

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Saluda County

Honorable Debra R. McCaslin, Circuit Court Judge

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DEMARCUS L. ROBINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000626

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Victor R Seeger  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**Jan 25 2022**

S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether trial counsel provided ineffective assistance of counsel for failing to call Petitioner's mother as an alibi witness where trial counsel was on notice her testimony was crucial to proving Petitioner's alibi and where Petitioner's only defense to the crime was based on that alibi?

## STATEMENT

During its November 2016 term, the Saluda County Grand Jury indicted Petitioner for kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime. App. 503 – 511. On November 6 – 8, 2017, Petitioner proceeded to trial before the Honorable Judge Robert E. Hood, and a jury. App. 1. Aimee J. Zmroczek represented Petitioner. Id. Douglas Wayne Fender, II and Alton H. Eargle, Jr., represented the state. Id.

Petitioner was found guilty as indicted. App. 391, l. 19 – 392, l. 7. Judge Hood sentenced Petitioner to concurrent twenty-five-year sentences of imprisonment for armed robbery and kidnapping, as well as a concurrent five-year imprisonment sentence for possession of a weapon during the commission of a violent crime. App. 402, l. 22 – 403, l. 5.

Petitioner filed a direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967). App. 405 – 420. The Court of Appeals issued an unpublished opinion on October 9, 2019 denying Petitioner relief. App. 421 – 22; State v. Robinson, No. 2017-002624 (Ct. App. 2019).

Petitioner filed an application for post-conviction relief (PCR) on December 3, 2019. App. 423 – 429. The state filed a return and motion for more definite statement on April 1, 2020. App. 430 – 442. In response, Petitioner filed an amended PCR application on April 22, 2021. App. 443 – 444.

Petitioner's PCR hearing was held on April 30, 2021, before the Honorable Debra R. McCaslin. App. 445. Ashley A. McMahan represented Petitioner. Id. Lillian L. Meadows represented the state. Id.

In an order filed on May 24, 2021, the PCR court denied Petitioner relief. App. 488 – 502. The PCR court held that Petitioner's allegations that trial counsel provided ineffective assistance of counsel were without merit. App. 498 – 499. Petitioner alleged that trial counsel provided

ineffective assistance of counsel for failure to investigate into and call alibi witnesses to prove he was at home sleeping at the time of the robbery; however, the PCR court found that he failed to satisfy the burden of proof because he did not produce those witnesses at the PCR hearing. App. 496; App. 498 – 499.

This petition for writ of certiorari follows.

## ARGUMENT

Trial counsel provided ineffective assistance of counsel for failing to call Petitioner's mother as an alibi witness where trial counsel was on notice her testimony was crucial to proving Petitioner's alibi and where Petitioner's only defense to the crime was based on that alibi.

### **Relevant Facts**

During the early morning hours of August 1, 2016, a man entered the Circle K in Ridge Spring. App. 147, l. 16 – 149, l. 25. The man brandished a firearm and held it to the clerk to rob the store. Id. The robber stole an indeterminant amount of money in five- and one-dollar bills, a case of cigarettes, and a cigar. Id.

After the robber left, the clerk called 9-1-1 at 2:42 AM and gave a description of the suspect. App. 150, l. 14 – 151, l. 22; App. 178, l. 7 – 179, l. 20. The suspect wore a mask during the incident. App. 150, ll. 14 – 17. Despite not being able to see the suspect's face, the clerk later "realized" he recognized the suspect because he was a "regular" at the store. App. 150, l. 18 – 151, l. 24. The clerk identified the suspect as Petitioner because he allegedly recognized a scar and "star tattoo." Id.

Michael James Raffield, a corporal in Saluda County Sheriff's Office Patrol Division, responded to the call regarding the armed robbery. App. 242, l. 11 – 245, l. 13. Raffield was advised that the suspect left the scene on foot. App. 245, ll. 8 – 13.

While driving to the Circle-K, Raffield was informed that the clerk identified the suspect as Petitioner. App. 246, ll. 13 – 20; App. 247, l. 25 – 250, l. 1. As a result, Raffield drove to the home of Petitioner's mother, where Petitioner stayed, and knocked on the door. Id.; Id. Raffield alleged Petitioner's mother answered the door and allowed him into the home. App. 48, ll. 9 – 23; App. 250, ll. 4 – 8. Raffield also alleged at trial Petitioner's mother told him that Petitioner arrived

home approximately 2:30 AM. App. 250, l. 9 – 251, l. 4; App 282, l. 8 – 283, l. 14; App. 262, l. 21 – 264, l. 2. Petitioner’s mother was not called as a defense witness to rebut Raffield’s testimony during Petitioner’s trial.

According to Raffield, Petitioner was found sleeping in a sleeping bag on the floor of his bedroom when Raffield entered the room. App. 49, ll. 3 – 14. Petitioner was allegedly sleeping on multiple five- and one-dollar bills totaling forty-one dollars. Id. Raffield claimed he also observed clothing in Petitioner’s bedroom that allegedly was “consistent with what the robber was wearing.” App. 262, ll. 7 – 10.

After “securing” Petitioner, Raffield obtained a search warrant to search Petitioner’s bedroom. App. 49, l. 3 – 50, l. 13. Including the forty-one dollars, police officers also found “a silver or gray-in-color revolver,” a box of ammunition, several packs of cigarettes, and a cigarillo. Id.

During Petitioner’s trial, defense counsel’s sole argument was that Petitioner was not the person who robbed the Circle-K. App. 359, l. 23 – 363, l. 25; App. 462, ll. 6 – 22. Despite the defense theory being that Petitioner could not have committed the armed robbery because he was at home sleeping at the time of the incident, trial counsel failed to call alibi witnesses to prove that theory.

Petitioner testified at his PCR hearing that defense counsel should have investigated into his mother being an alibi witness and called her to testify at his trial. App. 455, l. 20 – 456, l. 6. Prior to the trial, Petitioner put defense counsel on notice his mother could be an alibi witness and that her testimony would have exonerated him of the armed robbery. App. 461, l. 19 – 463, l. 3. Petitioner’s mother would have testified that he was at home sleeping at the time of the incident.

App. 458, ll. 18 – 23. That alibi evidence would have directly supported the defense that Petitioner was not the one who committed the armed robbery.

Defense counsel testified at the PCR hearing as well. App. 460, l. 24. Defense counsel admitted Petitioner was consistently denied committing the armed robbery from the outset of her representation of Petitioner. App. 462, ll. 14 – 16. Specifically, Petitioner explained to defense counsel that he was not at the Circle-K during the incident. Id. Defense counsel also admitted that the only version of Petitioner's whereabouts presented at trial was from Raffield who testified that Petitioner's mother stated Petitioner had just gotten home around 2:30 AM. App. 463, ll. 4 – 7.

Defense counsel claimed that although she spoke with Petitioner's mother several times about the case, his mother never said she would be an alibi witness in Petitioner's case. App. 462, ll. 16 – 22. Defense counsel also mentioned that other women, Petitioner's sister and girlfriend, would also call to discuss Petitioner's case. App. 461, l. 19 – 462, l. 3. However, defense counsel failed to successfully contact any of the potential alibi witnesses to procure their testimony before Petitioner's trial. App. 462, l. 23 – 463, l. 3; App. 474, l. 15 – 475, l. 3. Accordingly, Petitioner was unable to properly present his alibi defense and he was found guilty as indicted. App. 391, l. 19 – 392, l. 7.

## **Discussion**

Defense counsel provided ineffective assistance of counsel for failing to call Petitioner's mother to elicit her crucial alibi witness testimony at Petitioner's trial. That ineffective assistance of counsel prejudiced Petitioner because defense counsel was on notice his mother was a potential alibi witness, Petitioner's sole defense was that he was not the person who committed the armed robbery, and his mother would have testified he was at home sleeping at the time of the incident. App. 455, l. 20 – 456, l. 6.

To prove a claim of ineffective assistance of counsel, a PCR applicant must show that trial counsel provided deficient performance and that this deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 687 (1984). Deficient performance is performance that “fell below an objective standard of reasonableness.” Matthews v. State, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). Prejudice results from the deficient performance where counsel's deficiency undermined confidence in the outcome of the trial. Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016).

Upon appellate review “the PCR court's factual findings and will [be upheld] if supported by any evidence in the record.” Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436–37 (2018) (internal quotations omitted). However, “[q]uestions of law are reviewed de novo, and [the Court] will reverse the PCR court if its decision is controlled by an error of law.” Id. The failure to call an alibi witness is a matter of law. See Martin v. State, 427 S.C. 450, 455, 832 S.E.2d 277, 279 (2019).

“[A]n 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). Thus, a PCR applicant is not prejudiced by his counsel's failure to interview a potential alibi witness who cannot present testimony that meets the legal definition of an alibi. Id. However, the PCR applicant only has to present evidence that “one viable interpretation of” the alibi witness testimony showed the physical impossibility necessary to meet the legal definition of an alibi. See Walker v. State, 407 S.C. 400, 407, 756 S.E.2d 144, 147 (2014).

In Martin v. State, supra, Martin's trial counsels were found ineffective for failing to call Martin's mother as an alibi witness. Martin, at 456 – 57, 832 S.E.2d at 280 – 81. Martin was

convicted of armed robbery and criminal conspiracy. Id. at 453, 832 S.E.2d at 278. At his PCR hearing, Martin alleged his trial attorneys provided ineffective assistance of counsel when they failed to elicit testimony from Martin's mother specifying the timeline for Martin's alibi. Id.

Martin's mother testified during his trial that she dropped Martin off in Atlanta in the morning on the day of the robbery. Martin, at 454, 832 S.E.2d at 279 (2019). However, Martin's defense counsel failed to ask her specifically when in the morning she dropped him off. Id.

At the PCR hearing, the only evidence Martin presented of what his mother would have testified to was his trial counsel's testimony that "[defense counsel's] file contained the mother's statement concerning the 'around 11:15, 11:30 a.m.' drop-off in Atlanta." Id. at 456, 832 S.E.2d at 280. Based on the note in Martin's defense counsel's file, our Supreme Court held Martin's defense counsel provided ineffective assistance of counsel that prejudiced Martin because without that testimony specifically demarcating the timeline Martin "failed to establish a legal alibi" at trial. Id. Accordingly, "counsel's failure to present the known and available alibi evidence – the specific drop-off time in Atlanta – undermined confidence in the outcome of [Martin's] trial." Id. at 457, 832 S.E.2d at 280.

It is important to note that Martin's mother did not testify at his PCR hearing. Therefore, it is not necessary for a PCR applicant to have the alibi witness testify at the PCR hearing for the PCR applicant to show their trial counsel was ineffective for failing to call the witness, or elicit the alibi evidence, as long as the applicant presents sufficient evidence of what the alibi witness' testimony would have been. See Glover v. State, 318 S.C. 496, 498 – 99, 458 S.E.2d 538, 540 (1995).

The present case was strikingly similar to Martin. Petitioner argued that defense counsel provided ineffective assistance of counsel for failing to call his mother to testify for his alibi

defense. App. 455, l. 20 – 456, l. 6. Petitioner’s sole defense to the armed robbery charge was that he was not the suspect who robbed the Circle-K because he was at home sleeping during the time of the incident. App. 462, ll. 13 – 16.

At his PCR hearing, Petitioner explained that his mother would have testified that he arrived home on the night in question before the armed robbery occurred such that he could not have committed the crime. App. 458, ll. 18 – 23. Petitioner explained his defense, that he was at home during the robbery of the Circle-K, would have been buttressed by the presentation of that alibi testimony. App. 456, ll. 4 – 6. Furthermore, the only version of the timeline of events given at trial was from Raffield. App. 463, ll. 4 – 7. Raffield claimed Petitioner’s mother told him that Petitioner arrived home at approximately 2:30AM, which left open the possibility of Petitioner committing the armed robbery. App. 250, l. 4 – 251, l. 4; App. 262, l. 21 – 263, l. 17; App. 283, ll. 4 – 14; See Martin, at 456, 832 S.E.2d at 280 (citing State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (“[A] purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.”) Thus, defense counsel’s failure to call Petitioner’s mother to testify regarding Petitioner’s alibi was doubly prejudicial because her testimony would have countered Raffield’s timeline as well.

Defense counsel was on notice Petitioner’s mother could have testified as an alibi witness in Petitioner’s defense at trial. App. 462, l. 6 – 463, l. 3. Defense counsel admitted during the PCR hearing that she spoke to Petitioner’s mother, as well as his sister and his girlfriend, several times before his trial. App. 461, l. 19 – 462, l. 3; App. 470, ll. 16 – 20. While defense counsel claimed that Petitioner’s mother never committed to be an alibi witness, defense counsel did not say his mother *refused* to be an alibi witness. App. 485, ll. 13 – 17. Furthermore, there was no evidence presented that defense counsel ever asked Petitioner’s mother about Petitioner’s alibi or asked if

she would be an alibi witness for Petitioner. Defense counsel could only say that she “would have loved” to present an alibi witness at trial if Petitioner had one to use. App. 474, ll. 15 – 25.

Defense counsel also admitted that the alibi testimony would have been impactful in Petitioner’s case because the crux of his defense “was always that he wasn’t there - - or that it wasn’t him.” App. 462, ll. 6 – 22. However, defense counsel alleged that as the trial date approached, she could not get “ahold” of any of the potential alibi witnesses that Petitioner provided her. App. 470, ll. 16 – 22; App. 474, ll. 15 – 25.

Defense counsel also claimed that she did not subpoena the alibi witnesses because Petitioner never gave her their addresses; however, Petitioner was arrested at his mother’s house such that defense counsel already knew where Petitioner’s mother lived. App. 462, l. 23 – 463, l. 3. Thus, the failure to subpoena Petitioner’s mother to secure her alibi testimony at Petitioner’s trial was not Petitioner’s fault but rather was a result of defense counsel’s ineffective assistance.

Since Petitioner sufficiently proved at his PCR hearing that his mother would have testified Petitioner was at home sleeping while the armed robbery took place and defense counsel was on notice Petitioner’s mother was an available alibi witness, her failure to call his mother to testify at his trial constituted ineffective assistance of counsel. See Martin, at 455, 832 S.E.2d at 280 – 81. That ineffective assistance of counsel prejudiced Petitioner because that alibi evidence was necessary to prove his alibi defense that he was sleeping at home when the armed robbery transpired. See Strickland, at 687.

**CONCLUSION**

Based on the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.



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Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 25<sup>th</sup> day of January, 2022.

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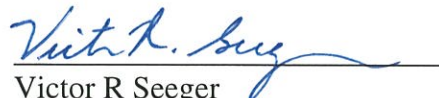
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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Demarcus L. Robinson states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Debra R. McCaslin, which was held on April 30, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Demarcus L. Robinson.

Respectfully Submitted,



Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 25<sup>th</sup> day of January, 2022.

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Jan 25 2022

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
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