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S.C. SUPREME COURT

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals

The Honorable Jocelyn Newman, Post-Conviction Relief Judge

The Honorable R. Ferrell Cothran, Jr., Trial Judge

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

VICTOR WELDON,

RESPONDENT,

v.

PETITIONER.

STATE OF SOUTH CAROLINA

APPENDIX

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was found in a parking lot in Johnson City, Tennessee and there was evidence the defendant telephoned a friend from 10 miles away from the car. The defendant's fingerprints were found inside the car. The Supreme Court reasoned the state only proved that the defendant was in the BMW on the last day that Cox was seen alive, and that was insufficient evidence to make this a jury question.

Similarly, in State v. Mitchell, 341 S.C. 406, 409 S.E.2d 126 (2000) a home was burglarized and two guns were stolen. Mitchell had been a guest at their several times. The day after the burglary was reported, investigators found a fingerprint on a screen leaning up against the house which matched Mitchell. *Id.* Mitchell was arrested and convicted of burglary; during his trial, Mitchell moved for a directed verdict, which was denied by the circuit court. *Id.*

The Supreme Court noted that the fingerprint was the only evidence linking Mitchell to the burglary. The Court wrote that the evidence presented was entirely circumstantial. “The fact that [Mitchell's] fingerprint was on a screen that was propped up against the house does not prove entry where [Mitchell] had been in and around [Mathis's] house at least three times prior to the burglary.” *Id.* The State did not produce any evidence concerning whether the screen was on the window when the window was broken or when the screen had been removed. *Id.*” Accordingly, the Supreme Court agreed with this Court that Mitchell was entitled to a directed verdict.

In this case there was evidence that Pearson did yard work for the victim, and Pearson had been in his garage. The state tried to make much of the fact that appellant and Pearson knew each other. The state's witnesses admitted there was not any way too date when Pearson's fingerprint was placed, and no way too similarly date when appellant's

DNA got on the duct tape -- or how. If appellant's sweat or saliva or whatever else could cause a DNA "match" was transferred by Pearson onto the duct tape then appellant risked being convicted on this one false piece of seemingly damning evidence.

Unlike Mitchell, there was no evidence appellant had ever been to the victim's house. To the extent that cuts in the state's favor here in distinguishing Mitchell, it also differentiates appellant's case from the state's alleged case against Pearson as for notice, opportunity and prior presence in the victim's house and garage. The Supreme Court granted a directed verdict in yet another case where the evidence was stronger against the defendant than here in State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011).

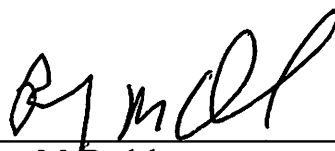
In Odems the defendant was in a car with the stolen property, fled from the police, and lied to attempt to have a woman cover from him. The Court nonetheless said this very suspicious behavior was not sufficient for the case to go to the jury.

Appellant was entitled to a directed verdict of acquittal. State v. Mitchell; State v. Arnold; State v. Bostick; State v. Schrock; State v. Odems, supra.

CONCLUSION

By reason of the foregoing arguments, a directed verdict of acquittal should be issued.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
Ralph F. Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

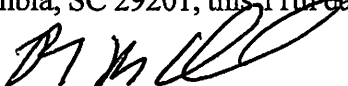
VICTOR WELDON,

APPELLANT

APPELLATE CASE NO. 2012-212563

CERTIFICATE OF SERVICE

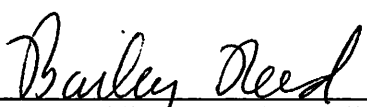
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of March, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of March, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County
Ralph F. Cothran, Circuit Court Judge

THE STATE,

Respondent,

vs.

VICTOR WELDON,

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FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

DNA evidence established substantial circumstantial evidence sufficient for a reasonable juror to find Appellant guilty as one of the three perpetrators of the brutal burglary, armed robbery, kidnapping, and grand larceny.

STATEMENT OF THE CASE

Appellant Weldon was indicted by the Clarendon County Grand Jury for first degree burglary, armed robbery, kidnapping, and grand larceny. Weldon was tried with his co-defendant, Michael Pearson, before a jury on May 14-18, 2012. Both defendants were found guilty as charged. The Honorable Ralph F. Cothran sentenced Weldon to thirty years' imprisonment for burglary and armed robbery, to be served consecutively. In addition, Weldon was sentenced to concurrent sentences of twenty years' imprisonment for kidnapping and five years' imprisonment for grand larceny.

STATEMENT OF FACTS

Small businessman Edward “Slick” Gibbons (Victim)¹ 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. ROA. III pp. 8-9.

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. Victim was jumped by three men who were hiding in the storage room in his carport. ROA. III pp. 8-9. They took approximately \$840 and beat him, asking where the rest of the money was. One of the men called him by his nickname. The men sat on him, kicked him, stomped on his chest and stomach, and wrapped duct tape around his face.² 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 Victim. 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. ROA. III pp. 14-19; pp. 24-26; p. 162.

Victim testified his El Camino was worth approximately \$6,500. ROA. III p. 29. 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. ROA. III, pp. 31-32. Victim’s hip was bruised and the “bone where the hip hooks together” was cracked. Victim testified his doctor asked him if wanted to replace the hip or let it heal. His doctor told him he was “going to always limp. But [the doctor] said

1 Victim owned Clarendon Auto Parts, a business he operated for forty-five years. His store is open six days a week and closed on Sunday, so naturally, he works six days a week. ROA. III, pp. 2-4; pp. 7-8.

2 All three robbers were engaged in the lynching. As Victim explained: “[O]ne jumped on top of me and sat across my chest and was beating me there. And then one was sitting across my legs and then the bigger guy was kicking me in the side and stomping me in the chest” ROA. III, p. 15, lines 9-13.

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." ROA. III p. 20, line 23 – p. 21, line 3.

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. ROA. III pp. 64-66. 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. ROA. III pp. 66-68.

Cecil "Mac" Eaddy, Jr., testified he found the El Camino in the road near his farm. 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. 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. ROA. III, pp. 78-83.

Investigator Ricky Richards, from the Clarendon County Sheriff's Office, testified he processed the vehicle after it was found. Investigator Richards found fingerprints on the rear quarter on the driver's side of the car, and also on the driver's side door jamb. He sent the prints to Marie Hodge, a fingerprint technician with the Sumter Police Department. ROA. III pp. 90-92. Hodge testified she examined the latent print sent by Investigator Richards and determined it matched Pearson's right thumb. ROA. III p. 131, p. 135, pp. 138-139.

Investigator Thomas "Lin" Ham, also from the Clarendon County Sheriff's Office, testified he was called to the scene on May 15, 2010. He knew Victim all his life. ROA. III, p. 103. Investigator Ham identified photographs from the crime scene depicting the black duct tape that was used and Victim at the hospital while duct tape was still wrapped

around his head. ROA. p. 107. Ham wore gloves to assist the nurse in removing the duct tape from Victim. The tape was put in a bag as evidence for SLED to process. ROA. III, pp. 108-109.

Pearson was interviewed by Investigator Kenneth Clark. Investigator Ham testified he was present for the interview. Pearson adamantly denied knowing Victim and claimed he did not know where Victim lived. He claimed to never been to Victim's home or place of business and never came into contact with Victim's vehicle. ROA. III pp. 115-116.

Investigator Kenneth Clark testified Victim described the robbers as three black males, of mid-age and medium build, who wore dark clothing and masks. ROA. IV pp. 160-162. Investigator Clark testified as to law enforcement's diligent efforts to find the perpetrators of the heinous crime. The first big break was a phone call about three individuals that were spending a lot of money. ROA. IV p. 164.

Investigator Clark testified he interviewed Pearson and Pearson denied being around Victim's property or vehicle. ROA. IV p. 167 A month later, a positive DNA hit was found which made Weldon a suspect. ROA. IV p. 173.

Investigator Clark subsequently interviewed Weldon, who prior to the DNA match had not been a suspect. Weldon denied knowing Victim, denied being around the scene, and denied knowledge of the robbery. He also claimed not to know Pearson. ROA. IV pp. 174-175. Weldon was arrested and a DNA sample was taken. Testing once again matched Weldon's DNA to the DNA left on the duct tape wrapped around Victim's head. ROA. IV pp. 176-177.

Investigator Clark discovered from landscaper Richard Gamble that Pearson had

been to Victim's house when he did landscaping work for Victim. ROA. IV pp. 178-179. 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 of time. ROA. IV pp. 180-181.

John Hornsby testified that Pearson and Weldon worked at Voc Rehab during an overlapping time period of December 9-12, 2008. 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. ROA. IV pp. 234-235.

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. ROA. IV pp. 221-225.

The duct tape removed from Victim's head was tested and found to be a one in 670 billion match with Weldon's DNA. ROA. IV pp. 244-245; p. 249.

Weldon's directed verdict motion was based solely on whether the State provided substantial circumstantial evidence to establish his identity as the perpetrator. Judge Cothran found: "The fact that [Weldon's DNA] is on the victim's head in his garage that morning gets to the jury." ROA. p. 282, lines 2-4.

ARGUMENT

DNA evidence established substantial circumstantial evidence sufficient for a reasonable juror to find Appellant guilty as one of the three perpetrators of the brutal burglary, armed robbery, kidnapping, and grand larceny.

Duct tape wrapped around Victim's head by one of the robbers contained Weldon's DNA. This evidence is some of the strongest circumstantial evidence possible to establish Weldon's presence and participation in the robbery. The trial court ruled: "The fact that [Weldon's DNA is] on the duct tape on the victim's head in his garage that morning gets to the jury." ROA. IV p. 282, lines 2-4. The trial court's ruling is not error as the DNA evidence is more than sufficient to establish Weldon's identity as one of the robbers.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 426 S.E.2d 317 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443

U.S. 307 (1979)).

The United States Supreme Court noted the following:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts.**

Jackson, at 319 (second emphasis added).

Our Supreme Court recently articulated the following concerning the standard of review:

The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to the guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)) (citations and internal quotations omitted).

This is consistent with the United States Supreme Court's observation concerning circumstantial evidence:

Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) *cited with approval in Jackson*, at 317 n.9.

“The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes.” See State v. Lane, 406 S.C. 118, 749 S.E.2d 165, 167 (Ct. App. 2013). Weldon’s DNA is on the duct tape cruelly wrapped around Victim’s head during the robbery. The most obvious inference from this evidence is that Weldon was one of the three robbers atop Victim during the crime. Hepburn and Cherry advise that the trial court does not need to find the evidence infers guilt to the exclusion of any other reasonable hypothesis.³ This Court does not need to pursue alternate theories of how Weldon’s DNA ended up on the duct tape. The most obvious inference readily supports the charges going to the jury.

Sticking to the custom of appellants as of late, Weldon argues his directed verdict case by arguing the evidence was “stronger” in other cases where the Supreme Court has reversed a conviction based on the failure to grant a directed verdict. This analysis misses the point. The determination is whether evidence supports each and every element of the offense, including the element of identity. Lane, supra. The presence of Weldon’s DNA on duct tape left on Victim’s head **during** the commission of the crime establishes substantial circumstantial evidence that he was one of the three robbers. In the cases Weldon relies on, there was a lack of evidence placing those appellants at the crime scene

3 The State submits Weldon’s alternate explanation is not even a reasonable hypothesis: “. . . appellant’s sweat or saliva or whatever else could cause a DNA ‘match’ was transferred by **Pearson** on to the duct tape . . .” (Br. of App. p. 12) (emphasis added). The State is not sure how an accidental transfer or otherwise from Pearson could place Weldon’s DNA on the duct tape wrapped around Victim’s head during the commission of the crime. Such a transfer would not even be inconsistent with guilt.

during the commission of the crime. Not so in the present case.

In State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), Martin borrowed his girlfriend's car the day before the murder and a similar car was seen near the murder scene, around the time of the murder. By the bar where Martin and his co-defendant picked up Martin's girlfriend, a restaurant manager found several bags of garbage containing items belonging to the victim and latex gloves similar to those Martin's girlfriend used. Martin told his girlfriend "some shit happened" and his co-defendant added "someone may have died tonight" when asked why they were late picking her up from the bar. Id., 340 S.C. at 600-01, 533 S.E.2d at 573-74.

In finding the evidence was insufficient to constitute substantial circumstantial evidence of Martin's guilt, the Supreme Court noted the following:

Most significantly, the State's evidence failed to place either defendant inside the apartment. The Solicitor himself summed up the State's failure of proof by confessing to the trial judge "we don't know which person actually held [Victim's] head in the pan of water" and "Your Honor, the whole point is we don't know if they acted in concert." Put another way, unlike the usual accomplice liability case or aiding and abetting situation, here the State had no proof that either defendant held Victim's head under water and the State had no proof that the defendants were working together to bring about the Victim's death.

Id., 340 S.C. at 602-03, 533 S.E.2d at 574-75.

Further, the Supreme Court then compared Martin to State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984), as follows:

In Schrock, the State presented evidence the defendant was in the area of the murders and that footprints at the scene of the crime were similar to footprints found in the area which Schrock admitted he had been walking. In this case, the

black car seen at the apartment is not identified as [girlfriend's] car. Like the footprints in Schrock, the possibility that it was the same car, without any other evidence placing the defendants at the scene is not enough evidence to place Defendant inside Victim's apartment.

Id., 340 S.C. at 602-03, 533 S.E.2d at 574-75.

While the State's admissions at trial, as noted in the Martin opinion, expose the possibility of Martin being not present or merely present during the murder, in the instant case, the reasonable inference is Weldon was present and participating in the crime. The one piece of evidence, Weldon's DNA on the duct tape, accomplishes far more than the various evidence presented in Martin to establish Weldon's presence and participation.

Martin's analysis of Schrock also exposes how the evidence in the present case is stronger than Schrock. Schrock admitted being **near** the crime scene and footprints were similar to footprints in the area where Schrock was walking. No evidence put Schrock at the crime scene. Schrock, supra. Weldon's DNA puts him at the scene **during** the robbery. Weldon's DNA left on the duct tape is far stronger evidence than the claim of "similar" footwear found in Schrock.

For similar reasons, Weldon's reliance on State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) is misplaced. In Bostick, the Supreme Court found the State failed to show substantial circumstantial evidence of guilt. The victim died of carbon monoxide poisoning from arson in her house, but she had also been struck by a blunt force object. Some of her items were found in a burn pile in the yard of Bostick's mother, but no evidence established Bostick's control over the burn pile. His mother's yard was about a quarter mile away from the victim's house. He had blood on a pair of jeans. However,

when analyzed for DNA evidence, the expert was able to exclude ninety-nine percent of the population and could not actually match the blood to the victim. Accelerant was used in the arson and on the items in the burn pile, and traces of fresh gasoline were found on Bostick's shoes. The Supreme Court noted no evidence established Bostick's control over the burn pile. Id.

In the instant case, unlike Bostick, DNA evidence matches Weldon and puts him at the crime scene. The burned items could not be linked to Bostick, but the duct tape is linked to Weldon. The instant case is both markedly different and stronger than Bostick.

The evidence presented in State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), likewise suffers from the inability to place the defendant at the murder scene. In that case, the murder victim, a doctor, had a clandestine affair, first with the State's chief witness and then with Arnold, in Savannah. The victim borrowed a BMW that day from a co-worker and then disappeared and was subsequently found dead off a road in Colleton County. The BMW was found abandoned in Tennessee. Arnold's thumbprint was found on a coffee cup lid found in the BMW. At the time these events occurred, Arnold travelled from Savannah to Tennessee, although the State failed to present any evidence to the jury of how close to where he was staying the abandoned car was found. Accordingly, the only evidence the jury had was that Arnold had a sexual relationship with the victim, he was in the BMW the day that the victim went missing, and he was in the same state where the BMW was found. Id., 361 S.C. at 389-90, 605 S.E.2d at 530-31.

The majority in Arnold noted that no evidence placed Arnold at the scene of the crime in Colleton County. Id., 361 S.C. at 390, 605 S.E.2d at 531. The evidence in the

present case puts Weldon at the scene of the crime during the crime. The evidence is far stronger in the instant case.

Weldon also compares this case to State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). In Mitchell, the appellant was present at the burglary victim's house on three prior occasions. The sole evidence regarding identity was a fingerprint found on a window screen propped up against the house near the broken window that was apparently the point of entry. No evidence was presented that the screen was on the window at the time the window was broken. The Supreme Court found "the fact that respondent's fingerprint was on a screen that was propped up against the house does not prove entry where respondent had been in and around the victim's house on at least three times prior to the burglary." Id., 341 S.C. at 409, 535 S.E.2d at 127.

Unlike Mitchell, no evidence suggests Weldon was ever present at Victim's house for an innocent reason. Further, because the DNA was on the duct tape wrapped around Victim's head during the crime, and not some random item outside the house, it is clear that the DNA was left during the commission of the crime.

In State v. Odems, 395 S.C. 582, 588, 720 S.E.2d 48, 51 (2011), the last case analyzed by Weldon, no evidence was presented that Odems was even at the scene of the burglary – instead he was found by law enforcement in a car with stolen goods and two burglars, and he fled. The burglars testified they picked Odems up at a gas station **after** the burglary. The burglars' prints were found on stolen items, but no fingerprints matching Odems were found. Id. Unlike Odems, Weldon is linked to the scene by DNA evidence. Evidence in this case is considerably stronger than the evidence presented in

Odems.

The trial court did not err in denying the motion for directed verdict because as the trial court aptly noted, Weldon's DNA was wrapped around Victim's head during the robbery. This evidence leads to the more than reasonable inference that Weldon was one of the three participants in this horrific crime.

CONCLUSION

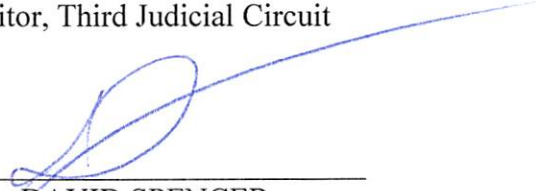
For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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March 7, 2014

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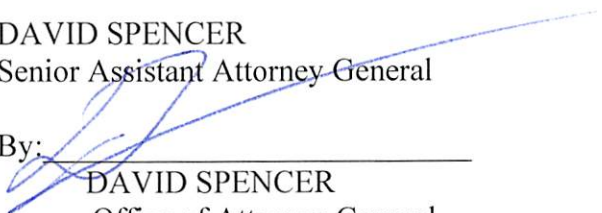
Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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VICTOR WELDON,

Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
Chief Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, S. C. 29211

I further certify that all parties required by Rule to be served have been served.

This 7th day of March, 2014.


NORMA BIGBEE
Legal Assistant

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

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Victor Weldon, Appellant.

Appellate Case No. 2012-212563

Appeal From Clarendon County
R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-463
Submitted November 1, 2014 – Filed December 17, 2014

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General David A. Spencer,
both of Columbia; and Solicitor Ernest Adolphus Finney,
III, of Sumter, for Respondent.

PER CURIAM: Weldon appeals his convictions for first-degree burglary, armed robbery, kidnapping, grand larceny, and possession of a weapon during the

commission of a violent crime, arguing the State failed to present substantial circumstantial evidence of his involvement in any of the crimes charged and, therefore, the trial court erred in denying his motion for a directed verdict. We affirm.¹

We find the trial court did not err in denying the motion for a directed verdict because the State presented substantial circumstantial evidence of Weldon's guilt. *See State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) ("On appeal from the denial of a directed verdict, [the appellate court] must view the evidence in the light most favorable to the State."); *id.* ("[I]f there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."). Here, Edward "Slick" Gibbons (Victim) was jumped by three men as he exited his garage. The three men robbed Victim of approximately \$840, beat him, and wrapped duct tape around his head. At trial, the State presented evidence that Weldon's DNA was found on duct tape removed from Victim's face following the burglary. This evidence constituted substantial circumstantial evidence of Weldon's guilt because the only logical explanation for his DNA being found on duct tape used in the Victim's robbery was that he participated in the robbery. *See State v. Schrock*, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) (stating the State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act"). Therefore, viewing the evidence in the light most favorable to the State, we find the DNA evidence constituted substantial circumstantial evidence of Weldon's guilt, and the trial court did not err in refusing to grant a directed verdict.

AFFIRMED.

WILLIAMS, GEATHERS, and McDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

VICTOR WELDON,

APPELLANT

APPELLATE CASE NO. 2012-212563

Appeal from Clarendon County

Ralph F. Cothran, Circuit Court Judge

Opinion No. 2014-UP-463

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, appellant requests rehearing because this Court may have overlooked the fact that appellant's DNA being found on duct tape, which is impossible to date, in a small community is *substantial circumstantial evidence* that appellant participated in the burglary, armed robbery, kidnapping and grand larceny. The trial judge and this Court both found that appellant's DNA being found on the duct tape *by itself* was sufficient to constitute *substantial circumstantial evidence* of appellant's guilt to this very serious crime which resulted in a sixty year prison term. DNA found on a piece of duct tape -- left at some point somehow -- invited a verdict based on speculation based on that single shred of evidence.

The victim in this case said he saw three black men in his garage with masks over their faces. R. 12, ll. 2-17. He was robbed of his wallet -- which he said had about eight hundred dollars in it -- and his money clip (with contained thirty to forty dollars). R. 13, l. 7 – 14, l. 19.

The victim was never able to identify the robbers. He was thrown to the ground “and one [of them] jumped on top of me and sat across my chest and was beating me there. And then one was sitting across my legs and the bigger guy was kicking me in the side and stomping me in the chest and . . .” R. 15, ll. 4-13.

He acknowledged he never saw a gun during the robbery. However, he speculated that one or more of the men could have been armed. At one point he saw something that could have been a weapon. He recalled: “They tried to put tape around you know, wrap it around my face . . . I kept kicking them - - I kept kick moving my legs and stuff. They never did get it wrapped around my feet so I could move. But they did get it around my face.” R. 17, l. 8 – 18, l. 22.

According to a police witness co-defendant Pearson “adamantly denied knowing Mr. Gibbons.” However, they stated their investigation led them to know that co-defendant Pearson had done yard work for Gibbons in the past. R. 115, l. 6 – 117, l. 18. Co-defendant Pearson’s fingerprints -- his right thumb actually -- was matched to Gibbons’ garage according to Marie Hodge of the Sumter Police Department. R. 124 l. 1 – 136, l. 18.

Appellant’s fingerprints were *not* found anywhere on the property owned by Gibbons. The state’s case against appellant was appellant’s DNA was found on the same duct tape that had been tied around the head of Gibbons. R. 176, l. 17 -180, l. 2. The state also put in evidence that appellant said he did not know co-defendant Pearson, but appellant and Pearson allegedly worked briefly for a Vocational Rehabilitation sponsored facility for a short time. Again, this was in

Manning, South Carolina and it appeared strangers were few. R. 174, l. 21 – 175, l. 17; R. 244, l. 17 – 245, l. 6.

Directed verdict motion

An extensive directed verdict motion was made in this case. Defense Counsel Knobloch for appellant cited State v. Mitchell, State v. Bostick and State v. Arnold in support of his argument that a directed verdict should be granted in this case. Defense counsel noted that the state's case against Arnold was actually stronger than the evidence in this case against appellant. Yet the Supreme Court direct a verdict of acquittal for Arnold. R. 271, l. 19 – 278, l. 3. In Arnold the defendant was placed in the victim's car in another state a short time after the crime. R. 277, l. 22 – 278, l. 3.

The judge here ultimately ruled “it's a number of facts they've (the jury) has got to struggle with. But I'm going to let them make that call.” The judge opined he thought there was more evidence in this case “than the Mitchell, Arnold, or Bostick cases.” R. 283, l. 10 – 285, l. 3.

Pearson was later granted a verdict of acquittal by this Court. State v. Pearson, 410 S.C. 392, 401-403, 764 S.E.2d 706, 711-712 (2014). The panel of this Court reasoned that the most damaging evidence against Pearson was his fingerprint being found on the victim's automobile. This Court nonetheless correctly reasoned that Pearson's fingerprint could have innocently been placed on the vehicle at an earlier time. Respectfully, nothing extremely consequential or substantial separates appellant's DNA being found on the duct tape from Pearson's fingerprint being found on the victim's car.

“Mere suspicion” of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). Again, the state's evidence against appellant is that his DNA at some point, somehow, got on the duct tape. From there the jury

was asked to speculate that because appellant worked with Pearson at the same place for a short time, that appellant knew him, and participated in this violent crime with him. Therefore, appellant should be convicted based on that circumstantial evidence.

Case Law

Where, as here, the state fails to produce substantial circumstantial evidence the defendant committed the particular crime the defendant is entitled to a directed verdict. State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002).

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court held the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her house on fire. The state's case was that Ms. Polite worked at her church and always brought the collection proceeds home on Sunday afternoon.

The state presented evidence that investigators found the decedent's personal items, burned by an accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick's *next door property*. Bostick's mother testified she never used accelerants in the family burn pile.

The Supreme Court noted that the evidence above as well as the fact Bostick had a pattern of gasoline on his shoes and *gasoline was the accelerant used to start the fire* at the Polite home. The Court held this evidence raised a suspicion that Bostick may have been guilty but it was not sufficient for the case to have gone to the jury.

Earlier, and similarly, in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) the Supreme Court held that the state's circumstantial evidence against Martin was insufficient to take the case to the jury. In Martin the defendant borrowed his girlfriend's car which was later placed near the scene of the murder.

On the morning after the murder the manager of a restaurant found several bags of garbage near the bar where defendant Martin and co-defendant Wilson picked up Martin's girlfriend late the prior night. Inside the trash were items belonging to the victim. Also found were inside were latex gloves similar to those Martin's girlfriend used to clean her dogs.

When Martin girlfriend's asked him why he and co-defendant Wilson were so late in picking her up from the bar, defendant Martin replied "some shit happened" and co-defendant Wilson added "someone may have died tonight."

The Supreme Court held that this circumstantial evidence was not substantial circumstantial evidence, and it was insufficient to take the case to the jury. The Court in Martin cited State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) which was a case which provided a strong suspicion of the defendant's guilt.

In State v. Schrock, Schrock admitted to the police that he smoked Marlboro brand cigarettes – the same brand as the cigarette butts found at the murder scene. However, a saliva test could not match a cigarette butt to the defendant. A similar footprint to Schrock's was found at the scene and nearby the scene. Schrock apparently later disposed of the clothes and shoes he had been wearing and he did not present an alibi. The Supreme Court held this evidence only raised a suspicion of Schrock's guilt and that he was entitled to a directed verdict.

In State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), the Supreme Court affirmed the holding of this Court that a directed verdict should have been issued. The victim, Cox, was shot, and his body found off of a road in *Colleton County*. On the last day Cox was seen alive he borrowed a friend's BMW Z3 to go to the dentist's office. *The car was found in a parking lot in Johnson City, Tennessee and there was evidence the defendant telephoned a friend from 10 miles away from the car. The defendant's fingerprints were found inside the car.* The Supreme Court

reasoned the state only proved that the defendant was in the BMW on the last day that Cox was seen alive, and that was insufficient evidence to make this a jury question.

Similarly, in State v. Mitchell, 341 S.C. 406, 409 S.E.2d 126 (2000) a home was burglarized and two guns were stolen. Mitchell had been a guest at their several times. The day after the burglary was reported, investigators found a fingerprint on a screen leaning up against the house which matched Mitchell. Id. Mitchell was arrested and convicted of burglary; during his trial, Mitchell moved for a directed verdict, which was denied by the circuit court. Id.

The Supreme Court noted that the fingerprint was the only evidence linking Mitchell to the burglary. The Court wrote that the evidence presented was entirely circumstantial. “The fact that [Mitchell's] fingerprint was on a screen that was propped up against the house does not prove entry where [Mitchell] had been in and around [Mathis's] house at least three times prior to the burglary.” Id. The State did not produce any evidence concerning whether the screen was on the window when the window was broken or when the screen had been removed. Id.” Accordingly, the Supreme Court agreed with this Court that Mitchell was entitled to a directed verdict.

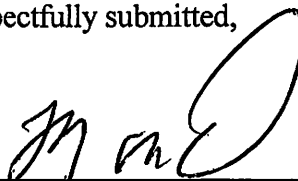
In this case there was evidence that Pearson did yard work for the victim, and Pearson had been in his garage. The state tried to make much of the fact that appellant and Pearson knew each other. The state's witnesses admitted there was not any way too date when Pearson's fingerprint was placed, and no way too similarly date when appellant's DNA got on the duct tape -- or how. If appellant's sweat or saliva or whatever else could cause a DNA “match” was transferred by Pearson onto the duct tape then appellant risked being convicted on this one false piece of seemingly damning evidence.

Unlike Mitchell, there was no evidence appellant had ever been to the victim's house. To the extent that cuts in the state's favor here in distinguishing Mitchell, it also differentiates

appellant's case from the state's alleged case against Pearson as for notice, opportunity and prior presence in the victim's house and garage. The Supreme Court granted a directed verdict in yet another case where the evidence was stronger against the defendant than here in State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011).

In Odems the defendant was in a car with the stolen property, fled from the police, and lied to attempt to have a woman cover from him. The Court nonetheless said this very suspicious behavior was not sufficient for the case to go to the jury. The DNA, which cannot be dated, being found on a piece of duct tape was not *substantial circumstantial evidence* of appellant's guilt. Rehearing, and oral argument should respectfully be granted. State v. Mitchell; State v. Arnold; State v. Bostick; State v. Schrock; State v. Odems, supra.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

This 31st day of December, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County
Ralph F. Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

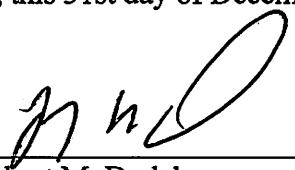
VICTOR WELDON,

APPELLANT

APPELLATE CASE NO. 2012-212563

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of December, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 31st day
of December, 2014.

Rhonda Demeine Zgaworth (S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.

The South Carolina Court of Appeals

The State, Respondent,

v.

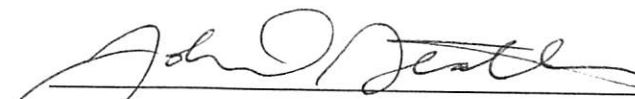
Victor Weldon, Appellant.

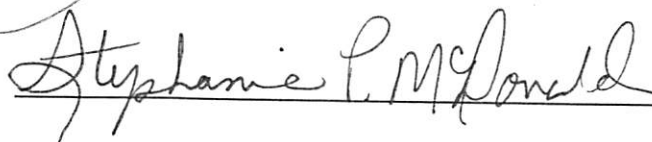
Appellate Case No. 2012-212563

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.

 J.

 J.

 I.

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire

David A. Spencer, Esquire

Alan McCrory Wilson, Esquire

Ernest Adolphus Finney, III, Esquire

The Honorable R. Ferrell Cothran, Jr.

FILED

January 23, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Ralph F. Cothran, Circuit Court Judge

Opinion No. 2014-UP-463 (S.C. Ct. App. filed 12/17/2014)

11-GS-14-0068

THE STATE,

RESPONDENT,

V.

VICTOR WELDON,

PETITIONER

APPELLATE CASE NO. 2015-000340

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 23, 2015.

QUESTION PRESENTED

Whether the Court of Appeals erred by holding evidence petitioner's DNA was found on a piece of duct tape -- left at some point somehow -- was by itself substantial circumstantial petitioner participated in the robbery since there was no other "logical explanation" for his DNA being on the duct tape, since this was not "substantial circumstantial evidence" under the precedents of this Court, not to mention burden-shifting?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted by the Clarendon County Grand Jury for the offenses of burglary in the first degree, armed robbery, kidnapping, and grand larceny. R. 361. Michael Pearson was the co-defendant in this case. He was indicted for the same offenses, and also possession of a weapon during a violent crime.

Their joint cases were called to trial on May 14, 2012 before the Honorable Ralph F. Cothran, and a jury. Ernest A Finney, III and Jason Corbett were the prosecutors. John Knobloch and Laura Knobloch represented petitioner, Victor Weldon. Michael Pearson was represented by Harry Devoe. R. 1.

On May 18, 2012 the jury found Petitioner Weldon and co-defendant Pearson guilty on all counts. R. 354, l. 10 – 355, l. 9. Co-defendant Pearson was also found guilty of possession of a weapon during a violent crime. R. 355, ll. 7-9.

Judge Cothran sentenced Petitioner Weldon to thirty years imprisonment for burglary in the first degree, thirty years *consecutive* for armed robbery, twenty years concurrent for kidnapping, and five years concurrent for grand larceny. Co-defendant Pearson received the same sentence with an additional five years concurrent for possession of a weapon during a violent crime. R. 359, l. 6 – 360, l. 7.

The Court of Appeals affirmed petitioner's convictions in The State v. Victor Weldon, 2014-UP-463 (filed December 17, 2014). The Court found that Petitioner's DNA was found on duct tape "removed from Victim's face following the burglary. This evidence constituted substantial circumstantial evidence of Weldon's guilt because the only logical explanation for his

DNA being found on duct tape used in the Victim's robbery was that he participated in the robbery." App. 1-2.

A different panel of the Court of Appeals held that co-defendant Michael Pearson was entitled to a directed verdict of acquittal, where Pearson's fingerprint was found on the victim's stolen automobile. The Court reasoned that there was no showing as to when Pearson's fingerprint came to be placed on the victim's stolen automobile. The Court also held there was **no evidence** during the joint trial establishing a relationship between Pearson and Weldon. State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (2014) (Geathers, J., Few, CJ., and Short, J.).

A petition for rehearing was filed on Petitioner Weldon's behalf on December 31, 2014. App. 3-10. Rehearing was denied on January 23, 2015. App. 11-12. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by holding evidence petitioner's DNA was found on a piece of duct tape -- left at some point somehow -- was by itself substantial circumstantial petitioner participated in the robbery since there was no other "logical explanation" for his DNA being on the duct tape, since this was not "substantial circumstantial evidence" under the precedents of this Court.

Relevant trial Facts

Edward "Slick" Gibbons owned the Clarendon Auto Parts store in Manning, South Carolina. He had operated that business for forty-five years. R. 2, l. 8 – 4, l. 11.

The front of the Gibbons home faced Country Club Drive and the back of his house faced a pond. The garage was separate from the house. Gibbons had neighbors on both sides of his house. R. 4, l. 3 – 6, l. 12.

The Auto Parts store was open six days a week and was closed on Sunday. That was also the victim's work schedule. He remembered on May 15, 2010, a Saturday, he was preparing to leave the house between 6:00 a.m. and 6:30 a.m. to go to work. R. 7, l. 14 – 8, l. 12.

That morning Gibbons went out in his garage to put his shoes on. He usually locked the door when he left for work because his wife was usually not out of bed. "When I shut the door and bent down three guys came out of that little closet room in there and that's when they jumped me; and it's a miracle I'm still here after that." R. 8, l. 8 – 9, l. 9.

The victim, Gibbons, said he saw three black men in his garage with masks over their faces. R. 12, ll. 2-17. He was robbed of his wallet -- which he said had about eight hundred dollars in it -- and his money clip (with contained thirty to forty dollars). R. 13, l. 7 – 14, l. 19.

The victim was never able to identify the robbers. He was thrown to the ground “and one [of them] jumped on top of me and sat across my chest and was beating me there. And then one was sitting across my legs and the bigger guy was kicking me in the side and stomping me in the chest and . . .” R. 15, ll. 4-13.

He acknowledged he never saw a gun during the robbery. However, he speculated that one or more of the men could have been armed. At one point he saw something that could have been a weapon. He recalled: “They tried to put tape around you know, wrap it around my face . . . I kept kicking them - - I kept kick moving my legs and stuff. They never did get it wrapped around my feet so I could move. But they did get it around my face.” R. 17, l. 8 – 18, l. 22.

Gibbons said one of the men said: “Slick, you know that [we] know that you got money and where is the rest of it? I said this is all I got. I said there’s no use to beat me any more for money so just shoot me because this is all I got.” R. 19, ll. 7-18.

The three unknown men stole his El Camino and drove away. R. 21, l. 16 – 30, l. 10. He remembered that he was taken to Clarendon Memorial Hospital and then taken by helicopter to a Columbia hospital where he was in intensive care before going to a rehabilitation center in Sumter for a week. R. 32, ll. 2-23.

On cross-examination, Gibbons admitted he never saw a gun during the robbery. He also thought it was daylight outside when the robbery occurred “between 6 and 6:30 in the morning.” R. 60, ll. 5-10.

Cecil Eaddy had lived in the Manning area his whole life. He knew Gibbons as “Slick.” He found the stolen El Camino shortly after the incident that morning in the road near his farm. R. 78, l. 18 – 82, l. 5.

Eaddy said: “I knew it was Mr. Gibbons’ car . . . then I called the store and Ken answered the phone. And I asked if he [the victim] was there and he said no, he wasn’t there. And then I told him I found the car. And he told me he [the victim] had just been beaten up at his house. . . . so I pulled it out of the road and switched it off and took the keys out. That’s when I took it on up there to the store.” R. 81, l. 7 – 82, l. 18.

An employee from the Auto Parts store came and picked up the car “and rode back to the store and I went on out to the farm.” R. 83, ll. 4-24.

According to a police witness, co-defendant Pearson “adamantly denied knowing Mr. Gibbons.” However, they stated their investigation led them to know that co-defendant Pearson had done yard work for Gibbons in the past. R. 115, l. 6 – 117, l. 18. Co-defendant Pearson’s fingerprints -- his right thumb actually -- was matched to Gibbons’ garage according to Marie Hodge of the Sumter Police Department. R. 124 l. 1 – 136, l. 18.

Petitioner’s fingerprints were *not* found anywhere on the property owned by Gibbons. As seen, a different panel of the Court of Appeals held that Pearson was entitled to a directed verdict given that the fingerprint evidence on the victim’s stolen car was insufficient to withstand a directed verdict motion because there was no showing **when the fingerprint got placed on the stolen car.** State v. Pearson, 410 S.C. 392, 402-403, 764 S.E.2d 706, 712 (2014).

The state’s case against petitioner was petitioner’s DNA was found on the same duct tape that had been tied around the head of Gibbons. R. 176, l. 17 -180, l. 2. The state also put in evidence that petitioner said he did not know co-defendant Pearson, but petitioner and Pearson allegedly worked briefly for a Vocational Rehabilitation sponsored facility for a short time. Again, this was in Manning, South Carolina, and it appeared strangers were few. R. 174, l. 21 – 175, l. 17; R. 244, l. 17 – 245, l. 6. Nonetheless, in State v. Pearson, 410 S.C. 392, 402-403, 764 S.E.2d 706,

712 (2014), the Court of Appeals held there was no evidence of a relationship between Pearson and Petitioner Weldon.

Directed verdict motion

An extensive directed verdict motion was made in this case. Defense Counsel Knobloch for petitioner cited State v. Mitchell, 341 S.C. 406, 409 S.E.2d 126 (2000), State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), and State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004) in support of his argument that a directed verdict should be granted in this case. Defense counsel noted that the state's case against Arnold was actually stronger than the evidence in this case against petitioner. Yet the Supreme Court directed a verdict of acquittal for Arnold. R. 271, l. 19 – 278, l. 3. In Arnold the defendant was placed in the victim's car in another state a short time after the crime. R. 277, l. 22 – 278, l. 3.

The judge here ultimately ruled “it's a number of facts they've (the jury) has got to struggle with. But I'm going to let them make that call.” The judge opined he thought there was more evidence in this case “than the Mitchell, Arnold, or Bostick cases.” R. 283, l. 10 – 285, l. 3.

Court of Appeals

As seen, the Court of Appeals affirmed petitioner's convictions in The State v. Victor Weldon, 2014-UP-463 (filed December 17, 2014). The Court found that Petitioner's DNA was found on duct tape “removed from Victim's face following the burglary. This evidence constituted substantial circumstantial evidence of Weldon's guilt because the only logical explanation for his DNA being found on duct tape used in the Victim's robbery was that he participated in the robbery.” App. 1-2.

Rehearing

Petitioner argued, inter alia, on rehearing that: “In this case there was evidence that Pearson did yard work for the victim, and Pearson had been in his garage. The state tried to make much of the fact that appellant and Pearson knew each other. The state’s witnesses admitted there was not any way to date when Pearson’s fingerprint was placed, and no way to similarly date when appellant’s DNA got on the duct tape -- or how. If appellant’s sweat or saliva or whatever else could cause a DNA “match” was transferred by Pearson onto the duct tape then appellant risked being convicted on this one false piece of seemingly damning evidence.” App. 8. The Court of Appeals denied rehearing.¹ App. 11-12.

Discussion

The timing of *when* and *how* petitioner’s DNA came to be placed on the duct tape is not conclusive evidence of his guilt any more than the fingerprint of Pearson on the stolen car was conclusive evidence of his guilt. Further, DNA can be transferred onto an object, whereas fingerprint evidence cannot be transferred.

The fact petitioner’s DNA was found on the duct tape, respectfully, did not lead to the “only logical conclusion” that he was guilty of the burglary, armed robbery, kidnapping, and grand larceny in this case. If petitioner touched the duct tape at some point in time his DNA could be found on that duct tape. Petitioner understands that elements such as water can lead DNA to be removed or found inconclusive but it does not follow that “the only logical explanation” for a defendant’s DNA being found on an object at the crime scene is that the defendant is guilty.

¹ State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (2014) is pending before this Court on the state’s petition for writ of certiorari.

This “only logical explanation” standard also was not only not in compliance with this Court’s “substantial circumstantial evidence” cases, it required the defense to produce some explanation for how petitioner’s DNA got on the duct tape if he was not present, and helping commit the crime. This Court has held that requiring the defense to rebut or explain evidence is improper. See State v. Legette, 282 S.C. 11, 316 S.E.2d 411 91984).

The judge also erred by deferring his duty to make the call on the directed verdict motion to the jury as seen above. In addition, the judge incorrectly opined there was more evidence in this case against petitioner than there was against the defendants in Mitchell, Arnold, or Bostick. “Mere suspicion” of guilt is insufficient to take the case to the jury, and beyond a directed verdict motion. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001).

The state’s evidence against petitioner is that his DNA at some point, somehow, got on the duct tape. From there the jury was asked to speculate that because petitioner worked with Pearson at the same place for a short time, that petitioner knew him, and participated in this violent crime with him. Therefore, petitioner should be convicted based on that circumstantial evidence. Again, another panel of the Court of Appeals found there was no relationship tying Pearson and Petitioner Weldon together. See State v. Pearson, 410 S.C. 392, 402-403, 764 S.E.2d 706, 712 (2014).

Where the state relies exclusively on circumstantial evidence, the trial judge is only required to submit the case to the jury if there is any **substantial circumstantial** evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001) If the state fails to produce substantial circumstantial evidence the defendant committed the particular crime the defendant is entitled to a directed verdict. State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002).

In State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), this Court affirmed the holding of the Court of Appeals that a directed verdict should have been issued. The victim, Cox, was shot, and his body found off of a road *in Colleton County*. On the last day Cox was seen alive he borrowed a friend's BMW Z3 to go to the dentist's office. *The car was found in a parking lot in Johnson City, Tennessee and there was evidence the defendant telephoned a friend from 10 miles away from the car. The defendant's fingerprints were found inside the car.* This Court reasoned the state only proved that the defendant was in the BMW on the last day that Cox was seen alive, and that was insufficient evidence to make this a jury question.

Similarly, in State v. Mitchell, 341 S.C. 406, 409 535 S.E.2d 126 (2000) a home was burglarized and two guns were stolen. Mitchell had been a guest at their several times. The day after the burglary was reported, investigators found a fingerprint on a screen leaning up against the house which matched Mitchell. *Id.* Mitchell was arrested and convicted of burglary; during his trial, Mitchell moved for a directed verdict, which was denied by the circuit court. *Id.*

This Court noted that the fingerprint was the only evidence linking Mitchell to the burglary. This Court wrote that the evidence presented was entirely circumstantial. "The fact that [Mitchell's] fingerprint was on a screen that was propped up against the house does not prove entry where [Mitchell] had been in and around [Mathis's] house at least three times prior to the burglary." *Id.* The State did not produce any evidence concerning whether the screen was on the window when the window was broken or when the screen had been removed. *Id.*" Accordingly, this Court agreed with this Court that Mitchell was entitled to a directed verdict.

In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), this Court held the state failed to produce substantial circumstantial evidence Bostick killed his neighbor, Ms. Polite, and set her

house on fire. The state's case was that Ms. Polite worked at her church and always brought the collection proceeds home on Sunday afternoon.

The state presented evidence that investigators found the decedent's personal items, burned by an accelerant, including a watch and two sets of car keys belonging to Ms. Polite in a burn pile on Bostick's *next door property*. Bostick's mother testified she never used accelerants in the family burn pile.

This Court noted that the evidence above as well as the fact Bostick had a pattern of gasoline on his shoes and that *gasoline was the accelerant used to start the fire* at the Polite home. The Court held this evidence raised a suspicion that Bostick may have been guilty but it was not sufficient for the case to have gone to the jury.

Earlier, and similarly, in State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000) this Court held that the state's circumstantial evidence against Martin was insufficient to take the case to the jury. In Martin the defendant borrowed his girlfriend's car which was later placed near the scene of the murder.

On the morning after the murder the manager of a restaurant found several bags of garbage near the bar where defendant Martin and co-defendant Wilson picked up Martin's girlfriend late the prior night. Inside the trash were items belonging to the victim. Also found were inside were latex gloves similar to those Martin's girlfriend used to clean her dogs.

When Martin girlfriend's asked him why he and co-defendant Wilson were so late in picking her up from the bar, defendant Martin replied "some shit happened" and co-defendant Wilson added "someone may have died tonight."

This Court held that this circumstantial evidence was not substantial circumstantial evidence, and it was insufficient to take the case to the jury. This Court in Martin cited State v.

Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) which was a case which provided a strong suspicion of the defendant's guilt.

In State v. Schrock, Schrock admitted to the police that he smoked Marlboro brand cigarettes – the same brand as the cigarette butts found at the murder scene. However, a saliva test could not match a cigarette butt to the defendant. A similar footprint to Schrock's was found at the scene and nearby the scene. Schrock apparently later disposed of the clothes and shoes he had been wearing and he did not present an alibi. This Court held this evidence only raised a suspicion of Schrock's guilt and that he was entitled to a directed verdict.

In this case there was evidence that Pearson did yard work for the victim, and Pearson had been in his garage. The state tried to prove that petitioner and Pearson knew each other. The state's witnesses admitted there was not any way to date when Pearson's fingerprint was placed, and no way to similarly date when petitioner's DNA got on the duct tape -- or how. If petitioner's sweat or saliva or whatever else could cause a DNA "match" was transferred by Pearson onto the duct tape then petitioner risked being convicted on this one false piece of seemingly damning evidence. Moreover, since there was no way to determine when and how petitioner's DNA got on the duct tape he should have been granted a directed verdict in the same manner as Pearson, especially where Pearson's fingerprint, unlike DNA, had to be placed on the victim's stolen car by Pearson himself.

Unlike Mitchell, there was no evidence petitioner had ever been to the victim's house. To the extent that cuts in the state's favor here in distinguishing Mitchell, it also differentiates petitioner's case from the state's alleged case against Pearson as for notice, opportunity and prior presence in the victim's house and garage. The Supreme Court granted a directed verdict in yet another case where the evidence was stronger against the defendant than here in State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011).

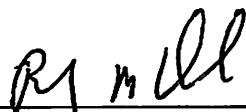
In Odems the defendant was in a car with the stolen property, fled from the police, and lied to attempt to have a woman cover for him. The Court nonetheless said this very suspicious behavior was not sufficient for the case to go to the jury.

Petitioner was entitled to a directed verdict of acquittal. State v. Mitchell; State v. Arnold; State v. Bostick; State v. Schrock; State v. Odems, supra.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 26th day of February, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County
Ralph F. Cothran, Circuit Court Judge

Opinion No. 2014-UP-463 (S.C. Ct. App. filed 12/17/2014)
11-GS-14-0068

THE STATE,

RESPONDENT,

V.

VICTOR WELDON,

PETITIONER

CERTIFICATE OF SERVICE

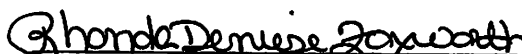
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon the S.C. Court of Appeals this 26th day of February, 2015.



Robert M. Dudek
Chief Appellate Defender

SWORN TO BEFORE ME this 26th day
of February, 2015.

ATTORNEY FOR PETITIONER

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County
Ralph F. Cothran, Circuit Court Judge

Appellate Case No: 2015-000340

THE STATE,

Respondent,

vs.

VICTOR WELDON,

Petitioner.

**RETURN TO PEITITON
FOR WRIT OF CERTIORARI**

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STATEMENT OF ISSUE ON APPEAL

DNA evidence established substantial circumstantial evidence sufficient for a reasonable juror to find Petitioner guilty as one of the three perpetrators of the brutal burglary, armed robbery, kidnapping, and grand larceny.

STATEMENT OF THE CASE

Petitioner Weldon was indicted by the Clarendon County Grand Jury for first degree burglary, armed robbery, kidnapping, and grand larceny. Weldon was tried with his co-defendant, Michael Pearson, before a jury on May 14-18, 2012. Both defendants were found guilty as charged. The Honorable Ralph F. Cothran sentenced Weldon to thirty years' imprisonment for burglary and armed robbery, to be served consecutively. In addition, Weldon was sentenced to concurrent sentences of twenty years' imprisonment for kidnapping and five years' imprisonment for grand larceny.

Weldon appealed the convictions and sentences. The Court of Appeals affirmed the conviction and sentence, without oral argument, in an unpublished opinion. State v. Victor Weldon, 2014-UP-463 (S.C. Ct. App., filed December 17, 2014).

STATEMENT OF FACTS

Small businessman Edward “Slick” Gibbons (Victim)¹ 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. ROA. pp. 8-9.

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. Victim was jumped by three men who were hiding in the storage room in his carport. ROA. pp. 8-9. They took approximately \$840 and beat him, asking where the rest of the money was. One of the men called him by his nickname. The men sat on him, kicked him, stomped on his chest and stomach, and wrapped duct tape around his face.² 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 Victim. 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. ROA. pp. 14-19; pp. 24-26; p. 162.

Victim testified his El Camino was worth approximately \$6,500. ROA. p. 29. 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. ROA. pp. 31-32. Victim’s hip was bruised, and the “bone where the hip hooks together” was cracked. Victim testified his doctor asked him if wanted to replace the hip or let it heal. His doctor told him he was “going to always limp. But [the doctor] said

¹ Victim owned Clarendon Auto Parts, a business he operated for forty-five years. His store is open six days a week and closed on Sunday, so naturally, he works six days a week. ROA. pp. 2-4; pp. 7-8.

² All three robbers were engaged in the lynching. As Victim explained: “[O]ne jumped on top of me and sat across my chest and was beating me there. And then one was sitting across my legs and then the bigger guy was kicking me in the side and stomping me in the chest . . .” ROA. p. 15, lines 9-13.

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." ROA. p. 20, line 23 – p. 21, line 3.

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. ROA. pp. 64-66. She called her daughter, who called 911 and came to their house. An ambulance and law enforcement arrived, and Victim was sent to the hospital. ROA. pp. 66-68.

Cecil "Mac" Eaddy, Jr., testified he found the El Camino in the road near his farm. 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. 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. ROA. pp. 78-83.

Investigator Ricky Richards, from the Clarendon County Sheriff's Office, testified he processed the vehicle after it was found. Investigator Richards found fingerprints on the rear quarter on the driver's side of the car, and also on the driver's side door jamb. He sent the prints to Marie Hodge, a fingerprint technician with the Sumter Police Department. ROA. pp. 90-92. Hodge testified she examined the latent print sent by Investigator Richards and determined it matched Pearson's right thumb. ROA. p. 131, p. 135, pp. 138-139.

Investigator Thomas "Lin" Ham, also from the Clarendon County Sheriff's Office, testified he was called to the scene on May 15, 2010. He knew Victim all his life. ROA. III, p. 103. Investigator Ham identified photographs from the crime scene depicting the black duct tape that was used and Victim at the hospital while duct tape was still wrapped

around his head. ROA. p. 107. Ham wore gloves to assist the nurse in removing the duct tape from Victim. The tape was put in a bag as evidence for SLED to process. ROA. pp. 108-109.

Pearson was interviewed by Investigator Kenneth Clark. Investigator Ham testified he was present for the interview. Pearson adamantly denied knowing Victim and claimed he did not know where Victim lived. He claimed to never been to Victim's home or place of business and never came into contact with Victim's vehicle. ROA. pp. 115-116.

Investigator Kenneth Clark testified Victim described the robbers as three black males, of mid-age and medium build, who wore dark clothing and masks. ROA. pp. 160-162. Investigator Clark testified as to law enforcement's diligent efforts to find the perpetrators of the heinous crime. The first big break was a phone call about three individuals that were spending a lot of money. ROA. p. 164.

Investigator Clark testified he interviewed Pearson, and Pearson denied being around Victim's property or vehicle. ROA. p. 167. A month later, a positive DNA hit was found which made Weldon a suspect. ROA. p. 173.

Investigator Clark subsequently interviewed Weldon, who prior to the DNA match had not been a suspect. Weldon denied knowing Victim, denied being around the scene, and denied knowledge of the robbery. He also claimed not to know Pearson. ROA. pp. 174-175. Weldon was arrested, and a DNA sample was taken. Testing once again matched Weldon's DNA to the DNA left on the duct tape wrapped around Victim's head. ROA. pp. 176-177.

Investigator Clark discovered from landscaper Richard Gamble that Pearson had

been to Victim's house when he did landscaping work for Victim. ROA. pp. 178-179. 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 of time. ROA. pp. 180-181.

John Hornsby testified that Pearson and Weldon worked at Voc Rehab during an overlapping time period of December 9-12, 2008. 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 twenty-five people work at the facility from 8:30 a.m. to 2:30 or 3:00 p.m. ROA. pp. 234-235.

Gamble testified he took Pearson with him to Victim's house to do yard work. Pearson worked with Gamble on 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. ROA. pp. 221-225.

The duct tape removed from Victim's head was tested and found to be a one in 670 billion match with Weldon's DNA. ROA. pp. 244-245; p. 249.

Weldon's directed verdict motion was based solely on whether the State provided substantial circumstantial evidence to establish his identity as the perpetrator. Judge Cothran found: "The fact that [Weldon's DNA] is on the victim's head in his garage that morning gets to the jury." ROA. p. 282, lines 2-4.

ARGUMENT

DNA evidence established substantial circumstantial evidence sufficient for a reasonable juror to find Petitioner guilty as one of the three perpetrators of the brutal burglary, armed robbery, kidnapping, and grand larceny.

Duct tape wrapped around Victim's head by one of the robbers contained Weldon's DNA. This evidence is some of the strongest circumstantial evidence possible to establish Weldon's presence and participation in the robbery. The trial court ruled: "The fact that [Weldon's DNA is] on the duct tape on the victim's head in his garage that morning gets to the jury." ROA. p. 282, lines 2-4. The trial court's ruling is not error as the DNA evidence is more than sufficient to establish Weldon's identity as one of the robbers.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 426 S.E.2d 317 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443

U.S. 307 (1979)).

The United States Supreme Court noted the following:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts.**

Jackson, at 319 (second emphasis added).

Our Supreme Court recently articulated the following concerning the standard of review:

The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to the guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)) (citations and internal quotations omitted).

This is consistent with the United States Supreme Court's observation concerning circumstantial evidence:

Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) *cited with approval in Jackson*, at 317 n.9.

“The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes.” See State v. Lane, 406 S.C. 118, 749 S.E.2d 165, 167 (Ct. App. 2013).³ Weldon’s DNA is on the duct tape cruelly wrapped around Victim’s head during the robbery. The most obvious inference from this evidence is that Weldon was one of the three robbers atop Victim during the crime. Hepburn and Cherry advise that the trial court does not need to find the evidence infers guilt to the exclusion of any other reasonable hypothesis.⁴ This Court does not need to pursue alternate theories of how Weldon’s DNA ended up on the duct tape. The most obvious inference readily supports the charges going to the jury.⁵

Sticking to the custom of appellants as of late, Weldon argues his directed verdict case by arguing the evidence was “stronger” in other cases where the Supreme Court has reversed a conviction based on the failure to grant a directed verdict. This analysis misses the point. The determination is whether evidence supports each and every element of the offense, including the element of identity. Lane, *supra*. The presence of Weldon’s DNA

3 The Court of Appeals’ opinion in Lane was reversed because this Court found evidence sufficient to withstand directed verdict. State v. Lane, 410 S.C. 505, 765 S.E.2d 557 (2014).

4 Weldon complains that the Court of Appeals shifted the burden of proof when it stated guilt was the only logical explanation for Weldon’s DNA being on the duct tape. This misses the point. The trial court does not have to exclude every other reasonable hypothesis of guilt in order to find the issue should be decided by the jury. However, Respondent agrees there is no other reasonable explanation for Weldon’s DNA being found on the duct tape.

5 Pearson’s convictions were reversed by the Court of Appeals. State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014). The Court of Appeals in that opinion observed: “Despite the fact Weldon was tied to the crimes because of his DNA on the duct tape, nothing tied Pearson to the crime scene.” *Id.* 410 S.C. at 402, 764 S.E.2d at 712. The State has petitioned this Court for writ of certiorari to review the Court of Appeals’ decision in Pearson.

on duct tape left on Victim's head **during** the commission of the crime establishes substantial circumstantial evidence that he was one of the three robbers. In the cases Weldon relies on, there was a lack of evidence placing those appellants at the crime scene during the commission of the crime. Not so in the present case.

In State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000), Martin borrowed his girlfriend's car the day before the murder and a similar car was seen near the murder scene, around the time of the murder. By the bar where Martin and his co-defendant picked up Martin's girlfriend, a restaurant manager found several bags of garbage containing items belonging to the victim and latex gloves similar to those Martin's girlfriend used. Martin told his girlfriend "some shit happened" and his co-defendant added "someone may have died tonight" when asked why they were late picking her up from the bar. Id., 340 S.C. at 600-01, 533 S.E.2d at 573-74.

In finding the evidence was insufficient to constitute substantial circumstantial evidence of Martin's guilt, the Supreme Court noted the following:

Most significantly, the State's evidence failed to place either defendant inside the apartment. The Solicitor himself summed up the State's failure of proof by confessing to the trial judge "we don't know which person actually held [Victim's] head in the pan of water" and "Your Honor, the whole point is we don't know if they acted in concert." Put another way, unlike the usual accomplice liability case or aiding and abetting situation, here the State had no proof that either defendant held Victim's head under water and the State had no proof that the defendants were working together to bring about the Victim's death.

Id., 340 S.C. at 602-03, 533 S.E.2d at 574-75.

Further, the Supreme Court then compared Martin to State v. Schrock, 283 S.C.

129, 322 S.E.2d 450 (1984), as follows:

In Schrock, the State presented evidence the defendant was in the area of the murders and that footprints at the scene of the crime were similar to footprints found in the area which Schrock admitted he had been walking. In this case, the black car seen at the apartment is not identified as [girlfriend's] car. Like the footprints in Schrock, the possibility that it was the same car, without any other evidence placing the defendants at the scene is not enough evidence to place Defendant inside Victim's apartment.

Id., 340 S.C. at 602-03, 533 S.E.2d at 574-75.

While the State's admissions at trial, as noted in the Martin opinion, expose the possibility of Martin being not present or merely present during the murder, in the instant case, the reasonable inference is Weldon was present and participating in the crime. The one piece of evidence, Weldon's DNA on the duct tape, accomplishes far more than the various pieces of evidence presented in Martin to establish Weldon's presence and participation.

Martin's analysis of Schrock also exposes how the evidence in the present case is stronger than Schrock. Schrock admitted being **near** the crime scene and footprints were similar to footprints in the area where Schrock was walking. No evidence put Schrock at the crime scene. Schrock, supra. Weldon's DNA puts him at the scene **during** the robbery. Weldon's DNA left on the duct tape is far stronger evidence than the claim of "similar" footwear found in Schrock.

For similar reasons, Weldon's reliance on State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011) is misplaced. In Bostick, the Supreme Court found the State failed to show substantial circumstantial evidence of guilt. The victim died of carbon monoxide

poisoning from arson in her house, but she had also been struck by a blunt force object. Some of her items were found in a burn pile in the yard of Bostick's mother. His mother's yard was about a quarter mile away from the victim's house. He had blood on a pair of jeans. However, when analyzed for DNA evidence, the expert was able to exclude ninety-nine percent of the population and could not actually match the blood to the victim. Accelerant was used in the arson and on the items in the burn pile, and traces of fresh gasoline were found on Bostick's shoes. The Supreme Court noted no evidence established Bostick's control over the burn pile. Id.

In the instant case, unlike Bostick, DNA evidence matches Weldon and puts him at the crime scene. The burned items could not be linked to Bostick, but the duct tape is linked to Weldon. The instant case is both markedly different and stronger than Bostick.

The evidence presented in State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004), likewise suffers from the inability to place the defendant at the murder scene. In that case, the murder victim, a doctor, had a clandestine affair, first with the State's chief witness and then with Arnold, in Savannah. The victim borrowed a BMW that day from a co-worker and then disappeared and was subsequently found dead off a road in Colleton County. The BMW was found abandoned in Tennessee. Arnold's thumbprint was found on a coffee cup lid found in the BMW. At the time these events occurred, Arnold travelled from Savannah to Tennessee, although the State failed to present any evidence to the jury of how close to where he was staying the abandoned car was found. Accordingly, the only evidence the jury had was that Arnold had a sexual relationship with the victim, he was in the BMW the day that the victim went missing, and he was in the same state where the

BMW was found. Id., 361 S.C. at 389-90, 605 S.E.2d at 530-31.

The majority in Arnold noted that no evidence placed Arnold at the scene of the crime in Colleton County. Id., 361 S.C. at 390, 605 S.E.2d at 531. The evidence in the present case puts Weldon at the scene of the crime during the crime. The evidence is far stronger in the instant case.

Weldon also compares this case to State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). In Mitchell, the appellant was present at the burglary victim's house on three prior occasions. The sole evidence regarding identity was a fingerprint found on a window screen propped up against the house near the broken window that was apparently the point of entry. No evidence was presented that the screen was on the window at the time the window was broken. The Supreme Court found "the fact that respondent's fingerprint was on a screen that was propped up against the house does not prove entry where respondent had been in and around the victim's house on at least three times prior to the burglary." Id., 341 S.C. at 409, 535 S.E.2d at 127.

Unlike Mitchell, no evidence suggests Weldon was ever present at Victim's house for an innocent reason. Further, because the DNA was on the duct tape wrapped around Victim's head during the crime, and not some random item outside the house, it is clear that the DNA was left during the commission of the crime.

In State v. Odems, 395 S.C. 582, 588, 720 S.E.2d 48, 51 (2011), the last case analyzed by Weldon, no evidence was presented that Odems was even at the scene of the burglary – instead he was found by law enforcement in a car with stolen goods and two burglars, and he fled. The burglars testified they picked Odems up at a gas station **after**

the burglary. The burglars' prints were found on stolen items, but no fingerprints matching Odems were found. Id. Unlike Odems, Weldon is linked to the scene by DNA evidence. Evidence in this case is considerably stronger than the evidence presented in Odems.

The trial court did not err in denying the motion for directed verdict because as the trial court aptly noted, Weldon's DNA was wrapped around Victim's head during the robbery. This evidence leads to the more than reasonable inference that Weldon was one of the three participants in this horrific crime.

CONCLUSION

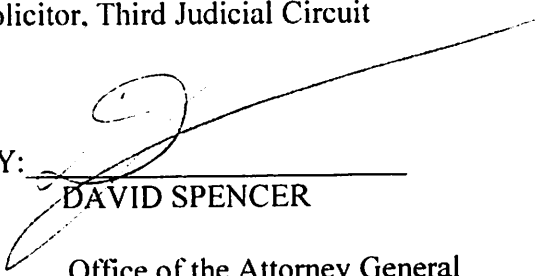
For the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar # 68571

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY: 

DAVID SPENCER

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

ATTORNEYS FOR RESPONDENT

March 2, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County
Ralph F. Cothran, Circuit Court Judge

Appellate Case No: 2015-000340

THE STATE,

Respondent,

vs.

VICTOR WELDON,

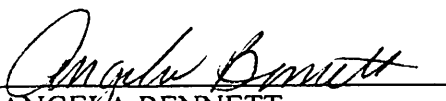
Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 2nd day of March, 2015.


ANGELA BENNETT
Administrative Assistant

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

The Supreme Court of South Carolina

The State, Respondent,

v.

Victor Weldon, Petitioner.

Appellate Case No. 2015-000340

Lower Court Case No. 2011-GS-14-0068

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Weldon*, Op No. 2014-UP-463 (S.C. Ct. App. filed Dec. 17, 2014). We deny the petition.

 C.J.
FOR THE COURT

Columbia, South Carolina

April 8, 2015

cc:

The Honorable Jenny Abbott Kitchings

The Honorable Beulah G. Roberts

David A. Spencer, Esquire

Alan McCrory Wilson, Esquire

Ernest Adolphus Finney, III, Esquire

Robert Michael Dudek, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

2016-CR14-00002

County of Clarendon)

IN THE COURT OF COMMON PLEAS

Victor McLoe Weldon #350911)
 Full name and prison number (if any) of Applicant)

The 3rd Judicial Circuit

V.)

APPLICATION FOR

State of South Carolina

**CERTIFIED TRUE COPY
 OF ORIGINAL FILED IN THIS OFFICE**

POST-CONVICTION RELIEF

DATE 1/5/2016

Beulah H. Roberts
 CLERK OF COURT
 CLARENDON COUNTY, SC

2016 JAN - 5 P 4:17
 BEULAH H. ROBERTS
 CLERK OF COURT
 CLARENDON COUNTY, SC

INSTRUCTIONS-READ CCAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction of perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which established that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

- Place of detention Perry Correctional Institution, 430 Oaklawn Rd., Pelzer S.C. 29669.
- Name and location of Court which imposed sentence Clarendon County Courthouse, P.O. Box 136, 3 West Keitt St., Manning, S.C. 29102
- Name(s) of co-defendant(s) (if any) Michael Wilson Pearson
- The indictment number or numbers (if known) upon which and the offenses for which

sentence was imposed:

- (a) Burglary 1st 2011-GS-14-0068 / Armed Robbery - 2011-GS-14-0068
 (b) Attempted Murder - 2011-GS-14-0068 / Kidnapping - 2011-GS-14-0068
 (c) Grand Larceny - 2011-GS-14-0068 / POW during violent crime - 2011-GS-14-0068

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) May 18, 2012 - Burglary 1st 30 yrs / Armed Robbery 30 yrs
 (b) Grand Larceny 5 yrs Kidnapping 20 yrs /
 (c) POW during violent crime 5 yrs

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty N/A
 (b) after a plea of not guilty /
 (c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered yes to (7), list:

(a) the names of each Court to which you appealed:

i. South Carolina of appeals

ii. N/A

iii. N/A

(b) the result in each such Court to which you appealed:

i. ~~April 8, 2015~~ Denied

ii. N/A

iii. N/A

(c) the date of each such result:

i. April 8, 2015

ii. N/A

iii. N/A

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. N/A

iii. N/A

9. If you answered no to (7), state your reasons for not so appealing:

(a) N/A

(b) N/A

(c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See attachment

(b) See attachment

(c) See attachment

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See attachment

(b) See attachment

(c) See attachment

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? N/D

13. If you answered yes to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Petition to rehearing

ii. N/A

iii. N/A

iv. N/A

(b) the name and location of the Court in which each was filed:

i. State of S.C. in the Supreme Court -

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

i. January 23, 2015

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. February 26, 2015

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/Aiii. N/Aiv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. Due Processii. N/Aiii. N/A

(b) the proceedings in which each ground was raised:

i. General Session - change of venueii. N/Aiii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not Previously been presented:

(a) N/A(b) N/A(c) N/A

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? N/A(b) your trial, if any? ✓

- (c) your sentencing? ☒
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? ☒
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? ☐

18. If you answered yes to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. John Knoblauch - 808 Johnnie Dodd BLVD
Mount Pleasant, S.C. 29464

ii. Robert Dudek - P.O. Box 11589
Columbia, S.C. 29211

iii. N/A

N/A

(b) the proceedings at which each such attorney represented you:

i. John Knoblauch - Trial Lawyer and sentencing

ii. Robert Dudek - Appeal lawyer

iii. N/A

19. State clearly the relief you seek in filing this application:

Reverse/Vacate Conviction

20. Are you now under sentence from any other court that you have not challenged?

No

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Victor M. Weldon hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefore. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Victor Weldon
Applicant

SWORN or affirmed to and subscribed before me this
21 day of December, 2015.

Tamara Conwell
Notary Public

My Commission Expires: September 25, 2023

STATE OF SOUTH CAROLINA)

County of Clarendon)

VERIFICATION

I, Vito M. Weldon, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Vito Weldon

SWORN to and subscribed before me this 21
day of December, 2015.

Tamara Conwell (L.S.)
Notary Public

My Commission Expires: September 25, 2023

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC

Summary

On May 15, 2010, Edward Guy Gibbons was robbed in his garage by 3 mask assailants, then fled in his automobile with a small amount of cash.

On July 20, 2010, a warrant was issued for Victor McCoy Weldon. May 18, 2012, Victor Weldon and Micheal Pearson was found guilty of all charges and sentence to 60 yrs in S.C.D.C.

During trial victim stated, he never saw a gun, also stated it was bright enough to see. It was never stated assailants moved victim from point A to B, or told him not to move. No type of weapons were found.

Before the trial, Mr. Knobelch filed a motion to be relieved off of my case, due to me writing him up for lack of communication. Never following-up any of my request throughout my trial. At the end, Micheal Pearson and I was convicted and sentence to (2) 30 yrs consecutive. All appeals have been denied and PCR is now in motion.

I have continually told the state I was innocent and had alibi's to back it up my claim.

Argument I

10a Ineffective Assistance Counsel (Trial Counsel)

- 11a Attorney file a motion to be relieved of case/
 None of my alibi's were called to testify on my behalf/
 I was never called to the stand to testify.
 Lack of communication
 Force me into a joint trial
 Offer a joint plea instead of a independent plea -

Argument II

10b Due Process

- 11b Denied my motion for a Change of Venue/
 Gave me a joint trial -

Argument III

10c Prosecutorial Misconduct

- 11c Offer Me a joint plea instead of a independent plea

Argument IV

10d Judicial Bias

- 11d Judge and victim were acquaintance

Argument V

10e Jury Violation

11e Change the jury when proven clearly of a lesser included offense, the charge of the jury made me look guilty

Victor Weldon # 350911
Perry Correctional Institution
Q1-A-218
430 Oaklawn Rd.
Pelzer S.C. 29669

December , 2015

Clarendon County Clerk of Court

Manning, S.C.

RE: Victor Weldon vs. The State
C/A. No.: 2011-BS-14-0068

Dear Clerk,

Please find enclosed applicants notice of motion to amend his PCR Application, 11a-11e, any attachment and proof of service.

Also enclosed is a pre-paid self-addressed envelope for the return of the extra copy herewith. Please clock stamp file the same and return it

)

Thank you in advance

S/Vitor Weldon

()

)

State of South Carolina
 County of Clarendon
 Victor Weldon
 Applicant,

✓

State of South Carolina
 Respondent

In the Court of Common Pleas
 for the 3rd Judicial Circuit

C/A. No. 2011-GS-14-0068

Motion to Amend
 - PCR Application

Applicant hereby moves to amend his PCR application.
 Pursuant to SCRCVP Rules 41.1(d) with following

All attachment
 PCR Application - 11a - 11e

For the foreign reason applicants PCR should
 be amended. Said additional arguments are
 merits, and support the original

December 2015

3/ Victor Weldon

In the State of South Carolina
County of CLARENDON
VICTOR WELDON
Plaintiff

In the Court of Common Pleas
3rd Judicial Circuit

CA No.

✓
The State of South Carolina
Defendant

C Proof
Certificate of Service

I, Victor Weldon, hereby certify that on this 21st day
of Dec, 2015, that I have served a copy of
Motion to Amend upon the following party(ies) 1) Clerk
of Court by way and through the Perry Correctional
Institution's legal ~~system~~ mail system

Sworn to and subscribed before me on
This 21 day of December, 2015

Tamara Conwell
Notary Republic Signature

My Commission Expires
September 25, 2023

My Commission Expires

Victor Weldon
Your Name
Address

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
Victor McCoy Weldon, #35091,	)	2016-CP-14-00002
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed January 5, 2016, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Applicant was true bill indicted at the January 2011 term of the Clarendon County Grand Jury for burglary – first degree, attempted murder, armed robbery, grand larceny (\$2000-\$10000), kidnapping, possession of a weapon during a violent crime (2011-GS-14-0068). John Knobloch, Esquire, represented Applicant. Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. Judge Cothran sentenced Applicant to thirty years for armed robbery running consecutively to a sentence of thirty years for burglary – first degree. Judge Cothran further sentenced Applicant to five years for grand larceny, twenty years for kidnapping, and five years for possession of a weapon during a violent crime, all running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Weldon, 2014-UP-463 (Ct. App. filed December 17, 2014). Applicant filed a Petition for Writ of Certiorari to the South Carolina

Supreme Court. The Petition was denied via order filed January 23, 2015. The Remittitur was issued on May 8, 2015.

Attached herewith and incorporated herein are the records of the Clarendon County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is 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."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCRCP.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "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." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have 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 of

trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Applicant alleges that he was denied due process of law. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a prima facie showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Respondent submits Applicant has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed.

VI.

Respondent submits that the second, fourth, and fifth allegations should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegations presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Therefore, the Court should summarily dismiss these allegations as they are not proper in a post-conviction relief action.

VII.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VIII.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

IX.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

April 11, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	
	)	
	)	2016-CP-14-00002
	)	
VICTOR MCCOY WELDON, #350911,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Lance S. Boozer, Esquire
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, South Carolina 29201

DATED this 11th day of April, 2016.



Caroline Collins, Legal Assistant
For Respondent

State of South Carolina)	In the Court of Common Pleas
)	Third Judicial Circuit
County of Clarendon)	2016-CP-14-00002

Victor McCoy Weldon,	)	
	)	
Applicant,	)	
	)	
vs.	)	Transcript of Record
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

July 27, 2016
Sumter, South Carolina

B E F O R E:

The Honorable Jocelyn Newman, Judge

A P P E A R A N C E S:

Lance S. Boozer, Esquire
Attorney for the Applicant

Julie A. Coleman, Esquire, Assistant Attorney General
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

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I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Victor Weldon	
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Direct Examination by Mr. Boozer	32
John Knobeloch	
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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page No.</u>
	No Exhibits Introduced.	

1 THE COURT: This is Victor Weldon vs. The State of
2 South Carolina, 2016-CP-14-00002. Applicant is presently
3 confined in the South Carolina Department of Corrections
4 pursuant to orders of commitment of the Clarendon County
5 Clerk of Court. Applicant was true-bill indicted at the
6 January 2011 term of the Clarendon County Grand Jury for
7 burglary first degree, attempted murder, armed robbery,
8 grand larceny, kidnapping, and possession of a weapon
9 during a violent crime. John Knobeloch, Esquire,
10 represented the applicant.

11 Applicant proceeded to a jury trial before the
12 Honorable R. Ferrell Cothran, Jr. Judge Cothran sentenced
13 applicant to thirty years for armed robbery, running
14 consecutively to a sentence of thirty years for burg first.
15 Judge Cothran further sentenced applicant to five years for
16 grand larceny, twenty years for kidnapping, and five years
17 for possession of a weapon during a violent crime, all to
18 run concurrent.

19 A timely notice of appeal was filed on applicant's
20 behalf; the South Carolina Court of Appeals affirmed the
21 applicant's conviction and sentence. Applicant filed a
22 petition for a writ of certiorari to the South Carolina
23 Supreme Court, and the petition was denied via an order
24 filed January 23, 2015. The remittitur was issued on May
25 8, 2015.

1 Applicant filed a timely application for
2 post-conviction relief on January 5, 2016, alleging that he
3 was being held unconstitutionally for the following
4 reasons: ineffective assistance of counsel, due-process
5 violation, prosecutorial misconduct, judicial bias, and
6 jury violation. The state filed a return on April 11,
7 2016, and the applicant is present today in the courtroom
8 and represented by Mr. Lance Boozer.

9 THE COURT: And Mr. Boozer.

10 MR. BOOZER: Thank you, Your Honor. May it please the
11 court? Judge, I do have one preliminary matter, and that
12 would be -- I discussed this with Madame Attorney General
13 this past week about making just an oral amendment on the
14 record, and I don't believe they're opposing it.

15 And, Judge, specifically the amendment would be for
16 ineffective assistance of counsel for failing to object,
17 and for the court's information, the specific testimony
18 which would've been objectionable is in volume four of the,
19 of the transcripts, volume four of five. And specifically
20 it's on page 76, and it would be lines 19 through 20, and
21 we'll of course address that with the applicant and his
22 former counsel.

23 THE COURT: Is there any opposition?

24 MS. COLEMAN: No objection.

25 THE COURT: Okay.

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

5

1 All right, Mr. Boozer, you may proceed.

2 MR. BOOZER: Thank you, Your Honor. I will call Mr.
3 Weldon to the stand.

4 VICTOR M. WELDON, BEING DULY
5 SWORN, TESTIFIES AS FOLLOWS:

6 BAILIFF: Please state your full name. Spell your
7 last name for the record.

8 WITNESS: Victor McCoy Weldon, W-e-l-d-o-n.

9 (A PAUSE.)

10 DIRECT EXAMINATION BY MR. BOOZER:

11 Q. Mr. Weldon, how are you?

12 A. Fine.

13 Q. Okay. Mr. Weldon, do you know why you're here today?

14 A. Yes, sir.

15 Q. All right. Why? What have you filed with the court
16 today?

17 A. I filed ineffective assistance of counsel on my
18 lawyer, John Knobloch, prosecution misconduct, jury
19 violation, judicial bias, and due process.

20 Q. Okay, and we'll talk at length about each one of those
21 claims, but you filed an application for post-conviction
22 relief?

23 A. Yes, sir.

24 Q. All right, and do you understand what it is that
25 you're asking this court to do for you?

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

6

1 A. Yes, sir.

2 Q. What is that? What are you asking this court to do?

3 A. To look into these arguments that I raised for a new
4 trial.

5 Q. Okay, and what is it that you want the court to do?

6 A. I want them to -- I want, I want a new trial really.

7 Q. Okay. You understand that the only relief this court
8 can give you is to basically start you over and you have a
9 new trial on all the original charges you face?

10 A. Yes, sir.

11 Q. And that's what you want to do?

12 A. Yes, sir.

13 Q. All right. Now, did you previously -- did you have a
14 trial?

15 A. Yes, sir.

16 Q. And what were the charges?

17 A. Attempted murder, kidnapping, first-degree burglary,
18 armed robbery, grand larceny, and possession of a weapon
19 during a violent crime.

20 Q. All right, and ultimately what was the sentence that
21 you received?

22 A. Thirty years ran consecutive with another thirty.

23 Q. All right. So, you've got a total, a sixty-year
24 sentence?

25 A. Yes, sir.

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

7

1 Q. Okay. Now, who represented you at your trial?

2 A. John Knobloch.

3 Q. And was he appointed or retained to represent you?

4 A. He was appointed.

5 Q. Okay. Where, where was it alleged that all these
6 events occurred?

7 A. Clarendon County, Manning.

8 Q. All right. Where do you live?

9 A. Sumter County.

10 Q. Where did you live at the time that all of this was
11 supposedly -- all this occurred?

12 A. In Sumter County.

13 Q. All right. Now your lawyer, where is he from?

14 A. Charleston County.

15 Q. Why do you -- why did you have a Charleston County
16 lawyer representing you?

17 A. They said my victim was closely connected to all of
18 the bar members in Clarendon, Sumter, Lee, Kingstree, and
19 so I had to get one, I guess, far away.

20 Q. Okay. Now, where were you first arrested on the
21 charges?

22 A. July 20th.

23 Q. All right, July 20th of what?

24 A. 2010.

25 Q. And when did you first get Mr. Knobloch to represent

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

8

1 you, if you recall?

2 A. I want to say October. I'm not sure. I think it's
3 October.

4 Q. All right, and your trial was when?

5 A. May 2012.

6 Q. All right. Between October of 2010 and 2012, how many
7 times did you either meet with or talk to your lawyer?

8 A. The minimum, max? Maybe four. Maybe.

9 Q. Okay. What would y'all discuss during your meetings?

10 A. The first meeting I remember was about a bond hearing.
11 The second one was he was asking was I willing to go to
12 trial. I told him yes, and he was filing different type of
13 motions, and he asked did I still want to be represented by
14 him. Then I think the last one I remember when he was
15 talking about who he was calling up to the stand to
16 testify, did I want to testify, stuff like that.

17 Q. What was it alleged that you did?

18 A. They said I went in to Mr. Gibbons's house, robbed
19 him, beat him with a gun, and took some cash, and left with
20 his car.

21 Q. Was it, was it alleged that you were by yourself or
22 were there other people?

23 A. No. They said it was more than one person.

24 Q. Okay. Do you recall when they alleged the crime
25 occurred?

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

9

1 A. No. I don't remember when it occurred.

2 Q. Okay.

3 A. I just know when I got locked up.

4 Q. Well, the crime was alleged to have occurred on May
5 15, 2010, based on testimony at the trial between 6 a.m.
6 and 6:30 a.m. at trial. Would you agree with that?

7 A. Yeah.

8 Q. Okay. Did you have any discussion with your lawyer
9 about where you were at that time?

10 A. Yeah.

11 Q. Tell the court about those discussions.

12 A. Told the lawyer, he asked could I remember around the
13 time it happened where I was. I told him I lived with my
14 mom and this girl and sister and that I was at the house
15 with my mom. When she come back from work, she usually at
16 home. I mean, when she come from work, I'm usually at home
17 with, with my sister waiting for her to go to school.

18 Q. Okay. So on May 15, 2010, where is it that you were
19 telling your lawyer you were?

20 A. At the house.

21 Q. All right. What were you doing at the house at the
22 time between 6 and 6:30 when this crime occurred?

23 A. We was just getting up with my sister, waiting for my
24 mother to come home.

25 Q. Okay. What time does your mom usually get home?

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER.

10

1 A. 7, between 7, 7:15.

2 Q. Let's, let's back up a little bit. You were living at
3 that house?

4 A. Yes, sir.

5 Q. And what, what was the address of that house?

6 A. [REDACTED] Drive.

7 Q. And who all lived there?

8 A. My sister, my mom, my little brother occasionally, and
9 my girl who stays with me occasionally.

10 Q. What's your sister's name?

11 A. Jessica Weldon.

12 Q. And what's your mom's name?

13 A. Debra Weldon.

14 Q. Okay. The day before, or let's say the night before
15 this crime -- so the night before would be May 14, 2010?

16 A. Yeah.

17 Q. Where would you have been then?

18 A. Home. Sleep maybe.

19 Q. Okay. Do you have any idea probably what time you
20 went to bed that night?

21 A. I would say about 11 maybe. I usually watch TV until
22 I fall asleep. I'd say about 11.

23 Q. Was your sister home when you went to bed?

24 A. Yeah.

25 Q. Okay. Do you know what time you got up the next

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

11

1 morning?

2 A. Well, at about 6:40, 6:45 maybe, around that time,
3 estimate.

4 Q. And did you, did you see anyone when you got up that
5 morning?

6 A. My sister.

7 Q. Your sister was there?

8 A. Yeah.

9 Q. All right. Did you talk to her?

10 A. Yeah.

11 Q. All right, and then when did you see your mom?

12 A. When she walked through the door.

13 Q. Do you know when she walked through the door?

14 A. Usually about 7, maybe 7:15.

15 Q. Okay. Did you tell your lawyer all that?

16 A. Yeah, I told my lawyer.

17 Q. What was his response?

18 A. He said he would fill a motion out to call them to the
19 stand to testify on my behalf.

20 Q. All right. Now, was it your understanding that your
21 mom and your sister would be there to testify to that at
22 trial?

23 A. Yes, sir.

24 Q. Were your mom and your sister physically present at
25 trial?

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER 12

1 A. Yes, sir.

2 Q. Was anyone else there on your behalf?

3 A. I had, I had family members that were not just to
4 testify, but I had my brothers, uncles. My dad was there a
5 couple of times.

6 Q. Okay, and did your mom and your sister, did they ever
7 testify at trial?

8 A. No, sir.

9 Q. Do you know if they were under subpoena to be there?

10 A. I think they was. I'm not sure.

11 Q. All right. Was it your understanding that they were
12 going to testify at trial?

13 A. Yes, sir.

14 Q. And to your knowledge, would they have also testified
15 that you were there at the house at the time that this
16 crime had occurred?

17 A. Yes, sir.

18 Q. And did you testify at trial?

19 A. No, sir.

20 Q. All right. Did you want to testify at trial?

21 A. Yes, sir.

22 Q. All right. Why didn't you?

23 A. My lawyer said he wanted the closing argument, the
24 last, the last argument. Something that he wanted to go
25 last with the closing argument.

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

13

1 Q. Why did he -- what does that have to do with you
2 testifying? Do you know?

3 A. I don't know.

4 Q. Okay. Did y'all present any witnesses?

5 A. No, none.

6 Q. All right. What you testified to today, would you
7 have testified to that at your trial had you been called as
8 a witness?

9 A. Oh, yes, sir.

10 Q. All right. Did you ask him during the trial why your
11 mom and sister weren't testifying?

12 A. No. I didn't even ask.

13 Q. Were you concerned that they weren't testifying?

14 A. Yes, I was.

15 Q. Why didn't you ask him?

16 A. Nervous. Never been in a trial before.

17 Q. Okay. Without you testifying and without your sister
18 and your mother testifying, was there any other way for the
19 jury to hear where you were that day?

20 A. No, sir.

21 Q. Do you think that that prejudiced your trial?

22 A. I do.

23 Q. All right. Do you know if your lawyer had ever filed
24 what's called a notice of alibi defense?

25 A. Yes, he did.

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

14

1 Q. Do you know what that defense was going to be, or what
2 the basis of the motion of the notice was?

3 A. I don't remember. I don't remember, but I know he
4 filed one. I remember seeing the motion.

5 Q. Okay. You've got a number of allegations, and we need
6 to go through each one of those. If you would, you've got
7 ineffective assistance of counsel. Your attorney filed a
8 motion to be relieved of the case. Explain to the court
9 what you mean by that.

10 A. My lawyer wasn't, I felt he wasn't representing me the
11 way he should communicate. So, I think I filed something
12 on it. I can't remember what it's called, but a couple
13 months later, he asked me did I still want to be his lawyer
14 and stop writing him up. I told him I hadn't talking to
15 him for about nine, ten months, and I think a couple months
16 later he wrote a motion to be relieved off my case, and I
17 hadn't heard nothing from him for almost a year until it's
18 time to go to trial.

19 Q. All right, was that motion -- did anything happen to
20 that motion? He was never relieved, was he?

21 A. No.

22 Q. Okay.

23 A. He stayed my lawyer.

24 Q. Did you want him relieved?

25 A. I didn't want him to represent me, not if he ain't

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

15

1 studied my case.

2 Q. All right. Did you feel that he had done everything
3 he could to know about your case?

4 A. No, I didn't.

5 Q. All right. You've also got that -- and this -- these
6 are your words. None of, none of your alibis were called
7 to testify on your behalf. Have we covered that with your
8 testimony earlier today?

9 A. Yeah, we just covered that, sir.

10 Q. Okay, and then also your third allegation was that you
11 were never called to, to the stand to testify. Have we
12 also covered that?

13 A. Yes, sir.

14 Q. All right, lack of communication, do you think we
15 covered that?

16 A. Yes, sir.

17 Q. All right, and you've got another one that says you
18 were forced into a joint trial. Explain that.

19 A. I told my lawyer that I didn't want it to go to trial
20 with my co-defendant because he had people testifying on
21 him and him sitting beside me, I felt that kind of
22 prejudiced me to make me look like I was with him. So, I
23 told my lawyer I didn't want to go to trial with him, but
24 he said I had to go.

25 Q. Did your lawyer ever file a motion to sever your cases

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

16

1 or anything like that?

2 A. No.

3 Q. You've also got an allegation that you were offered a
4 joint plea instead of an independent plea. What -- explain
5 that.

6 A. My lawyer came to me and said they offered me a
7 fifteen-year plea, but my co-defendant had to take the plea
8 with me. Otherwise, it would've been no good. It was,
9 like, a joint plea. Both of us had to take it.

10 Q. You got sixty years in this case. Did your lawyer
11 ever make you aware that you could potentially get a
12 sixty-year sentence?

13 A. I didn't think I'd get sixty. I knew the max was
14 thirty. I didn't think sixty, no.

15 Q. Okay, and you didn't want to take the plea?

16 A. I wasn't willing to take the plea, no.

17 Q. All right. Also, you've got a due-process violation
18 claim in that you were denied your motion for change of
19 venue?

20 A. Yeah.

21 Q. Explain that.

22 A. I felt because the motion that my lawyer wrote out
23 saying the victim was closely connected to 500 members of
24 the bar, which is lawyers and judges, that I wouldn't get a
25 fair trial if I was tried in Clarendon County, but the

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

17

1 motion, I don't know what happened to it.

2 Q. Well, do you know if the motion was ever argued, or
3 was it pursued? Do you know?

4 A. My lawyer said something in trial about the motion,
5 but he said that it wasn't right and it still not -- I
6 don't understand it. I think cold or something. I don't
7 know what he was talking about.

8 Q. Okay, we'll discuss that with your attorney when he
9 testifies. You've also got an allegation that you were
10 given a joint trial, and is that the same as your
11 allegation that you were forced into a joint trial?

12 A. Uh-huh.

13 Q. Okay. So we've covered that?

14 A. Yes, sir.

15 Q. All right. You also got an allegation of
16 prosecutorial misconduct in that you were offered a joint
17 plea instead of an independent plea, and we covered that
18 issue?

19 A. Yes, sir.

20 Q. All right. Now, you also have judicial bias in that
21 you feel the judge and the victim were acquaintances?

22 A. Yes, sir.

23 Q. If you would explain that to the court?

24 A. Being that 500 members of the bar are closely
25 connected to my victim, which is judges, solicitors,

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

18

1 lawyers, I feel that they was pretty close.

2 Q. Did you, did you, did you ever express that to your
3 lawyer?

4 A. Yeah. I told him, I told him I, I didn't want to get
5 tried nowhere near Clarendon County. I told him the
6 reason.

7 Q. All right. Did he ever do anything as a result of
8 that?

9 A. Nothing ever happened.

10 Q. All right. You've also got that you feel there was a
11 jury violation when you say: Charge the jury -- charged the
12 jury when proven clearly of a lesser-included offense.
13 Explain what you mean by that.

14 A. When they charged -- he charged the jurors how he --
15 to me is how he charged it. Like, he was saying if, if you
16 believe it's a armed robbery, then charge him armed
17 robbery. If you believe it's a strong-arm robbery, charge
18 him strong-arm robbery. I believe he persuaded the jury to
19 charge me regardless of either or instead of not guilty.

20 Q. Okay. Also, you've got the charge of the jury made
21 you look guilty. Is that what you mean by that?

22 A. Yeah.

23 Q. All right. Now, today we've made an oral amendment to
24 your application regarding some testimony at trial, and do
25 you, do you recall ---

V. WELDON - DIRECT EXAMINATION BY MR. BOOZER

19

1 MR. BOOZER: Court's indulgence, Your Honor?

2 THE COURT: Yes, sir.

3 BY MR. BOOZER:

4 Q. Do you recall in your trial an investigator
5 testifying? It begins on page 75 of volume four of the
6 transcript on through page 76 where I guess a search
7 warrant was executed at the house you were living at.

8 A. Yes, sir.

9 Q. All right, and, and it says that the search warrant,
10 that nothing was found as a result of the search warrant at
11 in your house. Is that right?

12 A. Yes, sir.

13 Q. All right, and then the solicitor continues to
14 question the investigator, and on page 76 the solicitor
15 asks:

16 Did you go there looking to see if there were --
17 if there was a -- some boots or a mask there at
18 the house, you were hoping to find it, right?

19 Answer: Yes.

20 Question: But how many -- eight weeks had gone
21 by?

22 Answer: Yes. Easily evidence could have been
23 destroyed by then.

24 Did your lawyer object at that point?

25 A. No, sir.

V. WELDON - CROSS-EXAMINATION BY MS. COLEMAN

20

1 Q. Okay. Was there any other evidence offered that
2 evidence had been destroyed?

3 A. Repeat?

4 Q. Sure. Was there anything -- there was nothing to --
5 strike that. Mr. Weldon.

6 A. Yes, sir.

7 Q. We've covered your allegations that you have in your
8 PCR application and also the oral amendment that was made
9 today.

10 A. Yes, sir.

11 Q. Is there anything that we have not covered regarding
12 your application or regarding your allegations in support
13 of your PCR?

14 A. No. All things have been covered.

15 Q. All the things have been covered? Okay.

16 MR. BOOZER: Thank you, sir. Please answer any
17 questions the state may have for you.

18 CROSS-EXAMINATION BY MS. COLEMAN:

19 Q. Good morning, Mr. Weldon. How are you?

20 A. Good morning. Fine.

21 Q. How many times did you meet with your attorney before
22 your trial?

23 A. Four. Three, four.

24 Q. Do you recall reviewing discovery with your attorney
25 before the trial?

V. WELDON - CROSS-EXAMINATION BY MS. COLEMAN

21

1 A. The motion discovery?

2 Q. Yes, or any of the discovery materials?

3 A. Yes.

4 Q. State's evidence against you. Did you give your
5 attorney any leads or witnesses to investigate?

6 A. I gave him just the alibis.

7 Q. So, you told him about your alibi? You told your
8 attorney that?

9 A. Yes, ma'am.

10 Q. Okay, and what witnesses did you want him to present
11 to testify?

12 A. My mother and my sister, Debra and Jessica Weldon.

13 Q. And are they here today?

14 A. Yes, ma'am.

15 Q. Are they going to testify today?

16 A. They will.

17 Q. Okay. Did you tell your attorney that you wished to
18 testify at trial?

19 A. Yes, ma'am.

20 Q. Now, you have an allegation. You testified that the
21 judge and the victim were acquaintances. Do you know for a
22 fact that the judge and the victim know each other?

23 A. Not a hundred percent, no, ma'am.

24 Q. Okay.

25 MS. COLEMAN: No further questions. Thank you.

D. WELDON - DIRECT EXAMINATION BY MR. BOOZER

22

1 THE COURT: Any redirect?

2 MR. BOOZER: No redirect, Your Honor.

3 THE COURT: All right, thank you, sir. You can go sit
4 back next to your lawyer.

5 WITNESS: All right.

6 (THE WITNESS EXITS THE STAND.)

7 THE COURT: All right, Mr. Boozer.

8 MR. BOOZER: Thank you, Your Honor. At this time we
9 call Ms. Debra Weldon to the stand.

10 DEBRA L. WELDON, BEING DULY SWORN,
11 TESTIFIES AS FOLLOWS:

12 BAILIFF: Please state your full name, and spell your
13 first and last name for the record, please.

14 WITNESS: Debra L. Weldon, D-e-b-r-a W-e-l-d-o-n.

15 DIRECT EXAMINATION BY MR. BOOZER:

16 Q. Ms. Weldon, how are you today?

17 A. I'm okay.

18 Q. Okay. You nervous?

19 A. A little sleepy. I just got off of work.

20 Q. Well, let's talk it. It sounds like you're a
21 hard-working woman.

22 A. Yeah.

23 Q. Where do you work?

24 A. I work at Tuomey Hospital, and I also work at the
25 Barbecue Hut.

D. WELDON - DIRECT EXAMINATION BY MR. BOOZER

23

1 Q. Okay. Now, do you know Victor Weldon?

2 A. That's my second oldest son.

3 Q. All right. So, you're his mom?

4 A. Right.

5 Q. All right, and are you aware that your son was accused
6 of committing a crime that occurred back on May 15, 2010?

7 A. Yes, I am.

8 Q. All right. Are you also aware they allege that that
9 crime occurred sometime between 6 and 6:30, 7 a.m. that
10 day?

11 A. Yes. Yes, I am.

12 Q. All right. Were you present for a jury trial for your
13 son on those charges in May of 2012?

14 A. Yes, I was.

15 Q. How, how many days was that trial? Do you remember?

16 A. I think it was just one day.

17 Q. Okay, but you were present?

18 A. Uh-huh.

19 Q. Why were you there?

20 A. Supposed to be the witness.

21 Q. You were going to be a witness?

22 A. Yes, sir.

23 Q. Okay, and what, what was your testimony going to
24 consist of? What were you going to tell the court?

25 A. That once I got off from work, Victor was at the

D. WELDON - DIRECT EXAMINATION BY MR. BOOZER

24

1 house.

2 Q. Well, let's talk about that. So, the crime was
3 alleged to have occurred on -- or the crime occurred on May
4 15, 2010, and on May 14, 2010 -- well, let me ask you this
5 as a general question. During that time, who was living at
6 the house, your house?

7 A. Well, okay, I had my daughter.

8 Q. What's her name?

9 A. Jessica Weldon.

10 Q. Okay.

11 A. My baby boy, Marcus Weldon. He -- his friend, his
12 girlfriend would be in and out; and then Rell [phonetic],
13 Victor's ex, would be in and out; my oldest son, Matthew;
14 and myself.

15 Q. All right. So, let's start on May 14th of 2010. When
16 did you get home that evening or when did you leave the
17 house to either go to work or go somewhere else that
18 evening?

19 A. Okay, I got off work at the Barbecue Hut 8:30 that
20 night.

21 Q. Okay. Keep going.

22 A. Okay, and when I go to Tuomey Hospital -- that's if I
23 even work because on some of the weekends, I'm usually
24 home. So, usually I'm home on Saturday and Sunday. I
25 would be working every other weekend. At that time I was

D. WELDON - DIRECT EXAMINATION BY MR. BOOZER

25

1 PRN, but now I'm full time, so I do a whole weekend
2 straight.

3 Q. Okay. Well, after getting done with the Barbecue Hut
4 at 8:30, where did you go?

5 A. I went home.

6 Q. You went home. All right, how long were you home for?

7 A. I stayed home until at least about 10:30 that night.

8 Q. All right. At 10:30 that night, you then left. Did
9 you leave at 10:30 that night to go somewhere else?

10 A. Probably to the store or something if I didn't work.

11 Q. Okay. Do you know if you worked that night?

12 A. No. I don't work on the -- if it was on the weekend,
13 I don't work on the weekend.

14 Q. Okay. Well, let me ask you this. At 10:30 that night
15 -- well, let me ask you this. When did you go to bed that
16 evening?

17 A. I usually lay on the sofa because where we stay was a
18 trailer, and the sofa's right there and the door's, you
19 know, right in front of there. So, I usually lay on the
20 sofa, and then I'll get up latter, go get in the bed.

21 Q. Okay. Do you have an independent recollection of that
22 night of seeing your son there at the house?

23 A. Yes, because he was one who made me get off the sofa
24 and go to bed.

25 Q. Okay. So, do you know what time you went to bed that

1 night?

2 A. Probably -- so long ago. Probably about midnight.

3 Q. All right. What time did you get up then the next
4 morning?

5 A. 8:00.

6 Q. All right. When you got up, who was at the house?

7 A. Victor, Jessica, myself. My baby boy, I think he was
8 there that night, too.

9 Q. All right. So on May 15, 2010, you think you got up
10 at what time?

11 A. About 8:00.

12 Q. And Victor was there?

13 A. Yeah.

14 Q. All right. Did anything seem unusual or out of the
15 ordinary?

16 A. No. Victor's usually Victor. You know, wanting to
17 know -- make sure I take my medicine and tell me, you know,
18 to eat my breakfast and stuff.

19 Q. Okay. To your knowledge, had Victor left the house
20 that evening or that morning?

21 A. No. He usually don't go nowhere; he's a homebound
22 person.

23 Q. Does he have a car?

24 A. No.

25 Q. Okay. Did he have access to a car?

D. WELDON - DIRECT EXAMINATION BY MR. BOOZER

27

1 A. Not at that time. I only had a car, and he wasn't
2 using mine.

3 Q. Okay. Let me ask you. Did you ever discuss that,
4 what you've just testified to, did you ever discuss that
5 with his lawyer, Mr. Knobeloch?

6 A. No, I don't think so.

7 Q. Did he ever -- did your lawyer -- did his lawyer ever
8 ask you any questions about where you were on May 14th or
9 May 15, 2010?

10 A. I believe he did.

11 Q. And do you know what you would have told him?

12 A. At home.

13 Q. All right. Do you know if you would have also told
14 him that Victor was at home?

15 A. Yes.

16 Q. Did his lawyer ever ask you to come to trial and
17 testify?

18 A. Yes, he did.

19 Q. All right. When did that -- when did he ask you that?

20 A. The same day that they had the trial, he asked me to
21 testify, but they never called me to the stand.

22 Q. And do you know what the purpose of your testimony
23 was?

24 A. You know, tell whether Victor was at the house at the
25 time of the crime.

D. WELDON - DIRECT EXAMINATION / CROSS-EXAMINATION 28

1 Q. All right. Everything that you've testified to today
2 about your whereabouts and as well as Victor's from May 14,
3 2010, to May 15, 2010, is that what you would have
4 testified to at trial had you been called as a witness?

5 A. Yes, sir.

6 Q. And what's the address of the house that y'all were
7 living in?

8 A. What? Now?

9 Q. At the time.

10 A. Oh. Okay. It was Country Spring, [REDACTED],
11 I believe.

12 Q. And where is that? Sumter County?

13 A. Yes, sir.

14 Q. Okay.

15 MR. BOOZER: Thank you. That's all the questions I
16 have for you.

17 WITNESS: Okay.

18 CROSS-EXAMINATION BY MS. COLEMAN:

19 Q. Good morning. How are you?

20 A. I'm okay.

21 Q. Good. What were you doing on May 13th of 2010?

22 A. Well, I was at home being a mom. Probably cooking,
23 cleaning, fussing.

24 Q. Okay, and what were you doing on May 17th of 2010?

25 A. At home or at work.

D. WELDON - CROSS-EXAMINATION BY MS. COLEMAN

29

1 Q. Do you remember specifically the times that you did
2 anything?

3 A. Well, if I know what -- what day was the 17th?

4 Q. May 17th would be Monday.

5 A. Oh, okay. Yeah, I was at home.

6 Q. Okay. This was six and a half years ago?

7 A. Right.

8 Q. Yeah. So, it's kind of hard to remember?

9 A. Yeah.

10 Q. Okay. You said that you do not work on the weekends.
11 Is that right?

12 A. I didn't at that time.

13 Q. Okay, at the time and May 15th, the day that this
14 crime occurred, was a Saturday, correct?

15 A. Yes.

16 Q. Okay. So, you testified that you went to bed the
17 night before around midnight, and what ---

18 A. I worked at the Barbecue Hut, and I go in at 9 and get
19 off at 8:30.

20 Q. Okay.

21 A. Then I come straight home, but I was not working at
22 the hospital at the time.

23 Q. Okay.

24 A. On the weekends because I had just got hired.

25 Q. So on Saturday, May 15, 2010, you testified that you

D. WELDON - CROSS-EXAMINATION / REDIRECT EXAMINATION 30

1 woke up about 8 a.m.?

2 A. Yeah.

3 Q. Okay, and this crime occurred about -- between 6 and
4 6:30 a.m. Is that correct?

5 A. That's what I was told, yeah.

6 Q. Okay.

7 MS. COLEMAN: Thank you. No further questions.

8 WITNESS: Okay.

9 THE COURT: Mr. Boozer.

10 MR. BOOZER: Just briefly.

11 REDIRECT EXAMINATION BY MR. BOOZER:

12 Q. Going back to that date, May 15, 2010, that's a pretty
13 important date, isn't it?

14 A. Yeah.

15 Q. It's an important date because your son was alleged to
16 have committed a very serious crime. Is that right?

17 A. That's right.

18 Q. Is that one way that you're able to recall the events
19 of that day and the evening before that?

20 A. Yes.

21 MR. BOOZER: Thank you, Your Honor. No further
22 questions.

23 THE COURT: All right, thank you, ma'am. You can go
24 back and have a ---

25 MS. COLEMAN: Excuse me, Your Honor. One more

D. WELDON. - RECROSS-EXAMINATION BY MS. COLEMAN

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1 question.

2 THE COURT: Oh, I'm sorry.

3 MS. COLEMAN: Sorry. Just one more.

4 RECROSS-EXAMINATION BY MS. COLEMAN:

5 Q. Your son testified that he was waiting for you to get
6 home from work about 7:15 a.m. Is that correct?

7 A. He -- well, you mean that morning?

8 Q. Yes.

9 A. I was at home.

10 Q. Okay, you were at home and ---

11 A. Yes.

12 Q. --- and asleep until 8 a.m.?

13 A. Yeah.

14 Q. Okay.

15 A. I didn't work that weekend.

16 Q. Okay.

17 MS. COLEMAN: Thank you. That's all.

18 WITNESS: All right.

19 THE COURT: Now you can go back.

20 (THE WITNESS EXITS THE STAND.)

21 THE COURT: Mr. Boozer, any other witnesses?

22 MR. BOOZER: One other witness, Your Honor. That
23 would be Ms. Jessica Weldon.

24 JESSICA WELDON, BEING DULY SWORN,

25 TESTIFIES AS FOLLOWS:

J. WELDON - DIRECT EXAMINATION BY MR. BOOZER

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1 BAILIFF: State your full name. Spell your last name
2 for the record.

3 WITNESS: Jessica Shanika Weldon, W-e-l-d-o-n.

4 DIRECT EXAMINATION BY MR. BOOZER:

5 Q. Ms. Weldon, how are you?

6 A. I'm doing all right.

7 Q. Good. Do you know Victor Weldon?

8 A. Yes, sir.

9 Q. How are -- are you related to him?

10 A. Yes, sir. That's my brother.

11 Q. That's your brother? All right. What you do for a
12 living?

13 A. What I do?

14 Q. Uh-huh.

15 A. Right now I'm a mother right now. I don't do nothing.

16 Q. That's a full-time job.

17 A. No. Yeah, it really is.

18 Q. Okay.

19 A. It's a job with responsibilities.

20 Q. All right. Now, are you aware that your brother,
21 Victor, was accused of committing a crime on May 15, 2010,
22 in Clarendon County?

23 A. Yes, sir.

24 Q. All right, and are you aware that that crime allegedly
25 occurred sometime between 6 and 6:30 a.m., there or about

J. WELDON - DIRECT EXAMINATION BY MR. BOOZER

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1 give or take some time?

2 A. Yes, sir.

3 Q. All right, and then he was convicted after a jury
4 trial for those charges some time in May of 2012?

5 A. Yes, sir.

6 Q. You're aware of that?

7 A. Yes, sir.

8 Q. All right. Were you actually at a trial for Victor?

9 A. Yes, sir. I was at -- I think they had, like, two
10 days for his trial. I know I didn't come -- I didn't come
11 to the sentencing.

12 Q. But you were there for the actual trial itself?

13 A. Yes, sir.

14 Q. All right. Why were you there?

15 A. I was supposed to come and testify for him.

16 Q. All right. Who told you that you would be testifying?

17 A. His lawyer.

18 Q. And who was his lawyer? Do you remember?

19 A. I can't pronounce his name. His last name was --
20 John. I can't pronounce his last name.

21 Q. Is it Knobeloch? Did it have a K in it?

22 A. Yes, sir.

23 Q. All right. Prior to the trial in May of 2012, did you
24 ever have any discussions with his lawyer, Mr. Knobeloch?

25 A. Yes, sir.

J. WELDON - DIRECT EXAMINATION BY MR. BOOZER

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1 Q. What did you two discuss?

2 A. I remember it was in Manning court, and he asked me
3 was I around at the time. I told him, I told him yes, and
4 he asked me would I be willing to testify for Victor, and I
5 said yes, sir, I will.

6 Q. Do you know if you were under a subpoena to testify,
7 or were you there just voluntarily?

8 A. I think I was just there voluntarily.

9 Q. And did you end up testifying at the trial?

10 A. No, sir.

11 Q. Were you ever told why you weren't called as a
12 witness?

13 A. No, sir.

14 Q. Was it your intention to testify while you were there?

15 A. Yes, sir.

16 Q. All right. Let's go back to May 15, 2010, which is
17 the date the crime occurred. Where were you living at that
18 time?

19 A. [REDACTED] Drive, Sumter, South Carolina.

20 Q. Okay, and who did you live with?

21 A. My mother, Debra Weldon; and my brother Victor Weldon;
22 my other brother Marcus Weldon; Victor Weldon girlfriend;
23 and Marcus Weldon girlfriend.

24 Q. All right. The day before, on May 14, 2010, that
25 evening, what time did you go to bed?

J. WELDON - DIRECT EXAMINATION BY MR. BOOZER

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1 A. That evening, I know, like, I got out of school at
2 4:00. I got off the bus and he was outside, and I ain't
3 went to sleep til late because it was Friday night. I
4 ain't had, I ain't had to go to school, so I didn't went to
5 sleep til around, I'm going to say, 12:00.

6 Q. 12 a.m.?

7 A. Yeah. Like, a little bit past 12.

8 Q. Okay. When you went to sleep, who was there?

9 A. My brother Victor; his girlfriend, Rell; and my
10 brother girlfriend Kathy, the other -- Marcus girlfriend,
11 Kathy.

12 Q. How about your mom? Do you know if she was there?

13 A. Yes, sir. She was there. I forgot to say her.

14 Q. All right. Where was your brother when you went to
15 bed?

16 A. In a room with his girlfriend.

17 Q. How close was that to the room that you sleep?

18 A. Right there.

19 Q. It's very close?

20 A. Very close.

21 Q. Is it next door?

22 A. No. It's a bathroom is next door, but if he come out
23 his room, like, when he come out his room, he pass my room,
24 I see everything coming out his room, going in.

25 Q. Okay. Now, what time did you get up the next day on

J. WELDON - DIRECT EXAMINATION BY MR. BOOZER

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1 May 15th?

2 A. I got up around 5 something because my friend Dina
3 called me. So when I get up, I try to sneak a cigarette
4 from his girlfriend at the time, and he was in the room.

5 Q. So, you were trying to sneak a cigarette from Victor's
6 girlfriend?

7 A. Yes, sir.

8 Q. Okay, and that was at what time?

9 A. 5 something.

10 Q. All right.

11 A. It was in the morning, 5 a.m.

12 Q. Was Victor in the room?

13 A. Yeah. He was sleep at the time.

14 Q. All right.

15 A. There. I guess when I opened the door --- because I
16 was outside. I smoked the cigarette outside the house. I
17 did see him peek out the window.

18 Q. All right, from let's say 6 a.m. to 7 a.m. on May 15,
19 2010, where were you?

20 A. I was at the house.

21 Q. All right. Where was Victor?

22 A. In the house.

23 Q. Where was he?

24 A. In the room with his girlfriend.

25 Q. All right. Do you know when Victor probably got up

J. WELDON - DIRECT EXAMINATION BY MR. BOOZER

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1 that morning? When's the next time you saw him get out of
2 the room?

3 A. I see him part open the door a little bit. I'm going
4 to say around 9, a little bit after because he had two
5 cats, and he let the cats out so they could play outside.

6 Q. And the testimony that you've just given, is that what
7 you would have stated at Victor's trial in May of 2012 if
8 you had been called as a witness?

9 A. Yes, sir.

10 Q. And what you've told me -- or, excuse me, what you've
11 told this court today, is that what you told Victor's
12 lawyer?

13 A. I told him -- had, like -- I ain't going to say I tell
14 him the whole thing because I don't recall, but, like, tell
15 him the whole thing about -- I mean, just having a
16 conversation with him to ask was I around at the time.

17 Q. Okay, and how is it you're able to recall the events
18 around that time?

19 A. After my brother got locked up, that all we talk
20 about.

21 Q. Do y'all still talk about this to this day?

22 A. Yes, sir.

23 Q. Okay.

24 MR. BOOZER: Thank you, Your Honor. That's all the
25 questions I have of this witness.

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 Thank you, Ms. Weldon.

2 THE COURT: All right, Ms. Coleman.

3 MS. COLEMAN: No questions for this witness.

4 THE COURT: All right, thank you. You can go back and
5 have a seat in the back of the courtroom.

6 WITNESS: Yes, ma'am.

7 (THE WITNESS EXITS THE STAND.)

8 THE COURT: All right, Mr. Boozer.

9 MR. BOOZER: Yes, ma'am. We would call former counsel
10 John Knobeloch to the stand.

11 THE COURT: All right.

12 JOHN KNOBELOCH, BEING DULY SWORN,
13 TESTIFIES AS FOLLOWS:

14 BAILIFF: Please state your full name and spell your
15 last name for the record.

16 WITNESS: It's John Knobeloch, K-n-o-b-e-l-o-c-h.

17 DIRECT EXAMINATION BY MR. BOOZER:

18 Q. Good afternoon, or morning still, Mr. Knobeloch. How
19 are you?

20 A. Good.

21 Q. It may be afternoon by the time we get done here.

22 Mr. Knobeloch, where do you currently practice law?

23 A. Charleston County, Mount Pleasant.

24 Q. All right. How long have you been practicing in
25 Charleston?

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 A. Twenty years, give or take a year.

2 Q. Now, you represented Mr. Weldon for his trial?

3 A. Correct.

4 Q. And how is it that you, a Charleston lawyer, became
5 involved in Clarendon County?

6 A. I think that they amended Rule 608 about a year before
7 his trial and took Clarendon from Florence and gave it to
8 Charleston, and I think that's how it came about. The ---

9 Q. Do you -- go ahead. I'm sorry.

10 A. I was going to say the, the, the letter of appointment
11 from the clerk stated that the reason was that all of the
12 attorneys in Clarendon County and the neighboring counties
13 had such a close, personal relationship with the victim
14 that no attorney in those counties could represent Mr.
15 Weldon.

16 Q. Did that cause you any concern?

17 A. It, it did. I thought that that was an odd reason for
18 an appointment, and I did draft a motion for change of
19 venue. I do not recall -- I, I believe that I presented
20 the motion but withdrew it on the spot at court, but I
21 don't recall. I may have actually argued it.

22 Q. And let -- we'll circle back to that in just a second.
23 We'll keep moving forward with sort of the background. Do
24 you know when you were appointed to represent Mr. Weldon?

25 A. I don't recall the exact date.

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 Q. Do you know how many times you may have met with Mr.
2 Weldon prior to his trial?

3 A. I recall at least twice. There was, of course, a
4 distance between us, so there would have been some
5 communications by mail, and I believe that the courthouse
6 -- I mean, the jail he was in allowed phone calls, I
7 believe.

8 Q. So, you may have had some phone calls with him as
9 well?

10 A. Possibly.

11 Q. All right. What were the allegations against Mr.
12 Weldon?

13 A. Attempted murder, kidnapping, burg first, armed
14 robbery, and I believe possession of a weapon during a
15 violent crime.

16 Q. And what were the facts that were supporting these
17 allegations?

18 A. In the early morning, I believe it was just before
19 sunrise to meet the elements of, of burg first, a number of
20 people -- I forget the exact number. I think it may have
21 been three. It may have been four. All wearing masks
22 entered Mr. Gibson's [sic] garage and attacked him as he
23 was leaving for the morning. Beat him pretty severely and,
24 I believe, took the money that he had in his wallet.

25 Q. In meeting with Mr. Weldon, did y'all talk about the

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 evidence and what was -- what he was facing?

2 A. Yes.

3 Q. How, how would you categorize the evidence or
4 characterize the evidence against Mr. Weldon in this case?

5 A. I recall after receiving the discovery that I reached
6 out to the assistant, the assistant solicitor with no
7 tongue-in-cheek thinking that I had received the wrong
8 discovery package because he's not mentioned in it.

9 Q. Okay, and throughout the course of your representation
10 in the trial, was the discovery -- was evidence against Mr.
11 Weldon lacking?

12 A. Initially the only evidence that I saw was -- there
13 was DNA evidence which took a while to get from the
14 solicitor's office, but I did eventually get that, that DNA
15 was found on a piece of duct tape.

16 Q. And it was linking Mr. Weldon?

17 A. The, the DNA did match Mr. Weldon.

18 Q. Did you take issue, though, with the way in which the
19 evidence -- with the evidence itself?

20 A. I don't think that I did on the record. I, I, I, I
21 investigated trying to suppress it based on the fact that
22 the hit came from a CODIS database. It's been a while
23 since I've done the research, but I was, I was attempting
24 to say that those -- that sample in the database should
25 have been expunged and was not, and that that's another one

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 I think that I ended up was unable to connect the dots on
2 my argument, and I don't know if I made that argument.

3 Q. What type of investigation did you perform in the
4 case?

5 A. I requested funds for an expert witness to -- who I
6 did not call but to review the DNA evidence, and I also
7 requested a private investigator because there were
8 numerous second and third-hand accounts in the officer's
9 notes from confidential informants, and I used the private
10 investigator to try and track those people down.

11 Q. Prior -- or at the trial, what was the trial strategy
12 in the case?

13 A. The, the, the trial strategy was to attack the DNA,
14 which was the only evidence linking Mr. Weldon to the
15 crime. There were no witnesses. All of the defendants
16 were wearing masks. There was, there was nothing linking
17 him except for the DNA. And I guess the -- our, our theory
18 on weakness of the DNA evidence was that the police
19 officers did take a sample from both the outside of the
20 duct tape and the sticky side of the duct tape, the
21 significance being that if, you know, the DNA is found on
22 the sticky side, it's much more likely that you were
23 present because you had to expose the sticky side at --
24 where, where -- when the, when the sample, DNA sample was
25 put on it, even though the police officers took samples of

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 both sides, they didn't label them. So, they were unable
2 to say whether the, whether the DNA sample came from the
3 outside or the sticky side of the duct tape.

4 Q. Did you raise that issue at trial?

5 A. I believe I did, but I don't recall. It's been a
6 while.

7 Q. Okay. If you did, it'd be in the transcript and ---

8 A. That's correct.

9 Q. --- of course if you didn't, it wouldn't?

10 A. That's correct.

11 Q. And if you, if you didn't raise it, is that something
12 you feel like you should have ---

13 A. Absolutely.

14 Q. --- raised? Do you think if you would have been able
15 to keep that DNA evidence out, that that would -- could
16 have changed the outcome of the trial?

17 A. Absolutely.

18 Q. In favor of Mr. Weldon?

19 A. In favor. There was no other evidence except for
20 that.

21 Q. But you'll defer to the transcript?

22 A. I will defer. It was several years ago, and I will
23 absolutely defer to the transcript.

24 Q. Have you been in the courtroom since we've called --
25 or since this case has been called for a hearing?

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 A. Yes.

2 Q. Have you heard the testimony of Debra Weldon and
3 Jessica Walton today?

4 A. I have.

5 Q. All right. Did you ever have any contact with either
6 Jessica Walton or Debra Weldon prior to the trial?

7 A. I, I recall speaking with his mother, Debra Weldon,
8 several times, and reviewing my notes I believe I did also
9 speak with his sister.

10 Q. So, both Debra and Jessica you would have spoken to?

11 A. Correct.

12 Q. Did you have any discussion with either Jessica or
13 Debra about where Victor was the day that this crime
14 occurred?

15 A. Yes.

16 Q. Do you know what the substance of that discussion
17 would have been?

18 A. It, it would have been very similar to the testimony
19 that they gave earlier today.

20 Q. Do you think that that's what they indicated to you
21 back then when you were investigating then?

22 A. I don't recall verbatim, but the, the general essence
23 of what they testified to today would have been the same
24 thing.

25 Q. Now at trial, did you call any witnesses on Mr.:

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 Weldon's behalf?

2 A. We did not.

3 Q. All right. Why were no witnesses called on his
4 behalf?

5 A. I do not know. The -- we did file a notice of alibi
6 and I did prepare -- in the trial notebook there is a spot
7 where I had prepared to ask Debra, at least the mother,
8 Debra Weldon, questions supporting the alibi. Possibly we
9 did not call a witness so that we could have final
10 argument, but so honestly I, I don't know why we would not
11 have called them as alibi witnesses.

12 Q. So, you think that -- well, let me ask you this. You
13 did file a notice of alibi?

14 A. Correct.

15 Q. All right, and was that notice of alibi, was that for
16 the testimony of Debra Weldon and Jessica Weldon?

17 A. Correct.

18 Q. And that would have been alibi for where Mr. Weldon
19 was on May 15, 2010?

20 A. Correct.

21 Q. And it's your understanding that, based on your
22 investigation of the -- Ms. Weldon and her daughter,
23 Jessica Weldon, and discussions with Victor Weldon, that he
24 was at their house in Sumter when all this allegedly
25 occurred?

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 A. That is correct.

2 Q. All right. Had you present -- was there any other way
3 if Mr. Weldon didn't testify and Ms. Jessica Weldon didn't
4 testify and Debra Weldon didn't testify, was there any
5 other way to convey that to the jury?

6 A. No.

7 Q. Do you think that that was important testimony for the
8 jury to consider?

9 A. I do.

10 Q. Okay. Looking back, should you have called them as
11 witnesses in the trial?

12 A. I believe so, yes.

13 Q. And do you think that that could have changed the
14 outcome of Mr. Weldon's trial?

15 A. I do.

16 Q. Now, going back to a few of Mr. Weldon's allegations,
17 was there a motion to be relieved filed in the case, if you
18 recall?

19 A. There -- I cannot remember if I brought that motion
20 before the court, but I do remember speaking with Mr.
21 Weldon because he did have concerns about my representation
22 and asking him if he wanted me to stay on the case. And I
23 recall that at the end of that conversation, we decided
24 that I would remain his attorney. I don't recall whether
25 or not I filed a motion before the court to be relieved.

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 Q. And, and if it's -- if the transcript notes that
2 you're not pursuing the motion to be relieved, would you
3 agree that's what occurred?

4 A. Correct.

5 Q. Okay, and going back to Jessica Weldon and Debra
6 Weldon, were they actually at the trial?

7 A. I remember his mother being there, and I believe his
8 sister was also.

9 Q. And you indicated that you may have considered having
10 last argument versus presenting witnesses?

11 A. With, with hindsight, you know, reading the PCR
12 application, I'm scratching my head wondering why we would
13 not have called our alibi witnesses, and that's the only
14 thing I can come up with, but I don't see that in my notes
15 that were taken at the time of trial.

16 Q. So, you're not even sure if you made that decision?

17 A. Correct.

18 Q. But you would -- even if you had made that decision,
19 would you agree that calling alibi witnesses would have
20 been a much more favorable strategic decision versus not
21 calling alibi witnesses and trying to get the last
22 argument?

23 A. I do.

24 Q. Because there's no other way to present an alibi
25 defense.

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 A. That's right.

2 Q. He was tried with a co-defendant?

3 A. Correct.

4 Q. All right. Did y'all have any discussion about trying
5 to separate those trials?

6 A. I don't specifically recall discussing that with Mr.
7 Weldon.

8 Q. Did you make any sort of motion with regard to that?

9 A. I do not believe I did.

10 Q. Do you think that that's something that may have been
11 successful at the time, or do you recall?

12 A. I don't know whether the court would have granted that
13 or not.

14 Q. Well, were there any statements that were being made
15 against one another?

16 A. From memory, I do not believe that either defendant
17 pointed the finger at the other.

18 Q. Do you have any recollection of some sort of a joint
19 plea being offered to both defendants, that it was
20 contingent upon both of them accepting it?

21 A. I looked through my file again, and I did not see a
22 written plea offer in my file from the solicitor's office.
23 I, I did not recall it until I heard Mr. Weldon testify
24 today, but it does vaguely sound familiar, but I do not
25 specifically recall that.

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 Q. And, and obviously he didn't end up accepting that.

2 A. Correct.

3 Q. Was he pretty adamant about having a trial?

4 A. Yes.

5 Q. Now, did you also file a motion for change of venue?

6 A. I did.

7 Q. Okay. What was your reason for the motion for change
8 of venue?

9 A. My understanding is that the standard for a change of
10 venue is pretty high, and that it's not that the community
11 knows about the facts of the case. It's that the community
12 cannot set aside its either prejudice or bias to give a
13 fair trial. And so the premise of my motion is if three to
14 500 attorneys who certainly have a -- an -- should
15 certainly be able to take on a case, even if they do have
16 connections to the community. If three to 500 attorneys in
17 all of the counties couldn't set aside their own prejudices
18 or biases, that I did not believe that the community as
19 jurors could.

20 Q. Do you have any recollection as to whether the motion
21 was ever ruled upon?

22 A. I believe that we did file it, and I believe that we
23 withdrew it during preliminary motions prior to the jury
24 selection.

25 Q. Okay.

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 MR. BOOZER: Your Honor, may I approach the witness?

2 THE COURT: Yes, sir.

3 BY MR. BOOZER:

4 Q. Mr. Knobeloch I'm going to turn to -- this is volume
5 one of the trial transcript, and specifically I'm looking
6 at page 12, and I'm looking at beginning at line 8 through
7 line 12. If you would, just take a moment and review that
8 to yourself.

9 (A PAUSE.)

10 A. Okay.

11 Q. Have you had a moment to take a look at that?

12 A. I have.

13 Q. Okay. Sitting here looking at it, it appears you're
14 addressing the court and you say based on page 12, line 8:
15 And from memory, the motion to be relieved, I'm not
16 pursuing. So, you weren't pursuing the motion to be
17 relieved?

18 A. Correct.

19 Q. And you go on to say:

20 And I think the other motion that I filed at --
21 the last time we were here was for a change of
22 venue, which was not moved -- I mean, it was not
23 ripe and it still is not.

24 Do you have any idea what that meant?

25 A. I, I can't tell from reading that if I was trying to

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 say that the, the not -- if there was a -- if the court
2 even ruled on the motion and I was addressing the court's
3 ruling, or if I was referring to the underlying motion
4 itself.

5 MR. BOOZER: Your Honor, may I approach the witness
6 again?

7 THE COURT: Yes, sir.

8 BY MR. BOOZER:

9 Q. All right, Mr. Knobeloch, I want to direct your
10 attention. This is volume four of the transcript, and
11 specifically it's page 76. If you would just take a moment
12 and read to yourself, and you may want to start at the top
13 to orient yourself to the transcript. Just take a moment
14 to read that to yourself.

15 (A PAUSE.)

16 Q. Have you had a moment to review that section?

17 A. I have.

18 Q. Okay, and does this appear to you to be portions of
19 testimony from one of the investigators?

20 A. Correct.

21 Q. All right, and looking at it, it appears that -- or
22 would you agree that it appears to be testimony discussing
23 that investigator executing a search warrant at the house?

24 A. The, the testimony has to do with the investigator
25 searching the house pursuant to a warrant that was issued

1 approximately eight weeks after the crime.

2 Q. And that -- was that a search of Mr. Weldon's house?

3 A. It was, it was, I believe it was either Mr. Weldon's
4 house or his father's house, but I think it was Mr.
5 Weldon's house.

6 Q. Okay, and then it goes on, that question at line 15:

7 Did you go there looking to see if there was a --
8 some boots or a mask there at the house you were
9 hoping to find it, right?

10 Investigator responds: Yes.

11 Question: But how many -- eight weeks had gone
12 by?

13 Answer: Yes. Easily evidence could have been
14 destroyed by then.

15 In the transcript, there's no objection noted. Do you
16 know if you objected to that?

17 A. I do not recall objecting.

18 Q. Okay. Do you believe that that's something that is
19 objectionable?

20 A. Yes.

21 Q. Okay, and do you believe that it's prejudicial for the
22 investigator to insinuate that ---

23 A. Correct.

24 Q. --- evidence has been destroyed when there is no
25 evidence of that?

J. KNOBELOCH - DIRECT EXAMINATION BY MR. BOOZER

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1 A. That's correct.

2 Q. Okay. Is that something you should have objected to?

3 A. I should have.

4 Q. Was any curative instruction requested with regard to
5 that?

6 A. I do not, I do not believe so.

7 Q. You've heard Mr. Weldon's allegation that he believed
8 that the judge had some sort of bias because the judge and
9 victim were acquaintances. Do you, you have any
10 recollection of that, or did you have any discussion with
11 Mr. Weldon about that?

12 A. I am -- I'm not from Clarendon County, but I certainly
13 knew that the victim, Mr. Gibson, had significant ties to
14 the community. That was the whole basis of my appointment,
15 and I do recall as he entered the courtroom, it seems that
16 he shook hands with every bailiff, every janitor, every
17 attorney, prosecutor. And so I, I would, I would
18 absolutely believe that there was a, a -- at least an
19 acquaintanceship between Mr. Weldon and the judge.

20 Q. Did you make any sort of motion or request for a -- I
21 guess other than the change of venue, did you make any sort
22 of motion for the judge to recuse himself or anything like
23 that?

24 A. We did not.

25 Q. Okay. Also, Mr. Weldon made some allegations about, I

J. KNOBELOCH - DIRECT EXAMINATION / CROSS-EXAMINATION 54

1 guess, the jury charges and he alleges that he feels like
2 (A) the charge itself made him look guilty, and (B) that
3 his interpretation is that the charges given to the jury
4 really only gave them two options, both of which were to
5 find him guilty of either armed robbery or strong-arm
6 robbery. Do you recall anything about the jury charges?

7 A. I don't recall the jury charges.

8 Q. And would you, I guess, have objected had there been
9 an issue with them?

10 A. Is he -- is Mr. Weldon referring to lesser-included
11 charges? Is that what he -- I'm not sure I'm following
12 what...

13 Q. That's my understanding, yes, sir.

14 A. I would have to look at the statutes to see the
15 sentences. I feel, my gut feeling would be that we would
16 want to include the lesser-included charges because of the
17 mandatory minimum on, on some of the, on some of the
18 charges that were pending.

19 MR. BOOZER: Mr. Knobloch, that's all the questions I
20 have, and I appreciate your time.

21 WITNESS: Thank you.

22 CROSS-EXAMINATION BY MS. COLEMAN:

23 Q. Hi. How are you?

24 A. Good.

25 Q. You've already testified quite a bit with Mr. Boozer

J. KNOBELOCH -- CROSS-EXAMINATION BY MS. COLEMAN

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1 about your interactions with the applicant and how you
2 investigated and prepared for trial. Let's see, I'll start
3 with the alibi witnesses that were presented today. You
4 testified that you had spoken to these witnesses before.
5 Is that correct?

6 A. Correct.

7 Q. Okay, and they -- did they tell you a similar story
8 that was presented today?

9 A. Yes.

10 Q. Okay, and you choose not to use them at trial,
11 correct?

12 A. Correct.

13 Q. Did you -- are you concerned at all today with the
14 fact that the witnesses, all three witnesses today, their
15 stories didn't quite match up?

16 A. Like I testified earlier, I don't recall the specific
17 -- I don't recall the minutia, the detail of, of those
18 conversations, but I do recall in general that they were
19 alibi witnesses, and I do recall that I spoke with them
20 about that.

21 Q. Right, and if they had -- if these witnesses had been
22 presented at trial and if they had testified with the
23 discrepancies that they presented today with -- for
24 example, the question about the time they woke up, whether
25 or not or the mother was there, whether she worked that

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1 day, things like that, if those had been presented to a
2 jury, would that have made them -- made the case better or
3 worse?

4 A. Well, if we had called all three witnesses then yes,
5 but if we only called one witness, I think it would have
6 made the case better.

7 Q. Okay. If you thought that these -- or that one, at
8 least one of these witnesses would have been helpful at the
9 time, would you have called them as a witness?

10 A. With hindsight, I have no idea why I did not call the
11 alibi witnesses.

12 Q. Right.

13 A. Usually I will in my notes at least have an internal
14 discussion with myself that I -- you know, weighing pros
15 and cons and reviewing my notes, I don't, I don't know why
16 I did not call them.

17 Q. So at the time, if it had been an issue, you think you
18 would have had a discussion with yourself and made that
19 decision, a conscious choice not to do that?

20 A. I would think so.

21 Q. Okay.

22 MS. COLEMAN: Beg the court's indulgence.

23 (A PAUSE.)

24 BY MS. COLEMAN:

25 Q. You testified that one of the reasons you didn't call

J. KNOBELOCH - CROSS-EXAMINATION BY MS. COLEMAN

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1 witnesses might have been to have the final closing
2 argument, correct?

3 A. Correct.

4 Q. And you did, in fact, have the final closing argument,
5 correct?

6 A. Correct.

7 Q. You testified that your, your strategy in this case
8 was to attack the credibility of -- or the admissibility of
9 the DNA evidence, correct?

10 A. Correct.

11 Q. And you did, in fact, vigorously cross-examine the
12 state's witnesses that they presented on this evidence,
13 correct?

14 A. Correct.

15 Q. Okay. You also made a motion to suppress all DNA
16 evidence before the trial began. Is that right?

17 A. Correct.

18 Q. And you also made a motion for directed verdict on the
19 basis of the DNA evidence, right?

20 A. I believe so, correct.

21 Q. Also in volume four on page 119 of the transcript,
22 which is your cross-examination of the state's witness,
23 would you agree that you did get the opportunity to argue
24 the issue of DNA evidence on the front of the duct tape
25 versus the sticky side? If that's in the transcript, would

J. KNOBELOCH - CROSS-EXAMINATION BY MS. COLEMAN

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1 you dispute it?

2 A. If it's in the transcript, I don't dispute it, no.

3 Q. Okay.

4 MS. COLEMAN: And, Your Honor, that began -- that
5 cross-examination begins on page 111 and ends on page 120
6 of volume four.

7 BY MS. COLEMAN:

8 Q. And that DNA evidence did match up to the applicant,
9 correct?

10 A. Correct.

11 Q. And you think that's -- do you think that's strong
12 evidence against him?

13 A. I don't know if that one piece of evidence is enough
14 for me personally to think that it overcomes the, the, the
15 standard of beyond a reasonable doubt.

16 Q. Okay. As far as the joint trial goes, you testified
17 that you, you do not recall discussing this at all with the
18 applicant. If the applicant had asked you to file a motion
19 to split the trial, would you have done it?

20 A. I certainly would have considered it. I just can't
21 remember. We may have discussed it; I may have discussed
22 it with another attorney just bouncing ideas off. I just
23 don't recall one way or the other on that issue of severing
24 the, the defendants.

25 Q. And had you done a joint trial like this before?

J. KNOBELOCH - CROSS-EXAMINATION BY MS. COLEMAN

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1 A. I'm a real estate attorney, so I don't do criminal
2 trials. I, I -- well, in twenty-something years, I may
3 have done one or two but generally I don't ---

4 Q. Right.

5 A. --- try criminal cases.

6 Q. And at the time of the trial, if you had thought that
7 the joint trial would have prejudiced him in some way,
8 would you have made a motion to split the trial?

9 A. If I thought it was going to prejudice him, prejudice
10 him, then yes, I assume I would have.

11 Q. Okay. As far as the issue of judicial bias, of course
12 you testified about how this is a small town, and everyone
13 seems to know each other. Did the judge ever indicate to
14 you or to the jury or to anyone that he knew the victim in
15 this case?

16 A. I don't recall specifically, but I believe -- I think
17 that he did, but I cannot recall specifically.

18 Q. And it's also -- would you agree with me that trials
19 like this, jury trials happen in small towns here and all
20 across the state every day, every week, every month without
21 having to change the venue even though people might know
22 each other ---

23 A. As ---

24 Q. --- and be familiar with each other?

25 A. As, as far as what you were touching on earlier about

1 the relationship with the judge, I don't think I ever would
2 have filed a motion to, to ask the judge to recuse himself
3 even if there was a relationship. As far as the change of
4 venue, I think having three to 500 attorneys not be able to
5 take the case because of their close ties to the victims is
6 unusual. With hindsight, the -- on the first day of the
7 trial, the *voir dire* didn't show up. We didn't have enough
8 people show up to participate in the jury, and so I think
9 venue is an issue in this, in this particular case even
10 though it is often that trials are tried in small towns.

11 Q. Now, the amended allegation that they added today,
12 volume four, page 75, the objection that he was talking
13 about that was not made about the search warrant, what
14 objection specifically would you have made to this?

15 A. That the, that the officer was, was entering his own
16 opinion and not stating a fact.

17 Q. But it had, in fact, been eight weeks since crime. Is
18 that correct?

19 A. I wouldn't have objected to that part.

20 Q. Just that he was inserting his own ---

21 A. Correct.

22 Q. Okay, but at the time -- and can you just kind of walk
23 me through your strategy when it comes to objecting to
24 things in court, how you generally decide what to object to
25 and what not to?

J. KNOBELOCH - CROSS-EXAMINATION BY MS. COLEMAN

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1 A. I, I probably would not have objected to that. You
2 know, I honestly -- in reality, it's probably that it just
3 went by me and I didn't catch it. But I will also say that
4 I probably would not have objected to it anyway. Things
5 that are not significant, I don't want to stop the flow or
6 draw attention to it, so I probably would not have objected
7 to that even if I had caught it.

8 Q. Okay.

9 MS. COLEMAN: Beg the court's indulgence one moment.

10 (A PAUSE.)

11 MS. COLEMAN: Your Honor, may we have just one moment?

12 THE COURT: Absolutely. In fact, let's take a quick
13 three-minute break.

14 MS. COLEMAN: Thank you, Your Honor.

15 THE COURT: Don't discuss your testimony with anyone.

16 (OFF THE RECORD.)

17 THE COURT: If the state's ready?

18 MS. COLEMAN: Yes.

19 THE COURT: Okay.

20 MS. COLEMAN: Thank you, Your Honor.

21 THE COURT: Yes, ma'am.

22 BY MS. COLEMAN:

23 Q. You testified that you believe you did draft a motion
24 to be relieved in this case that you did not go forward on.
25 Is that correct?

1 A. I, I think so. I know that there was a -- I, I
2 remember for sure discussing me staying on the case with
3 Mr. Weldon..

4 Q. Okay, yes, and I believe that's in volume one of the
5 transcript on the record where you decided not to go
6 forward on that motion, and was that after you had
7 discussed it with your client and decided not to?

8 A. I, I know that he and I reached a resolution on that
9 and agreed that he wanted me to stay on the case. So, I
10 would assume that that's why I withdrew that motion.

11 Q. Okay. Thank you. Going back to the alibi witnesses,
12 you testified that you probably would have just called one
13 of them if their stories hadn't matched up to avoid being
14 more harmful than helpful?

15 A. Well, I don't recall their stories not matching up, so
16 I can't say that I would have only, only called one. And
17 you, I think, had asked me if it would've been helpful or
18 hurtful. I was just replying that if we'd only called one,
19 if would've been ---

20 Q. Right.

21 A. --- not been an issue.

22 Q. Okay, and if you, hypothetically speaking ---

23 A. Sure.

24 Q. --- if you had only called one of them, is it possible
25 that the state could have called the other witnesses to

J. KNOBELOCH - CROSS-EXAMINATION BY MS. COLEMAN

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1 rebut their testimony?

2 A. Sure, it's possible.

3 Q. Were you ever in contact with the girlfriend that they
4 testified about today who was allegedly in the room with
5 applicant that whole morning?

6 A. I remember speaking with her at one of the hearings
7 prior, much prior to the trial.

8 Q. Okay, and did she testify to a story that matched with
9 the -- with testimony given today?

10 A. Again, I don't recall the specifics, but I do recall
11 in general the people in the household being part of an
12 alibi.

13 Q. Okay. If her story had not matched up, is it possible
14 that the state could have called her as a witness again to
15 rebut their testimony?

16 A. Absolutely.

17 Q. Okay, and at that point, if that happened, would you
18 agree that it would be more harmful than helpful to you?

19 A. Yes, it would be harmful for the alibi witnesses not
20 to have the same story.

21 Q. Right, and if that were the case and you had presented
22 the alibi witnesses, then you would not have the final
23 closing argument, correct?

24 A. That is true; yes, that's true. If I present a
25 witness, I would not have final argument.

1 Q. Okay. Okay.

2 MS. COLEMAN: No further questions. Thank you.

3 THE COURT: Any redirect?

4 MR. BOOZER: No redirect, Your Honor.

5 THE COURT: All right. Thank you, sir.

6 WITNESS: Thank you.

7 (THE WITNESS EXITS THE STAND.)

8 THE COURT: Anything further from the applicant?

9 MR. BOOZER: Nothing further from the applicant, Your
10 Honor.

11 THE COURT: Does the state have any witnesses?

12 MS. COLEMAN: The state has no witnesses, Your Honor.

13 THE COURT: All righty.

14 MS. COLEMAN: Your Honor, at this time I would request
15 to leave the record open for the purposes of, like we did
16 yesterday, obtaining a criminal background check on the
17 alibi witnesses just to see if there is the existence of an
18 admissible prior history for impeachment purposes, and also
19 the venue, the motion for venue. It was referenced in the
20 first transcript, but I don't believe we have a copy of
21 that. I'd like to request permission to see if that
22 transcript exists and possibly order it to add it to the
23 record.

24 THE COURT: Okay. I will give you, as with the case
25 yesterday, ten days to provide me with any rap sheets or

1 any information about the existence of impeachable offenses
2 for the alibi witnesses. Within that same ten days, if you
3 will determine whether a transcript exists regarding the
4 motion to, what was it, to change venues?

5 MS. COLEMAN: Yes, the motion for venue.

6 THE COURT: The motion to be relieved or the motion to
7 change venue?

8 MS. COLEMAN: Venue, the motion to change venue.

9 THE COURT: Okay.

10 MS. COLEMAN: Thank you, Your Honor.

11 THE COURT: Let me know about that and if it exists
12 and some additional time is needed. I don't know if the
13 applicant has any objection to that.

14 MR. BOOZER: We do not, Your Honor.

15 THE COURT: Okay.

16 MR. BOOZER: On the motion to change venue. I guess
17 on the initial request by the state, which is on the
18 background of the witnesses presented today, I provided the
19 dates of birth for both folks so they can perform the
20 check, and I guess I just would request that it's obviously
21 limited just to submitting to the court just for you to
22 look at. There's not going to be any brief or arguments
23 on, on any of that.

24 THE COURT: Absolutely.

25 MR. BOOZER: Or recalling the witnesses.

1 THE COURT: Absolutely. That's understood, right, Ms.
2 Coleman?

3 MS. COLEMAN: That's understood.

4 THE COURT: No narrative or, you know, editorial about
5 the meaning of those convictions or anything. Just the
6 existence of the convictions, if any exist.

7 MS. COLEMAN: Yes, Your Honor.

8 THE COURT: I'll take that. Within that ten days
9 you'll let me know. If you need additional time to obtain
10 a transcript -- if one exists -- of course then, you know,
11 we'll have to leave it open for another thirty or sixty
12 days, however long it takes to obtain the transcript, but
13 we'll deal with that at that time.

14 MS. COLEMAN: Thank you.

15 THE COURT: Okay, thank you.

16 All right, anything from the applicant?

17 MR. BOOZER: Your Honor, I just, I guess if for
18 whatever reason if the, if the court is inclined to grant
19 the PCR, I, I certainly don't want it to lay too far out
20 just for the motion to change venue. I guess that is an
21 issue, but I don't want to get ninety days or anything like
22 that, and I'm not sure -- I know there's obviously rules
23 for court reporters in responding to requests. Certainly
24 have to abide by those, but I don't want to get in a
25 situation where we're putting it off too far.

1 MS. COLEMAN: And we could if, if the record exists,
2 we could order it and expedite it to be brought in as
3 quickly as possible.

4 THE COURT: If necessary. So, let's conduct all of
5 this via email.

6 MS. COLEMAN: Okay.

7 THE COURT: And you'll certainly copy Mr. Boozer on
8 that email so that, you know, if you need thirty days or
9 sixty days. I mean, contact the court reporter, of course,
10 and let me know how much time is necessary. If there is
11 some specific objection to the length of time that the
12 court reporter needs, then Mr. Boozer will be on those
13 emails as well, and he can let me know that objection at
14 that time, okay?

15 MS. COLEMAN: Okay. Thank you, Your Honor.

16 MR. BOOZER: Thank you, Your Honor.

17 THE COURT: Thank you.

18 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR CLARENDON COUNTY, SOUTH CAROLINA, ON
THE 27TH DAY OF JULY, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

DECEMBER 18TH, 2017

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON FOR THE THIRD JUDICIAL CIRCUIT

Victor McCoy Weldon, #350911,

2016-CP-14-00002

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 5, 2016. Respondent submitted its return on April 11, 2016. An evidentiary hearing was convened on July 27, 2016, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. Applicant was true bill indicted at the January 2011 term of the Clarendon County Grand Jury for burglary – first degree, attempted murder, armed robbery, grand larceny (\$2000-\$10000), kidnapping, and possession of a weapon during a violent crime (2011-GS-14-0068). John Knobeloch, Esquire, represented Applicant. Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. Judge Cothran sentenced Applicant to thirty years imprisonment for armed robbery running consecutively to a sentence of thirty years imprisonment for burglary – first degree. Judge Cothran further sentenced Applicant to five years imprisonment for grand larceny, twenty

years for kidnapping, and five years for possession of a weapon during a violent crime, all running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Weldon, 2014-UP-463 (Ct. App. filed December 17, 2014). Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Petition was denied via order filed January 23, 2015. The Remittitur was issued on May 8, 2015.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

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."

At the PCR hearing, Applicant orally amended his application to add an additional allegation of ineffective assistance of counsel for failing to object to the State's question on direct examination about destroying evidence. This was located on Volume 4, page 76 of the trial transcript, lines 15 through 21.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have 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." Id. at 117-18, 386 S.E.2d at 625.



IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises several allegations arguing that Counsel was ineffective in his representation surrounding his trial. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). This Court finds that the testimony presented at the PCR hearing satisfies neither prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice, thus these allegations should be denied and dismissed with prejudice.

Motion to be Relieved

Applicant argues that counsel was ineffective for moving to be relieved as counsel. This argument is meritless, especially because Trial Counsel chose not to make his motion to be relieved as counsel and instead proceeded forward with the trial for which he had prepared. Trial Counsel testified that Applicant had expressed some concern and no longer wanted his representation. However, before the trial, he and Applicant resolved their issues and Applicant decided that he wanted Trial Counsel to stay on the case. Trial Counsel then, on the record, chose not to move to be relieved before the judge and decided to continue forward with trial. Even if Trial Counsel had moved to be relieved, Applicant cannot prove that anything about that motion



constituted ineffective assistance of counsel or was prejudicial to his case, and thus neither prong of the Strickland test is satisfied. Therefore, this allegation is denied and dismissed.

Alibi Witnesses

Trial Counsel's decision not to use the alibi witnesses presented at the PCR hearing was part of a valid trial strategy and was neither ineffective nor prejudicial.

Trial Counsel testified that he spoke to each alibi witness prior to the trial and had filed notice of an alibi defense. He had prepared to use their testimony at trial, but did not. Trial Counsel stated that he could not recall why he did not use their testimony.

At the PCR hearing, Applicant testified about his alibi and presented two witnesses which corroborated his alibi testimony. However, the testimony presented did not exactly match up. All three recollections of the morning in question differed slightly in time and detail. For example, Applicant testified that his mother was at work the morning of the crime and he woke up between 6:00 and 6:45 A.M. to wait for her when she came home at 7:15 A.M. However, Applicant's mother, Debra Weldon, testified that she did not work that day because it was Saturday morning and she did not work on weekends at the time; she stated she was home and did not wake up until 8:00 A.M. Jessica Weldon, Applicant's sister, testified that Applicant was in his room with his girlfriend that morning and did not wake up until around 9:00 A.M., which contradicts Applicant's testimony that he woke up around 6:00 A.M.

When asked about the discrepancies in the alibi stories, Trial Counsel agreed that presenting all three of these different stories at trial would have hurt his case. He stated that using only one of these stories would have helped his case, but agreed that the State could have presented testimony from the other two alibi witnesses to contradict his witness had he only used one.



The South Carolina Supreme Court has held that an attorney cannot be ineffective if there is evidence to support his decision not to call witness with credibility issues. "A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions, even if that witness is a co-defendant." Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (citing Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the co-defendant's credibility was a concern and the same evidence would be presented through another witness)). Trial Counsel testified that having conflicting alibi witnesses would have hurt his case rather than help, and it is reasonable to think that he considered this as part of his strategy in not calling these witnesses.

The decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel's trial strategy. Trial counsel must be given leeway to make reasonable strategic decisions. "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 at 688-89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. In proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312



(1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778. "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). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290, ___, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Even though Trial Counsel did not recall his specific reasoning for choosing not to call alibi witnesses, his trial strategy can be inferred from the basis of his overall strategy, which he testified was to attack the State's DNA evidence against Applicant.

Furthermore, the testimony at the PCR hearing reflected Trial Counsel's intention to have the final closing argument at trial, which is accomplished by not presenting the alibi witnesses. Not only did Trial Counsel testify about his plan to have the final word during closing argument, but Applicant testified that Trial Counsel told him this plan at the time of the trial, thus indicating his trial strategy in not calling these witnesses.

Finally, at the PCR hearing, Trial Counsel testified that, had he thought the alibi witnesses were necessary at the time of trial, he would have called them. He stated that, in hindsight, he had no idea why he did not call them to testify, but at the time of the trial he would have weighed the pros and cons and, if he believed their testimony would have been helpful, he would have used them.



"[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 v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Trial Counsel's decisions at the trial were clearly made with a tactical strategy in mind and his actions were carefully chosen, even if he disagreed with them looking back in hindsight. Trial Counsel was at least reasonably competent in his decisions at the time of trial, and thus his representation was not ineffective.

Because Trial Counsel articulated, both at the PCR hearing and at the time of trial, a strategic reason for choosing not to call alibi witnesses, his performance cannot be found ineffective, and this allegation is denied and dismissed with prejudice.

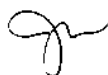
Applicant Not Called to Testify

Applicant alleges that Trial Counsel is ineffective for failing to call him to testify at his trial. This argument is meritless. Although Applicant testified at the PCR hearing that he indicated to his attorney that he wished to take the stand, no evidence presented proves that Trial Counsel would not allow him to testify. Trial Counsel could not recall why Applicant chose not to take the stand.

If Trial Counsel advised Applicant not to testify, it would fit into the trial strategy he articulated to have the final word in closing arguments by not putting up a defense. This is a reasonable strategy that should not be questioned in hindsight. Therefore, this argument is meritless and is denied and dismissed with prejudice.

Lack of Communication

Applicant's allegation that Trial Counsel was ineffective because of a lack of communication is meritless. At the PCR hearing, Applicant testified that he spoke with Trial



Counsel about four times before his trial. He stated that Trial Counsel was not communicating like he should, so he filed a motion to have Trial Counsel relieved. Applicant stated that Trial Counsel filed a motion to be relieved, as well. Before the trial, however, Applicant indicated to Trial Counsel that he did want Trial Counsel to represent him, so Trial Counsel did not present his motion to be relieved and proceeded with the trial.

Trial Counsel testified that he met with Applicant at least twice. He stated that they mostly communicated by telephone or through written letters. South Carolina case law has established that even if Trial Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. "First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation." Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (recognizing that brevity of time spent in consultation with defendant, without more, did not establish that trial counsel was ineffective)).

Regardless of the gap in Trial Counsel's communication with Applicant, Applicant had the opportunity to discuss the details of his case with his attorney and provide him with defenses, witnesses, and an alibi as well as review his discovery in preparation for trial. Trial Counsel was clearly prepared for trial and vigorously cross-examined all the State's witnesses to present a defense on Applicant's behalf. Any breakdown in communication did not result in ineffective assistance of counsel. More importantly, even if this lack of communication was ineffective, it was not prejudicial to Applicant's case because there was no further information that could have been discussed before trial that could have changed the outcome of the case. Applicant has



presented no evidence that Trial Counsel was unprepared for trial or required any additional communication with Applicant prior to trial. Thus, this allegation is denied and dismissed.

Joint Trial

Applicant's allegation that counsel was ineffective for allowing him to have a joint trial with his co-defendant is meritless. Although this argument should have been made on direct appeal, Applicant is framing the issue as one of ineffective assistance of counsel for failing to move to sever the trials.

Joint trials with co-defendants are very common and happen often. It is in the solicitor's discretion to choose how to prosecute the action, and very often it is the best use of the State's resources to combine co-defendants with the same or similar charges under the same facts into one trial. This is a standard practice, and it is only inappropriate when the court determines that it would be prejudicial or unfair to one defendant to be tried along with his co-defendant.

"A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011) (citing State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App.2005)). In Spears, the South Carolina Court of Appeals held that the defendant was not prejudiced by a joint trial with his co-defendant where the evidence against both defendants for armed robbery and kidnapping was interconnected and no specific trial right was prejudiced by the joinder of these trials. The same argument applies to this case because the facts of the cases were the same, the evidence presented was connected, and neither co-defendant's case prejudiced the other's in any way.



Applicant has not only failed to prove that he was prejudiced in any way by having a joint trial, but also that Trial Counsel is somehow ineffective for allowing this to happen. At the PCR hearing, Trial Counsel testified that, at the time of the trial, he saw no legal reason for moving to sever the trials. He stated that, if he had seen reason to move for separate trials, he would have made the proper motion. Although Applicant testified that he asked Trial Counsel to file a motion to sever the trial, Trial Counsel credibly testified that he did not recall Applicant making this request. He stated that he would have filed a motion to sever if Applicant had asked him. This evidence supports the argument that counsel was not ineffective and Applicant was not prejudiced by this action, and accordingly this allegation is denied and dismissed with prejudice.

Joint Plea

Applicant alleges that Trial Counsel was ineffective for obtaining a joint plea rather than an independent plea. This argument is meritless, primarily because Trial Counsel has no direct control over any plea offer, if any, which the State chooses to extend to Applicant. While trial counsel may negotiate with the State to obtain a favorable plea deal, they cannot have the final say in what the State chooses to offer. Furthermore, Applicant has no constitutional right to a plea offer, whether independent from his co-defendants or otherwise. Thus he has been deprived of no right or necessity in his case. The only way Trial Counsel could have been ineffective in regard to a plea offer is by failing to convey the offer to Applicant, and this was not the case in Applicant's situation.

Furthermore, Applicant can show no prejudice from the offer of a joint plea deal. Whether the State offered a satisfactory plea deal to Applicant that he may or may not have accepted has no bearing on the outcome of his trial. Applicant chose to go to trial rather than



plead guilty, and the existence of an independent plea offer would not have changed the jury's verdict. Thus, the second prong of the Strickland test is not met.

Applicant can show no ineffective assistance of counsel and no prejudice from the offer of a joint plea, and thus has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.

Failure to Object

Applicant alleges that Trial Counsel was ineffective for failing to object to the State implying that Applicant could have destroyed the evidence that was not found during the execution of the search warrant. This Court finds that failure to object was not ineffective.

At the PCR hearing, Trial Counsel testified that he did not object to the testimony in question and that he did not ask for a curative instruction from the court. He stated that, in hindsight, he did think that he should have objected to the testimony at trial. However, he testified that, at the time the statement was made, if he had thought it was objectionable, he probably would have objected. He also stated that, if he had found it objectionable, he might not have objected to the statement anyway because he did not want to stop the flow of questioning and draw unnecessary attention to the statement.

As explained above, our courts do not expect defense counsel to act based on the knowledge that comes with the benefit of hindsight. Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). If Trial Counsel acted reasonably and strategically at the time the statement was made, then he cannot be found ineffective.

Furthermore, under the Strickland standard, because Trial Counsel articulated a strategic reasoning for choosing not to object to this statement, his inaction cannot be deemed ineffective. Therefore, this allegation is denied and dismissed with prejudice.



"Jury Violation": Lesser Included Offense

This Court interprets Applicant's allegation about a jury violation as one of ineffective assistance of counsel for failing to ask for the lesser included offense. Applicant has failed to present sufficient evidence to prove that counsel was ineffective on these grounds for any reason, and this allegation is denied and dismissed.

"Jury Violation": Jury Charge

This Court interprets Applicant's allegation regarding jury charges that made him look guilty as one of ineffective assistance of counsel for failing to object to the jury charges. Applicant has failed to present sufficient evidence to prove that counsel should have objected to any statements by the court during jury instructions that would have prejudiced him in any way, and this allegation is denied and dismissed.

In General

Trial Counsel's testimony at the PCR hearing combined with his actions at trial supported by the trial transcript evidence the fact that Trial Counsel performed above the standard level of competence required of defense counsel.

Trial Counsel testified that his trial strategy was to attack the State's DNA evidence against Applicant, which he did fully. Applicant's fingerprints were found on the piece of duct tape which was placed on the victim by his attackers during the armed robbery, and the fingerprints were matched to Applicant through a CODIS database hit which linked to him. Trial Counsel took several steps to investigate the evidence, he moved to suppress the evidence based on the fact that it matched through the CODIS database, and he questioned the integrity of the evidence in front of the jury. Trial Counsel vigorously cross-examined the State's witnesses about the reliability of the fingerprints, about whether they were on the sticky side of the duct



tape rather than the smooth side and how that affected them, and whether or not it was possible that his fingerprints could have been on the tape from before the robbery. He also moved for a directed verdict at the close of the State's case and provided the court with case law supporting his arguments.

Additionally, Trial Counsel moved for a change in venue based on what he believed was an unusual circumstance because the victim was well acquainted with every attorney in the county. Although his motion was not granted, Trial Counsel acted competently in moving for this relief on behalf of his client.

Even if Trial Counsel doubted his actions in hindsight based on the result of the trial or his fairly limited experience practicing criminal law, it is clear from the record and evidence presented that he was well prepared for trial, he vigorously argued for his client, questioned the evidence presented, and made the proper motions and arguments to support Applicant's case. Trial counsel acted well above the standard levels of competence required by Strickland. Thus, these allegations of ineffective assistance of counsel must be denied and dismissed.

OVERWHELMING EVIDENCE

Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice

from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

Applicant's fingerprints were found on the duct tape that was placed on the victim by his attackers during the robbery. Trial Counsel argued vigorously about the reliability of this evidence at trial, and while it was essentially the only direct evidence tying Applicant to the crime, it was an exact DNA match and cannot be rebutted easily. This evidence was overwhelming and it is unlikely that any other actions by Trial Counsel could have prevented a jury from convicting Applicant based on this DNA evidence.

Applicant did not dispute the evidence against him. This is clearly overwhelming evidence of Applicant's guilt. As a result, Applicant can show no prejudice from any of the allegations raised in his PCR application as no deficiency on behalf of Trial Counsel could have reasonably changed the outcome of trial, and this Court finds that this application should be denied.

DUE PROCESS VIOLATION

Change of Venue

Applicant's allegation that he was denied due process because his motion to change venue was denied is meritless and should be denied.

The testimony presented at the PCR hearing established that the victim in this case was a well-known figure throughout the local community and was personally connected to nearly every attorney in the county, which is why Trial Counsel, who practiced in another county, was appointed to represent Applicant. Applicant alleges that, because the victim is so connected within the community, it was impossible for him to receive a fair trial in the venue in which he was tried. Trial Counsel filed a motion to change venue before his trial and it was denied.



First, the denial of Applicant's motion for change of venue is a direct appeal issue and should have been raised when he appealed his conviction. Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). This argument is inappropriate for post-conviction relief and should be denied on that ground.

Furthermore, even if it had been raised in the direct appeal, South Carolina case law supports the trial court's denial of the motion absent an abuse of discretion, which Applicant has not proven.

Empaneling a jury pursuant to § 17-21-85 is similar in effect to a change of venue and is subject to the same scope of review. State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied, 513 U.S. 831, 115 S.Ct. 105, 130 L.Ed.2d 53 (1994). A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). An abuse of discretion occurs when the judge's ruling has no evidentiary support. Gooding v. St. Francis Xavier Hosp., 317 S.C. 320, 454 S.E.2d 328 (Cl.App.1995), affirmed in part, reversed in part, 326 S.C. 248, 487 S.E.2d 596 (1997).

State v. Manning, 329 S.C. 1, 7-8, 495 S.E.2d 191, 194 (1997).

Finally, even if the victim in this case was well-known throughout the local community, the *voir dire* process would have eliminated any potential jurors who were acquainted with him and biased for that reason. Applicant has shown no evidence to support an argument that the jurors were tainted by alleged personal connections to any of the participants of this trial. Therefore, Applicant has failed to meet his burden of proof and cannot show a due process violation on these grounds. This allegation is denied and dismissed with prejudice.



Joint Trial

For the reasons argued above, Applicant's allegation that he was denied due process because he was given a joint trial with his co-defendant is meritless. See State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011) ("A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt."). Applicant has proven no such prejudice based on his joint trial. Furthermore, this is a direct appeal issue that was not argued in Applicant's appeal, and thus this issue should be deemed abandoned and is denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

Joint Plea Offer

Applicant's allegation of prosecutorial misconduct based on the State's offer of a joint plea deal with his co-defendant rather than an individual plea offer is meritless. As discussed above, Applicant has no constitutional right to a plea offer from the State and was not entitled to relief by pleading guilty to this crime. It is in the State's discretion whether to offer any kind of benefit for choosing to plead, and they are simply not required to do so.

Applicant has not proven any misconduct or inappropriate behavior from the prosecutor and therefore this allegation is denied and dismissed with prejudice.

JUDICIAL BIAS

Judge's Relationship to Victim

Applicant's allegation that the trial judge was acquainted with the victim in his case which resulted in inappropriate judicial bias is meritless and must be dismissed.

No evidence presented at the PCR hearing indicated that the judge was acquainted with the victim. Both Applicant and Trial Counsel testified that they did not know for a fact that the Judge had a personal relationship with the victim. Applicant's allegation is not based on fact or evidence. Furthermore, he has shown no prejudice resulting from this alleged bias. Even if the judge was familiar with the victim, Applicant has not proven that the judge's failure to recuse himself from the case changed the jury's guilty verdict. The jury likely would have made the same decision with a different judge presiding. Therefore, this allegation is denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate



review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 9th day of November, 2016.


JOCELYN NEWMAN
Presiding Judge
Third Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable Jocelyn J. Newman, Circuit Court Judge

VICTOR MCCOY WELDON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-0020000

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief, where trial counsel failed to present alibi witnesses who were prepared, available, and present at trial, where counsel had spoken with the witnesses in advance and was aware of the substance of their proposed testimony, where counsel likewise failed to put Petitioner on the stand, and where counsel conceded that he was unaware of any strategic reason as to why he would not have called any of them to testify?

STATEMENT

Petitioner was indicted for burglary in the first degree, attempted murder, armed robbery, grand larceny, kidnapping, and possession of a weapon during a violent crime by a Clarendon County Grand Jury during its January 2011 term. App. 588 – 589. Petitioner proceeded to a five-day trial on May 14, 2012 before the Honorable Ralph F. Cothran and a jury. App. 1. Ernest A. Finney, III and Jason Corbett appeared on behalf of the State, and John Knobeloch and Laura Knobeloch represented Petitioner.

Petitioner and a co-defendant, Michael Pearson, were tried together following an incident at the home of Edward “Slick” Gibbons on May 15, 2010. App. 83 l. 8 – App. 90 l. 9. Gibbons averred that three masked men attacked him at his home. App. 92 l. 16 – App. 96 l. 17. According to Gibbons, the men attempted to wrap tape around his face and legs. App. 98 l. 22 – App. 99 l. 17. Gibbons’ El Camino was allegedly stolen as the men left. App. 102 ll. 4 – 21.

Pearson’s fingerprint was reportedly found at Gibbons’ garage. App. 219 l. 16 – App. Petitioner’s DNA was allegedly located on the tape used to tie up Gibbons. App. 275 ll. 15 – 25. Petitioner did not testify.

At the conclusion of trial, the jury found Petitioner guilty of burglary in the first degree, armed robbery, grand larceny, kidnapping, and possession of a weapon during a violent crime. App. 466 ll. 10 – 21. Judge Cothran sentenced Petitioner to thirty years’ imprisonment on the burglary charge, thirty years for the armed robbery charge, five years for the grand larceny, twenty years for the kidnapping charge, and five years on the possession of a weapon charge. App. 475 l. 6 – 25. The burglary and armed robbery sentences were imposed consecutive to one another, with the remaining charges running concurrently. Id.

Petitioner's sentences and convictions were affirmed. On or about January 5, 2016, Petitioner filed an application for post-conviction relief. App. 478. Petitioner's application contained allegations of ineffective assistance of counsel, including the claim that "none of [his] alibi [witnesses] were called to testify." App. 487.

The State made its Return on or about April 11, 2016. App. 493. An evidentiary hearing was conducted on July 27, 2016 before the Honorable Jocelyn Newman. App. 501. In addition to Petitioner and trial counsel, two of Petitioner's alibi witnesses—Debra Weldon and Jessica Weldon—testified at the hearing.

On August 3, 2017, Judge Newman issued her order denying Petitioner relief. App. 569. She ruled that "[t]he decision not to use contradictory alibi witnesses at trial was very likely a part of Trial Counsel's strategy." App. 574. As a result, the PCR court concluded that counsel's performance "cannot be found ineffective," and Petitioner's application was dismissed. App. 576.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief, where trial counsel failed to present alibi witnesses who were prepared, available, and present at trial, where counsel had spoken with the witnesses in advance and was aware of the substance of their proposed testimony, where counsel likewise failed to put Petitioner on the stand, and where counsel conceded that he was unaware of any strategic reason as to why he would not have called any of them to testify.

Relevant Facts

On the morning of May 15, 2010, Petitioner was at home. App. 509 ll. 4 – 14. He lived with his sister, mother, little brother, and girlfriend. App. 510 ll. 7 – 9. Petitioner informed his attorney that he woke up around 6:40 in the morning on May 15, 2010, and that he spoke with his sister and saw his mother at the house. App. 510 l. 25 – App. 511 l. 16; App. 520 ll. 4 – 19.

In response, counsel indicated that he would file a motion to “call them to the stand to testify” on Petitioner’s behalf to disprove the State’s assertion that Petitioner was involved in the alleged crime. App. 511 ll. 17 – 23; App. 513 ll. 23 – 25. Petitioner’s mother and sister were present at trial but did not testify. App. 511 l. 24 – App. 512 l. 8; App. 513 ll. 13 – 14. It was Petitioner’s belief that they would testify, and he became concerned that they did not. App. 512 ll. 11 – 13. Because counsel wished to have the last argument during closing, the witnesses who could have proven that Petitioner was at home during the time of the alleged crime were not called on Petitioner’s behalf. App. 512 ll. 22 – 25.

Debra Weldon, Petitioner’s mother, was present at her son’s trial and was supposed to be a witness. App. 522 l. 16 – App. 523 l. 22. She had gotten off work at 8:30 on the evening of May 14, 2010. App. 524 ll. 2 – 20. She went home, where she saw Petitioner at the house. App.

525 ll. 3 – 24. She recalled going to bed around midnight and waking up around 8:00 on the morning of May 15, 2010. App. 526 ll. 2 – 11. Petitioner was home when she went to bed and when she awoke. App. 526 ll. 12 – 13. Petitioner did not have a car, nor did he have access to one. App. 526 l. 19 – App. 527 l. 2. To Mrs. Weldon’s knowledge, her son did not leave the house during that span of time. Id. Mrs. Weldon informed trial counsel accordingly. App. 527 ll. 7 – 25. Counsel asked Mrs. Weldon to come to trial and testify. Id. She understood the purpose of her testimony was to “tell whether [Petitioner] was at the house at the time of the crime.” Id.

Petitioner’s sister, Jessica Weldon, testified similarly. App. 534 l. 16 – App. 537 l. 22. She recalled going to bed around midnight. Id. At that time, Petitioner, his girlfriend, and his mother were also at the house. Id. Petitioner was in a room with his girlfriend. Id. Around 5:00 the next morning, Jessica woke up around and snuck into Petitioner’s room for a cigarette. Id. She saw Petitioner in the room, asleep. Id. She testified that Petitioner was at the house from 6:00 to at least 7:00 that morning. Id. She recalled Petitioner opening the door to his room around 9:00 a.m. to let his two cats out. Id.

Much like Mrs. Weldon, Jessica Weldon was prepared and available to testify at Petitioner’s trial. App. 537 ll. 6 – 23. The above testimony is what she would have offered, under oath, same as the evidentiary hearing. Jessica was directed to be at her brother’s trial by counsel. App. 533 ll. 8 – 15. According to counsel, she was supposed to testify. App. 533 ll. 16 – 17. In fact, she had spoken with counsel regarding her testimony. App. 533 ll. 23 – 25. However, much like Petitioner and his mother, and contrary to her intentions, she did not end up testifying. App. 534 ll. 9 – 15.

The following exchange took place during the evidentiary hearing between Petitioner and his PCR counsel:

Q: Okay. Without you testifying and without your sister and your mother testifying, was there any other way for the jury to hear where you were that day?

A: No, sir.

Q: Do you think that prejudiced your trial?

A: I do.

App. 513 ll. 17 – 22.

Petitioner was arrested on July 20, 2010. App. 507 ll. 20 – 24. Counsel began representing Petitioner later that year, around October 2010. App. 507 l. 25 – App. 508 l. 3. During the entirety of trial counsel's representation, from October 2010 until Petitioner's trial in May 2012, Petitioner only met with him four times. App. 508 ll. 4 – 8.

Counsel recalled meeting with Petitioner "at least twice" during his year-and-a-half representation. App. 540 ll. 1 – 7. Counsel characterized the State's case against Petitioner as weak: "I recall after receiving the discovery that I reached out to the ... assistant solicitor with no tongue-in-cheek thinking that I had received the wrong discovery package because [Petitioner was] not mentioned in it." App. 541 ll. 3 – 8. The only piece of evidence which allegedly linked Petitioner to the crime was DNA on the duct tape. App. 541 ll. 9 – 17. Counsel explained his trial strategy:

[T]he trial strategy was to attack the DNA, which was the only evidence linking Mr. Weldon to the crime. There were no witnesses. All of the defendants were wearing masks. There was, there was nothing linking him except for the DNA. And I guess the - - our, our theory on weakness of the DNA evidence was that the police officers did take a sample from both the outside of the duct tape and the sticky side of the duct tape, the significance being that if, you know, the DNA is found on the sticky side, it's much more likely that you were present because you had to expose the sticky side ... when the sample, DNA sample was put on it,

even though the police officers took samples of both sides, they didn't label them. So they were unable to say whether the, whether the DNA sample came from the outside or the sticky side of the duct tape.

App. 542 l. 13 – App. 543 l. 3.

Counsel was present at the evidentiary hearing while Petitioner's mother and sister testified. App. 544 ll. 2 – 24. He recalled speaking with both of them in advance of Petitioner's trial and had notes which reflected such. Id. He agreed that their testimony at trial would have been "very similar to the testimony that they gave" at the evidentiary hearing. Id. Such a conclusion notwithstanding, he did not call any witnesses on Petitioner's behalf.

When asked why none were called, counsel could not articulate a reason:

I do not know. The - - we did file a notice of alibi and I did prepare- - in the trial notebook there is a spot where I had prepared to ask Debra, at least the mother, Debra Weldon, questions supporting the alibi. Possibly we did not call a witness so that we could have final argument, but so honestly I, **I don't know why we would not have called them as alibi witnesses.**

App. 545 ll. 3 – 11. (emphasis added).

The following exchange then took place between PCR counsel and trial counsel:

Q: All right. Had you present - - was there any other way if Mr. Weldon didn't testify and Ms. Jessica Weldon didn't testify and Debra Weldon didn't testify, was there any other way to convey that to the jury?

A: No.

Q: Do you think that that was important testimony for the jury to consider?

A: I do.

Q: Okay. Looking back, should you have called them as witnesses in the trial?

A: I believe so, yes.

Q: And do you think that that could have changed the outcome of Mr. Weldon's trial?

A: I do.

App. 546 ll. 2 – 15.

Furthermore, trial counsel questioned his own claim that he might have decided not to call these alibi witnesses in order to receive the last argument. App. 547 ll. 9 – 17. Not only was he “scratching [his] head wondering why [he] would not have called [the] alibi witnesses,” but he was not even sure if he made the decision not to do so in order to receive last argument. Id. Notably, he agreed that **“calling alibi witnesses would have been a much more favorable strategic discussion versus not calling alibi witnesses and trying to get the last argument”** because there was no other way to present an alibi defense. App. 547 l. 9 – App. 548 l. 1. (emphasis added). In hindsight, counsel had “no idea why [he] did not call the alibi witnesses.” App. 556 ll. 7 – 16

Discussion

Petitioner was home at the time of the alleged crime, and the two witnesses who could have corroborated his alibi were not called at his trial. Although Petitioner informed his attorney of this, and although the two witnesses were both available and prepared to testify, counsel elected not to put up a defense.

It is well settled that counsel's rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness. Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992); see Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994); see also Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding that it “was not objectively reasonable given the defense theory of the case” for counsel not to call witnesses that were critical to his client’s defense.).

Accordingly, the PCR Court erred in holding that trial counsel provided effective assistance of counsel because Petitioner's right to a fair trial was adversely affected by trial counsel's deficient performance.

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.' " Id. (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "[T]o establish prejudice, a 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." Id. at 534, 123 S.Ct. 2527 (quotations and citation omitted). In assessing prejudice, appellate courts "reweigh the evidence in aggravation against the totality of available mitigating evidence." Id. Prejudice is established where "there is a reasonable probability that at least one juror would have struck a different balance." Id. at 537, 123 S.Ct. 2527 (citation omitted). A "reasonable probability" is less than a preponderance of the evidence but still "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052.

In this case, Petitioner presented sufficient evidence at the PCR evidentiary hearing to establish that trial counsel should have called the alibi witnesses at his trial. Counsel was aware of the witnesses and had them available at trial. Based on his own admission, he should have called them.

The Order of Dismissal contained a ruling that trial counsel's "decision not to use the alibi witnesses presented at the PCR hearing was part of a valid trial strategy and was neither

ineffective nor prejudicial.” App. 573. In the very next paragraph, the Order reads: “Trial Counsel stated that he could not recall why he did not use their testimony.” The PCR Court erred, therefore, in the former conclusion, as trial counsel’s testimony did not support such a contention.

Although the Order of Dismissal did not contain a credibility determination, the PCR Court characterized trial counsel’s testimony as credible for a separate issue: “Trial Counsel credibly testified that he did not recall Applicant making this request.” App. 579. So at least in that capacity, the PCR Court weighed trial counsel’s credibility and found him believable.

As referenced above, counsel could not fathom why he did not call the alibi witnesses. He testified that he should have called them as witnesses, and the resulting failure to do so prejudiced Petitioner’s case. Furthermore, as someone with a detailed understanding of Petitioner’s case, counsel opined that the result in Petitioner’s matter would have been different had he called the alibi witnesses.

The Order of Dismissal extends cherrypicked portions of counsel’s testimony beyond any logical interpretation. Using language such as “it is reasonable to think that he considered this as part of his strategy” and “[t]he decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel’s trial strategy” contravenes the very testimony elicited from counsel. The PCR Court somehow transformed an admission of ineffectiveness into a valid trial strategy and thereby reached an incorrect conclusion based upon a lack of evidence.

The Order of Dismissal also seemed to suggest that counsel could only employ a singular overall strategy, which in this instance was to attack the State’s DNA evidence: “Even though Trial Counsel did not recall his specific reasoning for choosing not to call alibi witnesses, his trial strategy can be inferred from the basis of his overall strategy, which he testified was to

attack the State's DNA evidence against [Petitioner]." App. 575. The Order of Dismissal cited Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.E.2d 738 (2010) for the notion that:

A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce the strategy on the record.

App. 575.

This Court cited to Wood in Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014). In Weik, this Court held that counsel's failure to present readily available social history mitigation evidence was deficient performance, and the defendant suffered prejudice as a result of counsel's deficient performance. Id. This Court found counsel's decision to call only one witness to testify in mitigation "resulted from counsel's inattention, not reasoned strategic judgment." Id. at 236, 761 S.E.2d at 768. Quite importantly, this Court cited Wood, supra, in order to emphasize "the distinction between the issue of whether counsel made a strategic decision in the first place and the issue of whether a strategic decision is a reasonable exercise of professional judgment under Strickland." Id. (citation omitted).

The Order of Dismissal in the matter *sub judice* contained additional flawed conclusions wherein the PCR Court appeared to overlook trial counsel's admission that he failed to call the alibi witnesses and the resulting failure prejudiced Petitioner's case:

Trial Counsel's testimony at the PCR hearing combined with this actions at trial supported by the trial transcript evidence the fact that Trial Counsel performed above the standard level of competence required by defense counsel.

App. 581.

The PCR Court failed to review counsel's strategy under "an objective standard of reasonableness" as required by Ingle v. State and seemed only concerned with justifying his actions, his own testimony notwithstanding. 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Petitioner only had a juvenile offense on his prior record. App. 474 l. 16 – App. 475 l. 4. He would not have opened the door to a litany of prior offenses if he had taken the stand and testified. Similarly, there was no indication that either his sister or his mother had any convictions which would have subjected them to impeachment. Gibbons, the man who was attacked, was never able to identify the men involved. Petitioner had everything to gain from putting his alibi witnesses on the stand, yet it was not done. The resulting prejudice manifested itself in his convictions and lengthy consecutive sentences. As evidenced by trial counsel's testimony, there was a reasonable probability that the outcome would have been different had he called Petitioner's mother or sister to the stand to corroborate the testimony which would have been offered by Petitioner. Simply put, holding out for the last argument in closing was not a sufficient trial strategy to justify the decision not to put two credible alibi witnesses on the stand.

Therefore, the PCR judge erred in holding that trial counsel provided effective assistance of counsel because there is a reasonable probability that but for trial counsel's deficient performance, Petitioner would have received a fair trial. App. 545 – 547; see Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel where there is a reasonable probability that the result would have been different had trial counsel introduced relevant and favorable evidence at trial).

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Certiorari to Clarendon County

 Honorable Jocelyn J. Newman, Circuit Court Judge

 VICTOR MCCOY WELDON,

PETITIONER

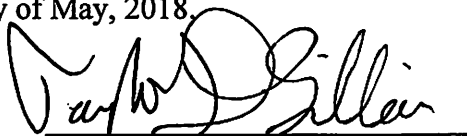
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

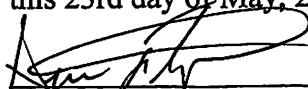
 CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Victor McCoy Weldon, #350911, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 23rd day of May, 2018.



 Taylor D Gilliam
 Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
 this 23rd day of May, 2018.



 (L.S)
 Notary Public for South Carolina
 My Commission Expires: 10/30/2022

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County
Jocelyn J. Newman, Circuit Court Judge

Appellate Case No. 2017-0020000

VICTOR MCCOY WELDON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Did the post-conviction relief court err in finding Trial Counsel was not ineffective in choosing not to call Petitioner or the alibi witnesses he had investigated to testify at trial where their testimony was inconsistent and incredible and did not support an alibi defense.

STATEMENT OF THE CASE

Procedural History

Petitioner Victor Weldon is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. During its January 2011 term, the Clarendon County Grand Jury indicted Petitioner for first-degree burglary, attempted murder, armed robbery, grand larceny (\$2000-\$10000), kidnapping, and possession of a weapon during a violent crime (2011-GS-14-0068). John Knobloch, Esquire, represented Petitioner on the charges. On May 14-16, 2012, Petitioner proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr, after which the jury convicted him as indicted. Judge Cothran sentenced Petitioner to thirty years' imprisonment for armed robbery, running consecutively to a sentence of thirty years' imprisonment for first-degree burglary. Judge Cothran further sentenced Petitioner to five year's imprisonment for grand larceny, twenty years for kidnapping, and five years for possession of a weapon during a violent crime, all running concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf. Chief Appellate Defender Robert M. Dudek, Esquire, represented him on appeal. Petitioner filed a brief challenging the trial court's denial of his directed verdict motion where the only evidence tying him to the crime was a single piece of duct tape. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence, finding the duct tape constituted substantial circumstantial evidence of Petitioner's guilt. State v. Weldon, 2014-UP-463 (Ct. App. filed December 17, 2014). Petitioner filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Petition was denied via order filed January 23, 2015. The Remittitur was issued on May 8, 2015.

Petitioner filed a timely application for post-conviction relief on January 5, 2016 (2016-CP-14-00002). In his application, Petitioner 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."

Respondent submitted its Return on April 11, 2016. An evidentiary hearing was convened on July 27, 2016, at the Sumter County Courthouse before the Honorable Jocelyn Newman. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the PCR hearing, Applicant orally amended his application to add an additional allegation of ineffective assistance of counsel for failing to object to the State's question on direct examination about destroying evidence. See App. 319, line 15 - 21. During the hearing, Petitioner testified on his own behalf and presented testimony from his mother, Debra Weldon, his sister, Jessica Weldon, and John Knobloch, Esquire ("Trial Counsel"). Judge Newman denied and dismissed the application with prejudice in an Order signed July 28, 2017 and filed August 3, 2017.

Petitioner filed a timely Notice of Appeal on September 27, 2017. The Petition for Writ of Certiorari and Appendix were filed on May 23, 2018. This Return to Petition for Writ of Certiorari follows.

Factual History

Small businessman Edward “Slick” Gibbons (Victim)¹ 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. 22.

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. Victim was jumped by three men who were hiding in the storage room in his carport. App. 22-23. They took approximately \$840 and beat him, asking where the rest of the money was. One of the men called him by his nickname. The men sat on him, kicked him, stomped on his chest and stomach, and wrapped duct tape around his face.² 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 Victim. 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. 28-32; 38-40.

Victim testified his El Camino was worth approximately \$6,500. App. 85. 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. 87-88. Victim’s hip was bruised and the “bone where the hip hooks together” was cracked. Victim testified his

¹ Victim owned Clarendon Auto Parts, a business he operated for forty-five years. His store is open six days a week and closed on Sunday, so naturally, he works six days a week. ROA. III, pp. 2-4; pp. 7-8.

² All three robbers were engaged in the lynching. As Victim explained: “[O]ne jumped on top of me and sat across my chest and was beating me there. And then one was sitting across my legs and then the bigger guy was kicking me in the side and stomping me in the chest” ROA. III, p. 15, lines 9-13.

doctor asked him if wanted to replace the hip or let it heal. 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. 76, line 23 – 77, line 3.

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. 120-122. 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. 122-124.

Cecil “Mac” Eaddy, Jr., testified he found the El Camino in the road near his farm. 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. 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. 134-139.

Investigator Ricky Richards, from the Clarendon County Sheriff’s Office, testified he processed the vehicle after it was found. Investigator Richards found fingerprints on the rear quarter on the driver’s side of the car, and also on the driver’s side door jamb. He sent the prints to Marie Hodge, a fingerprint technician with the Sumter Police Department. App. 146-148. Hodge testified she examined the latent print sent by Investigator Richards and determined it matched 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. He knew Victim all his life. App. 159. Investigator Ham identified photographs from the crime scene depicting the black duct tape that was used and Victim at the hospital while duct tape was still wrapped around his head. App. 163. Ham wore gloves to assist the nurse in removing the duct tape from Victim. The tape was put in a bag as evidence for SLED to process. App. 164-165.

Petitioner's co-defendant, Michael Pearson, was interviewed by Investigator Kenneth Clark. Investigator Ham testified he was present for the interview. Pearson adamantly denied knowing Victim and claimed he did not know where Victim lived. He claimed to never been to Victim's home or place of business and never came into contact with Victim's vehicle. App. 171-172.

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. 216-218. Investigator Clark testified as to law enforcement's diligent efforts to find the perpetrators of the heinous crime. 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 Pearson and Pearson denied being around Victim's property or vehicle. App. 265.

A month later, a positive DNA hit was found which made Petitioner a suspect. App. 271. Investigator Clark subsequently interviewed Petitioner, who prior to the DNA match had not been a suspect. Petitioner denied knowing Victim, denied being around the scene, and denied knowledge of the robbery. He also claimed not to know Pearson. App. 272-273. Petitioner was arrested and a DNA sample was taken. Testing once again matched Petitioner's DNA to the DNA left on the duct tape wrapped around Victim's head. App. 274-275.

Investigator Clark discovered from landscaper Richard Gamble that Pearson had been to Victim's house when he did landscaping work for Victim. App. 276-277. While Pearson and Petitioner 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 of time. App. 278-279.

John Hornsby testified that Pearson and Petitioner worked at Voc Rehab during an overlapping time period of December 9-12, 2008. 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. 337-338.

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.

The duct tape removed from Victim's head was tested and found to be a one in 670 billion match with Petitioner's DNA. App. 347-348; p. 352.

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo and appellate courts will reverse the PCR court 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). For questions of fact, the standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the post-conviction judge's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984).

In post-conviction relief proceedings, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an allegation of ineffective assistance of counsel exists, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper standard for review of counsel's performance is whether the attorney provided representation within the range of competency required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Judicial scrutiny of counsel's performance follows a strong presumption that counsel's conduct falls within the wide range of adequate and reasonable professional assistance.

The court uses a two-pronged test set forth in Strickland when evaluating allegations of ineffective assistance of counsel. Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 116, 386 S.E.2d 624, 625 (1989). Under this prong, attorneys are held to an objective standard of "reasonably effective

assistance” under “prevailing professional norms”. Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland 466 U.S. at 690). Second, the applicant not only has to show that counsel’s assistance was constitutionally deficient, but also that they were prejudiced by this deficiency so severely that it produced a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625.

ARGUMENT

The PCR court did not err in finding Trial Counsel was not ineffective in choosing not to call Petitioner or the alibi witnesses he had investigated to testify at trial where their testimony was inconsistent and incredible and did not support an alibi defense.

Petitioner asserts the PCR court erred in finding Trial Counsel was not ineffective for failing to present alibi witnesses at trial where the PCR court inferred a reasonable trial strategy from the record. However, the PCR court did not err in finding Trial Counsel was not deficient in this decision and the alibi witnesses would not have changed the outcome of the trial. Therefore, this Court should affirm the PCR Court's denial of post-conviction relief.

The testimony presented at the evidentiary hearing shows Trial Counsel filed a notice of an alibi defense before Petitioner's trial. Trial Counsel investigated and interviewed the potential alibi witnesses, and the witnesses were present at trial and prepared to testify. However, Trial Counsel opted not to call these witnesses at trial. At the evidentiary hearing, which took place more than four years after the trial, Trial Counsel could not recall his strategy or his decision making process in choosing not to call these witnesses. However, after hearing the testimony of the alleged alibi witnesses, the PCR court found Trial Counsel's decision not to call these witnesses was neither deficient nor prejudicial. App. 573.

Trial Counsel's choice not to present alibi witnesses was not deficient and there was no resulting prejudice because the testimony did not constitute an alibi and would not have changed the outcome of the 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) (reversed on other grounds). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must

produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

Petitioner testified about his alibi and presented two alibi witnesses at the evidentiary hearing. First, Petitioner testified he had been accused of committing this crime between 6:00 and 6:30 A.M. on May 15, 2010. He stated he told Trial Counsel that he was at home with his sister and his girlfriend between 6:00 and 6:30 that morning, and they were waiting for his mother to get home from work around 7:00 or 7:15. He testified that he went to bed around 11:00 P.M. the night before, and he did not wake up until 6:40 or 6:45 on the day of the crime, and his sister was there when he got up and he spoke to her. He testified that he did not see his mother until she came home from work and walked in the door around 7 or 7:15.

Debra Weldon, Petitioner's mother, testified that her son was accused of committing a crime between 6 and 7 A.M. on May 15, 2010. She testified that on the evening of May 14th, the day before the crime, she got off work at the Barbecue Hut at 8:30 P.M and went home, until she left her home at 10:30 P.M. She testified that she probably left to go to the store or somewhere else. Debra Weldon testified she did not work on the weekends at that time, so she did not go to work that evening when she left. She stated she returned home, and she went to sleep around midnight that evening. She testified Petitioner was home with her when she went to bed at midnight. Debra Weldon testified she did not wake up until 8:00 A.M. the next morning, on the day of the crime, and Petitioner was home when she got up. She testified Petitioner does not have a car and did not have access to a car at that time. App. 522-531.

Jessica Weldon, Petitioner's sister, testified that she lived with Petitioner and her mother at the time of the crime. She testified that on the night of May 14, the day before the crime, she

got out of school around 4:00 P.M. She stated Petitioner was outside her house when she got off the bus. She testified she stayed up late because it was a Friday night, and she went to sleep around midnight that evening. Jessica Weldon testified that when she went to sleep at midnight, Petitioner was there, as well as his girlfriend Rell, her other brother's girlfriend Kathy, and her mother. She testified she woke up at 5:00 A.M. on the day of the crime and went into Petitioner's room to sneak a cigarette from his girlfriend. She stated that Petitioner was in his room asleep at that time. She then opened the door and went outside to smoke the cigarette, and she saw Petitioner peeking at her out the window. She stated Petitioner stayed in his room with his girlfriend that morning until around 9:00 A.M., when he opened the door to let his two cats outside. Jessica Weldon testified that she recalls the details so well because after her brother got "locked up" it is all she and her family talk about. App. 531-537.

In its Order of Dismissal, the PCR court noted the discrepancies in the three witnesses' testimony. Although it did not make a specific credibility finding about these witnesses, it made an implicit credibility finding by pointing out the differences in their stories and found Trial Counsel was not ineffective for choosing not to present "conflicting alibi witnesses" which could have "hurt his case rather than help." App. 574. The PCR court address this testimony as follows:

At the PCR hearing, Applicant testified about his alibi and presented two witnesses which corroborated his alibi testimony. However, the testimony presented did not exactly match up. All three recollections of the morning in question differed slightly in time and detail. For example, Applicant testified that his mother was at work the morning of the crime and he woke up between 6:00 and 6:45 A.M. to wait for her when she came home at 7:15 A.M. However, Applicant's mother, Debra Weldon, testified that she did not work that day because it was Saturday morning and she did not work on weekends at the time; she stated she was home and did not wake up until 8:00 A.M. Jessica Weldon, Applicant's sister, testified that Applicant was in his room with his girlfriend that morning and did not wake up until around 9:00 A.M., which contradicts Applicant's testimony that he woke up around 6:00 A.M.

When asked about the discrepancies in the alibi stories, Trial Counsel agreed that presenting all three of these different stories at trial would have hurt his case. He

stated that using only one of these stories would have helped his ease, but agreed that the State could have presented testimony from the other two alibi witnesses to contradict his witness had he only used one.

The South Carolina Supreme Court has held that an attorney cannot be ineffective if there is evidence to support his decision not to call witness with credibility issues. "A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility I questions, even if that witness is a co-defendant." Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (201 1) (citing Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768,771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the codefendant's credibility was a concern and the same evidence would be presented through another witness)). Trial Counsel testified that having conflicting alibi witnesses would have hurt his case rather than help, and it is reasonable to think that he considered this as part of his strategy in not calling these witnesses.

App. 573-574.

"When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under Strickland. Walker, 397 S.C. at 238, 723 S.E.2d at 616. "First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant." Id.

In applying this two part test to the testimony of these witnesses, the testimony does not hold up as a valid, credible alibi that would have changed the outcome of the trial.

First, Debra Weldon's testimony does not constitute a complete alibi defense. While her testimony does corroborate parts of the other witnesses' testimony, such as the detail that Petitioner lived with her and his sister, Debra Weldon cannot actually account for Petitioner's whereabouts during the time of the crime, or immediately before the crime, because she was asleep. She testified

that she went to bed around midnight the night before, and saw Petitioner at the house. She then stated that she did not wake up until around 8:00 the next morning, and Petitioner was at the house then, as well. However, according to her testimony, she does not have the ability to account for Petitioner's location at any time in the eight hours she was asleep, which is when the crime occurred. Petitioner could easily have left the house in the early morning hours, committed the crime around 6:00 A.M., then come back to his home before his mother woke up two hours later.

Even if a jury believed Petitioner's testimony that his mother was at work that morning, which differed from her testimony that she was not at work but rather at home asleep, Petitioner testified his mother was gone until she got home from work at 7:15 A.M. No matter which version, Debra Weldon was not home and consciously able to testify as to whether Petitioner was there. Therefore, her testimony does not constitute an alibi defense and does not meet the first prong of the analysis under *Walker*.

As to the second prong of the analysis of Debra Weldon's testimony, her testimony is inherently incredible. Although the PCR court did not make a specific credibility finding, it did point to factors which make her testimony not credible. Her story differed from the other witnesses' testimony. She claimed she was at home from sometime after 10:30 P.M. on the night before through to the next morning, but Petitioner testified she was at work during the night and did not return until 7:15 the next morning. She testified she fell asleep on the couch the night before and was woken up by Petitioner around midnight so she could go to her bed, but Petitioner testified he went to sleep at 11:00 that night. Furthermore, Debra Weldon is Petitioner's mother as has an obvious interest in protecting her son from a conviction. Based on these factors, she likely is not a credible witness, and her testimony would not have changed the outcome of the trial.

Second, Jessica Weldon’s testimony does not constitute an alibi. She claims that Petitioner was at home asleep on the morning of the crime, and she saw him in his room with his girlfriend at 5:00 A.M. when she went in to steal a cigarette. She mentioned that when she went outside to smoke it, she saw Petitioner’s looking out at her through the window. Jessica Weldon did not specifically account for her actions and whereabouts from 6:00 to 6:30 A.M., which is the time the crime occurred. She claimed that from 6 to 7 she was “at the house,” and Petitioner was also “[i]n the house... [i]n the room with his girlfriend.” App. 536, line 18-23. But she testified that she did not see Petitioner again until he got up at 9:00 A.M. to let the cats outside. She did not explain whether she was awake or asleep during those hours between, and she was not in the room with Petitioner to confirm his presence. It is possible that Petitioner left his room sometime between 5:00, when she saw him in his room and in the window, and 9:00 when she saw him next. Her testimony cannot, therefore, constitute a valid alibi defense.

Jessica Weldon also lacks credibility based the same factors as her mother—mainly because she is a direct relative and has an interest in protecting her brother. She testified that she recalls the details of the day so vividly because “[a]fter my brother got locked up, that all we talk about.” App. 537, line 19-20. She and her family had obviously discussed the alibi at length, and it’s possible that a jury may find her testimony unbelievable.

Because the alibi witnesses had major inconsistencies in their testimony and likely were not credible, Trial Counsel was not deficient in choosing not to present them at trial. He had clearly investigated, spoken with, and subpoenaed these witnesses to attend the trial. He was aware of what they would have said on the stand and how they would have appeared to a jury. However, he made a calculated decision not to call them at trial, regardless of whether he can now remember precisely what the reasoning behind the decision was more than four years later. Trial Counsel

thoroughly cross-examine the State's witnesses and challenged the DNA evidence tying Petitioner to the crime, and presented a full defense at trial. His actions here were not deficient and were reasonable under professional norms.

As to the prejudice prong of Strickland, it should be noted that the PCR court made a finding of overwhelming evidence of guilt, which precludes a finding of prejudice or of ineffective assistance of counsel. The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the defendant's trial. Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 U.S. 1114, (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

In this case, Petitioner's DNA was found on the duct tape that was taken from the victim's face after the robbers attacked him and attempted to tie him up with tape. The DNA profile found on the tape matched Petitioner, and 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. The DNA was found not on a random object outside the victim's home, but rather on the exact piece of duct tape which the robbers had forced onto the victim's head during the crime. Even though there was no other physical evidence tying him to the crime, this DNA evidence is extremely strong, especially when taken with the other evidence presented at trial of

Petitioner's connection to his co-defendant, and his co-defendant's connection to the victim's property. See Factual History, pg. 6-7.

Accordingly, because Trial Counsel was not deficient in choosing not to present the testimony of these alibi witnesses, and because their testimony would not have changed the outcome of the trial, Trial Counsel is not ineffective. Therefore, this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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October 8, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO CLARENDON COUNTY
Court of Common Pleas

The Honorable Jocelyn J. Newman, Circuit Court Judge

Appellate Case No. 2017-0020000

VICTOR MCCOY WELDON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Taylor D. Gilliam, Esquire
SC Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29201**

This 8th day of October, 2018


KAITLYN S. SLICE
LEGAL ASSISTANT

The Supreme Court of South Carolina

Victor McCoy Weldon, Petitioner,

v.

State of South Carolina, Respondent.

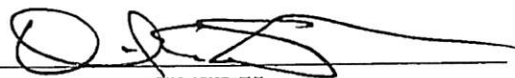
Appellate Case No. 2017-002000

ORDER

Pursuant to Rule 243(l) of the South Carolina Appellate Court Rules, this post-conviction appeal is hereby transferred to the South Carolina Court of Appeals.

FOR THE COURT

BY


CLERK

Columbia, South Carolina
October 23, 2018

cc:

Julie Amanda Coleman, Esquire
Taylor Davis Gilliam, Esquire
The Honorable Jenny A. Kitchings

The South Carolina Court of Appeals

Victor McCoy Weldon, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002000

ORDER

This matter is before the Court on a petition for a writ of certiorari. Based on the vote of the panel, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Julie Amanda Coleman, Esquire

Taylor Davis Gilliam, Esquire

Victor M. Weldon

The Honorable Jocelyn Newman

FILED

Oct. 9, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Clarendon County

Honorable Jocelyn J. Newman, Circuit Court Judge

VICTOR MCCOY WELDON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-0020000

BRIEF OF PETITIONER

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief, where trial counsel failed to present alibi witnesses who were prepared, available, and present at trial, where counsel had spoken with the witnesses in advance and was aware of the substance of their proposed testimony, where counsel likewise failed to put Petitioner on the stand, and where counsel conceded that he was unaware of any strategic reason as to why he would not have called any of them to testify?

STATEMENT

Petitioner was indicted for burglary in the first degree, attempted murder, armed robbery, grand larceny, kidnapping, and possession of a weapon during a violent crime by a Clarendon County Grand Jury during its January 2011 term. App. 588 – 589. Petitioner proceeded to a five-day trial on May 14, 2012 before the Honorable Ralph F. Cothran and a jury. App. 1. Ernest A. Finney, III and Jason Corbett appeared on behalf of the State, and John Knobeloch and Laura Knobeloch represented Petitioner.

Petitioner and a co-defendant, Michael Pearson, were tried together following an incident at the home of Edward “Slick” Gibbons on May 15, 2010. App. 83 l. 8 – App. 90 l. 9. Gibbons averred that three masked men attacked him at his home. App. 92 l. 16 – App. 96 l. 17. According to Gibbons, the men attempted to wrap tape around his face and legs. App. 98 l. 22 – App. 99 l. 17. Gibbons’ El Camino was allegedly stolen as the men left. App. 102 ll. 4 – 21.

Pearson’s fingerprint was reportedly found at Gibbons’ garage. App. 219 l. 16 – App. Petitioner’s DNA was allegedly located on the tape used to tie up Gibbons. App. 275 ll. 15 – 25. Petitioner did not testify.

At the conclusion of trial, the jury found Petitioner guilty of burglary in the first degree, armed robbery, grand larceny, kidnapping, and possession of a weapon during a violent crime. App. 466 ll. 10 – 21. Judge Cothran sentenced Petitioner to thirty years’ imprisonment on the burglary charge, thirty years for the armed robbery charge, five years for the grand larceny, twenty years for the kidnapping charge, and five years on the possession of a weapon charge. App. 475 l. 6 – 25. The burglary and armed robbery sentences were imposed consecutive to one another, with the remaining charges running concurrently. Id.

Petitioner's convictions were affirmed. On or about January 5, 2016, Petitioner filed an application for post-conviction relief. App. 478. Petitioner's application contained allegations of ineffective assistance of counsel, including the claim that "none of [his] alibi [witnesses] were called to testify." App. 487.

The State made its Return on or about April 11, 2016. App. 493. An evidentiary hearing was conducted on July 27, 2016 before the Honorable Jocelyn Newman. App. 501. In addition to Petitioner and trial counsel, two of Petitioner's alibi witnesses—Debra Weldon and Jessica Weldon—testified at the hearing.

On August 3, 2017, Judge Newman issued her order denying Petitioner relief. App. 569. She ruled that "[t]he decision not to use contradictory alibi witnesses at trial was very likely a part of Trial Counsel's strategy." App. 574. As a result, the PCR court concluded that counsel's performance "cannot be found ineffective," and Petitioner's application was dismissed. App. 576.

Petition submitted a petition for writ of certiorari on May 23, 2018. Respondent filed its return on October 8, 2018. This case was transferred to this Court on October 23, 2018. By Order filed October 9, 2019, this Court granted the petition for writ of certiorari and directed further briefing. This is the Brief of Petitioner.

STANDARD OF REVIEW

Appellate courts 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, 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)).

ARGUMENT

The PCR Court erred in denying Petitioner relief, where trial counsel failed to present alibi witnesses who were prepared, available, and present at trial, where counsel had spoken with the witnesses in advance and was aware of the substance of their proposed testimony, where counsel likewise failed to put Petitioner on the stand, and where counsel conceded that he was unaware of any strategic reason as to why he would not have called any of them to testify.

Relevant Facts

On the morning of May 15, 2010, Petitioner was at home. App. 509 ll. 4 – 14. He lived with his sister, mother, little brother, and girlfriend. App. 510 ll. 7 – 9. Petitioner informed his attorney that he woke up around 6:40 in the morning on May 15, 2010, and that he spoke with his sister and saw his mother at the house. App. 510 l. 25 – App. 511 l. 16; App. 520 ll. 4 – 19.

In response, counsel indicated that he would file a motion to “call them to the stand to testify” on Petitioner’s behalf to disprove the State’s assertion that Petitioner was involved in the alleged crime. App. 511 ll. 17 – 23; App. 513 ll. 23 – 25. Petitioner’s mother and sister were present at trial but did not testify. App. 511 l. 24 – App. 512 l. 8; App. 513 ll. 13 – 14. It was Petitioner’s belief that they would testify, and he became concerned that they did not. App. 512 ll. 11 – 13. Because counsel wished to have the last argument during closing, the witnesses who could have proven that Petitioner was at home during the time of the alleged crime were not called on Petitioner’s behalf. App. 512 ll. 22 – 25.

Debra Weldon, Petitioner’s mother, was present at her son’s trial and was supposed to be a witness. App. 522 l. 16 – App. 523 l. 22. She had gotten off work at 8:30 on the evening of May 14, 2010. App. 524 ll. 2 – 20. She went home, where she saw Petitioner at the house. App.

525 ll. 3 – 24. She recalled going to bed around midnight and waking up around 8:00 on the morning of May 15, 2010. App. 526 ll. 2 – 11. Petitioner was home when she went to bed and when she awoke. App. 526 ll. 12 – 13. Petitioner did not have a car, nor did he have access to one. App. 526 l. 19 – App. 527 l. 2. To Mrs. Weldon’s knowledge, her son did not leave the house during that span of time. Id. Mrs. Weldon informed trial counsel accordingly. App. 527 ll. 7 – 25. Counsel asked Mrs. Weldon to come to trial and testify. Id. She understood the purpose of her testimony was to “tell whether [Petitioner] was at the house at the time of the crime.” Id.

Petitioner’s sister, Jessica Weldon, testified similarly. App. 534 l. 16 – App. 537 l. 22. She recalled going to bed around midnight. Id. At that time, Petitioner, his girlfriend, and his mother were also at the house. Id. Petitioner was in a room with his girlfriend. Id. Around 5:00 the next morning, Jessica woke up around and snuck into Petitioner’s room for a cigarette. Id. She saw Petitioner in the room, asleep. Id. She testified that Petitioner was at the house from 6:00 to at least 7:00 that morning. Id. She recalled Petitioner opening the door to his room around 9:00 a.m. to let his two cats out. Id.

Much like Mrs. Weldon, Jessica Weldon was prepared and available to testify at Petitioner’s trial. App. 537 ll. 6 – 23. The above testimony is what she would have offered, under oath, same as the evidentiary hearing. Jessica was directed to be at her brother’s trial by counsel. App. 533 ll. 8 – 15. According to counsel, she was supposed to testify. App. 533 ll. 16 – 17. In fact, she had spoken with counsel regarding her testimony. App. 533 ll. 23 – 25. However, much like Petitioner and his mother, and contrary to her intentions, she did not end up testifying. App. 534 ll. 9 – 15.

The following exchange took place during the evidentiary hearing between Petitioner and his PCR counsel:

Q: Okay. Without you testifying and without your sister and your mother testifying, was there any other way for the jury to hear where you were that day?

A: No, sir.

Q: Do you think that prejudiced your trial?

A: I do.

App. 513 ll. 17 – 22.

Petitioner was arrested on July 20, 2010. App. 507 ll. 20 – 24. Counsel began representing Petitioner later that year, around October 2010. App. 507 l. 25 – App. 508 l. 3. During the entirety of trial counsel's representation, from October 2010 until Petitioner's trial in May 2012, Petitioner only met with him four times. App. 508 ll. 4 – 8.

Counsel recalled meeting with Petitioner "at least twice" during his year-and-a-half representation. App. 540 ll. 1 – 7. Counsel characterized the State's case against Petitioner as weak: "I recall after receiving the discovery that I reached out to the ... assistant solicitor with no tongue-in-cheek thinking that I had received the wrong discovery package because [Petitioner was] not mentioned in it." App. 541 ll. 3 – 8. The only piece of evidence which allegedly linked Petitioner to the crime was DNA on the duct tape. App. 541 ll. 9 – 17. Counsel explained his trial strategy:

[T]he trial strategy was to attack the DNA, which was the only evidence linking Mr. Weldon to the crime. There were no witnesses. All of the defendants were wearing masks. There was, there was nothing linking him except for the DNA. And I guess the - - our, our theory on weakness of the DNA evidence was that the police officers did take a sample from both the outside of the duct tape and the sticky side of the duct tape, the significance being that if, you know, the DNA is found on the sticky side, it's much more likely that you were present because you had to expose the sticky side ... when the sample, DNA sample was put on it,

even though the police officers took samples of both sides, they didn't label them. So they were unable to say whether the, whether the DNA sample came from the outside or the sticky side of the duct tape.

App. 542 l. 13 – App. 543 l. 3.

Counsel was present at the evidentiary hearing while Petitioner's mother and sister testified. App. 544 ll. 2 – 24. He recalled speaking with both of them in advance of Petitioner's trial and had notes which reflected such. Id. He agreed that their testimony at trial would have been "very similar to the testimony that they gave" at the evidentiary hearing. Id. Such a conclusion notwithstanding, he did not call any witnesses on Petitioner's behalf.

When asked why none were called, counsel could not articulate a reason:

I do not know. The - - we did file a notice of alibi and I did prepare- - in the trial notebook there is a spot where I had prepared to ask Debra, at least the mother, Debra Weldon, questions supporting the alibi. Possibly we did not call a witness so that we could have final argument, but so honestly I, **I don't know why we would not have called them as alibi witnesses.**

App. 545 ll. 3 – 11. (emphasis added).

The following exchange then took place between PCR counsel and trial counsel:

Q: All right. Had you present - - was there any other way if Mr. Weldon didn't testify and Ms. Jessica Weldon didn't testify and Debra Weldon didn't testify, was there any other way to convey that to the jury?

A: No.

Q: Do you think that that was important testimony for the jury to consider?

A: I do.

Q: Okay. Looking back, should you have called them as witnesses in the trial?

A: I believe so, yes.

Q: And do you think that that could have changed the outcome of Mr. Weldon's trial?

A: I do.

App. 546 ll. 2 – 15.

Furthermore, trial counsel questioned his own claim that he might have decided not to call these alibi witnesses in order to receive the last argument. App. 547 ll. 9 – 17. Not only was he “scratching [his] head wondering why [he] would not have called [the] alibi witnesses,” but he was not even sure if he made the decision not to do so in order to receive last argument. Id. Notably, he agreed that **“calling alibi witnesses would have been a much more favorable strategic discussion versus not calling alibi witnesses and trying to get the last argument”** because there was no other way to present an alibi defense. App. 547 l. 9 – App. 548 l. 1. (emphasis added). In hindsight, counsel had “no idea why [he] did not call the alibi witnesses.” App. 556 ll. 7 – 16.

Discussion

Petitioner was home at the time of the alleged crime, and the two witnesses who could have corroborated his alibi were not called at his trial. Although Petitioner informed his attorney of this, and although the two witnesses were both available and prepared to testify, counsel elected not to put up a defense. The PCR court erred in concluding that “Counsel’s decision not to use the alibi witnesses presented at the PCR hearing was part of a valid trial strategy” where “Trial Counsel stated that he could not recall why he did not use their testimony. App. 537.

In Martin v. State, 427 S.C. 450, 832 S.E.2d 277 (2019), the South Carolina Supreme Court reversed the PCR court’s denial of post-conviction relief and remanded for a new trial. Martin was convicted of armed robbery and criminal conspiracy; he alleged his trial attorneys were ineffective for failing to elicit testimony from his mother regarding the specific timeline of his alibi. Id. at 453, 832 S.E.2d at 278. Martin’s mother testified in his defense at trial, but

counsel did not question her about a statement she had given to them that would have established an alibi defense. Id. at 453, 832 S.E.2d at 279. Martin’s trial counsel admitted they were aware of this information. Id. at 453, 832 S.E.2d at 279. The Supreme Court held “as a matter of law that Petitioner’s trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner’s mother.” Id. at 456, 832 S.E.2d at 280.

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 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. 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 Walker was not prejudiced. Id.

The 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." 407 S.C. at 406, 756 S.E.2d at 147. Thus, 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.

In Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995), the applicant presented the testimony of the two witnesses who he claimed would have testified that he was in Florida at 8:30 *a.m.* on the day when the crimes were committed. A majority of the South Carolina 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 only 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, Glover's witnesses did not provide an alibi. Id.

It is well settled that counsel's rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient

representation under an objective standard of reasonableness. Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992); see Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994); see also Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding that it “was not objectively reasonable given the defense theory of the case” for counsel not to call witnesses that were critical to his client’s defense.). Accordingly, the PCR Court erred in holding that trial counsel provided effective assistance of counsel because Petitioner’s right to a fair trial was adversely affected by trial counsel’s deficient performance.

“An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.” Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). “To establish deficient performance, a petitioner must demonstrate that counsel's representation ‘fell below an objective standard of reasonableness.’ ” Id. (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). “[T]o establish prejudice, a 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.” Id. at 534, 123 S.Ct. 2527 (quotations and citation omitted). In assessing prejudice, appellate courts “reweigh the evidence in aggravation against the totality of available mitigating evidence.” Id. Prejudice is established where “there is a reasonable probability that at least one juror would have struck a different balance.” Id. at 537, 123 S.Ct. 2527 (citation omitted). A “reasonable probability” is less than a preponderance of the evidence but still “a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052.

In this case, Petitioner presented sufficient evidence at the PCR evidentiary hearing to establish that trial counsel should have called the alibi witnesses at his trial. Counsel was aware

of the witnesses and had them available at trial. Based on his own admission, he should have called them.

The Order of Dismissal contained a ruling that trial counsel's "decision not to use the alibi witnesses presented at the PCR hearing was part of a valid trial strategy and was neither ineffective nor prejudicial." App. 573. In the very next paragraph, the Order reads: "Trial Counsel stated that he could not recall why he did not use their testimony." The PCR Court erred, therefore, in the former conclusion, as trial counsel's testimony did not support such a contention.

Although the Order of Dismissal did not contain a credibility determination, the PCR Court characterized trial counsel's testimony as credible for a separate issue: "Trial Counsel credibly testified that he did not recall Applicant making this request." App. 579. So at least in that capacity, the PCR Court weighed trial counsel's credibility and found him believable.

As referenced above, counsel could not fathom why he did not call the alibi witnesses. He testified that he should have called them as witnesses, and the resulting failure to do so prejudiced Petitioner's case. Furthermore, as someone with a detailed understanding of Petitioner's case, counsel opined that the result in Petitioner's matter would have been different had he called the alibi witnesses.

The Order of Dismissal extends cherrypicked portions of counsel's testimony beyond any logical interpretation. Using language such as "it is reasonable to think that he considered this as part of his strategy" and "[t]he decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel's trial strategy" contravenes the very testimony elicited from counsel. The PCR court somehow transformed an admission of ineffectiveness into a valid trial strategy and thereby reached an incorrect conclusion based upon a lack of evidence.

The Order of Dismissal also seemed to suggest that counsel could only employ a singular overall strategy, which in this instance was to attack the State's DNA evidence: "Even though Trial Counsel did not recall his specific reasoning for choosing not to call alibi witnesses, his trial strategy can be inferred from the basis of his overall strategy, which he testified was to attack the State's DNA evidence against [Petitioner]." App. 575. The Order of Dismissal cited Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.E.2d 738 (2010) for the notion that:

A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce the strategy on the record.

App. 575.

The South Carolina Supreme Court cited to Wood in Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014). In Weik, the Court held that counsel's failure to present readily available social history mitigation evidence was deficient performance, and the defendant suffered prejudice as a result of counsel's deficient performance. Id. The Court found counsel's decision to call only one witness to testify in mitigation "resulted from counsel's inattention, not reasoned strategic judgment." Id. at 236, 761 S.E.2d at 768. Quite importantly, the Court cited Wood, supra, in order to emphasize "the distinction between the issue of whether counsel made a strategic decision in the first place and the issue of whether a strategic decision is a reasonable exercise of professional judgment under Strickland." Id. (citation omitted).

The Order of Dismissal in the matter *sub judice* contained additional flawed conclusions wherein the PCR Court appeared to overlook trial counsel's admission that he failed to call the alibi witnesses and the resulting failure prejudiced Petitioner's case:

Trial Counsel's testimony at the PCR hearing combined with this actions at trial supported by the trial transcript evidence the fact that Trial Counsel performed above the standard level of competence required by defense counsel.

App. 581.

The PCR Court failed to review counsel's strategy under "an objective standard of reasonableness" as required by Ingle v. State and seemed only concerned with justifying his actions, his own testimony notwithstanding. 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Petitioner only had a juvenile offense on his prior record. App. 474 l. 16 – App. 475 l. 4. He would not have opened the door to a litany of prior offenses if he had taken the stand and testified. Similarly, there was no indication that either his sister or his mother had any convictions which would have subjected them to impeachment. Gibbons, the man who was attacked, was never able to identify the men involved. Petitioner had everything to gain from putting his alibi witnesses on the stand, yet it was not done. The resulting prejudice manifested itself in his convictions and lengthy consecutive sentences. As evidenced by trial counsel's testimony, there was a reasonable probability that the outcome would have been different had he called Petitioner's mother or sister to the stand to corroborate the testimony which would have been offered by Petitioner. Simply put, holding out for the last argument in closing was not a sufficient trial strategy to justify the decision not to put two credible alibi witnesses on the stand. Petitioner had the right to have his attorney make a sound decision to present alibi witnesses.

Therefore, the PCR judge erred in holding that trial counsel provided effective assistance of counsel because there is a reasonable probability that but for trial counsel's deficient performance, Petitioner would have received a fair trial. App. 545 – 547; see Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel where there is a reasonable probability that the result would have been different had trial counsel introduced relevant and favorable evidence at trial).

CONCLUSION

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

A handwritten signature in black ink, appearing to read 'Taylor D Gilliam', is written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of February, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable Jocelyn J. Newman, Circuit Court Judge

VICTOR MCCOY WELDON,

PETITIONER

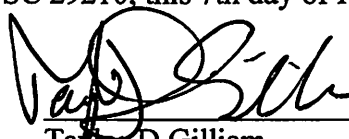
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

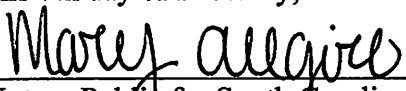
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Victor McCoy Weldon, #350911, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of February, 2020.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of February, 2020.

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Clarendon County
Jocelyn J. Newman, Post-Conviction Relief Judge

Appellate Case No. 2017-002000

VICTOR MCCOY WELDON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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PETITIONER'S ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief, where trial counsel failed to present alibi witnesses who were prepared, available, and present at trial, where counsel had spoken with the witnesses in advance and was aware of the substance of their proposed testimony, where counsel likewise failed to put Petitioner on the stand, and where counsel conceded that he was unaware of any strategic reason as to why he would not have called any of them to testify?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE

Did the post-conviction relief court err in finding Trial Counsel was not ineffective in choosing not to call Petitioner or alleged alibi witnesses he had investigated to testify at trial where their testimony was inconsistent and incredible and did not support an alibi defense, where it was ultimately Petitioner's sole decision not to testify, and where Trial Counsel articulated a trial strategy of choosing to not present the inconsistent and incredible witnesses so that he could have the final closing argument?

STATEMENT OF THE CASE

Procedural History

Petitioner Victor Weldon is presently confined in the South Carolina Department of Corrections. During its January 2011 term, the Clarendon County Grand Jury indicted Petitioner for first-degree burglary, attempted murder, armed robbery, grand larceny (\$2000-\$10000), kidnapping, and possession of a weapon during a violent crime (2011-GS-14-0068). John Knobeloch, Esquire, represented Petitioner on the charges. On May 14-16, 2012, Petitioner proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr, after which the jury convicted him as indicted. Judge Cothran sentenced Petitioner to thirty years' imprisonment for armed robbery, running consecutively to a sentence of thirty years' imprisonment for first-degree burglary. Judge Cothran further sentenced Petitioner to five year's imprisonment for grand larceny, twenty years for kidnapping, and five years for possession of a weapon during a violent crime, all running concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf. Chief Appellate Defender Robert M. Dudek, Esquire, represented him on appeal. Petitioner filed a brief challenging the trial court's denial of his directed verdict motion. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Weldon, 2014-UP-463 (Ct. App. filed December 17, 2014). Petitioner filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Petition was denied via order filed April 8, 2015. The Remittitur was issued on May 8, 2015.

Petitioner filed a timely application for post-conviction relief on January 5, 2016 (2016-CP-14-00002). In his application, Petitioner 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.”

Respondent submitted its Return on April 11, 2016. An evidentiary hearing was convened on July 27, 2016, at the Sumter County Courthouse before the Honorable Jocelyn J. Newman. Petitioner was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General’s Office.

At the PCR hearing, Petitioner orally amended his application to add an additional allegation of ineffective assistance of counsel for failing to object to the State’s question on direct examination about destroying evidence. See App. 319, line 15 - 21. During the hearing, Petitioner testified on his own behalf and presented testimony from his mother, Debra Weldon, his sister, Jessica Weldon, and John Knobloch, Esquire (“Trial Counsel”). Judge Newman denied and dismissed the application with prejudice in an order signed July 28, 2017 and filed August 3, 2017.

Following the denial of relief, Petitioner timely filed a notice of appeal. On October 9, 2019, this Court granted Petitioner’s petition for a writ of certiorari.

Factual History

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. p. 96-99, p. 102, l. 12).

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. p. 89, l. 11-25). Victim was jumped by three men who were hiding in the storage room in his carport. (App. p. 90, l. 1-9). They took approximately \$840 and beat him, asking where the rest of the money was. (App. p. 95, l. 19; p. 100, l. 14-20). The men sat on him, kicked him, stomped on his chest and stomach, and wrapped duct tape around his face. (App. p. 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. p. 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. p. 102, l. 16-20; p. 106-107).

Victim testified his El Camino was worth approximately \$6,500. (App. p. 110, l. 3-20). 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. p. 113). Victim’s hip was bruised and the “bone where the hip hooks together” was cracked. (App. 101, 20-23). Victim testified his doctor asked him if wanted to replace the hip or let it heal. (App. 102, l. 1-3). 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, l. 1-5).

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. p. 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. p. 150-151).

Cecil "Mac" Eaddy, Jr., testified he found the El Camino in the road near his farm. (App. p. 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. p. 172, l. 1-6). 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. p. 172, l. 17-19).

Investigator Ricky Richards from the Clarendon County Sheriff's Office testified he processed the vehicle after it was found. (App. p. 180-181). Investigator Richards found fingerprints on the rear quarter on the driver's side of the car, and also on the driver's side door jamb. (App. p. 181-183). He sent the prints to Marie Hodge, a fingerprint technician with the Sumter Police Department. (App. p. 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. p. 193). He knew Victim all his life. (App. p. 193). Ham testified that his assignment was to assist and oversee Investigator Kenneth Clark's investigation because Clark was a new investigator. (App. p.194, lines 9-19.) Ham identified photographs from the crime scene showing black duct tape, blood spots, and Victim at the hospital with the tape still wrapped around his head. (App. p. 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. p. 198, 20-25.)

Co-Defendant Pearson, was interviewed by Investigator Kenneth Clark. (App. 205, l. 19-24). Investigator Ham testified he was present for the interview. (App. 205, l. 19-24). Pearson adamantly denied knowing Victim and claimed he did not know where Victim lived. (App. 206, l. 14-20). He claimed to never been to Victim's home or place of business and never came into contact with Victim's vehicle. (App. 206, l. 14-20).

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. p. 258-259). The first big break was a phone call about three individuals that were spending a lot of money. (App. 262, l. 16-18.) Investigator Clark testified he interviewed Co-Defendant Pearson and he denied being around Victim's property or vehicle. (App. 265.)

A month later, a positive DNA hit was found which made Petitioner a suspect. (App. 271, l. 22-25). Investigator Clark subsequently interviewed Petitioner, who prior to the DNA match had not been a suspect. (App. 272, l. 21-34). Petitioner denied knowing Victim, denied being around the scene, denied knowledge of the robbery, and denied knowing Pearson. (App. 273, l. 4-7). Petitioner was arrested and a DNA sample was taken. Testing once again matched Petitioner's DNA to the DNA left on the duct tape wrapped around Victim's head. (App. 275, l 17-20).

Investigator Clark discovered from landscaper Richard Gamble that Pearson had been to Victim's house when he did landscaping work for Victim. (App. 276-277). While Pearson and Petitioner 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 of time. (App. 278-279).

John Hornsby testified that Pearson and Petitioner worked at Voc Rehab during an overlapping time 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).

The duct tape removed from Victim's head was tested and a DNA profile found on the tape matched Petitioner. 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; p. 352).

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court’s findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo and appellate courts will reverse the PCR court 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). For questions of fact, the standard of review set forth by the Supreme Court of South Carolina is that “any evidence” of probative value to support the post-conviction judge’s findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984).

In post-conviction relief proceedings, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an allegation of ineffective assistance of counsel exists, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper standard for review of counsel’s performance is whether the attorney provided representation within the range of competency required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Judicial scrutiny of counsel’s performance follows a strong presumption that counsel’s conduct falls within the wide range of adequate and reasonable professional assistance.

The court uses a two-pronged test set forth in Strickland when evaluating allegations of ineffective assistance of counsel. Strickland, 466 U.S. 668. First, an applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 116, 386 S.E.2d 624, 625 (1989). Under this prong, attorneys are held to an objective standard of “reasonably effective

assistance” under “prevailing professional norms”. Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland 466 U.S. at 690). Second, the applicant not only has to show that counsel’s assistance was constitutionally deficient, but also that they were prejudiced by this deficiency so severely that it produced a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625.

ARGUMENT

The PCR court did not err in finding Trial Counsel was not ineffective in choosing not to call Petitioner or the witnesses he had investigated to testify at trial where their testimony was inconsistent and incredible and did not support an alibi defense, where it was ultimately Petitioner's sole decision not to testify, and where Trial Counsel articulated a trial strategy of choosing to not present the inconsistent and incredible witnesses so that he could have the final closing argument.

Petitioner asserts the PCR court erred in finding Trial Counsel was not ineffective for failing to present alibi witnesses at trial where the PCR court inferred a reasonable trial strategy from the record, and where the witnesses were inconsistent and incredible and did not support an alibi defense, and where it was ultimately Petitioner's decision not to testify at trial. However, the PCR court did not err in finding Trial Counsel was not deficient in this decision and the alibi witnesses would not have changed the outcome of the trial. Therefore, this Court should affirm the PCR Court's denial of post-conviction relief.

The testimony presented at the evidentiary hearing shows Trial Counsel filed a notice of an alibi defense before Petitioner's trial. Trial Counsel investigated and interviewed the potential alibi witnesses, and instructed them to appear at trial and be prepared to testify. However, Trial Counsel opted not to call these witnesses at trial. At the PCR evidentiary hearing, which took place more than four years after the trial, Trial Counsel could not specifically recall his definite strategy or his decision making process in choosing not to call these witnesses. However, after hearing the testimony of the alleged alibi witnesses, the PCR court found Trial Counsel's decision not to call these witnesses was neither deficient nor prejudicial. (App. 573.)

1. Witness Testimony Would Not Have Satisfied Either Prong of the Walker Analysis

Trial Counsel's choice not to present alibi witnesses was not deficient and there was no resulting prejudice because the testimony did not constitute an alibi and would not have changed

the outcome of the trial. “When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel’s deficient performance constitutes prejudice under Strickland. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012) (reversed on other grounds). “First, the court must find as a matter of law whether the witness’s testimony meets the legal definition of an alibi. Second, the court must assess the witness’s credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant.” Id.

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, 397 S.C. at 238, 723 S.E.2d at 616. In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses’ testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). “[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). See United States v. Thomas, 58 F. App’x 952, 958 (4th Cir. 2003) (unpublished) (“Defense counsel could have reasonably determined that he could not present a viable alibi defense based on discrepancies in testimony concerning the timing of events”).

Petitioner testified about his alibi and presented two alibi witnesses at the evidentiary hearing. First, Petitioner testified he had been accused of committing this crime between 6:00 and 6:30 a.m. on May 15, 2010. (App. 509, l. 4-7). He stated he told Trial Counsel that he was at home with his sister and his girlfriend between 6:00 and 6:30 that morning, and they were waiting for his mother to get home from work around 7:00 or 7:15. (App. 509-510). He testified that he went to bed around 11:00 p.m. the night before, and he did not wake up until 6:40 or 6:45 on the day of the crime, and his sister was there when he got up and he spoke to her. (App. 510, l. 9-12 – 511, l. 3). He testified that he did not see his mother until she came home from work and walked in the door around 7 or 7:15. (App. p. 511, l. 12-15.)

Debra Weldon, Petitioner's mother, testified that her son was accused of committing a crime between 6 and 7 a.m. on May 15, 2010. (App. 523, l. 8-11). She testified that on the evening of May 14, the day before the crime, she got off work at the Barbecue Hut at 8:30 p.m. and went home, until she left her home at 10:30 p.m. She testified that she probably left to go to the store or "somewhere else." (App. 524-525). Debra Weldon testified she did not work on the weekends at that time, so she did not go to work that evening when she left. (App. 524, l. 21- 525, l.2). She stated she returned home, and she went to sleep around midnight that evening. (App. 526, l. 2). She testified Petitioner was home with her when she went to bed at midnight. (App. 526, l. 6-8). Debra Weldon testified she did not wake up until 8:00 a.m. the next morning, on the day of the crime, and Petitioner was home when she got up. (App. 526, l. 9-13). She testified Petitioner does not have a car and did not have access to a car at that time. (App. 526, l. 23-24.)

Jessica Weldon, Petitioner's sister, testified that she lived with Petitioner and her mother at the time of the crime. (App. 534, l. 19-23). She testified that on the night of May 14, the day before the crime, she got out of school around 4:00 p.m. (App. 535, l. 1-2). She stated Petitioner

was outside her house when she got off the bus. She testified she stayed up late because it was a Friday night, and she went to sleep around midnight that evening. (App. 535). Jessica Weldon testified that when she went to sleep at midnight, Petitioner was there, as well as his girlfriend Rell, her other brother's girlfriend Kathy, and her mother. (App. 535, l. 8-11). She testified she woke up at 5:00 a.m. on the day of the crime and went into Petitioner's room to sneak a cigarette from his girlfriend. (App. 536, l. 2-6). She stated that Petitioner was in his room asleep at that time. (App. 535, l. 12-13). She then opened the door and went outside to smoke the cigarette, and she saw Petitioner peeking at her out the window. (App. 536, l. 15-17). She stated Petitioner stayed in his room with his girlfriend that morning until around 9:00 a.m., when he opened the door to let his two cats outside. (App. 537, l. 3-4). Jessica Weldon testified that she recalls the details so well because after her brother got "locked up" it is all she and her family talk about. (App. 537, l. 19-20).

In its Order of Dismissal, the PCR court noted the discrepancies in the three witnesses' testimony. Although it did not make a specific credibility finding about these witnesses, it made an implicit credibility finding by pointing out the differences in their stories and found Trial Counsel was not ineffective for choosing not to present "conflicting alibi witnesses" which could have "hurt his case rather than help." (App. 574.) The PCR court address this testimony as follows:

At the PCR hearing, [Petitioner] testified about his alibi and presented two witnesses which corroborated his alibi testimony. However, the testimony presented did not exactly match up. All three recollections of the morning in question differed slightly in time and detail. For example, [Petitioner] testified that his mother was at work the morning of the crime and he woke up between 6:00 and 6:45 a.m. to wait for her when she came home at 7:15 a.m. However, [Petitioner's] mother, Debra Weldon, testified that she did not work that day because it was Saturday morning and she did not work on weekends at the time; she stated she was home and did not wake up until 8:00 a.m. Jessica Weldon, [Petitioner's] sister, testified that [Petitioner] was in his room with his girlfriend that morning and did not wake up until around 9:00 a.m., which contradicts Applicant's testimony that he woke up around 6:00 a.m.

When asked about the discrepancies in the alibi stories, Trial Counsel agreed that presenting all three of these different stories at trial would have hurt his case. He stated that using only one of these stories would have helped his case, but agreed that the State could have presented testimony from the other two alibi witnesses to contradict his witness had he only used one.

The South Carolina Supreme Court has held that an attorney cannot be ineffective if there is evidence to support his decision not to call witness with credibility issues. “A witness’s credibility and demeanor is crucial to an attorney’s trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility I questions, even if that witness is a co-defendant.” Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (citing Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768,771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the codefendant’s credibility was a concern and the same evidence would be presented through another witness)). Trial Counsel testified that having conflicting alibi witnesses would have hurt his case rather than help, and it is reasonable to think that he considered this as part of his strategy in not calling these witnesses.

(App. 573-574.)

In applying this two part test to the testimony of these witnesses, the testimony does not hold up as a valid, credible alibi that would have changed the outcome of the trial.

First, Debra Weldon’s testimony does not constitute a complete alibi defense. While her testimony does corroborate parts of the other witnesses’ testimony, such as the detail that Petitioner lived with her and his sister, Debra Weldon cannot actually account for Petitioner’s whereabouts during the time of the crime, or immediately before the crime, because she was asleep. She testified that she went to bed around midnight the night before, and saw Petitioner at the house. She then stated that she did not wake up until around 8:00 the next morning, and Petitioner was at the house then, as well. However, according to her testimony, she does not have the ability to account for Petitioner’s location at any time in the eight hours she was asleep, which is when the crime occurred. Petitioner could easily have left the house in the early morning hours, committed the crime around 6:00 a.m., then come back to his home before his mother woke up two hours later.

Even if a jury believed Petitioner's testimony that his mother was at work that morning, which differed from her testimony that she was not at work but rather at home asleep, Petitioner testified his mother was gone until she got home from work at 7:15 a.m. No matter which version, Debra Weldon was not home and consciously able to testify as to whether Petitioner was there. Therefore, her testimony does not constitute an alibi defense and does not meet the first prong of the analysis under Walker.

As to the second prong of the analysis of Debra Weldon's testimony, her testimony is inherently incredible. Although the PCR court did not make a specific credibility finding, it did point to factors which make her testimony not credible. Given the fact that the testimony comes strictly from family members, in addition to the fact that there are discrepancies in their testimonies, their testimonies would not have been helpful to Petitioner's defense. See Bergman v. Tansy, 65 F.3d 1372, 1380 (7th Cir. 1995) (concluding trial counsel was not ineffective for failing to call family members who would easily have been impeached for bias); McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th Cir. 1996) (finding no prejudice from failure to call three witnesses, and noting that credibility problems of the uncalled witnesses and the witness' close relationship to the defendant along with strong prosecution evidence may undercut the impact of these witnesses); Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir. 1995) (proposed alibi testimony by a defendant's family members is of significantly less exculpatory value than the testimony of an objective witness); Woods v. Schwartz, 589 F.3d 368, 377-78 (7th Cir. 2009) (counsel was not ineffective in failing to present defendant's brother as alibi witness, where the brother's alleged alibi testimony was ambiguous and inconclusive).

Additionally, her story differed from the other witnesses' testimony. She claimed she was at home from sometime after 10:30 p.m. on the night before through to the next morning, but

Petitioner testified she was at work during the night and did not return until 7:15 the next morning. She testified she fell asleep on the couch the night before and was woken up by Petitioner around midnight so she could go to her bed, but Petitioner testified he went to sleep at 11:00 that night. Furthermore, as previously discussed, Debra Weldon is Petitioner's mother and has an obvious interest in protecting her son from a conviction. Based on these factors, she is not a credible witness, and her testimony would not have changed the outcome of the trial.

Second, Jessica Weldon's testimony does not constitute an alibi defense. She claims that Petitioner was at home asleep on the morning of the crime, and she saw him in his room with his girlfriend at 5:00 a.m. when she went in to steal a cigarette. She mentioned that when she went outside to smoke it, she saw Petitioner's looking out at her through the window. Jessica Weldon did not specifically account for her actions and whereabouts from 6:00 to 6:30 a.m., which is the time the crime occurred. She claimed that from 6 to 7 she was "at the house," and Petitioner was also "[i]n the house... [i]n the room with his girlfriend." (App. 536, line 18-23.) But she testified at the PCR hearing that she did not see Petitioner again until he got up at 9:00 a.m. to let the cats outside. She did not explain whether she was awake or asleep during those hours between, and she was not in the room with Petitioner to confirm his presence. It is possible that Petitioner left his room sometime between 5:00, when she saw him in his room and in the window, and 9:00 when she saw him next. Her testimony cannot, therefore, constitute a valid alibi defense.

Jessica Weldon also lacks credibility based the same factors as her mother—mainly because she is a direct relative and has an interest in protecting her brother. She testified that she recalls the details of the day so vividly because "[a]fter my brother got locked up, that all we talk about." App. 537, line 19-20. She and her family had obviously discussed the alibi at length, and it is likely that a jury would find her testimony unbelievable.

Petitioner's testimony is also not credible given the inconsistencies described above, and because Petitioner had an incentive to manufacture an alibi defense, particularly in light of the fact that his DNA was found on the exact piece of duct tape used on the victim. Therefore, it is likely that a jury would not find his testimony believable.

Because the alibi witnesses had major inconsistencies in their testimony and likely were not credible, Trial Counsel was not deficient in choosing not to present them at trial. He had clearly investigated, spoken with, and subpoenaed these witnesses to attend the trial. He was aware of what they would have said on the stand and how they would have appeared to a jury. However, he made a calculated decision not to call them at trial, regardless of whether he can now remember precisely what the reasoning behind the decision was more than four years later. Trial Counsel thoroughly cross-examine the State's witnesses and challenged the DNA evidence tying Petitioner to the crime, and presented a full defense at trial. His actions here were not deficient and were reasonable under professional norms.

As to the prejudice prong of Strickland, it should be noted that the PCR court made a finding of overwhelming evidence of guilt, which precludes a finding of prejudice or of ineffective assistance of counsel. The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the defendant's trial. Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 U.S. 1114, (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C.

245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

In this case, Petitioner's DNA was found on the duct tape that was taken from the victim's face after the robbers attacked him and attempted to tie him up with tape. The DNA profile found on the tape matched Petitioner, and 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.) The DNA was found not on a random object outside the victim's home, but rather on the exact piece of duct tape which the robbers had forced onto the victim's head during the crime. Even though there was no other physical evidence tying him to the crime, this DNA evidence is extremely strong, especially when taken with the other evidence presented at trial of Petitioner's connection to his co-defendant, and his co-defendant's connection to the victim's property. See Factual History, pg. 6-7.

Additionally, even if this case does not constitute overwhelming evidence, Petitioner has not shown and cannot show that the outcome of his case would have been different if Trial Counsel had presented the witness testimony because any alibi testimony presented would not have negated the validity of the DNA evidence contained on the tape. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011) (emphasis added); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). As discussed above, the alibi witness testimony was inconsistent and incredible, and importantly, could not refute or explain the highly-inculpable DNA evidence found on the tape. Petitioner's DNA evidence was found on the exact piece of tape placed around the victim's head during the crime, and it was determined that the probability of randomly selecting an unrelated individual having a profile matching the major

contributor to the mixture was approximately 1 in 670 billion. Therefore, even if Counsel had presented the supposed alibi testimony, it would not explain or refute the incriminating DNA evidence which was found to match Petitioner. Therefore, Petitioner cannot show he was prejudiced by any alleged failure to present alibi testimony.

Because Trial Counsel was not deficient in choosing not to present the testimony of these alibi witnesses, and because their testimony would not have changed the outcome of the trial, Trial Counsel is not ineffective. Therefore, this Court should affirm the PCR court's decision denying Petitioner post-conviction relief.

2. It Was Petitioner's Sole Decision Whether to Testify

Additionally, Trial Counsel was not and cannot be deemed ineffective for failing to force Petitioner to testify on his own behalf regarding his alibi, or for merely advising Petitioner against testifying on his own behalf, as it is ultimately Petitioner's decision whether to testify on his own behalf.

As an initial matter, if Trial Counsel advised Applicant not to testify, it coincides with the trial strategy he articulated to have the final word in closing arguments by not putting up a defense. As the PCR court properly found, this is a reasonable strategy that should not be questioned in hindsight.

Moreover, it is ultimately solely Petitioner's decision whether to testify on his own behalf. See U.S. Const. Amend. V (“[n]o person ... shall be compelled in any criminal case to be a witness against himself”); See generally Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). The trial court conducted a thorough colloquy with Petitioner regarding his decision not to testify at his trial. When the trial court asked if he understood that he had a right to testify, but that he did not have to testify, Petitioner responded, “Yes, Sir.” (App. 375, l. 1.16-21). Petitioner also indicated

he understood that if he did testify on his own behalf, he would be subject to cross-examination. (App. 375, l. 22- 376, l. 6). When the trial court asked Petitioner if he had enough time to discuss whether he was going to testify with his attorney, he replied, “Yes, Sir.” (App. 376, l. 2-6). Importantly, when the trial court asked Petitioner if he understood that it was ultimately up to Petitioner to decide whether or not he would testify, and *not* his attorney’s decision, Petitioner responded, “Yes, sir.” (App. 376, l. 10-14). Ultimately, Petitioner had a choice: (1) to testify in his own defense, present his alleged alibi, and subject himself to cross-examination, during which he would have to explain the DNA evidence found on the duct tape, or (2) exercise his right not to testify and avoid having to explain the DNA evidence found on the tape, while also having the opportunity to present the last argument. Accordingly, Petitioner has not and cannot prove that Trial Counsel was deficient because Petitioner did not testify at his trial.

As to the prejudice prong of Strickland, Petitioner has not shown and cannot show that the outcome of his case would have been different had Petitioner testified. As previously discussed, Petitioner would have been subject to cross-examination had he testified, which would have required him to explain why his DNA was found on the exact piece of tape used on Victim during the robbery. Additionally, any attempt he would have made to prove his alibi would not have negated the presence of his DNA. This is particularly crucial considering Petitioner denied ever having contact with Victim or his property. Accordingly, Petitioner has not proven that he was prejudiced by the fact that he did not testify at his trial.

Because Trial Counsel was not deficient as it relates to Petitioner’s decision not to testify, and because Petitioner’s testimony would not have changed the outcome of the trial, Trial Counsel was not ineffective. Therefore, this Court should affirm the PCR court’s decision denying Petitioner post-conviction relief.

3. Trial Counsel Testified to a Possible Trial Strategy for Not Calling Witnesses

Trial Counsel's decision not to use the alibi witnesses presented at the PCR hearing was part of a valid trial strategy and was neither deficient nor prejudicial.

Trial Counsel testified at the PCR hearing that he spoke to each alibi witness prior to the trial and had filed notice of an alibi defense. He had prepared to use their testimony at trial, but did not. Trial Counsel initially stated that he could not specifically recall why he did not use their testimony, he later suggested that he decided not to utilize the testimony so that he could have the last closing argument. This trial strategy was corroborated by Petitioner himself during the same PCR hearing. (App. 512, l. 20-25; 545, l. 8-10).

At the PCR hearing, Petitioner testified about his alibi and presented two witnesses, which, according to Petitioner, corroborated his alibi testimony. However, the testimony presented was inconsistent. All three recollections of the morning in question differed in time and detail. For example, Petitioner testified that his mother was at work the morning of the crime and he woke up between 6:00 and 6:45 a.m. to wait for her when she came home at 7:15 a.m. However, Petitioner's mother, Debra Weldon, testified that she did not work that day because it was Saturday morning and she did not work on weekends at the time; she stated she was home and did not wake up until 8:00 a.m. Jessica Weldon, Petitioner's sister, testified that Petitioner was in his room with his girlfriend that morning and did not wake up until around 9:00 a.m., which contradicts Petitioner's testimony that he woke up around 6:00 a.m.

When asked about the discrepancies in the alibi stories, Trial Counsel agreed that presenting all three of these different stories at trial would have hurt his case. He stated that using only one of these stories would have helped his case, but agreed that the State could have presented

testimony from the other two alibi witnesses to contradict his witness had he only used one. (App. 562, l. 23- 563, l. 10).

The South Carolina Supreme Court has held that an attorney cannot be ineffective if there is evidence to support his decision not to call witness with credibility issues. “A witness’s credibility and demeanor is crucial to an attorney’s trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions, even if that witness is a co-defendant.” Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (citing Jackson v. State, 329 S.C. 345, 351–52, 495 S.E.2d 768, 771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the co-defendant’s credibility was a concern and the same evidence would be presented through another witness)). Trial Counsel testified that having conflicting alibi witnesses would have hurt his case rather than help, and it is reasonable to think that he considered this as part of his strategy in not calling these witnesses.

As the PCR properly determined, the decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel’s trial strategy. Trial counsel must be given leeway to make reasonable strategic decisions. “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 at 688-89. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 691. Therefore, “[j]udicial scrutiny of counsel’s performance must be highly deferential.” Id. at 689. In proving a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778. "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). See also McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Even though Trial Counsel did not recall his specific reasoning for choosing not to call alibi witnesses, his trial strategy can be inferred from the basis of his overall strategy, which he testified was to attack the State's DNA evidence against Petitioner.

Furthermore, the testimony at the PCR hearing reflected Trial Counsel's intention to have the final closing argument at trial, which is accomplished by not presenting the alibi witnesses. Not only did Trial Counsel testify about his plan to have the final word during closing argument, but Petitioner testified that Trial Counsel told him this plan at the time of the trial, thus indicating his trial strategy in not calling these witnesses. (App. 512, l. 20-25).

Finally, at the PCR hearing, Trial Counsel testified that, had he thought the alibi witnesses were necessary at the time of trial, he would have called them. (App. 556, l. 17-20). He stated that, in hindsight, he had no idea why he did not call them to testify, but at the time of the trial he

would have weighed the pros and cons and, if he believed their testimony would have been helpful, he would have used them.

Petitioner fixates on a hindsight argument, cherry-picking phrases in Trial Counsel's testimony, indicating that, knowing the outcome of Petitioner's case, he believed it could have benefited Petitioner to call the witnesses. However, as this Court has established, PCR relief is not granted solely based on hindsight thoughts of defense counsel. "[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 v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Trial Counsel's decisions at the trial were clearly made with a tactical strategy in mind and his actions were carefully chosen, even if he disagreed with them looking back in hindsight knowing the outcome of the trial. Trial Counsel was at least reasonably competent in his decisions at the time of trial, and therefore, was not deficient.

As to the prejudice prong of Strickland, as previously discussed, Petitioner has not shown and cannot show that the outcome of his case would have been different if the witness testimony had been presented because the testimony would not have negated the validity of the strong DNA evidence contained on the duct tape. Accordingly, Trial Counsel's representation was not ineffective.

CONCLUSION

For the foregoing reasons, this Court should affirm the PCR court's decision denying the Petitioner post-conviction relief.

Respectfully submitted,

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June 25, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO CLARENDON COUNTY

Jocelyn J. Newman, Post-Conviction Relief Judge
Appellate Case No. 2017-002000

VICTOR WELDON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF 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 Brief of Respondent has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Taylor D. Gilliam, Esquire
tgilliam@sccid.sc.gov

This 25th day of June, 2020.

s/ Brianna L. Schill
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Subject: Victor Weldon v. State - PCR appeal - BOR
Date: Thursday, June 25, 2020 1:44:29 PM
Attachments: [WELDON Victor - Letter Sending BOR, Cert. and BOR \(02311635xD2C78\).pdf](#)

Good afternoon, Mr. Gilliam,

Please find attached the State's Brief of Respondent for the above-referenced matter, which I will be e-filing in the South Carolina Court of Appeals, today, June 25, 2020.

Thank you,

Brianna Schill



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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Victor McCoy Weldon, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002000

ON WRIT OF CERTIORARI

Appeal From Clarendon County
Jocelyn Newman, Circuit Court Judge

Opinion No. 5867
Heard March 1, 2021 – Filed October 6, 2021

REVERSED AND REMANDED

Appellate Defender Taylor Davis Gilliam, of Columbia,
for Petitioner.

Attorney General Alan McCroy Wilson, Senior Assistant
Deputy Attorney General Megan Harrigan Jameson, and
Assistant Attorney General Brianna Lynn Schill, all of
Columbia, for Respondent.

MCDONALD, J.: Victor M. Weldon (Petitioner) argues the post-conviction relief (PCR) court erred in finding he received effective assistance of counsel despite trial counsel's failure to call Petitioner or either of his alibi witnesses to testify at

Petitioner's trial. As to the alibi witnesses, we agree; thus, we reverse and remand to the court of general sessions for a new trial.

Facts and Procedural History

Following a May 2012 trial, a jury found Petitioner guilty of first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime in connection with the robbery of Edward Gibbons (Victim) on May 15, 2010. The trial court sentenced Petitioner to consecutive thirty-year sentences for first-degree burglary and armed robbery, and concurrent five, twenty, and five-year sentences for grand larceny, kidnapping, and the weapons charge. Petitioner appealed his conviction, and this court affirmed, finding the trial court did not err in denying Petitioner's directed verdict motion. *See State v. Weldon*, Op. No. 2014-UP-463 (S.C. Ct. App. filed Dec. 17, 2014). Thereafter, Petitioner filed an application for PCR, which the PCR court denied by order dated July 28, 2017. Following our supreme court's transfer of the matter, the court of appeals granted the petition for a writ of certiorari and ordered briefing.

At trial, Victim testified he was preparing to leave his home between 6:00 and 6:30 a.m. on May 15, 2010, when three masked men emerged from a storage room in his garage and jumped him. The men threw Victim to the ground, and one assailant sat across Victim's chest and hit him in the face while another sat on his legs. The three men restrained Victim by wrapping duct tape around his head; they then took his personal property, including money, and left together in his vehicle. An acquaintance of Victim found the stolen vehicle abandoned on the side of the road at approximately 6:40 a.m.

Days after the robbery, Investigator Kenneth Clark of the Clarendon County Sheriff's Department received reports of three individuals spending a lot of money. In connection with these reports, Investigator Clark interviewed Michael Pearson. Shortly thereafter, Investigator Clark learned Pearson's fingerprint positively matched a fingerprint taken from Victim's stolen vehicle. A subsequent "positive [DNA hit] came off the black duct tape that was wrapped around Victim's head," and the DNA matched Petitioner. Investigator Clark testified Petitioner was not a person of interest in the case until law enforcement received the DNA hit. Four pieces of duct tape were collected from the crime scene, but Petitioner's DNA was found on only one piece recovered from Victim's head. Investigator Clark admitted that none of the people he interviewed implicated Petitioner in the robbery.

Although Petitioner denied knowing Pearson, Investigator Clark discovered Petitioner and Pearson had both attended the South Carolina Vocational Rehabilitation Center (Vocational Rehabilitation) for a four-day period in December 2008; their time cards indicated both men worked in the wood shop on three of those days. A Vocational Rehabilitation area supervisor, John Hornsby, testified that approximately twenty-five people worked in the 250-square-foot wood shop on a daily basis. He confirmed everyone working in the wood shop worked six hours a day on the same shift, ate in the same area, and shared a restroom.

Catherine Leisy, a forensic scientist at the South Carolina Law Enforcement Division (SLED), testified she tested a swab from duct tape taken from Victim's head, and this swab contained a mixture of DNA from at least two individuals. Petitioner was the major DNA contributor on the swab taken from this part of the duct tape. She explained, "The probability of randomly selecting an unrelated individual having a profile matching the major contributor to this mixture is approximately 1 in 670 billion." Petitioner's DNA did not match the DNA on any of the other items she received for testing, including the swabs from other pieces of duct tape recovered from Victim. When asked on cross-examination whether she had "any information as to whether the pertinent sample came from the inside or the outside of the duct tape," Leisy responded, "The description that I received was a swab from outside and inside area [sic] of the black duct tape from the victim's head." Trial counsel then asked, "So the swab was taken on both sides of the duct tape?" Leisy answered, "Based on the information I received, yes sir." Leisy did not receive the duct tape itself, only the swabs taken from the tape.

The trial court advised Petitioner of his Fifth Amendment right not to testify, and Petitioner confirmed he had been afforded sufficient time to discuss his decision with trial counsel. The trial court then stated,

And only you can talk to your lawyers, you can get advice from your lawyers as to what they think you should or should not do or whatever trial strategy they plan to implement. But ultimately it is your decision and not theirs as to whether you testify or not.

Petitioner indicated he understood and chose not to testify.

In its closing argument, the State argued,

You don't think the DNA is enough? What about that story? Mr. Weldon? I don't know anything about this case. His DNA is on the tape. Not the tape on the floor. Not the tape that somebody found in the storage room. His DNA is on the tape that [was] wrapped around [Victim's] head

In his closing, trial counsel emphasized that the only evidentiary item implicating Petitioner was one swab from the duct tape. He argued,

My first point is you will notice on that report that they took a swab from the outside of the duct tape and the inside of the duct tape, but they didn't test them separately. They jumbled them up and tested them together.

Certainly if they were able to show that Victor Weldon's DNA was on the dead center middle sticky side of the duct tape five feet into the roll, we'd have a much more difficult case today. That evidence is not there. There is evidence that there may be his DNA on the duct tape; possibly from the outside and possibly from the inside.

Trial counsel also noted duct tape is not "some Samurai sword or a hunting knife" or otherwise unusual item. He stated, "I've got duct tape in my truck, in my boat, in my kitchen drawer, in my tool box; I don't know if that duct tape in my boat is my duct tape or if it's my buddy's duct tape from the last time we went fishing." Both Petitioner and Pearson were convicted.¹

¹ Petitioner and Pearson were tried together. After the State rested in the joint trial, each moved for a directed verdict:

Pearson argued that even though his fingerprint was found on the outside of Gibbons'[s] car, the fingerprint was insufficient to place him at the crime scene. In reply, the State argued the fingerprint was found on the rear of the vehicle, where Gibbons testified one of the men who robbed him had been seated as they fled his house.

At the PCR hearing, Petitioner claimed he wanted to testify at trial but did not because "[trial counsel] said he wanted the closing argument." Petitioner testified he told trial counsel he was at his house with his mother on the morning of the armed robbery. At that time, Petitioner lived with his mother and his sister; Petitioner's girlfriend and his little brother stayed with them occasionally. Petitioner testified that between 6:00 and 6:30 a.m., when the crimes occurred, he and his girlfriend were "just getting up with my sister, waiting for my mother to come home." His mother normally came home from work between 7:00 and 7:15 a.m. Petitioner believed that on the night of May 14, he would have been home and he had probably gone to bed around 11:00 p.m. He testified his sister was home when he went to bed that night and he believed he woke up the morning of the 15th around 6:40 or 6:45 a.m. Petitioner saw his sister when he woke up, and he saw his mother when she arrived home between 7:00 and 7:15 a.m. Petitioner claimed he told all of this to trial counsel, and he believed his mother and sister could have testified they were with Petitioner at their home when the armed robbery occurred. He explained his mother and sister were present at the trial and he was concerned when they did not testify. Although he did not understand this, he did not ask trial counsel about it at trial because he was nervous.

Petitioner's mother, Deborah Weldon (Mother), testified she was present at Petitioner's trial, and although trial counsel had asked her to testify, he never called her as an alibi witness. Petitioner lived with her at her Sumter home on May 15,

State v. Pearson, 410 S.C. 392, 397, 764 S.E.2d 706, 709 (Ct. App. 2014), *rev'd*, 415 S.C. 463, 783 S.E.2d 802 (2016). This court reversed Pearson's conviction, finding the single recovered fingerprint

merely raised a suspicion of Pearson's guilt because there was no additional evidence showing when the fingerprint was placed on the vehicle. Moreover, none of the other evidence presented by the State placed Pearson at the crime scene or established a relationship between Pearson and Weldon. For this reason, the jury could only have guessed Pearson was involved in the crimes.

Id. at 402, 764 S.E.2d at 712. Our supreme court reversed this court and affirmed Pearson's convictions, finding sufficient substantial circumstantial evidence of Pearson's guilt existed to withstand the directed verdict motion. *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016).

2010, and Mother saw Petitioner on the night of May 15 when he woke her up around midnight to tell her to move from the couch to her bed. Mother testified Petitioner was home when she woke up at 8:00 a.m. on May 15. To Mother's knowledge, Petitioner did not leave the house during the evening of May 14 or the morning of May 15. Mother did not work overnight on May 15, 2010, because at that time, she was working on an "as needed" schedule at Tuomey Hospital.

Petitioner's sister, Jessica Weldon (Sister), testified she was present at Petitioner's trial and trial counsel told her she would testify, but he never called her to the stand. Sister recalled when she went to bed around midnight on May 14, Petitioner was at home in his room with his girlfriend. Petitioner's room was "very close" to hers and "[she could] see everything coming out his room, [and] going in." Sister testified she woke up around 5:00 a.m. the next morning when a friend called, and she saw Petitioner asleep in his bed when she went into Petitioner's room "to sneak a cigarette from his girlfriend at the time." While Sister was outside smoking, she saw Petitioner "peek out the window." Sister testified she was at home between 6:00 and 7:00 a.m., and Petitioner was in his room with his girlfriend. The next time she saw Petitioner leave his room was around 9:00 a.m. that morning, when Petitioner let his two cats outside to play.

Trial counsel explained his trial strategy was to attack the DNA evidence, and he believed the weakness of the DNA evidence was that it could not be determined whether the DNA sample had been taken from the outside or the inside sticky side of the duct tape. If the DNA was found on the sticky side, trial counsel believed it was much more likely that Petitioner was present during the crime. Trial counsel confirmed he spoke with Mother and Sister about Petitioner's whereabouts on May 15, and the substance of those conversations would have been very similar to their testimonies at the PCR hearing. Trial counsel had filed a notice of an alibi defense but confirmed he did not call any witnesses at trial on Petitioner's behalf. He did not know why he failed to call the witnesses, but he admitted there was a notation in his trial notebook indicating he had prepared to question Mother regarding Petitioner's alibi. Trial counsel conceded that in hindsight, he should have called Mother and Sister as witnesses, and he thought presenting their testimony could have changed the outcome of Petitioner's trial. Trial counsel testified he may have considered having the last argument versus presenting witnesses, but he was not sure whether that was the reason he failed to call them. Trial counsel explained,

With, with hindsight, you know, reading the PCR application, I'm scratching my head wondering why we would not have called our alibi witnesses, and that's the

only thing I can come up with, but I don't see that in my notes that were taken at the time of trial.

Trial counsel agreed with PCR counsel's statement that even if he had made an actual decision on this point in order to retain the final closing argument, "calling alibi witnesses would have been a much more favorable strategic decision versus not calling alibi witnesses and trying to get the last argument."

On cross-examination, the State asked trial counsel whether he was concerned with whether the witnesses' stories at the PCR hearing "didn't quite match up." Although trial counsel did not recall the alibi witnesses' stories "not matching up," he responded that Petitioner's case would have been better if he had called only one alibi witness. However, trial counsel reiterated, "With hindsight, I have no idea why I did not call the alibi witnesses." In response to various scenarios presented by the State, trial counsel agreed it was possible the State could have called witnesses to rebut the alibi testimony. Trial counsel recalled speaking with Petitioner's girlfriend prior to trial, and although he did not remember the details of their conversation, he did "recall in general the people in the household being part of an alibi." Trial counsel acknowledged that if he had presented the alibi witnesses, he would not have had the final argument. When asked whether he had ever participated in a joint trial such as this one, trial counsel responded, "I'm a real estate attorney, so I don't do criminal trials. I, I—well, in twenty-something years, I may have done one or two but generally I don't . . . try criminal cases." There was no redirect.

In its order of dismissal, the PCR court held trial counsel was not ineffective for failing to call the alibi witnesses. Specifically, the court found,

Trial counsel testified that having conflicting alibi witnesses would have hurt his case rather than help, and it is reasonable to think that he considered this as part of his strategy in not calling these witnesses.

The decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel's strategy. . . .

. . . .

. . . . Even though Trial Counsel did not recall his specific reasoning for choosing not to call alibi witnesses,

his trial strategy can be inferred from the basis of his overall strategy, which he testified was to attack the State's DNA evidence against [Petitioner].

The PCR court further found the testimony at the PCR hearing reflected trial counsel's intention to have the final closing argument, stating:

Trial Counsel's decisions at the trial were clearly made with a tactical strategy in mind and his actions were carefully chosen, even if he disagreed with them looking back in hindsight. Trial Counsel was at least reasonably competent in his decisions at the time of trial, and thus his representation was not ineffective.

Because Trial Counsel articulated, both at the PCR hearing and at the time of trial, a strategic reasoning for choosing not to call alibi witnesses, his performance cannot be found ineffective, and this allegation is denied and dismissed with prejudice.

The PCR court deemed meritless Petitioner's argument that trial counsel was ineffective in failing to call Petitioner to testify. The PCR court found Petitioner did not present any evidence that proved trial counsel would not allow him to testify, and trial counsel could not recall why Petitioner chose not to take the stand. The court further found that if trial counsel had advised Petitioner not to testify, it would have fit into trial counsel's trial strategy to have the final closing argument by not putting up a defense; the PCR court held this was "a reasonable strategy that should not be questioned in hindsight."

Additionally, the PCR court found Petitioner failed to meet his burden of showing he was prejudiced by any alleged deficiencies because there was "overwhelming evidence of his guilt." The court specifically noted Petitioner's DNA was found on the duct tape recovered from the victim, and although this was "essentially" the only direct evidence linking Petitioner to the crime, an exact DNA match could not be easily rebutted. Thus, the court determined it was "unlikely that any other actions by Trial Counsel could have prevented a jury from convicting [Petitioner] based on this DNA evidence."

Standard of Review

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We review questions of law de novo, with no deference to trial courts." *Id.* at 180–81, 810 S.E.2d at 839.

Law and Analysis

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "We defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). "This court gives great deference to the PCR court's findings on matters of credibility." *Putnam v. State*, 417 S.C. 252, 260, 789 S.E.2d 594, 598 (Ct. App. 2016).

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514. Deficiency "is measured by an objective standard of reasonableness." *Taylor*, 404 S.C. at 359, 745 S.E.2d at 102. To establish prejudice, an applicant must show that "but for counsel's error, there is a reasonable probability the result of the proceedings would have been different." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). "In other words, he must show that 'the factfinder would have had a reasonable doubt respecting guilt.'" *Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (quoting *Strickland*, 466 U.S. at 695). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S. at 690). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be

deemed ineffective assistance of counsel." *Id.* "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. "[W]here trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance." *Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998).

"In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error." *Smalls*, 422 S.C. at 190, 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 (quoting *Strickland*, 466 U.S. at 695). "Additionally, the strength of the State's evidence should be viewed in light of trial counsel's errors such that there 'is no reasonable possibility [counsel's errors] contributed in any way to [the applicant's] convictions.'" *Martin v. State*, 427 S.C. 450, 456, 832 S.E.2d 277, 280 (2019) (alterations in original) (quoting *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845).

Initially, we find Petitioner has failed to show trial counsel was ineffective in failing to call Petitioner to testify at trial. *See Speaks*, 377 S.C. at 399, 660 S.E.2d at 514 ("In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application."). At the PCR hearing, Petitioner claimed he wanted to testify but did not because trial counsel told him he wanted the final closing argument. Petitioner did not testify that trial counsel prevented him from testifying at trial, and he did not elicit testimony from trial counsel at the PCR hearing addressing this issue. The trial court advised Petitioner of his Fifth Amendment right and emphasized it was his decision, not trial counsel's, whether or not to testify. Accordingly, we find evidence supports the PCR court's denial of post-conviction relief on this ground.

However, we find no evidence supports the PCR court's findings that trial counsel provided effective assistance or implemented—much less articulated—any valid trial strategy with respect to the alibi witnesses. *See Martin*, 427 S.C. at 456, 832 S.E.2d at 280) (finding "as a matter of law that Petitioner's trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner's mother" where "[l]ead counsel candidly admitted his file contained the mother's statement" as to the time she took Petitioner to the bus stop in Atlanta and the drop-off time coincided with that of the armed robbery). Mother's and Sister's timeline testimonies are comparable to that in *Martin*, and the PCR court's finding that trial counsel's "decision not to use contradictory alibi witnesses at trial was very likely part of [his] trial strategy" is unsupported by the record.

Trial counsel admitted at the PCR hearing that he did not know why he failed to elicit Petitioner's alibi from at least one of the available alibi witnesses. Although trial counsel hypothesized he did not call the witnesses so that Petitioner could have final argument, he agreed "that calling alibi witnesses would have been a much more favorable strategic decision versus not calling alibi witnesses and trying to get the last argument." On cross-examination, trial counsel reiterated he did not know why he did not call the witnesses. But he thought that if it had been an issue, he "would have had a discussion with [himself] and made a conscious choice" not to present their testimony.

We recognize trial counsel agreed with the State's suggestion that he may have declined to call the witnesses because the State might have then called rebuttal witnesses to challenge the alibi testimony and because he wanted to have the last closing argument. Still, trial counsel repeatedly testified he did not know why he chose not to call the witnesses. Thus, we can find no support in the record for the PCR court's finding that because trial counsel "articulated, both at the PCR hearing and at the time of trial, a strategic reason for choosing not to call alibi witnesses, his performance cannot be found ineffective."

And while there are minor discrepancies among the witnesses' testimonies regarding exactly what time Petitioner woke up on May 15 and whether Mother worked the night of May 14, these discrepancies did not involve credibility issues nor were they necessarily contradictory. *Cf. Edwards*, 392 S.C. at 458, 710 S.E.2d at 65 ("A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with *serious* credibility questions, even if that witness is a co-defendant." (emphasis added)). Sister's testimony could have provided Petitioner with an alibi because she testified she saw him at their Sumter

home around 5:00 a.m., he was at the house between 6:00 a.m. and 7:00 a.m., and she did not see him leave his room until 9:00 a.m. when he let his cats outside. *See Walker v. State*, 407 S.C. 400, 406–07, 756 S.E.2d 144, 147 (2014) (finding a witness's testimony that she spent every weekend with the petitioner provided sufficient testimony to support the PCR court's conclusion that the witness would have offered alibi testimony "that reasonably could have resulted in a different outcome at trial" because, if true, the testimony showed it was impossible for petitioner to have committed the crime that occurred on a Saturday). Thus, we can conceive of no *valid* trial strategy supporting trial counsel's failure to call at least one of the alibi witnesses.²

Further, we find the presence of Petitioner's DNA on a single piece of duct tape recovered from Victim does not constitute "overwhelming evidence" such that it precludes a finding of prejudice. *See Smalls*, 422 S.C. at 190, 810 S.E.2d at 844 ("In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error."). Other than his possible acquaintance with Pearson, the DNA match from the duct tape was the only evidence presented at trial linking Petitioner to the crime, and there could be other reasonable explanations for its presence. Petitioner was not a person of interest in the investigation until the DNA hit. Petitioner challenged the strength of the DNA evidence, and the testimony he elicited from Leisy may have been sufficient to raise a reasonable doubt regarding his guilt had he also presented evidence of an alibi. *See id.* at 191, 810 S.E.2d at 845 ("[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

² Of additional concern is the PCR court's finding that "[t]rial counsel's decisions were *clearly made* with a tactical strategy in mind and his actions were *carefully chosen*, even if he disagreed with them looking back in hindsight." (Emphasis added). In discussing prejudice and overwhelming evidence, the PCR court further noted trial counsel "testified that his trial strategy was to attack the State's DNA evidence against Applicant, which he did fully," yet the court also found "Applicant did not dispute the evidence against him. This is clearly overwhelming evidence of Applicant's guilt." Finally, it appears the court conflated the fingerprint evidence against Pearson with Petitioner's DNA match from the duct tape, as the order denying relief states "Applicant's fingerprints were found on the duct tape that was placed on the victim by his attackers during the robbery."

Strickland standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." (quoting *Strickland*, 466 U.S. at 695)). Had even one of Petitioner's alibi witnesses testified, there is a reasonable probability the result at trial would have been different. See *Taylor*, 404 S.C. at 359, 745 S.E.2d at 102 (recognizing that to obtain relief, a PCR applicant must "demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different").

Conclusion

Based on the foregoing, we find the evidence does not support the PCR court's dismissal of Petitioner's application for post-conviction relief. We reverse and remand for a new trial.

REVERSED AND REMANDED.

KONDUROS and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Clarendon County

The Honorable Jocelyn Newman, Post-Conviction Relief Judge

The Honorable R. Ferrell Cothran, Jr., Trial Judge

Appellate Case Number 2017-002000

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

Victor McCoy Weldon.....Petitioner,

v.

State of South Carolina, ...Respondent.

PETITION FOR REHEARING

On October 6, 2021, this Court issued a published opinion reversing the post-conviction relief court's denial of post-conviction relief and remanding Petitioner Victor McCoy Weldon's case back to the court of general sessions for a new trial after finding Weldon met his burden of establishing his trial counsel was constitutionally ineffective for failing to present testimony from his mother and sister regarding his purported alibi. 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, this Court 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. 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, Respondent, the State, respectfully petitions for rehearing because the State believes this Court misapprehended and overlooked its argument before this Court that 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. Moreover, this Court misapprehended and overlooked the State's argument and the post-conviction relief court's finding that trial counsel agreed with strategic reasons for not presenting Weldon's mother and sister as witnesses and erroneously concludes that trial counsel must articulate a strategy to avoid a finding of deficiency in direct contrast to Strickland and its progeny which require that a favorable presumption be given to counsel's performance. In support of this petition for rehearing, the State asserts the following:

Weldon, like all post-conviction relief applicants, 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), SCRCR. 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 applicant 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, in order for this Court 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, this Court repeatedly points to Counsel's testimony that he could not remember why he did not call the supposed alibi witnesses at trial as evidence to support this Court's assertion that trial counsel's failure to do so was not based on trial strategy. However, this Court overlooks that there is evidence in the record to support the post-conviction relief court's findings this decision was based on strategic considerations can be read from the record as a whole, and 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, this Court 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 this Court to reverse the PCR court’s decision and grant Weldon a new trial under Strickland, this Court must find that *no reasonably competent attorney* could have decided not to present the testimony from Weldon’s mother and sister.

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 Counsel was not constitutionally ineffective, despite 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. p. 526. 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 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. p. 536. She stated Weldon and his girlfriend were in his room asleep at that time. App. p. 535. She then opened the door and went outside to smoke the cigarette, and she saw Weldon peeking at her out the window. App. p. 536. 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. pp. 536-37. She did not provide any details as to how she was certain Weldon had not left the house, and moreover,

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. p. 528. According to Google maps, Petitioner's home was approximately fifteen miles or twenty-five minutes by car from the crime scene.

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. p. 536.

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. p. 511. 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. p. 537. 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. p. 573. This Court must give great 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

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. pp. 525, 529.

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, the Weldon’s mother’s and sister’s testimony established a presumably more neutral witness was present at the house that morning, Weldon’s then-girlfriend, Rell. App. pp. 524, 535-36. And crucially, according to the sister, Rell was actually present in the room with Weldon during the time period in question. App. p. 535-36. Yet, Weldon did not present Rell as a witness at the evidentiary hearing and offered no explanation for his failure to do so. App. p. 563. 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. pp. 544-45, 547, 555, 563. 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. pp. 555-56. Counsel stated instead, he believed the defense would have been helped had he presented only one witness. App. pp. 562-63. He also acknowledged, however, this strategy would have opened the door for the State to present the other conflicting witness or witnesses. App. pp. 562-63. 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. pp. 381-83, 418-27, 556-57.

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 not 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 State respectfully urges this Court to reconsider this matter for all the foregoing reasons, grant rehearing, vacate its prior opinion, and issue a new published opinion affirming the post-conviction relief court's finding that Weldon failed to establish he was entitled to post-conviction relief.

Respectfully submitted,

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October 21, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Clarendon County
 The Honorable Jocelyn Newman, Post-Conviction Relief Judge
 The Honorable R. Ferrell Cothran, Jr., Trial Judge

Appellate Case Number 2017-002000
 Op. No. 5867 (filed October 6, 2021)

VICTOR WELDON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 262(b)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and Appendix has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Appellate Defender Taylor Gilliam
 South Carolina Comm. on Indigent Defense – Office of Appellate Defense
 tgilliam@sccid.sc.gov

This 21st day of October, 2021.

s/Megan Harrigan Jameson
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The South Carolina Court of Appeals

Victor McCoy Weldon, Petitioner,

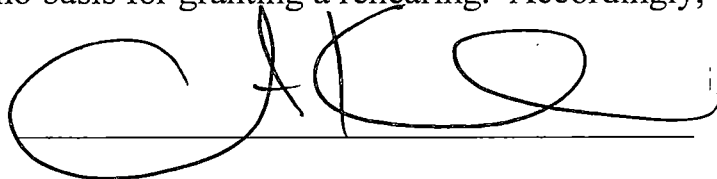
v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002000

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.

 J.

 J.

 J.

Columbia, South Carolina

cc:

Taylor Davis Gilliam, Esquire
Megan Harrigan Jameson, Esquire
The Honorable Jocelyn Newman

FILED

November 19, 2021