STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Lexington County
The Honorable J. Mark Hayes, Circuit Court Judge
(Common Pleas, PCR Appeal)

BOYD RASHAEEN EVANS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2016-001287

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. Whether the PCR court erred in finding that Petitioner was not prejudiced by trial counsel's deficient examination of Cherise Evans regarding Petitioner's alibi defense?

II. Whether the PCR court erred in finding that trial counsel rendered effective assistance where he failed to locate and call Yacia Montgomery as an additional alibi witness to testify in Petitioner's defense at trial.

RESPONDENT'S COUNTER PRESENTATION OF QUESTIONS PRESENTED

I. Is there any evidence of probative value which supports the PCR Judge's ruling that Petitioner failed to meet his burden in proving prejudice arising from trial counsel's failure to elicit testimony of the time in which Petitioner picked Ms. Evans up from work?

II. Is there any evidence of probative value supporting the PCR Judge's finding that Ms. Yacia Montgomery was not made known to trial counsel as a potential alibi witness?

RESPONDENT'S STATEMENT OF THE CASE

On November 26, 2007, a Lexington County Grand Jury returned indictments against Petitioner Boyd Rashaeen Evans for armed robbery, possession of a firearm during a crime of violence, two counts of kidnapping, and possession of a pistol by a person under twenty-one. (PCR App. pp. 729-736). The charge of underage possession of a pistol was *nolle prossed.* (PCR App. pp. 616, lines 8-16).

On January 11 through January 14, 2010, Petitioner was tried jointly with Lywone Capers before the Honorable Judge Knox McMahon. Petitioner was represented by private counsel David Miller and the State was represented by assistant attorney generals Robert Maldonado and Joshua Underwood. (PCR App. pp. 1). During trial one count of kidnapping was dismissed by directed verdict for each defendant. (PCR App. pp. 459, lines 15-24). At the conclusion of the trial, the jury returned a verdict of guilty against Petitioner for the remaining charges of armed robbery, possession of a firearm during a crime of violence, and for one count of kidnapping. (PCR App. pp. 615, lines 8-16). Judge McMahon sentenced Petitioner to twenty-one years for armed robbery, twenty-one years for kidnapping, and five years for possession of a fire arm during a violent crime, all to be served concurrently. (PCR App. pp. 623, lines 1-17).

Mr. Evans appealed his conviction. Ms. Katherine Hudgins filed an *Anders* brief on Mr. Evan's behalf on June 14, 2011. (PCR App. pp. 625). Mr. Evans raised the single issue:

> Did the trial judge err in refusing to allow cross-examination of a witness in regard to conditions and medications that may have affected her memory when the witness testified that appellant, her brother, visited her from North Carolina the afternoon before the robbery, placing appellant in the vicinity of the robbery, when identity was a key issue at trial? (PCR App. pp. 628).

The Court of Appeals subsequently dismissed the *Anders* appeal on May 16, 2012. (PCR App. pp. 638).

Mr. Evans then sought Post-conviction Relief ("PCR") by application filed February 20, 2013. (PCR App. pp. 640). The State responded with its filed Return on April 28, 2015. (PCR App. pp. 647) On September 28, 2015, counsel for Petitioner, Kristy G. Goldberg, filed an Amended Application for PCR. (PCR App. pp. 653). An evidentiary hearing was held before the Honorable J. Mark Hayes, wherein testimony was provided by Mr. Evans, alleged alibi witness Yacia Montgomery, and trial counsel David Miller. (PCR App. pp. 655-656). Judge Hayes took the matter under advisement, and later issued an Order of Dismissal on May 25, 2016. (PCR App. pp. 719). This Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

On July 26, 2007, at approximately 12:30am, four African-American individuals robbed the Pitt Stop located at 125 Rollings Meadow Lane. Video surveillance footage of the robbery was captured by Pitt Stop security cameras. (Exhibit S-52). This video shows the four individuals performing the armed robbery with partially covered faces and fleeing in a blue Ford Explorer with gold trim. This video also shows the left shoulder of one of the perpetrators, wherein a large scar is visible. (PCR App. pp. 118, line 17 through pp. 119, line 2). Still photographs were taken from this video which provided photographic evidence of the scar and the getaway vehicle (State's Exhibits 1-33). Various witnesses (as set out more fully below) repeatedly referred to this evidence in their testimony.

Following the robbery the police investigated and sought the arrest of Lywone Capers and Mr. Boyd Evans, as two of four suspects to the crime. The two individuals were extradited, charged, and a jointly tried. Testimony and evidence at trial established the following:

Witness Michael Rhaney

Witness Michael Rhaney testified that he lives in a mobile park home called Rolling Meadows, located approximately one mile from the Pitt Stop gas station. (PCR App. pp. 254, lines 18-20). Mr. Rhaney lives there with his fiancé, Glynnessa Evans, who is also the sister of Petitioner Boyd Evans. (PCR App. pp. 258, lines 3-9). At the time of the robbery, Mr. Rhaney was employed by the Pitt Stop where the robbery occurred, but had ended his shift at 11:00pm. (PCR App. pp. 255-256). Mr. Rhaney testified that on July 25th, while on his way to work, he saw Petitioner driving a blue Ford Explorer that had "tan over the wheel rail". (PCR App. pp. 261, lines 21-24). Mr. Rhaney upon examination of State's Exhibits 1-8, (still photographs taken of the getaway car used at the robbery), confirmed that it was the same vehicle he witnessed earlier that afternoon. (PCR App. pp. 262, lines 5-11; pp. 263, lines 17-19).

Before arriving at work, Mr. Rhaney had to turn around and retrieve his work tag and saw Petitioner and Capers at his home. (PCR App. pp. 268, line 23-24; pp. 269, line 22-23; pp. 282, line 25 through pp. 283, line 5). Upon examination of State's Exhibits 9-33, Mr. Rhaney confirmed that he recognized the Petitioner in the robbery photographs by his clothing, skin tone, and build from that day (PCR App. pp. 258, lines 17-25; pp. 264, line 9 through pp. 265, line 7). Mr. Rhaney also saw the vehicle at his home and was able to recall the North Carolina state tags, and remembers the tag number of "WPD 2995" for the vehicle (PCR App. pp. 289, lines 12-14; pp. 274, lines 1-2; pp. 15-22). He subsequently testified that he initially provided an incorrect tag

number to Detective Prestigacomo. (PCR App. pp. 292, lines 17-19). Detective Prestigacomo clarified during his testimony that Mr. Rhaney's tag number was inaccurate by one digit for a vehicle matching the description. (PCR App. pp. 408, line 1).

Witness Rosa Lugo

Ms. Rosa Lugo testified that she was manager of the Rolling Meadows mobile home park. She testified that Mr. Evans lived in Rolling Meadows in July 2005. (PCR App. pp. 295, lines 1-7). She recalled that on July 25, 2007, she had an incident requiring her to respond to loud music from individuals in a Ford Explorer SUV (which she described as black), and she made the individuals leave. (PCR App. pp. 296, lines 15-22; pp. 297, lines 10-11). After this incident she testified that the same Ford Explorer nearly ran into her as it was leaving, which prompted her to take down the license plate number. (PCR App. pp. 297, lines 13-18). She wrote the license plate number "WU 2895", "Explorer", and "North Carolina" down and provided the note to a Lexington County deputy soon after. (PCR App. pp. 298, line 1-22). Detective Prestigacomo later confirmed that this tag number was close, but was off by certain letters for a vehicle matching the description. (PCR App. pp. 408, lines 10-16).

