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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 2021-UP-099 (S.C. Ct. App. filed March 31, 2021)

BOYD RASHAEEN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001287

SUPPLEMENTAL APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Boyd Rashaeen Evans, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001287

ON WRIT OF CERTIORARI

Appeal From Lexington County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2021-UP-099
Submitted May 8, 2020 – Filed March 31, 2021

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General William Joseph Maye, all of Columbia, for Respondent.

PER CURIAM: In this post-conviction relief (PCR) action, Boyd Rashaeen Evans (Petitioner) argues the PCR court erred in finding he was not prejudiced by trial counsel's deficient examination of an alibi witness. We affirm.

Facts and Procedural History

On November 26, 2007, the Lexington County Grand Jury indicted Petitioner for armed robbery, possession of a weapon during the commission of a violent crime, possession of a pistol by a person under the age of twenty-one, and two counts of kidnapping. Petitioner and his co-defendant, Lywone Capers, pled not guilty and appeared for a jury trial on January 11, 2010. Ultimately, the jury acquitted Capers of all charges[1] and found Petitioner guilty of armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime.[2] The circuit court sentenced Petitioner to concurrent terms of imprisonment—twenty-one years for armed robbery, twenty-one years for kidnapping, and five years for the weapon charge.

Thereafter, Petitioner's counsel filed an *Anders*[3] appeal; this court dismissed the appeal and relieved counsel. *State v. Evans*, Op. No. 2012-UP-299 (S.C. Ct. App. filed May 16, 2012). Petitioner subsequently filed an application for PCR, alleging his trial counsel was ineffective for failing to adequately present his alibi defense and for unreasonably advising Petitioner not to testify at trial. Petitioner appeared for an evidentiary hearing on January 15, 2016, after which the PCR court dismissed Petitioner's application.

Standard of Review

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[1] Capers presented four alibi witnesses, all of whom testified Capers was at home in Charlotte throughout the 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.

[2] The trial court directed a verdict on one kidnapping charge, and the State *nolle prossed* the charge of possession of a pistol by a person under the age of twenty-one.

[3] *Anders v. California*, 386 U.S. 738 (1967).

"Our standard of review in PCR cases depends on the specific issue before us." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* "We review questions of law de novo, with no deference to trial courts." *Id.* at 181, 810 S.E.2d at 839.

Law and Analysis

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, 687–88 (1984). To prove ineffective assistance of counsel, a petitioner must prove trial counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability that the result would have been different. *Id.* at 691–94. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

Here, video evidence shows four armed males, all with their faces covered by a mask or shirt, entered the Pitt Stop Convenience Store at 12:34 AM, held a clerk hostage, stole approximately $200 from the cash register, and exited the store at 12:35 AM. Trial testimony from Petitioner's sister, Glynnessa Evans (Sister 1), revealed that Petitioner and some of their cousins arrived unannounced from Charlotte to visit Sister 1 at her Lexington County home on the afternoon of the robbery. The following day, Detective Edward Prestigacomo of the Lexington County Sheriff's Office went to Sister 1's house and showed her photographs pulled from the surveillance video of the robbery. The robbery occurred less than a mile from Sister 1's home, and she identified Petitioner and her cousins from the video stills.[4]

At trial, Sister 1, who testified in the State's case in chief, explained she was able to identify Petitioner as the man in the photographs by the scar on his shoulder, the blue Ford Explorer he drove to her house, and the clothes—a black tank top and dark pants—he was wearing that day. She further testified that after reviewing the Pitt Stop surveillance video, she could identify both Capers's and Petitioner's

[4] Sister 1's fiancé, Michael Rhaney, worked at the Pitt Stop during the time period the robbery took place. He testified he worked from 3:00 PM until 11:00 PM on the evening of the robbery. Rhaney first identified Petitioner to Detective Prestigacomo, who then met with Sister 1.

voices. Sister 1 admitted she would not be able to pick Capers out of a crowd but stated she recognized his nose, eyes, and voice on the video.
Petitioner called his other sister, Cherise Evans (Sister 2), to testify in his defense. Sister 2 testified Petitioner picked her up after her shift at Church's Chicken in Charlotte on the night of the robbery, but trial counsel did not ask the specific time Petitioner picked her up from work.

Although Petitioner expected Sister 2 to testify at his PCR hearing, she did not appear. Petitioner had not subpoenaed Sister 2, and the PCR court declined to hold the record open to consider Sister 2's testimony at a later date. Petitioner testified he dropped Sister 2 off at work in Charlotte at 9:00 AM on July 25, 2007, and picked her up at midnight. He stated he remained in the Charlotte area the whole day and spent the evening at home with friends and family. Petitioner admitted he had a scar similar to the one seen in the Pitt Stop video, and that the robbery happened around 12:20 AM. He acknowledged Sister 1's fiancé testified for the State that Petitioner was in a blue Ford Explorer in Lexington County on the day of the robbery and that a blue Ford Explorer can be seen in the surveillance video.

