

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Apr 07 2021**

**S.C. SUPREME COURT**

\_\_\_\_\_

Certiorari to Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

\_\_\_\_\_

KARRAS CASCELLE COHEN, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-001417

\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_

Jessica M. Saxon  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUE PRESENTED .....1

STATEMENT.....2

ARGUMENT

The PCR Court erred in finding plea counsel effective where  
counsel was informed of potential alibi witnesses but did not  
investigate those witnesses prior to advising Petitioner to enter a  
guilty plea.....6

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL .....10

**ISSUE PRESENTED**

Whether the PCR Court erred in finding plea counsel effective where counsel was informed of potential alibi witnesses but did not investigate those witnesses prior to advising Petitioner to enter a guilty plea?

## STATEMENT

On September 2, 2016, shortly after midnight, police were called to the home of Teresa Wilkins. App. 123. Wilkins stated that at roughly 11:45 pm on September 1, 2016, four black males forced their way into her trailer while she was having a small “get together.” In the home when the incident occurred were Wilkins, Quinton Wilkins, Ben Haas, Benjamin Holcombe, and Starlyn Lyles. The victims stated all four men were armed with pistols and had bandannas covering their faces. App. 12-13; App. 123. According to the witness statements the men targeted Holcombe and robbed him of several hundred dollars. The rest of the home was searched for valuables but no one else was robbed. App. 13, ll. 10-14.

Holcombe and Ms. Wilkins fled while the men were searching the trailer. The state alleged that two or three of the men, one being Petitioner, followed Holcombe outside and shot at him as he ran, striking him once. App. 13-14. The four men then fled into a green Kia Soul which had been parked on a nearby highway. App. 14, ll. 11-14. The driver of the Kia Soul was identified as Jennifer Drake. App. 14, ll. 15-17.

Drake admitted to driving Petitioner, Christopher Foote, Jotti Gossett, and a fourth unknown male to the trailer park the evening of the incident. App. 14, ll. 18-24. Police prepared photo lineups from which Holcombe identified Gossett and Petitioner as two of the individuals that chased after and shot him. App. 15, ll. 4-9.

In March of 2017, Petitioner was indicted<sup>1</sup> by the Spartanburg County grand jury for one count of attempted murder, one count of burglary first degree, one count of armed robbery, one count of possession of a weapon during the commission of a violent crime, and one count of

---

<sup>1</sup> Duplicate indictments True Billed during the February 2018 term of the Spartanburg County grand jury for the Burglary first degree, armed robbery, and weapons charges that are included in the appendix. App. 98-99; 104-105; 118-119.

possession of a weapon by a person convicted of a violent felony. App. 97-121. On February 28, 2018, Petitioner, represented by Beverly Jones, appeared before the Honorable Grace Knie to enter a guilty plea to the charges. App. 1. The State, represented by Spenser Smith, informed the court there was a recommendation for concurrent sentences between fifteen to thirty years imprisonment on the charges. App. 3-4.

During the plea hearing, Counsel Jones informed the trial court that Petitioner had problems with the strength of the alleged identification of him as a shooter because the witnesses had all said the faces of the four men were covered. Counsel Jones stated she had discussed the identification with Petitioner, and she felt that, at best, Holcombe was speculating as to the identity of the people that robbed him. App. 16, ll. 6-23. However, despite that contention, Counsel Jones informed the court Petitioner wanted to accept responsibility and plead guilty. App. 17, ll. 7-9. At no point did Counsel Jones suggest that Petitioner may have had an alibi for the incident. Petitioner was sentenced to an aggregate term of nineteen years imprisonment. App. 32-33.

On July 9, 2018, Petitioner filed an application for post-conviction relief alleging, *inter alia*, that Counsel Jones failed to investigate potential alibi witnesses. App. 36-42. The State filed a return, partial motion to dismiss and a motion for a more definite statement on April 16, 2019. App. 43-52. On July 15, 2019, an evidentiary hearing was held before the Honorable J. Derham Cole. App. 53. Petitioner was represented by Rodney Richey. The State was represented by Johnny James. At the start of the hearing the parties informed the court they were only going forward on the claim of ineffective assistance of counsel for failure to investigate alibi witnesses. App. 56, ll. 3-7.

During the PCR hearing Petitioner testified he was not at the scene on the night of the incident. He identified three individuals that were potential alibi witnesses for him: Larissa Bell, Tiffany Shell, and Kinitra Makupson. App. 57, ll. 14-23; App. 59, ll. 21-24; App. 60, ll. 5-9. Petitioner testified he informed Counsel Jones that he had alibi witnesses, but he did not know if she did any investigation or tried to contact them. App. 57, ll. 21-App. 58, l. 2; App. 60, ll. 3-14. Petitioner alleged he had told Counsel Jones he wanted to go to trial, but her response was that he had no choice but to plead guilty. App. 58, ll. 10-17.

Tiffany Shell, Petitioner's sister, testified during the PCR hearing that Petitioner was with her the day of the incident all day until around seven or eight that evening. Shell stated Petitioner left to visit his child then "came right back," but later clarified that Petitioner returned sometime around "midnight, like 11:00, 12:00, 11:45" in the evening. App. 63, ll. 5-12; App. 67, ll. 3-11. Shell knew he had returned later in the evening because she was waiting for him to get back so she could go work the night shift at her job. App. 67, ll. 12-22. Shell never spoke with Counsel Jones. Shell stated she did not speak up prior to the plea because she "felt like it was too late" at that point for her information about Petitioner's alibi to matter. App. 64, ll. 1-20; App. 66, ll. 7-24.

Counsel Jones testified Petitioner never told her Shell was a potential alibi witness. The only potential alibi witness Petitioner mentioned to Counsel Jones was Makupson. App. 71, ll. 19-25. Counsel Jones admitted an alibi witness, especially Shell, could have helped Petitioner's case. App. 79, ll. 3-14. However, she was not sure how useful Shell's testimony would have been given the tight time frame during which the incident was alleged to have occurred. App. 69, l. 23-App. 70, l. 7. Counsel Jones maintained that she knew who Shell was but that Shell had never been identified to her as a potential alibi witness. App. 73, ll. 1-17.

Counsel Jones stated Petitioner told her he was with Makupson the evening of the incident and provided her with Makupson's contact information. Prior to Counsel Jones speaking with Makupson, Petitioner allegedly admitted some involvement in the incident but denied being a shooter. When Counsel Jones explained what an alibi witness was and what was required of an alibi witness, Petitioner supposedly stopped saying that Makupson could place him somewhere other than the incident location and told Counsel Jones not to contact Makupson. App. 72, l. 2-25; App. 80, ll. 12-17.

The guilty plea of a co-defendant led to a plea offer. Petitioner considered the plea offer overnight and accepted it on the morning his trial was set to begin. App. 76, l. 13-App. 77, l. 16; App. 78, ll. 7-12. Counsel Jones stated she never told Petitioner he could not proceed to trial. App. 77, ll. 8-9.

The order of dismissal was filed on October 8, 2020. In the order the PCR court found Counsel Jones' testimony credible, while finding Petitioner's and Shell's testimony not credible. App. 92. The court further ruled that Counsel Jones' duty to investigate was not triggered because Petitioner never informed her of the potential alibi witnesses. Finally, the court ruled that there could be no prejudice as Shell's testimony did not create an alibi as it left Petitioner's whereabouts unknown from roughly seven to midnight which encompassed the entirety of the time frame during which the crimes occurred. App. 92-93.

## ARGUMENT

The PCR Court erred in finding plea counsel effective where counsel was informed of potential alibi witnesses but did not investigate those witnesses prior to advising Petitioner to enter a guilty plea.

The testimony elicited during the PCR hearing revealed Petitioner had told Counsel Jones about at least one, if not multiple, potential alibi witnesses that could have assisted in his case. Further, Counsel Jones readily admitted that she did not contact the one alibi witness she remembered – Makupson. Counsel Jones’ performance was deficient, and Petitioner was prejudiced as a result of Counsel Jones’ failure to investigate.

“To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.” Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) (citing Strickland v. Washington, 466 U.S. 668 (1984)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Strickland 466 U.S. at 695 (1984). A PCR applicant is entitled to relief based on ineffective assistance of trial counsel if he can establish that counsel's performance was deficient and that this deficiency prejudiced his defense. Id.; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting Strickland, 466 U.S. 668, 691 (1984)). “One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is

unreasonable.” Id. (citing Grooms v. Solem, 923 F.2d 88, 90 (8th Cir.1991)). If a PCR applicant claims trial counsel was ineffective for failing to interview or call alibi witnesses, then the “applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses’ testimony in a manner consistent with the rules of evidence.” Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995).

The PCR court found that Counsel Jones’ duty to investigate was never triggered. Notably, Petitioner testified that he informed Counsel Jones of three potential alibi witnesses. App. 59, l. 21-App. 60, l. 9. Counsel Jones’ testimony partially corroborates Petitioner’s testimony as she admitted that Petitioner told her about Makupson. App. 72, ll. 2-10. Once Petitioner had identified the potential alibi witnesses Counsel Jones’ duty to conduct a reasonable independent investigation was triggered. The fact that Petitioner may have later told Counsel Jones not to contact Makupson would not negate her duty to investigate, for herself, whether Makupson or the other named individuals could have provided a viable alibi.

The PCR court further found that Petitioner had not suffered any prejudice because the testimony of Shell did not provide him with an actual alibi. However, Shell’s testimony was that Petitioner returned to her home between 11:45p and midnight which is the time frame during which the incident occurred. If Shell’s testimony was true it would have been physically impossible for Petitioner to have committed the crimes as he could not have been in two places at once. Therefore, Shell’s testimony, if believed, did provide Petitioner with an actual alibi. Compare Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (citing State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) (finding PCR witnesses testimony was not sufficient to establish an alibi defense 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)) with Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014) (finding testimony of PCR witness was sufficient to establish an alibi because if the testimony of the alibi witness was true it would have been physically impossible for Walker to have committed the crimes).

Petitioner informed Counsel Jones of at least one, if not multiple alibi witnesses. Counsel Jones had a duty to investigate those witnesses and the failure to do so was deficient performance. There is a reasonable probability that had Counsel Jones investigated these witnesses that the results of the proceeding would have been different, particularly considering that Shell's testimony created an actual alibi. See Walker v. State, *supra*.

**CONCLUSION**

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on these issues.

*s/Jessica M. Saxon*  
Jessica M. Saxon  
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2021.

RECEIVED

Apr 07 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_

Certiorari to Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

\_\_\_\_\_

KARRAS CASCELLE COHEN, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

\_\_\_\_\_

PETITION TO BE RELIEVED AS COUNSEL

\_\_\_\_\_

Counsel for Karras Cascelle Cohen states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge J. Derham Cole, which was held on July 15, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Karras Cascelle Cohen.

Respectfully Submitted,

s/Jessica M. Saxon

Jessica M. Saxon  
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2021.

RECEIVED

Apr 07 2021

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

*s/Jessica M. Saxon*  
Jessica M. Saxon  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

This 7th day of April, 2021.