Witness Glynnessa Evans

Glynnessa Evans testified on behalf of the State. She confirmed that she lives at Rolling Meadows with Michael Rhaney and her kids, and had lived there for 9 years prior. (PCR App. pp. 305, lines 19-21; pp. 306, lines 16-19). Ms. Glynnessa Evans testified that on July 25, 2007, her brother, Petitioner Boyd Evans, along with co-defendant Lywone Capers and two other individuals named Ton and John visited her home unexpectedly. (PCR. App. pp. 308, lines 1-21). The group was driving a blue and gold Ford Explorer (PCR App. pp. 309, lines 10-12). On

the day that the Petitioner and the three others visited, Ms. Evans recalls that there was an incident wherein management responded to complaints of loud music and required the Petitioner and the others to leave. (PCR App. pp. 309 line 23 through pp. 310, line 5).

She testified that her brother was wearing a black tank-top that day, and she could recognize him and the other individuals from the surveillance video by their clothing (PCR App. pp. 388, lines 12-16; pp. 389, lines 12-16). She also was able to recognize the scar of the perpetrator in the States Exhibits 30-32 as matching Petitioner's scar. (PCR App. pp. 322, line 13 through pp. 323, line 3). She further recognized Petitioner from the video based on his voice, his build, and his cut (PCR. App. pp. 325, Line 22 through pp. 327, line 1).

Ms. Glynnessa Evans testified that she recalls this day specifically because the following day her and Michael Rhaney had to go to court for a custody hearing, and they tried to buy gas for the trip at the Pitt Stop wherein they encountered the ongoing police scene. (PCR App. pp. 311, line 11 through pp. 312, line 17).

Witness Detective Prestigacomo

Detective Prestigacomo testified he was assigned to investigate the July 26, 2007 robbery at the Pitt Stop. (PCR App. pp. 397, lines 17-24). He further testified that Mr. Michael Rhaney requested to speak with him, and Mr. Rhaney informed him that the robbery had been committed by his fiancé's cousins and initially named co-defendant Capers, Petitioner Evans, and John. (PCR App. pp. 402, line 24 through pp. 403, line 11). Detective Prestigacomo confirms that upon showing Mr. Rhaney the still photo of the vehicle from the robbery, Mr. Rhaney confirmed that it was the vehicle he saw them driving the previous day. (PCR App. pp. 404, lines 1-9).

Detective Prestigacomo also testified that upon speaking with Ms. Glynnessa Evans and showing her the photographs "she without hesitation pointed to each one identif [sic] – giving me names, one being Boyd Evans, Lywone Capers, John Sosa, and Ton . . ." (PCR App. pp. 406, lines 10-15). He confirms that Ms. Evans identified the vehicle from the robbery as the Ford Explorer the individuals had driven, which she recalled to have North Carolina tags. (PCR App. pp. 406, line 21-25). According to Detective Prestigacomo, Glynnessa Evans identified Petitioner Boyd in the video based upon a photo of the perpetrators scar, and recognized the skin tone, build and clothing of the perpetrators. (PCR App. pp. 407, line 3-21). Detective Prestigacomo also confirmed that Ms. Evans described the altercation with the individuals and the "maintenance lady Mrs. Rosa Lugo", and that this information led to the Detective seeking Mrs. Lugo out for further evidence. (PCR App. pp. 408, lines 3-9). Upon questioning Mrs. Lugo, Detective Prestigacomo was informed that she saw Boyd Evans driving the vehicle that almost hit her, and identified Petitioner Evans when shown a picture of him. (PCR App. pp. 409, line 16-25).

Detective Prestigacomo confirmed that Mr. Rhaney provided a tag number that was "off by one digit" and that Mrs. Lugo provided a tag number that had the right numbers, but some incorrect letters. (PCR App. pp. 408, lines 1-14). The *provided* tag numbers were not on file with the DMV. (PCR App. pp. 449, lines 1-5). However, Detective Prestigacomo used the combined information from the two tags to deduce a North Carolina license plate of a "blue over gold Explorer" registered to Frederick Neal. Detective agreed that it is very common for witnesses to provide tag numbers that are slightly incorrect. (PCR App. pp. 408, lines 13-17). In meeting

with Frederick Neal, Detective Prestigacomo confirmed that he was not an individual from the surveillance video based on his substantial age difference. (PCR App. pp. 411, lines 15-25).

