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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
J. Mark Hayes, Circuit Court Judge

Opinion No. 2021-UP-099 (S.C. Ct. App. filed March 31, 2021)
Lower Court Case No. 13-CP-32-0614

BOYD RASHAEEN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001287

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on June 25, 2021. Supp. App. 19.

QUESTIONS PRESENTED

I. Did the Court of Appeals violate the standard of review by failing to defer to the PCR court's findings of fact and substituting its own view of the facts in denying Petitioner relief from his convictions and sentences?

II. Did trial counsel's deficient performance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution prejudice Petitioner where trial counsel failed to ask the alibi witness the critical question to establish an alibi – the time with which the alibi witness was with Petitioner on the date in question?

STATEMENT OF THE CASE

About half past midnight on July 26, 2007, four black males, all with their faces covered, robbed the Pitt Stop near I-26 in Lexington County. App. 181, l. 6 – App. 182, l. 8; App. 204, l. 18-24; App. 210, ll. 17-23; App. 211, ll. 8-9. The robbery lasted less than two minutes. App. 207, ll. 12-18; App. 215, ll. 19-24; App. 454, ll. 15-24. Neither of the clerks who were working at the gas station during the robbery recognized the men. App. 207, ll. 23-25; App. 214, ll. 6-8.

Later on July 26, 2007, the manager of the Pitt Stop provided a copy of the surveillance video recording from the time of the robbery to the police. App. 228, l. 11 – App. 230, l. 12. Edward Prestigacomo with the Lexington County Sheriff's Office went to the Pitt Stop to speak with employees who were present during the robbery. App. 402, ll. 12-19. Michael Rhaney, an employee of Pitt Stop who was not present during the robbery, pulled Prestigacomo to the side and asked to speak to him privately. App. 402, l. 22 – App. 403, l. 4. Rhaney told Prestigacomo that he believed his fiancé's cousins robbed the store. App. 403, ll. 2-4. As a result, Prestigacomo showed Rhaney a still shot from the surveillance video. App. 403, ll. 3-11; State's Trial Exhibits 30-32.[1] From this, Rhaney provided Prestigacomo with some names, including Petitioner's name and Lywone Capers' name. App. 403, ll. 8-11. Prestigacomo also showed Rhaney a still photograph from the video, which showed a truck. App. 404, ll. 2-4. Rhaney claimed the truck in the photo was one driven by Petitioner on the day before the robbery. App. 404, ll. 4-9.

Rhaney admitted that he did not know Lywone Capers or Petitioner very well and had not seen them since 2005, save his allegation that he saw them at 2:45 p.m. on July 25 in a blue and tan Ford Explorer. App. 266, l. 19 – App. 268, l. 10; App. 283, l. 11 – App. 284, l. 18. Notably,

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[1] The Order of Dismissal indicates the PCR judge's review included "the transcripts and documents from the prior proceedings." App. 721.

Rhaney did not give the detective the story about seeing Petitioner in the Explorer until after the officer showed him the photograph of the vehicle involved in the incident. App. 255, l. 14 – App. 266, l. 11; App. 401, l. 12 – 404, l. 14.

Rhaney accompanied Prestigacomo to question Glynnessa Evans, Rhaney's fiancée and Petitioner's stepsister. App. 404, l. 17 – App. 12. Glynnessa was embroiled in a years long battle to win back custody of her daughter from Petitioner's aunt and adoptive mother, Emma Evans. App. 372, l. 21 – App. 373, l. 9; App. 487, ll. 11-18; App. 517, ll. 3-7. Emma Evans took in Glynnessa's daughter while Glynnessa was incarcerated for voluntary manslaughter from 1999 to 2002. App. 372, ll. 18-20; App. 376, ll. 9-24. Glynnessa lived in the same household as Petitioner from his birth in 1989 until her father's death in 1992. App. 375, ll. 1-20. She reunited with that side of the family before her daughter was born in 1998, at which time Petitioner would have been approximately nine years old. App. 375, l. 21 – App. 376, l. 8. Thereafter, Glynnessa and Petitioner both resided with Emma Evans for a brief time in 2005. App. 383, ll. 4-6; App. 391, ll. 7-16. Glynnessa had not seen Petitioner again until the day he allegedly came to her trailer unannounced on July 25, 2007, and left after spending a short time in the area visiting other friends. App. 307, l. 25 – App. 309, l. 22.

When Prestigacomo told Glynnessa why he was there, he "learned that she was aware of the robbery that had taken place." App. 405, ll. 6-16. Prestigacomo showed Glynnessa one still photograph from the surveillance footage that had all four individuals in the same frame. App. 406, ll. 10-15. She identified them as Petitioner, Lywone Capers, John Sosa, and "Ton" based on their clothing and build. App. 406, ll. 10-19; App. 407, ll. 17-21. As he had done with Rhaney, Prestigacomo showed Glynnessa the still shot of the truck from the surveillance video before asking for a description of the kind of car the boys were in when they allegedly arrived at her

home the prior day. App. 406, ll. 20-25. Rhaney and Glynnessa alleged that the Explorer belonged to Emma Evans, though the detective later determined it was actually owned by Frederick Neal. App. 273, ll. 7-11; App. 406, ll. 21-25; App. 408, ll. 1-17. When shown copies of other still photographs from the surveillance footage, Glynnessa said she recognized a cut or scar on the person's shoulder as belonging to Petitioner. App. 322, l. 13 – 323, l. 18.

On November 26, 2007, a Lexington County grand jury returned indictments against Petitioner for armed robbery, possession of a firearm during a crime of violence, and two counts of kidnapping. App. 729-736. On January 11-14, 2010, Petitioner and his co-defendant, Lywone Capers, appeared jointly for trial before the Honorable R. Knox McMahon and a jury. App. 1. David Miller represented Petitioner, and the state was represented by assistant attorney generals Robert Maldonado and Joshua Underwood. App. 1; App. 15. At the close of the state's case, the trial judge directed a verdict on one count of kidnapping for both defendants. App. 459, ll. 15-18.

Cherise Evans, Petitioner's sister, testified as an alibi witness at Petitioner's trial. App. 532, l. 17 – App. 535, l. 1; App. 537, ll. 10-16. Trial counsel asked Cherise whether she recalled who picked her up from work over July 25 and 26 of 2007, to which she responded: "my brother Boyd." He also asked Cherise whether Evans had left the Charlotte, North Carolina area over those dates, to which she responded: "no." App. 534, l. 4 – App. 535, l. 1. Trial counsel *neglected* to question Cherise regarding what time Petitioner dropped her off or picked her up.

The jury found Capers not guilty as to all charges but found Petitioner guilty. Judge McMahon sentenced Petitioner to concurrent terms of twenty-one years for armed robbery, twenty-one years for kidnapping, and five years for the weapons offense. On direct appeal, Petitioner was represented by appellate defender Katherine Hudgins, who filed a brief pursuant to

Anders v. California, 386 U.S. 738 (1967), on June 14, 2011. App. 625. On May 16, 2012, the Court of Appeals dismissed the appeal. App. 638.

On February 20, 2013, Petitioner filed an application for post-conviction relief ("PCR"). App. 640. On September 28, 2015, Petitioner, through counsel, amended his PCR application. App. 653. On January 15, 2016, the Honorable J. Mark Hayes, II, convened an evidentiary hearing regarding the application. App. 655. Petitioner was represented by Kristy Goldberg, and the state was represented by assistant attorney general Patrick Schmeckpeper. App. 655.

At the PCR hearing, trial counsel testified that Petitioner always maintained his innocence and said he was in Charlotte the entire day the robbery occurred. App. 692, l. 11 – App. 693, l. 3; App. 703, ll. 13-19. Though trial counsel initially said that Petitioner did not provide any witness to corroborate his alibi, he admitted that Petitioner's sister, Cherise Evans, provided an alibi and testified at trial. Compare App. 693, ll. 8-10 and App. 705, ll. 15-16, with App. 696, ll. 17-20, App. 699, l. 9 and App. 705, l. 19 – App. 708, l. 2. Trial counsel admitted that his notes reflected that Cherise worked "at Church's [Chicken], the 21st through the 28th, until close" and Petitioner picked her up at 1:00 a.m. App. 702, l. 14 – App. 703, l. 4; App. 708, l. 25 – App. 709, l. 6. Trial counsel further admitted that the sole purpose of calling Cherise to testify was as an alibi witness. App. 705, l. 19 – 707, l. 15. Yet, trial counsel did not question Cherise in front of the jury regarding what **time** Petitioner picked her up. App. 668, ll. 5-13; App. 707, l. 16 – App. 708, l. 2.

On May 25, 2016, Judge Hayes filed an order denying Petitioner relief from his convictions and sentences. App. 719. Judge Hayes found that trial counsel was deficient in failing to elicit testimony from Cherise that Petitioner was picking her up from work in Charlotte, North Carolina *at roughly the same time* that the armed robbery occurred in Lexington

County, South Carolina. App. 723. Trial counsel had information in his file regarding the time that Cherise got off work, which would have strengthened Petitioner's alibi defense. App. 723. However, Judge Hayes found that Petitioner did not prove that, but for counsel's deficient performance, there was a reasonable probability that the outcome of the proceeding would have been different. App. 724. Judge Hayes noted that Petitioner's co-defendant was acquitted despite very similar identification testimony from Glynnessa and Rhaney. App. 725. However, he found that Glynnessa had a closer relationship with Petitioner than the co-defendant and that Petitioner had "an identifiable scar, which was visible in the video of the armed robbery." App. 725. He also noted that the identification testimony was "attacked by aggressive cross-examination at trial." App. 725. Thus, he ruled:

> As a result, this court is not convinced that even with the extra alibi information, the defense would have overcome the identification testimony presented by Ms. [Glynnessa] Evans and Mr. [Rhaney]. [Petitioner]'s claim was not that he came to Lexington and returned to Charlotte, but, rather, that he was in Charlotte the entire day. Accordingly, [Petitioner] has failed to show a reasonable possibility that but for counsel's error the outcome of his proceeding would have been different. This allegation is therefore denied and dismissed.

App. 725.

An appeal from the order of dismissal was perfected through the filing of a petition for writ of certiorari in this Court on January 20, 2017. The state filed its return to the petition on July 5, 2017. Pursuant to Rule 243(l), SCACR, this Court transferred the case to the Court of Appeals by order dated October 30, 2017. On September 24, 2018, the Court of Appeals granted certiorari to review the first question presented in the petition. After briefing, the Court of Appeals affirmed the denial of relief in an unpublished opinion. Evans v. State, 2021-UP-009 (S.C. Ct. App. filed Mar. 31, 2021); Supp. App. 1-6. Petitioner filed a petition for rehearing on

April 15, 2021. Supp. App. 7-18. The Court of Appeals denied the petition for rehearing on June 25, 2021. Supp. App. 19. This petition for writ of certiorari follows.

ARGUMENT

I. The Court of Appeals violated the standard of review by failing to defer to the PCR court's findings of fact and substituting its own view of the facts in denying Petitioner relief from his convictions and sentences.

The appellate court must defer to a PCR court's findings of fact and must uphold them if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, if there is no evidence to support the PCR court's ruling, the appellate court will reverse. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) (citation omitted). Questions of law are reviewed de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

On appeal, Petitioner challenged the PCR judge's finding that he did not show he was prejudiced by trial counsel's failure to ask his alibi witness the critical question of the specific time the witness was with Petitioner on the night of the robbery. Without knowing the exact time that the witness was with Petitioner, the jury was unable to consider the evidence as a true alibi defense.