Trial counsel testified he had a "good recollection of the case," but ultimately he and his investigator could not find any of Petitioner's other alibi witnesses. Trial counsel's notes from an interview with Petitioner indicate Petitioner picked up Sister 2 from work in Charlotte around 1:00. He inferred that meant 1:00 PM but stated, "She was working at Church's, the 21st through the 28th, until close, so maybe that's one in the morning." Thereafter, the PCR court found trial counsel was deficient for failing to question Sister 2 about the specific time Petitioner picked her up from work in Charlotte on the night of the Lexington County Pitt Stop robbery. However, the circuit court denied the application, finding Petitioner failed to show prejudice because even with the additional alibi information, he could not demonstrate a reasonable probability that the outcome of his trial would have been different.

Whether trial counsel was deficient is not at issue in this appeal. Relying on *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998), the State contends Petitioner cannot show prejudice because he failed to produce Sister 2's alibi witness testimony or otherwise offer her testimony in accordance with the rules of evidence at the PCR hearing. In *Bannister*, our supreme court explained it has "repeatedly held a PCR applicant *must produce the testimony* of a favorable witness or *otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice with the witnesses' failure to testify at trial." *Id.* at 303, 509 S.E.2d at 809; *see e.g.*, *Pauling v. State*, 331 S.C. 606, 503

S.E.2d 468 (1998) (holding an applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (determining that where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding an applicant failed to establish prejudice where he did not offer witnesses at PCR hearing but merely alleged they would have provided him with an alibi defense and testified victims had recanted their trial testimony). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover*, 318 S.C. at 498–99, 458 S.E.2d at 540.

Here, Sister 2 testified at trial and trial counsel had his own notes of the information he expected her testimony would include. The State did not object to the admission of trial counsel's notes regarding Sister 2's proposed testimony. We find the notes were sufficient to properly present this allegation to the PCR court. Nevertheless, these notes do not relieve Petitioner of his burden of proof to satisfy the prejudice prong of the PCR analysis. *See Bannister*, 333 S.C. at 303, 509 S.E.2d at 809 (1998) ("The State's failure to object to [the petitioner's] testimony as to [the witness'] alleged testimony does not relieve respondent of the burden of producing and/or offering [the witness'] testimony in accordance with the rules of evidence."). Trial counsel's notes were unclear as to whether Petitioner picked Sister 2 up from work at 1:00 PM or 1:00 AM. The only evidence presented at the PCR hearing to provide the substance of Sister 2's testimony−other than the trial transcript−was Petitioner's own testimony and trial counsel's note, *which came from an interview trial counsel had with Petitioner, not Sister 2*.

Petitioner's situation differs from that in *Martin v. State*, 427 S.C. 450, 453, 832 S.E.2d 277, 278–79 (2019), in which the petitioner failed to present his mother's alibi testimony at his PCR hearing. There, our supreme court recognized, "[o]rdinarily the absence of a purported alibi witness is fatal, but in this case counsel admitted they were aware of the specific timeline furnished by the mother, yet failed to introduce it." *Id*. However, in *Martin*, trial counsel's file contained mother's own statement as to the alibi, including the specific time mother claimed she dropped Petitioner off at a bus stop in Atlanta. Here, trial counsel merely had notes from a conversation with Petitioner as to the timeline Sister 2 would have provided had she been specifically asked.

Other than Sister 2's trial testimony, Petitioner failed to offer any evidence contradicting the testimony from the State's witnesses, specifically, Rhaney's testimony addressing Petitioner and the blue Ford Explorer on the surveillance tape and Sister 1's testimony identifying Petitioner by his clothing, voice, vehicle, and the shoulder scar seen on the Pitt Stop's video footage.[5] Thus, 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 Sister 2 providing the exact time Petitioner allegedly picked her up from work in Charlotte on the night of the robbery.

Conclusion

Because evidence supports the PCR court's finding that Petitioner failed to prove he was prejudiced by trial counsel's deficient examination of his alibi witness, the decision of the PCR court is

AFFIRMED.[6]

HUFF, THOMAS, and MCDONALD, JJ., concur.

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[5] Trial counsel was able to cross-examine Sister 1 as to her prior conviction for involuntary manslaughter as well as her dispute with Petitioner's adoptive mother over custody of Sister 1's daughter, arguing Sister 1 was biased against Petitioner and his side of the family. However, trial counsel simply had no way to challenge the video evidence because "[t]he problem was this person decided to wear a tank top and ski mask and it's an exact body and build frame of Boyd Evans and it has the birthmark or the scar tissue, whichever it is, on his left shoulder and it's dead-on in the camera on multiple angles."

[6] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

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BOYD RASHAEEN EVANS,

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V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2016-001287

Appeal from Lexington County

J. Mark Hayes, Circuit Court Judge

Opinion No. 2021-UP-099

PETITION FOR REHEARING

On March 31, 2021, this Court affirmed the denial of post-conviction relief (PCR) to Petitioner. Evans v. State, Op. No. 2021-UP-099 (S.C. Ct. App. filed Mar. 31, 2021). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests rehearing because this Court violated the standard of review in reaching its decision.

The appellate court must defer to a PCR court's findings of fact and will 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 "Ms. Evans testified that on the day of the robbery, [Petitioner] picked her up and dropped her off from work," "Ms. Evans 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 Ms. Evans 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. Thus, the PCR judge concluded trial counsel's failure to ask the question and argue this point was error. App. 723. Turning to prejudice, the PCR judge was "not convinced" the alibi evidence "would have overcome the identification testimony" presented by the state. App. 725. Therefore, the PCR judge found Petitioner failed to show he was prejudiced by trial counsel's deficient performance.

Despite the PCR judge's clear factual finding that Petitioner "offered evidence that Ms. Evans would have said [Petitioner] was picking her up from work at roughly the same time the armed robbery occurred" and that the 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," this Court failed to defer to the PCR judge's factual findings on this point. Instead, this Court found "[t]rial counsel's notes were unclear was to whether Petitioner picked [Ms. Evans] 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). Also, this Court found trial counsel's note "*came from an interview trial counsel had with Petitioner, not [Ms. Evans]*." Id. (emphasis in original). This Court repeated this erroneous factual finding by stating "trial counsel merely had notes from a conversation with Petitioner as to the timeline [Ms. Evans] 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, this 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 [Ms. Evans] providing the exact time Petitioner allegedly picked her up from work in Charlotte on the night of the robbery." Id. Ultimately, this Court held "Petitioner failed to prove he was prejudiced by trial counsel's deficient examination of his alibi witness." Id.

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. Trial counsel asked Cherise whether she recalled who picked her up from work over July 25th and 26th of 2007, to which she responded: "my brother Boyd." He also asked Cherise whether Petitioner had left the Charlotte, North Carolina area over those dates, to which she responded: "no." App. 534, l. 4 – App. 535, l. 1. During the

PCR hearing, trial counsel testified that he and his investigator "talked obviously with all of the family." App. 696, ll. 16-17. Ms. Evans "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 Ms. Evans "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.[1] He admitted, however, that Ms. Evans 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 Ms. Evans referred to morning or afternoon, he interviewed her, and she testified. App. 703, ll. 1-4.

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

PCR counsel questioned trial counsel as follows: "You recently testified that you had notes that said that Cherise Evans told you that Boyd Evans picked her up at closing?" App. 708, l. 25 – App. 709, l. 2. Trial counsel answered, "I have a note right here just going back through my notes that were personal that I made with I interviewed him that - - I have a note Cherise, Church's Chicken, 21st through 28th till close, Boyd picked up at one." App. 709, ll. 3-6.

[1] Trial counsel's claim that he assumed that one o'clock referred to the afternoon was nonsensical in light of his admission that Ms. 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 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, this Court adopted an argument made by the state for the first time on appeal. The state contended in its return to the petition that the PCR court's denial of relief should be upheld because trial counsel's note was from a conversation with Petitioner, not Ms. Evans, 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. 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 – trial counsel admitted he knew what time Cherise was picked up from work, but failed to ask about it. 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 Ms. Evans as witness.

In summary, the PCR court properly found that trial counsel's representation was deficient. His failure to ask Cherise what time Petitioner picked her up from work on the date of the incident was such that she was not an actual alibi witness. While the evidence against Petitioner was sufficient to overcome a motion for directed verdict and the post-trial motion for new trial, the standard for proving prejudice at a PCR hearing is not nearly so high. Petitioner needed only to prove by a preponderance of the evidence that there is a reasonable probability that the result of his trial would have been different. Strickland, 466 U.S. 668, 694 (1984); Rule 71.1(e), SCRCP.

"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 the Supreme 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), the Supreme 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 Victim 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 Victim 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.

The Supreme 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. The 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 2001, 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 Ms. Evans' testimony credible, it could have disbelieved the identification testimony provided by Glynnessa about Petitioner, just as it disbelieved her identification testimony about Capers.

Petitioner respectfully requests this Court rehear the matter and afford the proper deference to the PCR court's factual findings. The PCR court found trial counsel's notes showed Ms. Evans 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. This Court must defer to the PCR court's factual findings. Furthermore, this Court should examine whether trial counsel's failure to present the alibi evidence prejudiced Petitioner. Had the 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.

Respectfully Submitted,

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

This 15th day of April, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

J. Mark Hayes, Circuit Court Judge

BOYD RASHAEEN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Rehearing in the above-entitled case has been served upon 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, this 15th day of April, 2021.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

Boyd Rashaeen Evans, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001287

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Hoff
_____ J.

Paula A. Thomas
_____ J.

Stephen P. McDonald
_____ J.

Columbia, South Carolina

cc:
Melody Jane Brown, Esquire
William Joseph Maye, Esquire
Donald J. Zelenka, Esquire
Susan Barber Hackett, Esquire
The Honorable J. Mark Hayes, II

FILED
Jun 25 2021