While at the Charlotte-Mecklenburg Jail, Detective Prestigacomo had the opportunity to meet Petitioner Boyd, who was wearing a tank-top at the time, and "immediately zeroed in on the scar on his shoulder" and took photographs of his shoulder which were admitted as exhibits 40-50. (PCR App. pp. 413, lines 2-25; pp. 434, lines 6-11).

Witness Cherise Evans

Witness Cherise Evans testified on behalf of Petitioner Boyd Evans at trial. She testified that she works at Church's Chicken and Serenity Nursing in Charlotte in 2007. (PCR App. pp. 534, lines 3-5). She testified that she is the sister of Petitioner Evans and lived with him in Charlotte during 2007. (PCR App. pp. 533, lines 13-25). At that time she claimed that Petitioner Boyd and her mother would transport her to and from work, but also waivered on whether or not her mom drives at all due to physical limitations. (PCR App. pp. 534, lines 8-15; pp. 538, lines 18-25).

Ms. Cherise Evans was asked: "Over July 25th, 26th of 2007 being the date of this incident, do you recall whether who, if anyone, picked you up from work?" Ms. Evans responded: "Yes.", and that her brother Boyd Evans picked her up. (PCR App. pp. 534, lines 16-23). She further testified that to her knowledge Petitioner Evans had not left Charlotte over those dates. (PCR App. pp. 534, line 24 through pp. 535, line 1). Ms. Evans testified that she recalled this specific date because she had family birthdays that week and was off work on July 23rd and July 24th, but had to return to work on July 25th. (PCR App. pp. 539, lines 1-6).

In addition to the photographic and video evidence, Petitioner Evans' scar was shown in person to the jury. (PCR App. pp. 437, line 2-24). No guns, fingerprints, or stolen materials were recovered (PCR App. pp. 559, lines 20-24).

During the PCR hearing, Cherise Evans was expected to appear and testify. However, she failed to appear, and Petitioner's attorney had not subpoenaed her to testify. (PCR App. pp. 660, lines 3-4; pp. 659, lines 15-22). The PCR Judge proceeded with the evidentiary hearing and declined to hold the record open and consider Ms. Cherise Evans testimony at a later date. (PCR App. pp. 716, line 19 through pp. 717, line 4). Petitioner Boyd testified and indicated that he dropped his sister Cherise off at work at 9am on the July 25, 2007, and picked her up at midnight that night. (PCR App. pp. 669, lines 20-25; PCR App. pp. 671, line 14 through pp. 672, line 10). He also testified that he remained in the Charlotte area that entire day and spent the evening at home with friends and family. (PCR App. pp. 673, lines 22-23).

Witness Yacia Montgomery testified at the PCR evidentiary hearing that she spent time with Petitioner Evans at his home the night of July 25, 2007. (PCR App. pp. 686, line 3 through pp. 687, line 8). She recalls him leaving to pick up his sister late that evening and returning with her early that following morning. (PCR App. pp. 687, lines 5-24). Ms. Montgomery states that she recalls this particular evening because it was the last summer she was in Charlotte until moving back in 2015, and that they "always had fun", "joked and laughed and played around", and "it was just good memories". (PCR App. pp. 688, lines 2-11). Ms. Montgomery was twenty-five years old at the time of her testimony, which was taken more than eight years after the crime occurred. (PCR App. pp. 655; PCR App. pp. 684, lines 22-23).

