grounds for the trial court to grant the motion. Further, Applicant has failed to show any prejudice resulting from the decision to withdraw the motion. This Court finds that Applicant has failed to meet his burden of proof in showing deficiency on the part of counsel as it relates to this allegation. Therefore, this Court dismisses this allegation with prejudice.

(App. p. 610). The PCR judge erred. Trial counsel was ineffective in advising Petitioner to waive the mistrial motion. While counsel advised Petitioner that a mistrial may have resulted in more pre-trial detention, it does not appear that counsel explained the possible positive outcomes that may have resulted from a mistrial and simply advised Petitioner that the decision was his alone to make. Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In Sanders v. State, 412 S.C. 611, 773 S.E.2d 580 (2015), the South Carolina Supreme Court addressed the issue of whether a waiver of collateral review precluded a claim that the advice provided with regard to the waiver was constitutionally defective. The Court distinguished Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008), and wrote:

> Instead, we agree with the wealth of federal jurisprudence which allows for ineffective assistance of counsel claims to proceed despite a previous waiver of collateral review where the challenge directly attacks the effectiveness of the advice to agree to that waiver. *See e.g.,* United States v. White, 307 F.3d 336, 343 (5th Cir.2002) (holding "an ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself"); Washington v. Lampert, 422 F.3d 864, 871 (9th Cir.2005) ("We therefore hold that a plea agreement that waives the right to file a federal habeas petition pursuant to 28 U.S.C. § 2254 is unenforceable with respect to an [ineffective assistance of counsel] claim that challenges the voluntariness of the waiver."); United States v. Cockerham, 237 F.3d 1179, 1187 (10th Cir.2001) ("[W]e hold that a plea agreement waiver of postconviction rights does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver."). As the United States Court of Appeals for the Seventh Circuit succinctly stated:
>
> > Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation. Jones v. United States, 167 F.3d 1142, 1145 (7th Cir.1999)

Sanders v. State, 412 S.C. 611, 615–16, 773 S.E.2d 580, 582 (2015). The Court held that, " . . . although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective."

In the present case the advice Petitioner received in agreeing to the waiver of the first mistrial motion was constitutionally defective. Counsel's advice regarding the mistrial motion

focused on the fact that if granted, Petitioner would face additional pre-trial detention. During the PCR hearing Petitioner testified that he felt pressured to agree to withdraw the mistrial motion because he did not want to sit in jail. (App. p. 508, lines 18-20). Counsel failed to advise Petitioner about possible benefits from allowing the judge to decide the mistrial motion, especially in light of the second mistrial motion made during jury deliberations. Counsel failed to advise Petitioner about possible positive outcomes that may have resulted from a mistrial. Although trial counsel testified that one of the reasons he advised Petitioner to withdraw the mistrial motion was because the State had not introduced the recording of a telephone call, counsel was able to minimize the impact of the evidence in the first trial and, at the time of the first mistrial motion, the State had not yet rested. There was nothing to prevent the State from moving to admit the recording after the sister's testimony. In fact, the State recalled Detective Weaver after the first mistrial motion was made. Instead of fully advising Petitioner about both the positive and negative consequences that might result from withdrawing the mistrial motion and allowing the judge to rule, counsel simply advised Petitioner that the decision was his alone to make.

Trial counsel was ineffective in advising Petitioner to withdraw the mistrial motion. Trial counsel testified that he believed the trial judge would have granted the mistrial. (App. p. 564, lines 1-7). There is a reasonable probability that, but for counsel's constitutionally defective advice with regard to the withdrawal of the mistrial motion, the result of the proceeding would have been different. This Court should grant Petitioner a new trial.

2. **The PCR judge erred in refusing to find trial counsel ineffective for failing to call Petitioner's mother, Janah Hurell, and brother, Tramaine Hurell, as alibi witnesses.**

At trial Petitioner did not present any evidence or witnesses. During the PCR hearing Petitioner testified that at the time of the robbery he was living in Atlanta but was visiting family in Summerville. (App. p. 512, lines 11-17). Petitioner testified that on the night of the robbery he was with a girl named Julia who later dropped him off at his mother's house around 10:00 PM. (App. p. 511, lines 5-17). Julia Piper Simmons testified at the PCR hearing and confirmed that she dropped Petitioner off at his mother's house between 8:00 PM and 10:00 PM. (App. p. 536, line 4 – p. 537, lines 1-16). Petitioner testified that his mother, Janah, and his brother, Tramaine, were both home when he got back to their house. (App. p. 511, lines 18-20). Petitioner watched LeBron James play some basketball and then went to sleep in the bed next to his brother. (App. p. 512, lines 8-21). Petitioner testified that his mother woke them up later and told them they needed to go to their sister's house because there had been a robbery near the sister's house, someone dropped money on her porch and the police were at the sister's house. (App. p. 513, lines 5-15). They did not go to their sister's house that night and instead went back to sleep. (App. p. 513, lines 16-18).

In the amended PCR application Petitioner alleged that, "Trial counsel failed to present alibi witness testimony." (App. p. 480). During the PCR hearing Petitioner testified that he told his lawyer that both his mother and his brother were alibi witnesses who would testify that Petitioner was with them on the night of the robbery. (App. p. 492, lines 1 – 22). Petitioner testified that the witnesses were eventually able to speak to trial counsel. (App. p. 493, lines 16-19). When asked about the conversation Petitioner testified, "And they told me that he told them the same thing he told me, which was the judge and the jury wouldn't believe them because of

they were family and they are expected to lie for me." (App. p. 493, lines 20-23). Petitioner testified that at trial he wanted the alibi witnesses called but trial counsel told him, "Nobody's going to believe them, so we're not going to do it." (App. p. 494, lines 19-20). When Petitioner asked trial counsel why the jury would not believe his mother when she had turned him in to the police on a previous occasion, Petitioner testified that trial counsel told him that the jury was not supposed to know that he had been locked up before. (App. p. 510, line 14- p. 511, lines 1-4). Based on the sister's earlier testimony that formed the basis for the first mistrial motion discussed in issue one, the jury already knew that Petitioner had been locked up before.

Both alibi witnesses testified at the PCR hearing. Janah Hurell testified that on the night of the robbery both Tramaine and Petitioner, Tashon, were at her house. (App. p. 521, line 6 – p. 522, lines 1-20). She confirmed that her daughter called her and told her about the robbery and she woke both Tramaine and Petitioner, who were asleep in bed, to tell them about the robbery. (App. p. 522, lines 1-20). Ms. Hurell testified that she told Petitioner's trial counsel where Petitioner was on the night of the robbery. (App. p. 524, lines 1-8). She stated that trial counsel told her the jury would not believe her because she was Petitioner's mother. She testified, "And he said, Well, they wouldn't do –jury or no one would believe me because I was his mother and most times mothers take up for they sons. I said, 'Well, I wouldn't take up for my son. Because if I know my kids are in trouble, I myself would personally walk them in there,' which I have done before with Tashon, with Tremaine, any of them." (App. p. 524, lines 9-15).

Tramaine Hurell testified that he told trial counsel that on the night of the robbery he and his brother were asleep in the same bed at their mother's house. (App. p. 529, lines 12-24). Tramaine testified that somebody dropped his brother off at their mother's house and he was already in bed when Petitioner came to bed around 11:00 PM. (App. p. 529, lines 22-24; p. 530,

lines 4-21). PCR counsel asked Tramaine if he was asleep when Petitioner got in bed and Tramanie answered, "Yes, softly asleep and - - - ." (App. p. 530, lines 4-7). Tramaine testified that he was aware of Petitioner getting into the bed next to him. (App. p. 530, lines 8-10). When asked about the trial lawyer's response to his alibi testimony Tramaine testified, "He –he didn't want—he didn't want me to testify, I believe, for – because he said it was the defense – the state's choice to try to prove that he's guilty, rather than him try to say that he's innocent." (App. p. 531, lines 2-6).