The PCR judge found trial counsel called Cherise Evans, Petitioner's sister, as an alibi witness during Petitioner's trial. App. 723. Although Cherise "testified that on the day of the robbery, [Petitioner] picked her up and dropped her off from work," Cherise "did *not* testify as to what *time* she was dropped off and picked up by [Petitioner]." App. 723 (emphasis added). The PCR judge found that trial counsel acknowledged "he did not ask Ms. Evans *when* she got off work the night in question." App. 723 (emphasis added). After considering Petitioner's "evidence that [Cherise] would have said [Petitioner] was picking her up from work at roughly

the same time the armed robbery occurred," the PCR judge was "convinced that trial counsel had information (the time the alibi witness got off of work) in his file that would have strengthened the alibi defense." App. 723. This was a factual finding to which the Court of Appeals was required to defer. Despite the clear standard of review requiring the Court of Appeals not substitute its own view of the facts where evidence supported the PCR court's factual findings, the Court of Appeals refused to defer to the PCR court and violated its duty as an appellate court.

Rejecting the PCR court's clear factual finding, which was supported by the evidence presented, the Court of Appeals found "[t]rial counsel's notes were unclear was to whether Petitioner picked [Cherise] up from work at 1:00 PM or 1:00 AM." Evans v. State, Op. No. 2021-UP-099 (S.C. Ct. App. filed Mar. 31, 2021); Supp. App. 1-6. Also, the Court of Appeals found trial counsel's note "*came from an interview trial counsel had with Petitioner, not [Cherise]*." Id. (emphasis in original). The Court of Appeals repeated this erroneous factual finding by stating "trial counsel merely had notes from a conversation with Petitioner as to the timeline [Cherise] would have provided had she been specifically asked." Id. Based upon this erroneous factual finding, which failed to accord due deference to the PCR court's factual determinations, the Court held "evidence in the record exists to support the PCR court's finding that the end result at trial would have been the same even if trial counsel had elicited testimony from [Cherise] providing the exact time Petitioner allegedly picked her up from work in Charlotte on the night of the robbery." Id. Ultimately, the Court of Appeals held "Petitioner failed to prove he was prejudiced by trial counsel's deficient examination of his alibi witness." Id.

The evidence presented supported the PCR court's factual findings, and the Court of Appeals erred by failing to defer to those factual findings. The PCR court recognized that

Cherise Evans was called by the defense as an alibi witness at Petitioner's trial. App. 532, l. 17 – App. 535, l. 1; App. 537, ll. 10-16. Cherise told the jurors that Petitioner picked her up from work over July 25 and 26 of 2007. App. 534, l. 4 – App. 535, l. 1. However, Cherise did not tell the jurors what time this occurred because trial counsel neglected to ask her this critical question.

During the PCR hearing, trial counsel testified that he and his investigator "talked obviously with all of the family." App. 696, ll. 16-17. Cherise "was the *only* one who could provide him an alibi to the extent that he took her to work and picked her up from work at the Church's Chicken." App. 696, ll. 17-20 (emphasis added). Trial counsel testified unequivocally that Cherise "indicated that he had taken her to work and picked her up" on the date of the robbery. App. 702, ll. 20-22. His note "from October 28, 2008, said [Petitioner] picked her up at one." App. 702, ll. 21-22. He assumed "that to be 1:00 in the afternoon." App. 702, ll. 22-23.[2] He admitted, however, that Cherise was working "until close, so maybe that's one in the morning." App. 702, ll. 24-25. Trial counsel reiterated that even though he was unsure if Cherise referred to morning or afternoon, *he interviewed her*, and she testified as an alibi witness. App. 703, ll. 1-4.

According to trial counsel, the "whole reason" to call Cherise as a witness was for the alibi defense. App. 706, ll. 19-21. Yet, trial counsel inexplicably never asked Cherise while she was testifying what time she got off from work – the critical question to establish an alibi. App. 707, ll. 16-17.

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[2] Trial counsel's claim that he assumed that one o'clock referred to the afternoon was nonsensical in light of his admission that Cherise Evans could provide an alibi for Petitioner and that the sole reason for calling her as a witness was so that she could provide an alibi. Had one o'clock referred to the afternoon, it would not have provided an alibi for Petitioner. Thus, one o'clock had to refer to the morning.

Based on this uncontroverted evidence, the PCR court found – as fact – Petitioner presented "evidence that Ms. Evans would have said [Petitioner] was picking her up from work at roughly the same time the armed robbery occurred." Thus, the PCR judge was "convinced that trial counsel had information (the time the alibi witness got off of work) in his file that would have strengthened the alibi defense." App. 723. Yet, the Court of Appeals adopted an argument made by the state for the first time on appeal that contradicted this factual finding. The state contended in its brief that the PCR court's denial of relief should be upheld because trial counsel's note was from a conversation with Petitioner, not Cherise, precluding a finding of prejudice. This argument was disingenuous, at best.

Here, PCR counsel requested that the record be held upon so that she could provide the testimony of Cherise at a later time. Despite having cooperated with PCR counsel prior to the hearing, Cherise was working at the time of the hearing and PCR counsel had not subpoenaed her or provided her with a work excuse. App. 659, l. 4 – App. 660, l. 13. Respondent objected to holding the record open and said: "I don't think it's necessary to have her here." App. 660, ll. 14-25. In fact, Respondent explained that PCR counsel "ha[d] an exhibit … that pretty much says what Ms. Evans is gonna testify to." App. 660, ll. 20-22. While the notes were not introduced as an exhibit, Respondent was well aware of the notes and conceded that the information contained within the notes – that Petitioner picked Cherise up from work at 1 a.m. – would have been the testimony offered by Cherise. Respondent's disingenuous disavowal of its concession during the PCR hearing must be rejected.

The PCR judge instructed PCR counsel to renew the motion at the end of the hearing, at which point he would be in a better position to make a ruling. App. 661, ll. 1-11. When counsel renewed the motion, the PCR judge responded:

> Well, I think the issue that deals with what we're dealing with here on a PCR, I think you've made a sufficient record as to what counsel knew. He's admitted that he knew it. The records from the proceeding seems clear that that question was not asked. So not knowing what *else* she would testify to, I really don't see a need in having -- in keeping the record open. So if by chance counsel for the [Petitioner] wishes to somehow secure that testimony, you could offer it -- well, what's the phrase? You could make it part of the record, but I won't be looking at it.

App. 716, l. 3 – App. 717, l. 4 (emphasis added).

This exchange demonstrated that all participants in the PCR hearing were well aware of what the evidence presented had shown – Cherise would have testified that Petitioner picked her up from work in Charlotte about the same time as the robbery was occurring in Lexington, trial counsel knew what time Cherise was picked up from work, and he failed to ask this critical question. See App. 716, ll. 19-25. Respondent did not dispute that factual finding, and actually agreed with the finding by arguing it was not necessary to call Cherise as witness in light of the notes showing precisely how Cherise would have testified had she been called.

Quite simply, the PCR court found trial counsel's notes showed Cherise would have testified that Petitioner picked her up from work at 1 a.m. in Charlotte, and therefore, it would have been impossible for Petitioner to rob a store in Lexington. The Court of Appeals violated the standard of review by failing to defer to these factual findings by the PCR court, which were supported by the record and conceded by Respondent. This Court should grant certiorari to review the Court of Appeals' decision in which it violated the standard of review.

II. Trial counsel's deficient performance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution prejudiced Petitioner where trial counsel failed to ask the alibi witness the critical question to establish an alibi – the time with which the alibi witness was with Petitioner on the date in question.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86 (1984); U.S. Const. amend. VI. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 687. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRCP).

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "[A] movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice." Black v. State, 151 S.W.3d 49 (Mo. 2004).

“In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). “In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury.” Id. “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” Id. at 189, 810 S.E.2d at 844. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice… the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of a ‘reasonable probability... the factfinder would have had a reasonable doubt’ cannot possibly be met.” Id. at 191, 810 S.E.2d at 845.

In Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995), the applicant presented the testimony of the two witnesses who he claimed would have testified that he was in Florida when the crimes were committed. His grandfather, Sylvester Jordan, stated he “believed” Glover was in Florida on the date the crimes were committed. 318 S.C. at 497, 458 S.E.2d at 539. However, Mr. Jordan subsequently stated he knew “nothing” and testified he did not recall any specific dates Glover was in Florida. Id. The second witness was Glover’s aunt, Sandra Jordan. Id. She testified Glover came to her house in Florida at approximately 8:00 *a.m.* on the date the crimes were committed and stayed approximately fifteen minutes. Id. A majority of this Court found that the witnesses’ testimony did not foreclose the possibility that Glover could have committed the crimes at 8:30 *p.m.* in light of testimony that Williamsburg County was a six-and-a-half-hour drive from the witness’s home in Florida. 318 S.C. at 498, 458 S.E.2d at 540. Thus, the

witnesses did not provide an alibi and Glover failed to prove prejudice from counsel's admitted failure to investigate. Id.

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), this Court reversed the Court of Appeals' holding that the applicant was not prejudiced by trial counsel's failure to interview the defendant's former girlfriend as a potential alibi witness. Walker was accused of kidnapping and sexual assault. 407 S.C. at 403, 756 S.E.2d at 145. The complaining witness reviewed surveillance footage from the gas station where she alleged that she met her assailant, who offered to help her when her car would not start. Id. A gas station employee identified Walker as the man pointed out by the complaining witness on the video. Id. When interviewed by police, Walker admitted going to the gas station but denied offering any help to anyone there or any involvement with the alleged victim. Id. He said he spent the afternoon and evening at a friend's home and then returned to his girlfriend's, Robina Reed's, home around 9:30 or 10:00 p.m. for the remainder of the night. Id.

Following his conviction, Walker filed for PCR, alleging that his trial counsel was ineffective in failing to conduct an adequate investigation. Walker, 407 S.C. at 403, 756 S.E.2d at 146. Walker's trial counsel admitted reviewing video of the police interview and had "Robina Reed" in her notes to interview but never did. Id. Though she said that her investigator spoke with or tried to speak with Reed, trial counsel never followed up with her investigator. Id. at 403-04, 756 S.E.2d at 146. Reed testified that she was never contacted about Walker's case and did not know why he disappeared in May 2002 until his PCR attorney contacted her. Id. at 404, 756 S.E.2d at 146. Though she could not provide specific dates and times, she testified that she and Walker spent every weekend together prior to his arrest. Id. The PCR court granted

Walker's application, but the Court of Appeals reversed, finding that Walker's trial counsel was deficient but that they Walker was not prejudiced. Id.

This Court recognized that Reed's testimony at Walker's PCR hearing vacillated but finally settled on an answer that "prior to Walker's arrest, she and Walker spent every weekend together." Walker, 407 S.C. at 406, 756 S.E.2d at 147. This Court found that there was evidence to support the PCR court's conclusion that Reed's testimony reasonably could have resulted in a different outcome at trial. Id. "If true and construed as meaning at least that Walker and Reed spent every night together on the weekends prior to his arrest, it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. "In other words, unlike Glover where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed's testimony to be true and for Walker to have committed the crime." Id. at 406-07, 756 S.E.2d at 147.

Here, like Walker, had the jury been presented with and believed Cherise's testimony that Petitioner picked her up at 1:00 a.m. in Charlotte, North Carolina, it would have been physically impossible for Petitioner to have committed the armed robbery in Lexington, South Carolina just thirty minutes earlier at 12:30 a.m. Thus, there is a reasonable probability, sufficient to undermine confidence in the outcome, that Petitioner's trial would have been different had the alibi defense been properly presented to the jury. Trial counsel admitted that Petitioner said "from the beginning" that "he absolutely was not there and did not do it." App. 692, ll. 21-24. He maintained that he was in Charlotte that entire day. App. 692, l. 25 – App. 693, l. 3. Petitioner never wavered in his explanation during the two years he was represented by trial counsel. App. 696, ll. 2-4; App. 703, ll. 13-19. In the trial judge's charge to the jury, he explained: "In order to establish an alibi it must be shown that the defendant was at another

specified place at the time the crime was committed, and that it was therefore impossible for the defendant to have been at the scene of the crime." App. 608, ll. 15-19. Unfortunately, as presented by trial counsel, the testimony simply did not constitute an alibi. While the PCR judge characterized this as "*extra* alibi information," the fact is that the missing information is *the information* that would have made Cherise an actual alibi witness. See App. 725 (emphasis added). This error in evaluating the importance of the alibi information, which was essentially non-existent at trial, informed the remainder of the PCR court's prejudice analysis.

The PCR judge primarily focused upon the identification testimony at trial and Petitioner's supposed "identifiable marks." The judge recognized that the jury found Petitioner's co-defendant, Lywone Capers, with whom he was tried jointly, not guilty. App. 725. The acquittal was despite "identification" testimony from Glynnessa Evans and Michael Rhaney, who claimed to have seen Capers in town earlier that day with Petitioner and to recognize him in the surveillance footage by his build, skin tone, nose, eyes, and voice. Capers presented four alibi witnesses – his mother, younger brother, aunt, and cousin – who all said that Capers was at home in Charlotte that day and at the time of the robbery. They recalled that Capers was sick and that his aunt brought over some soup and medicine for him. App. 482 – 529. Though not discussed by the PCR judge, another difference in the evidence was that the lead detective in the case improperly testified that Rosa Lugo identified Petitioner as the individual she saw driving a Ford Explorer in the mobile home park where Glynnessa resided on the afternoon before the incident. App. 245, l. 17-23; App. 408, l. 3 – App. 409, l. 23; see also App. 294-300. There was no such testimony that Lugo identified Capers.

While the scar seen in the still photographs taken from the surveillance footage is similar to that of Petitioner, it cannot be said that they are identical. Glynnessa agreed that there may be

others in the Lexington area with a similar scar, mole, or cut. App. 387, l. 22 – App. 388, l. 10. Further, while Glynnessa admitted that she could not pick Capers out of a crowd, her prior interactions with Petitioner were also limited. She lived in the same household with Petitioner until he was three years old, then saw him again when he was eight or nine years old. After she was released from prison in 2002, Glynnessa had some contact with the family and spent some time in 2005 living in the same household with Petitioner again. However, she admitted that she had not seen him again until he allegedly came to visit unannounced on the afternoon prior to the incident. Had the jury found Cherise's testimony credible, it could have disbelieved the identification testimony provided by Glynnessa about Petitioner, just as it disbelieved her identification testimony about Capers. Here, if jury heard Petitioner's alibi defense, as the jury heard his co-defendant's alibi defense, then there is a reasonable probability the outcome of the trial would have been different, just as it was for his co-defendant. Therefore, Petitioner was prejudiced by trial counsel's failure to question the alibi witness on the critical issue presented – the *time* when the witness was with Petitioner.

CONCLUSION

Petitioner respectfully requests this Court grant certiorari to review the questions presented and order full briefing. If this Court grants certiorari and dispenses with briefing, Petitioner respectfully requests this Court reverse the Court of Appeals, hold trial counsel's deficient performance prejudiced Petitioner, and order a new trial for Petitioner.

Respectfully Submitted,

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of July, 2021.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
J. Mark Hayes, Circuit Court Judge

Opinion No. 2021-UP-099 (S.C. Ct. App. filed March 31, 2021)
Lower Court Case No. 13-CP-32-0614

BOYD RASHAEEN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001287

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the petition for writ of certiorari and supplemental appendix in this case have been served on W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is jmaye@scag.gov; and Boyd Rashaeen Evans, #338854, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 26th day of July, 2021.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER