STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Lexington County

Honorable J. Mark Hayes, Circuit Court Judge

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BOYD RASHAEEN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001287

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# BRIEF OF PETITIONER

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## TABLE OF CONTENTS


TABLE OF CONTENTS .......... i

TABLE OF AUTHORITIES .......... ii

ISSUE PRESENTED .......... 1

STATEMENT OF THE CASE .......... 2

STANDARD OF REVIEW .......... 4

STATEMENT OF FACTS .......... 5

ARGUMENT .......... 10

The PCR court erred in finding that Petitioner was not prejudiced by trial counsel's deficient examination of Cherise Evans regarding Petitioner's alibi defense.

Introduction .......... 10

Effective Assistance of Counsel .......... 11

Discussion .......... 12

CONCLUSION .......... 20

## TABLE OF AUTHORITIES

**Cases**

Anders v. California, 386 U.S. 738 (1967) .......... 2

Black v. State, 151 S.W.3d 49 (Mo. 2004) .......... 11

Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 812 S.E.2d 438 (Ct. App. 2018) .......... 18

Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) .......... 4

Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) .......... 13

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) .......... 17, 18

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) .......... 4

Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000) .......... 4

Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016) .......... 4

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) .......... 4, 12, 13

State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) .......... 10

Strickland v. Washington, 466 U.S. 668 (1984) .......... 11, 19

Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) .......... 11

Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018) .......... 4

Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014) .......... 13, 14, 15

Wigington v. State, 413 S.C. 578, 776 S.E.2d 407 (Ct. App. 2015) .......... 11

**Rules**

Rule 71.1(e), SCRCP .......... 11, 19

Rule 220(c), SCACR .......... 17

Rule 243(l), SCACR .......... 3

**Other Authorities**

21 Am.Jur.2d Criminal Law § 136 (1980) .......... 10

U.S. Const. amend. VI .......... 11

## ISSUE PRESENTED

Whether the PCR court erred in finding that Petitioner was not prejudiced by trial counsel's deficient examination of Cherise Evans regarding Petitioner's alibi defense?

<u>STATEMENT OF THE CASE</u>

**Indictments and Trial**

On November 26, 2007, the Lexington County Grand Jury returned indictments against Petitioner Boyd Rashaeen Evans for armed robbery, possession of a firearm during a crime of violence, two counts of kidnapping, and possession of a pistol by a person under twenty-one. App 729 – 736. These charges related to a robbery of a convenience store in Lexington County by four masked black males. App. 181, l. 6 – 182, l. 20. The state subsequently *nolle prossed* the charge of a possession of a pistol by a person under twenty-one.

On January 11 – 14, 2010, Evans and his co-defendant, Lywone Capers, appeared jointly for trial before the Honorable R. Knox McMahon and a jury. App. 1. Evans was represented by David Miller 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. The jury found Capers not guilty as to all remaining charges but found Evans guilty. Judge McMahon sentenced Evans to concurrent terms of twenty-one years for armed robbery, twenty-one years for kidnapping, and five years for the weapons offense.

**Direct Appeal**

On direct appeal, Evans was represented by appellate defender Katherine Hudgins, who filed a brief pursuant to <u>Anders v. California</u>, 386 U.S. 738 (1967), on June 14, 2011. App. 625. On May 16, 2012, this Court dismissed the appeal pursuant to the <u>Anders</u> procedure. App. 638.

**Post-Conviction Relief Proceedings**

On February 20, 2013, Evans filed an application for post-conviction relief ("PCR"). App. 640. The State filed its return on April 28, 2015. App. 647. On September 28, 2015, Evans, through counsel, filed an amended PCR application. App. 653.

On January 15, 2016, an evidentiary hearing was held before the Honorable J. Mark Hayes. Evans was represented by Kristy Goldberg, and the State was represented by assistant attorney general Patrick Schmeckpeper. App. 655. On May 25 2016, Judge Hayes filed an order of dismissal denying Evans' PCR application. App. 719.

An appeal from the order of dismissal was perfected through the filing of a petition for writ of certiorari in the Supreme Court on January 20, 2017. The State filed its return to the petition on July 5, 2017. Pursuant to Rule 243(l), SCACR, this case was transferred to this Court by order filed October 30, 2017. On September 24, 2018, this Court filed an order granting certiorari to review the first question presented in the petition.

This brief of petitioner follows.

## STANDARD OF REVIEW

This Court defers 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, this 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)).

The appellate court does not defer to the PCR court's credibility findings as to witnesses who did not testify before the PCR court. Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018), *reh'g denied* (June 12, 2018). The PCR court reviewing the trial transcript is in no better position than the appellate court to determine the credibility of trial witnesses or otherwise assess the strength of the State's case; consequently, this Court gives no deference to the PCR court's credibility findings when we review the testimony of such witnesses. Id. (citing Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (stating the reason appellate courts give "great deference to a [PCR court's] findings" is because the PCR court has "the opportunity to directly observe the [PCR] witnesses")).

## STATEMENT OF FACTS

The robbery involved four black males, all with their faces covered by a mask or shirt. The incident was captured on video surveillance, which showed the men enter at 12:34:41 a.m. and leave at 12:35:24 a.m. App. 454, ll. 15-24. The detective produced still photographs from the video. App. 398, ll. 8-18; State's Trial Exhibits 30-32 (still photographs from video), on file with this Court.[1] Neither of the clerks who were working at the gas station during the robbery recognized the men. Evans' step-sister, Glynnessa, and her fiancé, Michael Rhaney, learned of the robbery when they went to fill their car with gas after the robbery occurred. Rhaney also worked at the gas station but had gotten off his shift at 11:00 p.m. When detective Prestigacomo came to the store the next day, Rhaney pulled him aside and claimed that his fiancé's cousins committed the robbery – identifying them by first names only as John, Lywone, and Boyd. Though Rhaney told the detective that he did not know the fourth person, he listed four names during his trial testimony – John, Boyd, Lywone, and Anton a/k/a "Ton." Boyd admitted that he did not know Lywone Capers or Boyd Evans very well and had not seen them since 2005, save his allegation that he saw them at 2:45 p.m. on July 25th in a blue and tan Ford Explorer. Notably, Rhaney did not give the detective the story about seeing Evans in the Explorer until after the officer showed him the picture of the vehicle involved in the incident. App. 255, l. 14 – App. 266, l. 11; App. 401, l. 12 – 404, l. 14.

Rhaney then took the detective to see Glynnessa, Evans' step-sister and Capers' cousin. The detective told her that some of her family members were suspects in the robbery of the gas station. Glynnessa was embroiled in a years long battle to win back custody of her daughter from Evans' aunt and adoptive mother, Emma Evans. Emma Evans took in Glynnessa's

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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.

daughter while Glynnessa was incarcerated for voluntary manslaughter from 1999 to 2002. Glynnessa lived in the same household as Evans from his birth in 1989 until her father's death in 1992. She reunited with that side of the family before her daughter was born in 1998, at which time Evans would have been approximately nine years old. Glynnessa and Evans both resided with Emma Evans for a brief time in 2005. Glynnessa had not seen Evans again until the day he allegedly came to her trailer unannounced on July 25, 2007 and left after spending approximately fifteen minutes in the area visiting other friends. Glynnessa admitted that she had even less prior interaction with Capers and would "not really" be able to pick him out of a crowd. While she said she would recognize Evans if she saw him, it is notable that the person alleged to be Evans in the surveillance footage had their face covered. App. 305, l. 19 – 330, l. 5; App. 346, l. 12 – 351, l. 14; App. 372, l. 18 – 392, l. 5.

Detective Prestigacomo said that when he told Glynnessa why he was there, he "learned that she was aware of the robbery that had taken place." App. 405, ll. 6-16. She said that her brother and cousins had visited her the day before. App. 405, l. 18-19. At trial, Glynnessa claimed that the boys arrived as the sun was going down but later agreed that she must be incorrect about the time if Rhaney also saw them before he left for work. App. 346, ll. 12-25; App. 383, l. 9 – 384, l. 22. Prestigacomo said that "after a brief conference," he showed Glynnessa one still picture from the surveillance footage that had all four individuals in the same frame. She identified them as Boyd Evans, Lywone Capers, John Sosa, and "Ton" based on their clothing and build. App. 406, ll. 10-19; App. 407, ll. 17-21. Like Rhaney, the detective showed Glynnessa the picture of the Explorer before asking for a description of the kind of car the boys were in when they allegedly arrived. App. 406, l. 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.[2] 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 Evans. App. 322, l. 13 – 323, l. 18; App. 1-15. The jury was shown photographs taken of Evans following his arrest and again while he was in jail. The detective characterized Evans' scars on his shoulder and elbow as "similar" to those of the suspect seen at the cash register. App.434, l. 4 – 435, l. 6; State's Trial Exhibits 40-50 (photos of Evans), on file with this Court. The judge also granted the solicitor's request to display a portion of Evans' body to the jury in the courtroom. App. 428, l. 12 – 433, l. 7; App. 436, l. 25 – 437, l. 23.

Glynnessa claimed that the manager of the mobile home park, Rosa Lugo, had ordered the boys to leave the area that day, after which Glynnessa did not see them again. Despite the solicitor's representation that a <u>Biggers</u> hearing was unnecessary because Lugo would not give identification testimony, detective Prestigacomo improperly testified that Lugo identified Evans as the driver the Ford Explorer she saw that day. App. 245, l. 17-23; App. 408, l. 3 – 409, l. 23; <u>see also</u> App. 294 – 300. While trial counsel's failure to object to this testimony was not raised as a separate allegation of ineffective assistance at Evans' PCR hearing, it is relevant to the PCR court's prejudice analysis because the jury's verdict was likely influenced by this improper testimony that Lugo saw Evans in Lexington on the afternoon prior to the incident.

At the PCR hearing, trial counsel Miller testified that Evans always maintained his innocence and said he was in Charlotte the entire day. App. 692, l. 11 – 693, l. 3; App. 703, ll. 13-19. Though trial counsel initially said that Evans did not provide any witness to corroborate

[2] Neal was not a suspect in the armed robbery investigation. App. 410, l. 7 – 412, l. 9.

his alibi, he admitted that Evan's sister, Cherise Evans (hereinafter "Cherise"), 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 – 708, l. 2.

Cherise Evans was called by the defense as an alibi witness at Evans' trial. App. 532, l. 17 – 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 Evans had left the Charlotte, North Carolina area over those dates, to which she responded: "no." App. 534, l. 4 – 535, l. 1. Trial counsel admitted that his notes reflected that Cherise worked "at Church's [Chicken], the 21st thought the 18th, until close" and Evans picked her up at 1:00 a.m. App. 702, l. 14 – 703, l. 4; Tr. 708, l. 25 – 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** Evans picked her up. App. 668, ll. 5-13; App. 707, l. 16 – 708, l. 2.

In the Order of Dismissal, **Judge Hayes found that trial counsel was deficient** in failing to elicit testimony from Cherise Evans (hereinafter "Cherise") that Petitioner Evans 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. Trial counsel had information in his file regarding the time that Cherise got off work, which would have strengthened Evan's alibi defense. App. 723. However, Judge Hayes found that Evans 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 Evans' co-defendant was acquitted despite very similar identification testimony from Glynnessa Evans (hereinafter "Glynnessa") and Michael Rhaney. However, he found that Glynnessa had a closer relationship

with Evans than the co-defendant and that Evans 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]. Applicant's claim was not that he came to Lexington and returned to Charlotte, but, rather, that he was in Charlotte the entire day. Accordingly, Applicant 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.

## ARGUMENT

**The PCR court erred in finding that Petitioner was not prejudiced by trial counsel's deficient examination of Cherise Evans regarding Petitioner's alibi defense.**

***Introduction***

Whether trial counsel was deficient is not at issue in this appeal, as the PCR court properly found that trial counsel's failure to elicit the time that Petitioner Evans picked up his sister, Cherise, from work on the night of the robbery and argue that point to the jury in support of an alibi defense, was error constituting deficient performance. App. 723. Rather, the issue before this Court is whether the PCR court erred in finding that Evans failed to prove prejudice from this deficiency. The PCR court's finding regarding prejudice was based upon its determination that the alibi defense would not likely have led to a different outcome in light of the other evidence adduced at trial. App. 724 – 725. In its return to the petition, Respondent defended that finding, but also submitted that a prejudice finding was precluded because Cherise was not called to testify at the PCR hearing. State's Return, pp. 13-17. Notably, however, Respondent took the position at the PCR hearing that Cherise was not a necessary witness. App. 660, ll. 14-25.

As will be discussed more fully *infra*, without the time of the pick-up in evidence, Cherise's testimony at trial did not provide an "alibi" for Evans. "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, **a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.**" State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (quoting 21 Am.Jur.2d Criminal Law § 136 (1980)) (emphasis added). The only other evidence against Evans was unreliable "identification" testimony and some similarity between a scar on his shoulder and one of the perpetrators. Had the jury been presented with a true alibi defense on

behalf of Evans, there is a reasonable probability that the jury would have found him not guilty, as it did Lywone Capers, Evans' co-defendant, who was "identified" by the same witnesses but presented a real alibi defense.

### *Effective Assistance of Counsel*

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).

### *Discussion*

The PCR court properly found that trial counsel was deficient in his representation of Evans where he failed to ask Cherise Evans, the sole witness called to support Evans' alibi, what time Evans picked her up from work on the date of the incident. App. 723. The robbery of the gas station in Lexington, South Carolina occurred at approximately 12:30 a.m. on July 26, 2007. App. 219, ll. 2-18; App. 454, ll. 16-22. Trial counsel's notes reflected that Evans picked Cherise up at 1:00 a.m. on July 26, 2007 at the Church's Chicken in Charlotte, North Carolina. However, he failed to elicit the information regarding the time when Evans picked up Cherise during her testimony at trial. As a result, her trial testimony did not rule out the possibility that Evans could have also been in Lexington at the time of the robbery. The PCR court accordingly found that trial counsel erred in failing to present that information, which was contained in his file, to the jury. App. 723.

