



**ISSUE PRESENTED**

Whether the PCR court erred where it found counsel provided effective representation where the court found counsel made “adequate and reasonable attempts” to obtain a receipt from Walmart that could have corroborated petitioner’s alibi defense, where counsel did not subpoena the receipt until after the trial had begun, since counsel has a duty to undertake a reasonable investigation?

## ARGUMENT

The PCR court erred where it found counsel provided effective representation where the court found counsel made “adequate and reasonable attempts” to obtain a receipt from Walmart that could have corroborated petitioner’s alibi defense, where counsel did not subpoena the receipt until after the trial had begun, since counsel has a duty to undertake a reasonable investigation.

Counsel’s performance was deficient where he failed to subpoena a copy of a receipt from Walmart that might have verified petitioner’s alibi until he was ordered to do so by the trial judge. Counsel claimed he did not seek the receipt because he thought it would show petitioner was at Walmart after the robbery instead of during it. However, without getting the receipt, counsel could not be certain at what time petitioner made the purchase.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. *Id.* at 687.

A criminal defense attorney has a duty to conduct a “reasonable investigation.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). “One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable.” *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). “This Court has stated previously that criminal defense attorneys have a duty to undertake a reasonable investigation, which at a

minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Ard v. Catoe*, *supra*).

The PCR court ruled that “[t]rial [c]ounsel made adequate and reasonable attempts to investigate this evidence [the Walmart receipt].” App. 859. Petitioner submits that the PCR court’s ruling on this matter was error—counsel’s performance was deficient. Counsel failed to conduct a reasonable investigation since he waited until the trial had begun—which was nearly a year after the crime occurred—to subpoena the receipt. App. 1; App. 868 – 871.

“[I]nquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions . . .” *Strickland v. Washington*, 466 U.S. 668, 691 (1984). “Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.” *Id.* Here, counsel spoke with petitioner; petitioner asked counsel to obtain a copy of the receipt because he believed it would bolster his alibi defense. Counsel’s failure to subpoena the receipt in a timely fashion was deficient performance, given this request by petitioner.

“Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting *Strickland*, 466 U.S. at 691) (internal alterations and quotations omitted). Here, it cannot be said that counsel made a reasonable decision to proceed without investigating the receipt, since counsel did try (albeit unsuccessfully) to obtain the receipt by the easiest method—counsel said he asked Emonie Ford for a copy. Counsel’s failure to take the step of subpoenaing the same document from Walmart in a timely manner was deficient performance.

“To show prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability the result of the trial would have been different.” *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Here, petitioner demonstrated he was prejudiced, since the receipt might have corroborated his alibi. *See Walker v. State*, 407 S.C. at 406, 756 S.E.2d at 147 (failure to investigate alibi testimony that reasonably could have resulted in a different outcome at trial prejudiced defendant). Moreover, petitioner should not be penalized for failing to produce the receipt at his PCR hearing, since trial counsel’s failure to subpoena the receipt from Walmart in a timely fashion likely rendered it lost forever.

## Conclusion

Based on the foregoing argument, Petitioner respectfully request Joanna K. Delany (Appellate Defender) be denied petition to be relieved as counsel and Writ of certiorari be granted to allow full briefing on this issue.

The 13<sup>th</sup> day of December 2019

Tykeem K. May

Tykeem K. May  
Petitioner

State of South Carolina  
In the Court of Appeals

RECEIVED

DEC 18 2019

S.C. SUPREME COURT

Appeal from Orangeburg Co. ct. of Com. Pleas  
the Honorable D. Craig Brown, Circuit Court Judge

Tykeem K. May,

Petitioner

V.

STATE OF SOUTH CAROLINA,

Respondent

Proof of Service

I, Tykeem May hereby certify that I have served the below persons my initial brief. By placing the above said into the hands of a Fairfield Co. jailer hands. I.E. postage prepaid. to be placed in the U.S. mail this 15<sup>th</sup> day of December 2019

The Supreme Court of South Carolina  
Post office Box 12159  
Columbia, South Carolina 29211

Tykeem May  
Fairfield County Detention Center  
10 Faith Lane  
Winnsboro, SC 29180

Tykeem v. <sup>34</sup>  
Fairfield County Detention Center  
10 Faith Lane  
Winnsboro, SC 29180

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Post office Box 12159  
Columbia, SC 29211

29211-2159

