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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Jocelyn Newman, Post-Conviction Relief Judge
R. Ferrell Cothran, Jr., Trial Judge

Op. No. 5867 (filed October 6, 2021)

VICTOR McCOY WELDON,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

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STATEMENT OF ISSUE ON PETITION FOR CERTIORARI

Is certiorari warranted to review the Court of Appeals' reversal of the post-conviction relief court and grant of a new trial to Respondent Victor Weldon on the basis that Weldon established trial counsel was constitutionally ineffective for failing to present his mother and sister as alibi witnesses, where the Court of Appeals applied an improper standard of review requiring trial counsel to articulate a trial strategy to refute a finding of ineffectiveness and erred in determining the two witnesses constituted an alibi defense when neither met the legal definition of an alibi?

STATEMENT OF THE CASE

Procedural Background

Respondent Victor McCoy Weldon is presently confined in the South Carolina Department of Corrections. During its January 2011 term, the Clarendon County Grand Jury indicted Weldon for first-degree burglary, attempted murder, armed robbery, grand larceny ($2,000-$10,000), kidnapping, and possession of a weapon during a violent crime (2011-GS-14-0068) for his role in a violent attack and robbery in the early morning hours of May 15, 2010. John Knobeloch, Esquire, represented Weldon on these charges. On May 14-16, 2012, Weldon proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr, after which the jury convicted him as indicted. Judge Cothran sentenced Weldon to consecutive terms of imprisonment of thirty years for armed robbery and thirty years for first-degree burglary, along with concurrent terms of imprisonment of five years for grand larceny, twenty years for kidnapping, and five years for possession of a weapon during a violent crime.

Weldon timely appealed his convictions and sentences and was represented on appeal by Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense-Division of Appellate Defense. Weldon filed a brief challenging the trial court's denial of his directed verdict motion. The South Carolina Court of Appeals affirmed Weldon's convictions and sentences in an unpublished opinion. State v. Weldon, 2014-UP-463 (Ct. App. filed December 17, 2014). Weldon then filed a petition for rehearing, and, once denied, sought certiorari review from this Court. This Court denied certiorari, and the remittitur was issued on May 8, 2015.

Weldon filed a timely application for post-conviction relief on January 5, 2016. In his application, Weldon alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
    a. "Attorney file a motion to be relieved of case."
    b. "None of my alibi's were called to testify on my behalf."
    c. "I was never called to the stand to testify."
    d. "Lack of communication."
    e. "Force me into a joint trial."
    f. "offer a joint plea instead of independent plea."
2. Due process violation
    a. "denied my motion for a change of venue."
    b. "gave me a joint trial."
3. Prosecutorial misconduct
    a. "offer me a joint plea instead of independent plea."
4. Judicial Bias
    a. "Judge and victim were acquaintance."
5. Jury violation
    a. "charge the jury when proven clearly of a lesser included offense."
    b. "the charge of the jury made me look guilty."

Thereafter, Lance S. Boozer, Esquire, was appointed to represent Applicant. The State served its return to the application and requested an evidentiary hearing to resolve the claims as set forth in the application.

An evidentiary hearing was convened July 27, 2016, before the Honorable Jocelyn Newman, circuit court judge. Weldon was present at the hearing alongside counsel Boozer. During the hearing, Weldon testified on his own behalf and presented testimony from his mother Debra Weldon, his sister Jessica Weldon, and trial counsel John Knobeloch, Esquire. Following her review of the record and testimony presented at the evidentiary hearing, Judge Newman denied and dismissed the application with prejudice by written order signed July 28, 2017, and filed August 3, 2017.

Following the denial of relief, Weldon timely filed a notice of appeal. Following the submission of his petition for writ of certiorari and appendix and the State's return to the petition, this Court transferred this matter to the Court of Appeals pursuant to Rule 243(l), SCACR. The Court of Appeals granted certiorari. Following briefing and oral argument, the Court of Appeals reversed the post-conviction relief court's denial of relief and remanded the matter for a new trial. Weldon v. State, Op. No. 5867 (S.C. filed Oct. 6, 2021 (Howard Adv. Sh. No. 35 at 50). In reversing the post-conviction relief court and granting Weldon relief, the Court of Appeals found Weldon met his burden of establishing he was entitled to relief because trial counsel did not present his mother and sister as alibi witnesses where trial counsel did not specifically articulate a trial strategy on the record. This Court further found Weldon established the result of his trial would have been different had trial counsel presented these purported alibi witnesses to satisfy the prejudice requirements for a grant of post-conviction relief.

Pursuant to Rule 221(a), SCACR, the State petitioned for rehearing, which was denied. The State now petitions for certiorari pursuant to Rule 242, SCACR.

Summary of Factual Background Presented at Trial

Small businessman Edward "Slick" Gibbons (Victim) was about to leave for his auto parts store on the morning of May 15, 2010, a Saturday, when three men hidden in his carport jumped him, beat him, robbed him, and stole his El Camino. (App. 83-146).

Victim testified he was leaving his house around 6:00 to 6:30 a.m. when he bent over to put on his shoes outside his garage. (App. 89-90). Victim was jumped by three men who were hiding in the storage room in his carport. (App. 90). They took approximately $840 and beat him, asking where the rest of the money was. (App. 95, 100). The men sat on him, kicked him, stomped on his chest and stomach, and wrapped duct tape around his face. (App. 96-100). Victim saw one

man with what he thought was a gun and he heard one of the robbers ask if they were going to shoot him. (App. 96-100). He heard the men leaving and rose to see what kind of car they had. One of the robbers said, "He's up, he's up," and a robber jumped out of the back of Victim's El Camino, beat Victim back down, and knocked him out. (App. 102, 106-107).

Victim testified his El Camino was worth approximately $6,500. (App. 110). He travelled by ambulance to the Clarendon Memorial Hospital and by helicopter to Columbia where he was in intensive care for a week and a rehabilitation center for another week. (App. 113). Victim's hip was bruised and the "bone where the hip hooks together" was cracked. (App. 101). Victim testified his doctor asked him if wanted to replace the hip or let it heal. (App. 102). His doctor told him he was "going to always limp. But [the doctor] said that's your option and [Victim] told him just to try to let it heal because I knew I had to go back to work." (App. 102).

Victim's wife, Kay Gibbons, testified she was in bed that morning when she heard the doorbell ring. She opened the door to find her husband bloodied and wrapped in tape, struggling to stand. (App. 148-149). She called her daughter, who called 911 and came to their house. An ambulance and law enforcement arrived, and Victim was taken to the hospital. (App. 150-151).

Cecil "Mac" Eaddy, Jr., testified he found the El Camino in the road near his farm. (App. 169). The car was running, and the passenger door was open at 6:40 a.m., a mile and half from Victim's store. Eaddy knew Victim and knew it was Victim's car. (App. 172). Eaddy pulled the car off the road and took the keys to Victim's store. An employee went with him back to the car to retrieve it. (App. 172).

Investigator Ricky Richards from the Clarendon County Sheriff's Office testified he processed the vehicle after it was found. (App. 180-181). Investigator Richards found fingerprints on the rear quarter on the driver's side of the car and on the driver's side door jamb. (App. 181-

183). He sent the prints to Marie Hodge, a fingerprint technician with the Sumter Police Department. (App. 181-183). Hodge testified she examined the latent print sent by Investigator Richards and determined it matched Co-Defendant Pearson's right thumb. (App. 187; 191, 194-195.)

Investigator Thomas "Lin" Ham, also from the Clarendon County Sheriff's Office, testified he was called to the scene on May 15, 2010. (App. 193). He knew Victim all his life. (App. 193). Ham testified that his assignment was to assist and oversee Investigator Kenneth Clark's investigation because Clark was a new investigator. (App. 194). Ham identified photographs from the crime scene showing duct tape, blood spots, and Victim at the hospital with the tape still wrapped around his head. (App.197). After removing the tape from Victim, Ham testified that he put it in a bag and turned it over to Investigator Clark as evidence so it could be taken to SLED and processed. (App. 198)

Co-defendant Pearson was interviewed by Investigator Kenneth Clark. (App. 205). Investigator Ham testified he was present for the interview. (App. 205). Pearson adamantly denied knowing Victim and claimed he did not know where Victim lived. (App. 206). He claimed to never have been to Victim's home or place of business and never came into contact with Victim's vehicle. (App. 206).

Investigator Kenneth Clark testified Victim described the robbers as three black males, of mid-age and medium build, who wore dark clothing and masks. (App. 258-259). The first big break was a phone call about three individuals that were spending a lot of money. (App. 262) Investigator Clark testified he interviewed Co-defendant Pearson and he denied being around Victim's property or vehicle. (App. 265.)

A month later, law enforcement was notified by the South Carolina Law Enforcement Division (SLED) of a positive "hit" to DNA recovered from the duct tape that had been wrapped around Victim's head. (App. 271). The DNA profile identified Weldon. (App. 271-72). Investigator Clark subsequently interviewed Weldon, who prior to the DNA match, had not been a suspect. (App. 272). Weldon denied knowing Victim, denied being around the scene, denied knowledge of the robbery, and denied knowing Pearson. (App. 273). Weldon was subsequently arrested, and law enforcement obtained a DNA sample from him. Testing once again matched Weldon's DNA to the DNA left on the duct tape wrapped around Victim's head. (App. 275).

Investigator Clark discovered from landscaper Richard Gamble that Pearson had been to Victim's house when he did landscape work for Victim. (App. 276-277). While Pearson and Weldon claimed to not know each other, Investigator Clark discovered that both men worked at the South Carolina Vocational Rehabilitation Center (Voc Rehab) in Sumter for an overlapping period. (App. 278-279).

John Hornsby testified that Pearson and Weldon worked at Voc Rehab during an overlapping period of December 9-12, 2008. (App. 337-339). He described the facility as a metal warehouse about 150 feet by 250 feet facility with an open floor plan split into two sides. About 25 people work at the facility from 8:30 a.m. to 2:30 or 3:00. (App. 337-339).

Gamble testified he took Pearson with him to Victim's house to do yard work. Pearson worked with Victim doing landscaping projects at Victim's home and next door, where Victim's son lived. Gamble estimated they worked at both homes for about a week during the spring of 2010. Gamble recalled that Pearson went into Victim's garage to retrieve tools when working. (App. 324-328).

During trial, the State presented SLED Forensic Scientist Catherine Leisy, who testified regarding the DNA match between duct tape removed from Victim's head and Weldon. She testified the probability of randomly selecting an unrelated individual having a profile matching the major contributor to the mixture was approximately 1 in 670 billion. (App. 347-348, 352).

STANDARD OF REVIEW

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the post-conviction relief judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the post-conviction relief judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Certiorari is warranted to review the Court of Appeals' erroneous reversal of the post-conviction relief court and grant of a new trial to Respondent Victor Weldon on the basis that Weldon established trial counsel was constitutionally ineffective for failing to present his mother and sister as alibi witnesses because the Court of Appeals applied an improper standard of review requiring trial counsel to articulate a trial strategy to refute a finding of ineffectiveness and erred in determining the two witnesses constituted an alibi defense when neither met the legal definition of an alibi.

In reversing the post-conviction relief court and granting Weldon a new trial, the Court of Appeals erroneously found Weldon met his burden of establishing he was entitled to relief because trial counsel did not present his mother and sister (neither of whom can testify as to Weldon's specific whereabouts with certainty during the time of the crime) as alibi witnesses where trial counsel did not specifically articulate a trial strategy on the record. The Court of Appeals further found Weldon established the result of his trial would have been different had trial counsel presented these purported alibi witnesses to satisfy the prejudice requirements for a grant of post-conviction relief.

Pursuant to Rule 242, SCACR, the State petitions this Court to review the Court of Appeals' decision because the Court of Appeals applied an improper standard of review requiring trial counsel to articulate a trial strategy on the record to refute claims of ineffectiveness levied against him in direct contrast to Strickland and its progeny which require that a favorable presumption be given to counsel's performance. The Court of Appeals also erroneously granted relief where Weldon failed to present evidence of an alibi defense based on an inability of his mother and sister to provide testimony that would have made it physically impossible to commit the crime. This Court should grant certiorari and ultimately reverse the Court of Appeals and reinstate the post-conviction relief court's denial of relief.

Weldon, like every other criminal defendant tried in South Carolina, has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

As the applicant in a post-conviction relief action, Weldon bore the burden of proving his allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813,

814 (1985); Rule 71.1(e), SCRCP. The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a post-conviction relief caapplicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. Id.

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " Dunn v. Reeves, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410

(2021) (alteration in original) (quoting Burt v. Titlow, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen*." Id. (alteration in original) (emphasis added) (quoting Titlow, 571 U.S. at 23–24).

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109–10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688–89; see id. at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among

'countless' strategic options." Dunn, 594 U.S. ___, 141 S. Ct. at 2410 (quoting Harrington, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." Id. (quoting Harrington, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied Strickland's deferential standard.

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see id. at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added). "An error by counsel, even if professionally

unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. Moreover, the South Carolina Supreme Court 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. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory.").

Appellate courts such as this Court, in turn, must give great deference to the post-conviction relief court's findings of fact and must affirm these findings if there is any evidence in the record to support them. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). However, pure questions of law are reviewed de novo and appellate courts will reverse the post-conviction

relief court's decision only if its decision is controlled by an error of law. Id.; Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). The post-conviction relief court's findings regarding prejudice are based on a thorough review of the record as a whole, and, accordingly, are inherently fact-based and must be afforded deference by a reviewing appellate court. See Briggs v. State, 421 S.C. 316, 334, 806 S.E.2d 713, 723 (2017) ("The PCR court found the case 'came down to the victim's believability and credibility.' The PCR court found the most damaging testimony to Briggs . . . was not reliable because [the witnesses'] 'credibility is highly suspect.' Finally, the PCR court found 'there is a reasonable probability that the result of the Applicant's trial would have been different' if Singleton had not allowed Arroyo-Staggs to improperly bolster the victim. Giving to the factual findings by the PCR court the deference we are required by law to give, we affirm the court's finding that Briggs proved prejudice, satisfying the second prong Strickland.").

Thus, for the Court of Appeals to properly reverse the post-conviction relief court's denial of relief and remand for a new trial, the record must be devoid of *any* evidence supporting the post-conviction relief court's finding Counsel was not constitutionally ineffective in declining to present Weldon's mother and sister as alleged alibi witnesses. In its opinion, the Court of Appeals repeatedly pointed to Counsel's testimony that he could not remember why he did not call the supposed alibi witnesses at trial as evidence to support the Court of Appeals' assertion that trial counsel's failure to do so was not based on trial strategy. However, the Court of Appeals disregarded evidence in the record to support the post-conviction relief court's findings that this decision was based on strategic considerations that can be read from the record as a whole, and trial counsel himself is not required to articulate or confirm any particular strategic reason for his decision. Harrington, 562 U.S. at 109-10 ("Although courts may not indulge '*post*

hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions . . . neither may they insist counsel confirm every aspect of the strategic basis for his or her actions." (internal citations omitted)).

Moreover, the Court of Appeals failed to properly afford the required deference to trial counsel's performance. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. For this reason, Strickland "calls for an inquiry into the *objective reasonableness* of counsel's performance, not counsel's subjective state of mind." Richter, 562 U.S. at 110 (emphasis added). "Surmounting Strickland's high bar is never an easy task." Padilla, 559 U.S. at 371. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Richter, 562 U.S. at 105. Essentially, in order for the Court of Appeals to reverse the PCR court's decision and grant Weldon a new trial under Strickland, the Court of Appeals must have found that *no reasonably competent attorney* could have decided not to present the testimony from Weldon's mother and sister. Such a finding is not supported by the record.

Trial counsel was not deficient for failing to present Weldon's mother and sister as witnesses to support an alibi defense because Weldon cannot establish that no competent attorney would have elected not to present these witnesses. Initially and crucially, the testimony from Weldon's mother and sister does not make it physically impossible for Weldon to have committed the crime, and, therefore, it does not establish an alibi defense as a matter of law. Moreover, there were inherent credibility issues in presenting alibi testimony from family members, particularly when the testimony was riddled with inconsistencies. The record is replete with evidentiary

support for the post-conviction relief court's finding trial counsel was not constitutionally ineffective, despite trial counsel's inability to recall or articulate a particular strategic reason for not presenting Weldon's mother or sister as witnesses at trial.

To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). "[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." Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995).

In this case, Weldon's mother's testimony wholly failed to establish an alibi for Weldon. She merely testified she saw Weldon at home the night before the crime before she went to bed, and then again when she woke up at 8 a.m. on the morning of the crime, notably after the crime had been committed. (App. 620). Testimony at trial established the crime took place between 6:15 a.m. and 6:30 a.m. that morning. Accordingly, Weldon's mother testifying that she saw him the evening before the crime and then more than an hour after the crime does not create a physical impossibility for Weldon to have been the perpetrator.[1] Because Weldon's mother's testimony does not establish an alibi under South Carolina law, Counsel cannot have been deficient in not presenting this testimony to the jury as a matter of law.

Weldon's sister's testimony comes closer to that of an alibi but still fails to establish the physical impossibility for Weldon to have committed the crime, and accordingly, also fails to

[1] The crime took place on Country Club Drive in Manning, South Carolina. App. pp. 147, 162, 251. Testimony at the evidentiary hearing established Petitioner lived on Country Springs Drive in Sumter, South Carolina, at the time of the crime. (App. 622). According to Google maps, Petitioner's home was approximately fifteen miles or twenty-five minutes by car from the crime scene.

establish an alibi defense as a matter of law. Incredibly, Weldon's sister testified she woke up at 5:00 a.m. on the day of the crime and went into Weldon's room to sneak a cigarette from his girlfriend. (App. 630). She stated Weldon and his girlfriend were in his room asleep at that time. (App. 629). She then opened the door and went outside to smoke the cigarette, and she saw Weldon peeking at her out the window. (App. 630). Although she asserted Weldon was at the house between 6 a.m. and 7 a.m. that morning, she acknowledged she did not see Weldon again until around 9 a.m. when he opened the door to his room to let his cats out. (App. 630-31). She did not provide any details as to how she was certain Weldon had not left the house, and moreover, her testimony admits Weldon had a way out of the house other than by using his bedroom door – the window he allegedly peeked through while she was smoking outside. (App. 630).

Notably, the sister's testimony – that she did not see Weldon again after 5 a.m. until 9 a.m. – conflicts with her mother's testimony that she saw Weldon already awake at the house at 8 a.m. that morning. And, both Weldon's mother's testimony and Weldon's sister's testimony conflict with Weldon's *own* testimony that he woke up and spoke to his sister around 6:45 a.m. and then saw his mother when she returned from work that morning at 7:15 a.m.[2] (App. 605). His sister testified she remembered the events of the morning so well because it was all the family talked about after her brother's arrest, yet when given the chance, she failed to mention that she actually saw and spoke to her brother at their home at the exact time the crime was being committed as Petitioner now purports in his testimony. (App. 631). As the post-conviction relief court found this testimony was inherently unreliable and incredible, noting the alibi witnesses' stories "did not exactly match up" and contained "discrepancies." (App. 667). This Court must give great

[2] In yet another discrepancy, Weldon's mother testified she did not work the overnight shift the night prior to and into the morning of the crime. (App. 619, 623)

deference to the post-conviction relief court's findings regarding the credibility of the witnesses and the plausibility of their version of events. Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018) ("[W]e afford great deference to a PCR court's credibility findings."); Briggs, 421 S.C. at 334, 806 S.E.2d at 723 ("Giving to the factual findings by the PCR court the deference we are required by law to give, we affirm the court's finding that Briggs proved prejudice, satisfying the second prong Strickland.")

The credibility issue created by the conflicting testimonies is further compounded by the fact that family members are already biased witnesses. "[A]libi testimony by a defendant's family members is of significantly less exculpatory value than the testimony of an objective witness." Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir. 1995); see also Maxwell v. Gilmore, 37 F.Supp.2d 1078, 1089 (N.D. Ill. 1999) ("But Maxwell's attorneys may well have thought – and surely reasonably so – that Maxwell's mother and girlfriend would not be credible alibi witnesses, given their obvious personal interest in his acquittal (certainly less of a problem with the presumably more neutral girlfriend's mother)"); Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) ("As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias"). Significantly, Weldon's mother's and sister's testimony established that a presumably more neutral witness was present at the house that morning—Weldon's then-girlfriend, Rell. (App. 618, 629-30). And crucially, according to the sister, Rell was physically present in the room with Weldon during the time period in question. (App. 629-30). Yet, Weldon did not present Rell as a witness at the evidentiary hearing and offered no explanation for his failure to do so. See generally App. 595-662. The absence of her testimony at trial would surely have been noticed by both the jurors and the State, and Weldon would be left without any means of explaining her absence.

Importantly, as neither Weldon's mother nor his sister create a legal alibi for Petitioner, his case is not akin to Martin v. State. 427 S.C. 450, 832 S.E.2d 277 (2019). In that case, Martin alleged trial counsel was constitutionally ineffective for failing to elicit the testimony of Martin's mother that she dropped Martin off at a bus stop in Atlanta around 11:15 to 11:30 a.m. on the morning of the robbery, which occurred at a bank in North Augusta at 12:20 p.m. Id. at 453-54, 832 S.E.2d at 279. Although Martin's mother testified at trial, trial counsel failed to question her about the precise time of the drop off even though he had notes in his file specifically recording the time. Id. Because North Augusta is at a minimum one-hundred and fifty miles, or two hours by car, away from Atlanta, the mother's testimony, if believed by the jury, would have provided Martin with a complete alibi which made it physically impossible for him to have committed the crime. Id. at 454, 832 S.E.2d at 279. Moreover, unlike in Weldon's case, there was no physical evidence linking Martin to the robbery; the only other evidence against him was the testimony of codefendants, all of whom were friends with each but barely knew Martin, who acknowledged they had previously lied to law enforcement in an effort to exonerate themselves and that they were hoping to receive a lesser sentence in exchange for testifying against Martin. Id. at 456, 832 S.E.2d at 280.

Instead, Petitioner's case is more similar to Boseman v. Battle, in which the Fourth Circuit reversed the district court and found "no error in the PCR court's conclusion trial counsel exercised reasonable professional judgment regarding his decision not to present alibi witnesses." 364 Fed. Appx. 796, 810 (4th Cir. 2010). In that case, Boseman was convicted of murder in the shooting death of a pizza deliveryman. Id. at 797. The State presented evidence at trial establishing the critical period of events occurred between 9:15 p.m. and approximately 10:30 p.m. on the night of the murder. Id. at 797-98, 799-800. At the PCR hearing, Boseman contended his trial counsel was

constitutionally ineffective for failing to present a supposed alibi witness, his brother, Walter, who testified he was with Petitioner at a different location from 8:30 p.m. to 10:30 p.m. Id. at 800. Boseman also introduced evidence of a report prepared prior to trial by trial counsel's investigator which stated, in relevant part, that Boseman was dropped off with Walter at 8:30 p.m. on the night of the murder, as Walter and his friends were leaving to go to a convenience store to buy beer, and Walter then left the house between 10:00 and 10:30 p.m. to return to Orangeburg. Id. at 800-01.

In analyzing the supposed alibi, the Fourth Circuit explained,

> Boseman and the district court both assert the Rickborn report states that Boseman was dropped off at his house around 8:30 p.m. and that Walter, his friends, and Boseman were together from that point in time until Walter left between 10:00 and 10:30 p.m. An equally fair reading, if not a more compelling reading, of the report's actual language is that Walter was with Boseman for undefined periods of the evening, Boseman was dropped off at an undisclosed location at 8:30 p.m., and that Walter and his friends were either out buying beer or at the house until they left around 10:00 p.m. Where Boseman was during that time period is simply not determinable from the Rickborn report. The report does not set forth the straightforward complete alibi that the district court erroneously credits to it.

Id. at 808. The Fourth Circuit ultimately reversed the district court and upheld the PCR court's finding trial counsel was not ineffective for declining to call Walter at trial, despite having him subpoenaed and present to testify, where "the evidence support[ed] trial counsel's statements during the PCR hearing that he investigated and considered an alibi defense" but ultimately decided not to pursue it because of "the incomplete nature of the alibi" where "the principal alibi witness was a family member," and "presenting an alibi defense would forfeit the right to make the last argument to the jury." Id. at 810.

Likewise, in Weldon's case, Counsel clearly investigated the possibility of presenting an alibi defense prior to trial, as he interviewed Weldon's mother, sister, and girlfriend, gave notice of intent to present an alibi defense, subpoenaed Weldon's mother and sister for trial. (App. 638-39, 641, 649, 657). Despite Counsel's hindsight testimony that he should have presented the alibi

witnesses, he conceded presenting the conflicting testimony of all three witnesses would actually have been harmful to the defense. (App. 649-50). Counsel stated instead, he believed the defense would have been helped had he presented only one witness. (App. 656-657). He also acknowledged, however, this strategy would have opened the door for the State to present the other conflicting witness or witnesses. (App. 656-57). Moreover, Counsel testified repeatedly his defense focused on retaining the last closing argument and challenging the DNA evidence, the sole piece of evidence linking Petitioner to the crime, which he did in several ways: (1) by moving to exclude it prior to trial; (2) by thoroughly cross-examining the State's expert; (3) by making a directed verdict motion, arguing the DNA match on the duct tape alone was insufficient to send the case to the jury based on previous South Carolina cases; and (4) by attacking its significance in closing argument. (App. 650-51).

Thus, in Weldon's case, particularly in light a valid alternative trial strategy of attacking the DNA evidence, a reasonably competent attorney could decide not to present any alibi testimony at all rather than introduce only partial alibi testimony from biased witnesses which only served to highlight the existence of an absent witness who allegedly could have established a complete alibi. Therefore, trial counsel was not constitutionally ineffective under Strickland.

For those reasons, the post-conviction relief court properly determined Weldon failed to meet his requisite burden of proof by failing to establish that no competent attorney would have elected no to present the testimony of Weldon's sister and mother in furtherance of a defense that did not constitute an alibi as a matter of law in light of other strategic considerations in the record. The Court of Appeals erred in reversing the post-conviction relief court's denial of relief. Certiorari is warranted to correct the Court of Appeals' incorrect application of the post-conviction relief standard and legally erroneous grant of relief to Weldon. Therefore, the State asks this Court to

grant certiorari and ultimately reinstate the lower court's denial of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for writ of certiorari and reverse the Court of Appeals' reversal of the post-conviction relief court's denial of relief. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

BY: *s/Megan Harrigan Jameson*
MEGAN HARRIGAN JAMESON

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

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