However, the PCR court erred in finding that Evans failed to prove he was prejudiced by trial counsel's deficient conduct. App. 702, l. 14 – 703, l. 4; App. 708, l. 25 – 709, l. 6. "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), *reh'g denied* (Mar. 29, 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."[3] 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' 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

[3] Notably, here, Respondent characterized the evidence against Evans as merely "substantial" in its Return. Return to Cert., pp. 17-19.

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 Evans picked her up at 1:00 a.m. in Charlotte, North Carolina, it would have been physically impossible for Evans 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 Evan's trial would have been different had the alibi defense been properly presented to the jury. Trial counsel admitted that Evans 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 - 693, l. 3. Evans 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 Evans' supposed "identifiable marks." The judge recognized that the jury found Evans' 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 Evans 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 Evans 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 – 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 Evans, 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 – 388, l. 10. Further, while Glynnessa admitted that she could not pick Capers out of a crowd, her prior interactions with Evans were also limited. She lived in the same household with Evans 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 Evans 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 Evans, just as it disbelieved her identification testimony about Capers.

Respondent contended in its return to the petition, presumably as an alternate sustaining ground pursuant to Rule 220(c), SCACR, that the PCR court's denial of relief should be upheld because Cherise did not testify at the PCR hearing, precluding a finding of prejudice. Return to Cert., pp. 13-17. Notably, this argument was not made at the PCR hearing and was not ruled upon by the PCR court. See App. 714, l. 13 - 715, l. 21; App. 723 - 725. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). However, "[a]n appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case." Id. "While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court." Id. at 421, 526 S.E.2d at 724. "In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal." Id. "Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it." Id.

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 - 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 Applicant 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 - 717, l. 4.

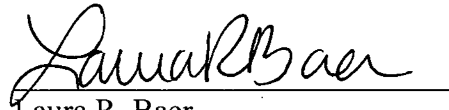
"A party cannot complain of error his own conduct has induced." Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 505, 812 S.E.2d 438, 441 (Ct. App. 2018), *cert. denied* (Aug. 21, 2018). Respondent objected to the pre-hearing motion to hold the record open for the submission of Cherise's testimony, specifically arguing that it was not necessary. App. 660, ll. 14-25. Further, the PCR judge likewise told PCR counsel that he did not see a need to keep the record open for Cherise's testimony, finding that trial counsel admitted he knew what time Cherise was picked up but failed to ask about it. App. 716, ll. 19-25. Respondent did not dispute that finding and made no mention of the failure to call Cherise to testify in the Order of Dismissal, which this Court can safely assume was prepared by Respondent. Thus, it would be "unfair," "unwise," and "unjust," to resolve this case on the failure to present Cherise's live testimony at the PCR hearing. See I'On, L.L.C., 338 S.C. at 421, 526 S.E.2d at 724.

In summary, the PCR court properly found that trial counsel's representation was deficient. His failure to ask Cherise what time Evans 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 Evans 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. Evans 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. at 694; Rule 71.1(e), SCRCP. The PCR court erred in finding that Evans failed to meet this burden. Respondent's alternative argument that the PCR court should be affirmed because Cherise did not testify at the hearing is disingenuous and should be rejected by this Court. Thus, Evans is entitled to a new trial.

## CONCLUSION

Based on the foregoing, Petitioner Boyd Rashaeen Evans respectfully requests this Court reverse the denial of post-conviction of relief and remand his case for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Lexington County

Honorable J. Mark Hayes, Circuit Court Judge

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SC Court of Appeals

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BOYD RASHAEEN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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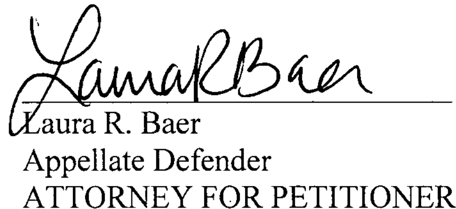
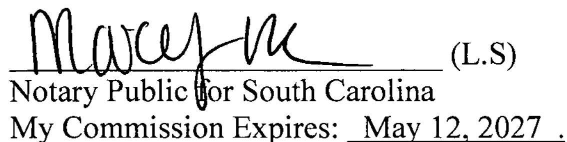
The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Melody J. Brown, Esquire, and Joseph Maye, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; upon Boyd Rashaeen Evans, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 16th day of October, 2018.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of October, 2018.


(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .