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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

VICTOR MCCOY WELDON,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2021-001496

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's Issue Presented on Certiorari

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

Respondent's Question Presented

Whether the Court of Appeals correctly held that the PCR court erred, where the Order of Dismissal was unsupported by the evidence, where a real estate attorney did not articulate a reasonable trial strategy as to why he did not call two alibi witnesses, and where the Court of Appeals properly granted Victor Weldon a chance to call his alibi witnesses in the form of a new trial?

STATEMENT OF THE CASE

Victor Weldon 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. 478 – 483.[1] Victor 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 Victor.

Victor 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. Victor's DNA was allegedly located on the tape used to tie up Gibbons. App. 275 ll. 15 – 25. Victor did not testify at trial.

At the conclusion of trial, the jury found Victor 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 him 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 –

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1 The pagination of the Appendix before this Court, upon information and belief, appears to be different than the Appendix that was before the Court of Appeals. For ease of reference, the undersigned will be utilizing the number in the larger font size that appears on the top right of each page.

25. The burglary and armed robbery sentences were imposed consecutive to one another, with the remaining charges running concurrently. Id.

Victor's convictions were affirmed on direct appeal. On or about January 5, 2016, he filed an application for post-conviction relief. App. 572. The application contained allegations of ineffective assistance of counsel, including the claim that "none of [his] alibi [witnesses] were called to testify." App. 581.

The state made its Return on or about April 11, 2016. App. 587. An evidentiary hearing was conducted on July 27, 2016 before the Honorable Jocelyn Newman. App. 595. In addition to Victor and trial counsel, two of his alibi witnesses—Debra Weldon and Jessica Weldon—testified at the hearing.

On August 3, 2017, Judge Newman issued her order denying Victor relief. App. 663. 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. 668. As a result, the PCR court concluded that counsel's performance "cannot be found ineffective," and Victor's application was dismissed. App. 576.

On behalf of Mr. Weldon, the undersigned submitted a petition for writ of certiorari on May 23, 2018. The state filed its return on October 8, 2018. This case was transferred to the Court of Appeals on October 23, 2018. By Order filed October 9, 2019, the Court of Appeals granted the petition for writ of certiorari and directed further briefing. The parties' briefs were filed in 2020. Oral argument was held via WebEx on March 1, 2021.

The Court of Appeals issued its opinion on October 6, 2021. The state petitioned for rehearing on October 21, 2021. The Court of Appeals denied rehearing on November 19, 2021. The state filed its petition in December 2021. This is the Return on behalf of Victor Weldon.

ARGUMENT

The Court of Appeals correctly held that the PCR court erred, where the Order of Dismissal was unsupported by the evidence, where a real estate attorney did not articulate a reasonable trial strategy as to why he did not call two alibi witnesses, and where the Court of Appeals properly granted Victor Weldon a chance to call his alibi witnesses in the form of a new trial.

> 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.

App. 653 ll. 1 – 5.

Victor Weldon was not represented by an experienced criminal defense attorney at trial. Trial counsel freely admitted as much. Further, this was not an instance of a defendant hiring an inexperienced attorney; counsel was appointed to represent Victor. App. 633 ll. 2 – 25.

Relevant facts

On the morning of May 15, 2010, Victor Weldon was at home. App. 603 ll. 4 – 14. He lived with his sister, mother, little brother, and girlfriend. App. 604 ll. 7 – 9. Victor 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. 604 l. 25 – App. 605 l. 16; App. 614 ll. 4 – 19.

In response, counsel indicated that he would file a motion to "call them to the stand to testify" on Victor's behalf to disprove the state's assertion that he was involved in the alleged crime. App. 605 ll. 17 – 23; App. 607 ll. 23 – 25. Victor's mother and sister were present at trial but did not testify. App. 605 l. 24 – App. 606 l. 8; App. 607 ll. 13 – 14. It was his belief that they would testify, and he became concerned that they did not. App. 606 ll. 11 – 13.

Debra Weldon, Victor's mother, was present at her son's trial and was supposed to be a witness. App. 616 l. 16 – App. 617 l. 22. She had gotten off work at 8:30 on the evening of May 14, 2010, the night before the incident involving Gibbons. App. 618 ll. 2 – 20. She went home, where she saw Victor at the house. App. 619 ll. 3 – 24. She recalled going to bed around midnight and waking up around 8:00 on the morning of May 15, 2010. App. 620 ll. 2 – 11. Victor was home when she went to bed and when she awoke. App. 620 ll. 12 – 13. Victor did not have a car, nor did he have access to one. App. 620 l. 19 – App. 621 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. 621 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 Victor was at the house at the time of the crime." Id.

Victor's sister, Jessica Weldon, testified similarly.[2] App. 628 l. 16 – App. 631 l. 22. She recalled going to bed around midnight. Id. At that time, Victor, his girlfriend, and his mother were also at the house. Id. Victor was in a room with his girlfriend. Id. Around 5:00 the next morning, Jessica woke up around and snuck into his room for a cigarette. Id. She saw Victor in the room, asleep. Id. She testified that he was at the house from 6:00 to at least 7:00 that morning. Id. She recalled him 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 her brother's trial. App. 631 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. 627 ll. 8 – 15. According to counsel, she was supposed to testify. App. 627 ll. 16 – 17. In

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2 Jessica Weldon was also listed as a potential witness. App. 17 l. 22 – App. 18 l. 14.

fact, she had spoken with counsel regarding her testimony. App. 627 ll. 23 – 25. However, much like Victor and his mother, and contrary to her intentions, she did not end up testifying. App. 628 ll. 9 – 15.

The following exchange took place during the evidentiary hearing between Victor 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. 607 ll. 17 – 22.

Victor was arrested on July 20, 2010. App. 507 ll. 20 – 24. Counsel began representing him 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 trial in May 2012, Victor only met with him between two and four times. App. 602 ll. 4 – 8; App. 634 ll. 1 – 10.

Counsel straightforwardly characterized the state's evidence against Victor as weak, at least, initially:

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

App. 635 ll. 5 – 8.

Regarding the PCR testimony of Victor's mom and sister, trial counsel indicated that the substance of their trial testimony "would have been very similar to the testimony that they gave earlier today" at the PCR hearing. App. 638 ll. 16 – 19. When asked why no witnesses were

called on behalf of Victor at trial, counsel answered truthfully: "I do not know." App. 639 ll. 3 – 11. He stated that a notice of alibi was filed, and his trial notebook contained questions to ask of Debra, Victor's mother. Trial counsel testified "[p]ossibly we did not call a witness so that we could have final argument, but honestly I, **I don't know why we would not have called them as alibi witnesses**." App. 639 ll. 3 – 11 (emphasis added).

Trial counsel recalled that Debra and Jessica were at trial and presumably ready to testify. App. 641 ll. 5 – 8. When again asked about any possible reason as to why he would not have called them, trial counsel was "scratching [his] head wondering why we would not have called our alibi witnesses" and speculated that it might have been to retain final argument. App. 641 ll. 9 – 15. Because he did not see any reference to that potential explanation in his contemporaneous trial notes, he agreed that he might not have even made that decision. App. 641 ll. 16 – 17. Additionally, he again 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." App. 641 l. 18 – App. 642 l. 1.

During cross examination at PCR, trial counsel testified that he remembered Jessica and Debra being alibi witnesses and that he had spoken with them about that accordingly. App. 649 ll. 13 – 20. Much like his comments on direct, counsel stated "I have no idea why I did not call the alibi witnesses." App. 650 ll. 7 – 11.

Trial counsel distinguished this situation from others involving strategic decisions by informing the PCR court of his personalized process. He testified how he would usually have in his notes "an internal discussion with myself that I - - you know, weighing pros and cons" but "reviewing my notes, I don't, I don't know why I did not call them." App. 650 ll. 12 – 16.

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. 636 l. 13 – App. 637 l. 3.

The PCR court's Order of Dismissal concluded 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. 667. The PCR court continued: "Trial Counsel stated that he could not recall why he did not use their testimony." App. 667. Located in the same section was the ruling that "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 part of his strategy in not calling these witnesses." App. 668. Yet another sentence contained speculation as to counsel's rationale: "The decision not to use contradictory alibi witnesses at trial was very likely part of Trial Counsel's strategy." App. 668.

The Court of Appeals found "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." Weldon v. State, Op. No. 5867 (S.C. Ct. App. filed October 6, 2021); App. 781. Similarly, the Court of Appeals concluded that 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" was unsupported by the record. The state's arguments on appeal do not change these facts. The Order of Dismissal was unsubstantiated by the testimony

elicited at the PCR evidentiary hearing. As a result, the Court of Appeals correctly reversed the PCR court.

Discussion

Victor Weldon 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 Victor 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 Court of Appeals correctly held that there was no evidence supporting the PCR court's conclusions.

This case does not involve a novel issue of law. There was no dissent in the decision at the Court of Appeals. The Court of Appeals opinion is not in conflict with a prior decision of this Court. Although the Sixth Amendment to the United States Constitution is referenced, by virtue of the fact that this is a PCR case, there is not a substantial constitutional issue directly involved in this matter. Further, the Court of Appeals opinion does not conflict with a decision by the United States Supreme Court. Rule 242, SCACR. Additionally, the state does not suggest that any of these considerations are true. The state's main contentions on appeal are that the Court of Appeals applied the incorrect standard of review and that the alibi witnesses were not actually alibi witnesses. These two arguments lack merit.

In Martin v. State, 427 S.C. 450, 832 S.E.2d 277 (2019), this 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. This 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.

The third footnote in Martin is equal parts relevant and noteworthy in Victor's case:

> The PCR court also based its finding of overwhelming evidence on the fact that Petitioner's three "co-defendants testified against him at trial ... [and Petitioner] did not dispute the evidence against him." This finding of the PCR court is erroneous and troubling in two respects. First, Petitioner had a constitutional right to remain silent at trial. Second, Petitioner most assuredly disputed the charges through his alibi plea.

427 S.C. 450, 457, 832 S.E.2d 277, 281 n. 3.

The PCR court in the matter at bar concluded "Applicant did not dispute the evidence against him. This is clearly overwhelming evidence of guilt." App. 677. Both Martin and Victor Weldon had a constitutional right to remain silent at trial. Second, both men both assuredly disputed the charges, Martin through his alibi plea and Victor by virtue of his decision to file an alibi notice and go to trial.

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), this Court reversed the Court of Appeals' holding that the applicant was not prejudiced by trial counsel's failure to interview the defendant's former girlfriend as a potential alibi witness. Walker was accused of kidnapping and sexual assault. 407 S.C. at 403, 756 S.E.2d at 145. The 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.

This Court, however, 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 this Court found that the witnesses' testimony did not foreclose the possibility that Glover could have committed the crimes at 8:30 *p.m.* in light of testimony that Williamsburg County was 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 Court of Appeals correctly applied this Court's jurisprudence in reaching the proper outcome.

"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, Victor 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. 667. 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. The PCR court's tortured reading of trial counsel's testimony selectively suppressed portions of the testimony wherein he admitted he could have called just one witness if needed." Counsel was not obligated to call multiple witnesses. The PCR court's reasoning was flimsy at best and showed the court's trepidation in outright concluding that trial counsel employed a reasonable trial strategy. The strained interpretation of trial counsel's testimony contravenes the essence of his comments.

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. 673. 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 Victor's case. Furthermore, as someone with a detailed understanding of Victor's case, counsel opined that the result in this matter would have been different had he called the alibi witnesses.

The Order of Dismissal extended 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" contradict 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 [Victor]." App. 669. 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. 669.

This 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. 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 Victor's case:

> 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 by defense counsel.

App. 675.

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). As a result, the Court of Appeals correctly reversed.

Victor 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.[3] Gibbons, the man who was attacked, was never able to identify the men involved. Victor 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 Jessica or Debra to the stand to offer an alibi. Simply put, holding out for the last argument in closing was not a sufficient trial strategy to justify the decision not to put one or two credible alibi witnesses on the stand. Victor had the right to have his attorney make a sound decision to present alibi witnesses.

Therefore, the Court of Appeals correctly held that there was a reasonable probability that but for trial counsel's deficient performance, Victor 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).

At oral argument at the Court of Appeals and in its Petition, the state suggested that Jessica and Debra were not actual alibi witnesses. Petition p. 11, 18. Despite the repeated and persistent assertions, this statement is belied by the record. The below question-and-answer exchange plainly and unambiguously sets forth the truth, that Jessica Weldon was an alibi witness:

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

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[3] The state sought to keep the record open "for the purposes of ... obtaining a criminal background check on the alibi witnesses just to se if there is the existence of an admissible prior history for impeachment purposes." App. 658 ll. 14 – 18. PCR counsel offered to provide dates of birth. App. 659 ll. 16 – 23. There does not appear to be any follow-up or indication that the witnesses had impeachable offenses.

A: I was at the house.

Q: All right. Where was Victor?

A: In the house.

Q: Where was he?

A: In the room with his girlfriend.

App. 630 ll. 18 – 24.

Given the opportunity to cross examine Jessica Weldon, rather than suggest that her testimony was "unreliable and incredible" over five years later, the state chose not to ask her any questions. Petition p. 20. This was likely a strategic decision given the clarity of her testimony.

Further, the state incorrectly submits that "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.' " Petition p. 20. To be clear, this was not a credibility finding. Given the opportunity to relegate Jessica and Debra's testimony to the realm of incredible, the PCR court elected not to do so. As noted above, however, trial counsel was found to be credible, at least for a separate issue. App. 673. It naturally follows, therefore, that trial counsel's comments that he should have called the alibi witnesses at Victor's trial and that it would have changed the outcome is entitled to *great deference* as posited by the state. Petition p. 20 – 21. "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). The state passed on an opportunity to cross examine Jessica at the PCR. Further, it never filed a Rule 59(e), SCRCP motion to alter or amend. Given the opportunity to shape the outcome of Victor's PCR appeal, the state

consciously chose not to do so. A disingenuous assertion that the PCR court made credibility findings as to Jessica and Debra is not a reason to grant certiorari.

Counsel was present at the evidentiary hearing while Victor's mother and sister testified. App. 638 ll. 2 – 24. He recalled speaking with both of them in advance of 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 Victor'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. 639 ll. 3 – 11.

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. 641 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. 641 l. 9 – App. 642 l 1. (emphasis added). In hindsight, counsel had "no idea why [he] did not call the alibi witnesses." App. 650 ll. 7 – 16.

This Court has weighed in on the benefit of final argument. During oral arguments in Eugene Thomas v. State, Appellate Case No. 2016-002304, on Tuesday, June 11, 2019, this

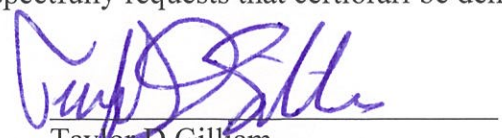
Court discussed how trial lawyers should weigh argument versus presentation of fact. There needs to be a reason why the final argument is valuable. There must be a legitimate purpose the lawyer thinks he/she could acquire from making final arguments. There has to be a reason why final argument is better than the nonfinal argument. Simply stating "I want to talk last" is insufficient.

Those considerations were at play in Victor's case, where the benefit of last argument was not outweighed by the evidence—alibi witnesses—that could have been presented. Counsel could have argued about the DNA evidence *and* noted Victor's alibi witness(es). Critically, trial counsel agreed there was no other way to convey Victor's alibi to the jury than by the testimony of the alibi witnesses. App. 640 ll. 2 – 12. Trial counsel outright confirmed that he "should have called them as witnesses in the trial." App. 640 ll. 10 – 12. Moreover, he believed it could have changed the outcome at trial. App. 640 ll. 13 – 15.

The state fails to recognize the reality of ordinarily people who live with their family and are unable to provide non-familial alibi witnesses. Victor Weldon could not control his whereabouts at the time of the attack on Gibbons. Often times, family members serve as alibi witnesses. That is where many people spend the bulk of their time outside of work. From the time most people get home until they go to work the next day, they are around family. Victor Weldon is no different. He had family member waiting in the courtroom, ready and willing to testify. Trial counsel had filed a notice of alibi and included at least Jessica on the potential witness list. The state likely ran a background check at that time. Yet at the PCR hearing, the state chose not to cross-examine Jessica. The state has presented no new arguments, nor has it explained why this Court should reverse the Court of Appeals or even grant certiorari.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that certiorari be denied.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR RESPONDENT

This 19th day of January, 2022.