Trial counsel testified that he met with Petitioner's mother and brother. (App. p. 574, line 15). When asked why he did not present their alibi testimony trial counsel testified, "I - - I - - other than the fact that I - - I - - I - - I didn't find - - I guess I didn't find them compelling; I didn't want to give up our right to find - - to closing argument." (App. p. 574, lines 16-18). Trial counsel testified that the brother was angry and uncooperative when he met with him and at that point in time he did not believe the brother was going to be helpful. (App. p. 574, lines 23-25). There is no indication of whether trial counsel attempted to speak with the brother later. Trial counsel did not indicate how the mother's testimony was not compelling and testified as to both, "But as far as a specific reason, I – no. We would've walked through it. and I would've told Mr. Hurell: 'These are my thoughts. This is what they are.' But there's nothing that just struck out like a bolt of lightning that said, 'Oh, no, I won't use you,' or 'I won't call you.' But I would not have refused. I – and I did not refuse to offer an alibi defense if, in fact, that had been the defendant's wish." (App. p. 575, line 1-8). Trial counsel also testified, "I may well have advised him that I think it's –you know, would be a bad choice." Trial counsel further testified that, "Within the context of the case, we felt like it would be disadvantageous to pursue that, and so we did not." (App. p. 575, lines 19-21).

In the order of dismissal the PCR judge wrote, "Counsel testified that he interviewed both potential witnesses and decided that the jury would likely not believe their testimony or find it compelling." (App. pp. 614-615). The record reflects that trial counsel did not testify at the PCR hearing that he decided that the jury would not believe the alibi witnesses. Instead, Petitioner and Petitioner's mother testified that trial counsel told them that the jury would not believe the mother's alibi testimony because she is Petitioner's mother. The PCR judge additionally wrote, "Both counsel and Applicant testified that they discussed this decision and counsel testified that he recalled Applicant agreeing with the decision at the time. This Court agrees that the testimony of applicant's mother and brother at the evidentiary would not have made for a compelling alibi defense for Applicant. Although their testimony was consistent, this Court agrees that it is perfectly reasonable for counsel to weigh how the jury will respond to an alibi presented by Applicant's close family with the potential benefits of having the final closing argument to the jury." (App. p. 615). It is unclear form the testimony of trial counsel what rendered the alibi witness's testimony "non-compelling," especially in light of the fact, as noted by the PCR judge, the testimony was consistent.

The PCR judge additionally wrote in the order of dismissal:

> The testimony of Applicant's brother Tremayne[2] was also not an alibi at all. Tremayne's testimony at the evidentiary hearing was that he was asleep when his brother returned home and was only made aware of his presence in the bed when their mother woke them up to tell them about the incident. Tremayne testified that he believes he would have woken up if Applicant got out of the bed that night, however, he did not testify with certainty. Tremayne's testimony in no way accounts definitively for Applicant's whereabouts until the point where his mother comes in to wake them up. Applicant's mother's testimony could potential [sic] provide an alibi, however, counsel made a reasonable strategic not to call her as a witness for the reasons enumerated previously.

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[2] The brother's name is spelled "Tremaine" in the PCR transcript but "Tremayne" in the order of dismissal.

(App,. p. 615).

In contrast to the finding of the PCR judge, the record reflects that Tremaine testified at the PCR hearing that he was aware when Petitioner got in bed next to him around 11:00 PM. (App. p. 530, lines 4-13). The bother's testimony, like the mother's testimony, established an alibi. The PCR judge erred in refusing to find trial counsel ineffective for failing to call two alibi witnesses. The determination, by both trial counsel and the PCR judge, that the alibi testimony from both witnesses was not compelling, is not supported by the record. Preserving the right to final closing argument is not a valid reasonable trial strategy that justifies the failure to present alibi witnesses. During the PCR hearing the attorney for the State asked trial counsel, "In your experience and professional opinion, is it highly important to retain closing argument, especially in a case where the State's - - mostly had circumstantial evidence against your client?" (App. p. 575, lines 22-25). Trial counsel answered, "I don't really know. I mean, I like to have closing argument. I'm not sure it really makes it in final. I - - I mean, I prefer - - I tell myself it makes a difference. I - - I don't know. At least I don't have to listen to the State argue twice. But, I mean, I - - I - - I don't know that it really make s a difference or not. I prefer to retain it if I can. Given my choice, I will. Whether or not it actually is a game-changer, I mean, I - - I have no - - I - - and I don't really know." (App. p. 576, lines 1-10). Trial counsel was ineffective in failing to call both alibi witnesses. Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the

applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The PCR judge erred in finding that trial counsel made a reasonable strategic decision not to call the alibi witnesses. The ability to present final closing argument is not a valid or reasonable reason not to call alibi witnesses. This is especially true in the present case where there was no showing, other than the fact that the alibi witnesses were close family members, that the alibi testimony was non-credible or non-compelling. Counsel's reason for not presenting the alibi witnesses is not valid or reasonable.

In Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017), the South Carolina Supreme Court wrote:

> As we have often stated, counsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. *E.g.,* Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. See Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (finding counsel's performance was deficient in making a decision not to object to the admission of testimony when the underlying strategy was not sound).

Trial counsel's decision not to present the alibi witnesses in order to preserve the right to final closing argument is not sound. Trial counsel admitted that he was not sure if final closing argument really made any difference at all. (App. p. 576, lines 1-10). There is a reasonable probability that presenting the alibi witnesses would have made a difference in the results of the proceeding. Trial counsel admitted that the State's case against Petitioner was largely circumstantial. (App. p. 579, lines 9-16).

In United States v. McCoy, 410 F.3d 124, 135 (3d Cir. 2005), the Third Circuit Court of Appeals wrote:

> We agree with the Government that courts have been highly deferential to counsel's strategic decisions, *see, e.g.,* Strickland, 466 U.S. at 690, 104 S.Ct. 2052 (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"); United States v. Otero, 848 F.2d 835, 838 (7th Cir.1988), but merely labeling a decision as "strategic" will not remove it from an inquiry of reasonableness. *See generally* Davidson v. United States, 951 F.Supp. 555, 558 (W.D.Pa.1996); *see also* Gov't of the V.I. v. Weatherwax, 77 F.3d 1425, 1431–32 (3d Cir.1996).

In Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984), the Eighth Circuit Court of Appeals wrote, "We agree that the label 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges." See also Quartararo v. Fogg, 679 F Supp 212, 247 (ED NY, 1988) (noting that "not all strategic choices are sacrosanct" and that "[m]erely labeling [counsel's] errors 'strategy' does not shield his trial performance from Sixth Amendment scrutiny"). "Tactical decisions do not render assistance ineffective merely because in retrospect it is apparent that counsel chose the wrong course. Baldwin v. Blackburn, 653 F.2d 942 (5th Cir.1981). However, certain defense strategies or decisions may be "so ill chosen" as to render counsel's overall representation constitutionally defective. Adams v. Balkcom, 688 F.2d at 738; Washington v. Watkins, 655 F.2d 1346, 1366 (5th Cir.1981), *cert. denied,* 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982)." Willis v. Newsome, 771 F.2d 1445, 1447 (11th Cir.

1985). In the present case counsel's decision not to call the alibi witnesses was "so ill chosen" as to render counsel's overall representation constitutionally defective.

In Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), the Sixth Circuit Court of Appeals wrote:

> Defense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected a defendant and was reasonably foreseeable as such before trial. United States v. Katz, 425 F.2d 928, 930 (2d Cir. 1970). If, however, action that appears erroneous from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

The decision not to call the alibi witnesses in the present case would not have been considered a competent decision by lawyers of ordinary skill in the criminal law. Petitioner was denied effective assistance of counsel. There is a reasonable probability that, but for trial counsel's failure to call the alibi witnesses, the result of the proceeding would have been different.

CONCLUSION

Based on the above arguments this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

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ATTORNEY FOR PETITIONER

This 31st day of March, 2021.