Trial Counsel David Miller testified at the evidentiary hearing and agreed that Ms. Cherise Evans was called as an alibi witness. (PCR App. pp. 706, lines 13-21). He concedes that he did not ask her what time she was picked up from work (PCR App. pp. 707, lines 16-20). In review and recitation of his notes he indicates that he has a note stating "Cherise, Church's Chicken, 21st through 28th till close, Boyd picked up at one". (PCR App. pp. 709, lines 3-6). Mr. Miller testified that he hired an investigator to track down all of the witnesses named by Petitioner Evans, but had difficulty finding many of them, despite substantial effort. (PCR App. pp. 692, lines 14-16; pp. 695, line 22 through 696, line 20). Mr. Miller stated unequivocally that he had never heard the name Yacia Montgomery until the day of the PCR evidentiary hearing. (PCR App. pp. 699, lines 18-19).

The PCR Judge issued an Order of Dismissal finding Petitioner had failed to meet his burden of proof in establishing ineffective assistance of counsel and denied post-conviction relief. (PCR App. pp. 723).

RELEVANT LAW

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State,* 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This "Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id. See also Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision."). In a post-conviction relief proceeding, the applicant bears the burden of proving

the allegations in their application. *Butler v. State,* 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

"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 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 673, 104 S.Ct. 2052 (1984)). A PCR "applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1 (e), SCRCP. See also *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In order to prove deficient performance, the convicted defendant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 687). Further, "[t]he standard for judging counsel's representation is a most deferential one." *Harrington*, 131 S.Ct. at 788. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland*, 466 U.S. at 689. *Holden,* 393 S.C. at 572, 713 S.E.2d at 615 ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.") (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "[F]air 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." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985) (quoting *Strickland*, [466 U.S. at 690]). Moreover, the Sixth Amendment does not require

"'perfect advocacy'" but "'reasonable competence'" given the circumstances at the time of trial. *Maryland v. Kulbicki*, __ U.S. __, __, 136 S. Ct. 2, 5 (2015) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1 (2003). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on has having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)

Further,"[i]n order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense." *Wiggins v. Smith*, 539 U.S. at 534, 123 S.Ct. 2527 (citing *Strickland,* 466 U.S., at 692, 104 S.Ct. 2052). "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792 (citing *Strickland*, 466 U.S. at 693). The Supreme Court has cautioned: "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland*, 466 U.S. at 694-695. "[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' *Murray v. Carrier,* 477 U.S. 478, 496 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 562 U.S. at 111.

Prejudice is not sufficiently shown, and an applicant is not entitled to relief for guilt phase related claims, where there is overwhelming evidence of guilt and the deficient performance did not affect jury consideration. *Rosemond v. Catoe*, 383 S.C. 320, 325-326, 680 S.E.2d 5, 8 (2009). See also *Jones v. State,* 332 S.C. at 333, 504 S.E.2d at 824 ("The bottom line

is that we must determine whether or not Jones has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about Jones's mental condition."). *Cf. Arnold v. State*, 309 S.C. 157, 171-172, 420 S.E.2d 834, 842 (1992) (reviewing claim malice charge was unconstitutional: "Based upon all the evidence presented tending to prove or disprove malice, no rational juror could have failed to find malice ... The erroneous malice charge beyond a reasonable doubt did not contribute to the verdict. Thus, the error was harmless.").

When the questions presented in the petition are analyzed within this legal framework, and in light of the record before the PCR court, the record well supports relief was not warranted and certiorari review is not warranted. Petitioner fails to show an absence of probative facts supporting the PCR judge's ruling. Petitioner's argument simply failed under the greater weight of the evidence before the PCR court. Again, certiorari review is not warranted. The petition should be denied.

ARGUMENT

I. (a)

Petitioner failed to produce Cherise Evan's alibi witness testimony or otherwise offer her testimony in accordance with the rules of evidence at the PCR hearing as required under *Bannister v. State*. Therefore, the finding of lack of prejudice by the PCR Judge was proper.

The Petition for Writ of Certiorari must be denied as the consequence of Petitioner's failure to introduce the testimony of his alleged favorable alibi witness, Ms. Cherise Evans.

"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 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 673, 104 S.Ct. 2052 (1984)) As to the second prong, 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 with the witness' failure to testify at trial." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing *Pauling v. State,* 331 S.C. 606, 503 S.E.2d 468 (1998)). The Court in *Bannister* made a definitive determination that the absence of the witness's testimony either in person or otherwise admitted pursuant to the rules of evidence is fatal to an ineffective assistance of counsel claim. *Bannister*, 333 S.C. at 303, 509 S.E.2d at 809-10. The absence of such testimony, such that only *speculation* can be made as to precisely what a witness would have said, precludes the establishment of prejudice. *Bannister*, 333 S.C. at 303, 509 S.E.2d at 809 (citing *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995)).

The circumstances of *Bannister* closely follow those presented at the PCR hearing for Petitioner Boyd Evans. Alibi witness Cherise Evans did testify at trial. However, petitioner's first claim for ineffective assistance of counsel is based on trial counsel's failure to *adequately* question Ms. Evans, and elicit what time Petitioner picked her up from her job in Charlotte. (PCR App. pp. 711, line 17 through pp. 712, line 13). The crux of his argument being that the absence of that one question prevents the creation of a complete alibi, and establishes both deficiency and prejudice as to his representation at trial. (PCR App. pp. 713, lines 1-6). However, upon being granted a PCR evidentiary hearing, Petitioner's attorney failed to subpoena Ms. Cherise Evans so that her testimony could be heard by the Judge. (PCR App. pp. 660, lines

1-8). Ms. Evans did not testify at hearing, nor was the content of her testimony *otherwise offered in accordance with the rules of evidence. Bannister*, 333 S.C. at 303, 509 S.E.2d at 809.

In initial matters before the PCR Judge, Petitioner's attorney requested the Record be kept open so that Ms. Evan's testimony could be provided at a later date. Attorney for the State objected and the Judge ultimately concluded that while he would allow counsel to add to the record, he would not consider additional evidence or testimony. (PCR App. pp. 717 lines 1-4). During the hearing, in lieu of Ms. Evan's testimony, the Petitioner testified as to his alleged whereabouts during the timeframe that the robbery took place. In doing so he stated that he drove Cherise Evans to work at 9am and picked her up from work at midnight. (PCR App. pp. 672, lines 3-10).

Trial counsel, David Miller, later testified at the PCR hearing. During his testimony Mr. Miller read from his October 28, 2008 pretrial notes pertaining to Cherise Evans. The totality of his notes as to Cherise Evan's potential testimony includes the truncated phrase:

> Cherise, Church's Chicken, 21st through 28th till close, Boyd picked up at one. (PCR App. pp. 709, lines 3-6)

No evidence was provided proving this to be PM or AM, and Mr. Miller states that,

> I take that to be 1:00 in the afternoon. I don't know that for a fact. She was working at Church's, the 21st through the 28th, until close, so maybe that's one in the morning. I don't know whether that was the following day, the day before, the day of, you know. That was not made clear". (PCR App. pp. 702 line 21 through 703 line 2).

Upon close examination of the PCR evidentiary hearing transcript, Mr. Miller's testimony indicates that these notes came *from interviewing Petitioner*, not Cherise Evans. As indicated by

Mr. Miller, these were personal notes that he made when he interviewed "him".[1] (PCR App. pp. 709, lines 3-5). No further evidence, speculative or otherwise, was provided by counsel for Petitioner relating to the alleged deficient examination of Cherise Evans.[2] As a result, the only evidence tending to provide the substance of Ms. Evan's testimony is the testimony of Petitioner and the recitation of notes from counsel made while interviewing Petitioner. Even if these notes were taken from an interview of Ms. Evans, it would not rise to a level sufficient to constitute testimony as is required by *Bannister*; it merely constitutes hearsay, inadmissible under the rules of evidence.[3]

In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. *Butler v. State,* 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Circumstances such as those presented in this matter are precisely why the *Bannister* rule exists. "In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." *Holden v. State*, 393 S.C. 565, 573,

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[1] Continued questioning from various attorneys makes it unclear where this particular note came from. This lack of clarity as to the note further undermines the limited speculative evidence that Petitioner provides as to Cherise Evans' anticipated testimony.

[2] It warrants consideration that the testimony provided by Ms. Evans at trial conflicts with the notes made by Mr. Miller, and otherwise seems implausible. At trial, in response to how she was able to remember July 25th, as opposed to any other day, Ms. Evans stated, "Because my sister' birthday's the ___ rd and my grandfather' birthday is the ___th and I had the 23rd and 24th off and the 25th I had to be to work." (PCR App. pp. 539, lines 1-6). This directly contradicts the trial counsel's notes as to her working the 21st through 28th. (PCR App. pp. 709, lines 3-6). The evidence is further self-contradictory in that Petitioner Evans claims he picked up his sister at midnight, while Mr. Miller's note suggests "one". Regardless of the AM/PM distinction, the evidence at the PCR hearing is not corroborated. Lastly, if all the speculative evidence is believed, despite contradiction, it would mean that Petitioner Evans dropped his sister off at work at 9am and picked her up at 1:00am, which would constitute a sixteen hour work day at Church's Chicken for a seventeen year old girl. (PCR App. pp. 533, lines 4-6). This is technically possible, but such a presumption casts substantial doubt on the accuracy of the information provided at the PCR evidentiary hearing, especially when such a long work day was not stated as a reason for recalling the specific date in question.

[3] *Pauling v. v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) presents a substantially different circumstance, as the notes admitted in *Pauling* were **written by the absent witness** during the course of her job as a triage nurse.

713 S.E.2d 611, 615 (2011). The Court in *Bannister* has ruled that in the absence of testimony from the alleged favorable witness, or such testimony otherwise properly offered, a PCR applicant *cannot* provide probative evidence in an ineffective assistance claim. *Bannister*, 333 S.C. at 303, 509 S.E.2d at 809-10.

A showing of prejudice demands the provision of the testimony of a favorable witness in reliable form *from the witness herself*, not speculation by others. See *Pauling v. v. State*, 331 S.C. 606, 610-11, 503 S.E.2d 468, 471 (1998) (noting that Petitioner satisfied the witness testimony requirement by presenting "evidence as to the nature of the nurse's testimony by introducing her triage notes"). Due to Petitioner Evans' failure to present Ms. Cherise Evans testimony in any non-speculative manner, we have no way of knowing whether Ms. Evans would have in fact testified as predicted, nor do we know how her testimony would have held-up in the face of cross examination, based upon the inconsistencies of the speculative testimony from Petitioner. (See Footnote 2, *Supra*). The Petitioner's failure to produce Ms. Evans' actual testimony prevents the establishment of a complete alibi.

In absence of proper testimonial evidence from the favorable witness, the PCR judge reasonably found that Petitioner failed to meet his burden and the Petition for Writ of Certiorari must be denied.

I. (b)

Based upon the substantial evidence of guilt admitted against Petitioner at trial, the PCR Judge was correct in his ruling that Petitioner failed to meet his burden in proving prejudice from ineffective assistance of counsel.

The Court properly concluded that Mr. Evans did not carry his burden of demonstrating prejudice from the error of trial counsel in light of the substantial evidence of guilt admitted

during trial. Upon review of the record and the Court's Order of Dismissal, there is more than sufficient probative evidence to support the Court's ruling, and denial of the Petition for Writ of Certiorari is proper in this matter.

"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 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 673, 104 S.Ct. 2052 (1984)) "In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision.". *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011). If there is any evidence supporting the PCR Judge's ruling that prejudice cannot be found in light of the substantial evidence of guilt against the Petitioner, then the ruling must be preserved and the Petition for Writ of Certiorari denied.

Petitioner asserts that trial counsel's failure to elicit specific testimony from Cherise Evans regarding the time in which her brother allegedly picked her up from work on July 26th supports a finding of ineffective assistance of counsel. The PCR Judge disagreed, based upon a well-reasoned evaluation of the entire record. Petitioner can only point to the alibi testimony of his own sister, Cherise Evans, as evidence supporting his defense at trial. While the PCR Judge found that trial counsel was deficient in examining Ms. Evans, he was correct in his decision to dismiss the matter and in his reasoning for that dismissal.[4] The Judge notes that even if Ms. Evan's testimony had been fully introduced as desired, it would not have created a reasonable

[4] Respondent maintains that trial counsel was not deficient in failing to elicit the speculated additional testimony from Ms. Evans during trial, but recognizes the well understood holding in *Strickland* that if a Court may more easily "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. . . that course should be followed". *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984).

probability of differing result at trial given the substantial degree of evidence in this case identifying Petitioner as one of the perpetrators. (PCR App. pp. 724-725).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on has having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792 (citing *Strickland*, 466 U.S. at 693). In light of the evidence at trial – specifically the surveillance video showing Petitioner's scar and the detailed testimony from Michael Rhaney, Glynnessa Evans, and Rosa Lugo – and the lack of proper testimony at evidentiary hearing, the PCR Judge reasonably found Petitioner was not entitled to relief.

II.

There is sufficient evidence supporting the PCR Judge's ruling that trial counsel's testimony was credible and that Petitioner failed to inform counsel of potential alibi witness Ms. Yacia Montgomery.

In review of rulings by a PCR Judge, the appellate court need only determine whether there is any evidence supporting the Judge's findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

As its second issue presented, Petitioner alleges that the PCR Judge "erred in finding that trial counsel rendered effective assistance where he failed to locate and call Yacia Montgomery as an additional alibi witness to testify in Petitioner's defense at trial." (Petition for Writ of

Certiorari, pp. 1).[5] Petitioner properly introduced the testimony of Ms. Montgomery at the PCR hearing, and Ms. Montgomery's testimony would have been proper alibi testimony had she been called to testify at trial. However, the issue presented hinges on Petitioner's and trial counsel David Miller's testimony as to whether Ms. Montgomery was ever made known to counsel as a potential witness.

The PCR Judge heard evidence from three sources regarding this matter: Petitioner Boyd, Yacia Montgomery, and trial counsel David Miller. Petitioner Evans was asked on two occasions during the evidentiary hearing to list the names he provided to trial counsel as his potential witnesses. The transcript and testimony for the first occasion is as follows:

PCR Counsel:	What is the name that you gave him ***or intended*** to give him?
Boyd Evans:	Kiandra Lovett.
PCR Counsel:	Okay. Who else?
Boyd Evans:	Cherise Evans. A Garren Sawyer.
PCR Counsel:	Who else?
Boyd Evans:	Aiesha Lov – Aiesha Scott
PCR Counsel:	Uh-huh.
Boyd Evans:	And Yacia Montgomery. (PCR App. pp.
664, line 20 through	pp. 665, line 3) (emphasis added).

The transcript and testimony for the second occasion is noticeably different. Petitioner Evans was asked on cross-examination: "Let's talk about these alibi witnesses. You told your attorney – what were the names?" In his response, Petitioner Evans includes a completely new name, "Lavon Scott", and completely omits Yacia Montgomery. (PCR App. pp. 677). Petitioner was

[5] Much of the Petition for Writ of Certiorari appears to be in argument that there was a failure to conduct an adequate investigation. (Petition for Writ of Certiorari, pp. 11, 12, 16). However, counsel for Petitioner Evans at the PCR evidentiary hearing conceded that her argument is a failure to present evidence, as opposed to a failure to investigate. (PCR App. pp. 713, 18-20; pp. 724). Further, the PCR Judge concluded in his Order of Dismissal that "Applicant has not alleged counsel was ineffective in failing to investigate." (PCR App. pp. 724). A free standing claim for failure to investigate is barred from review in this matter. *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

not able to provide any physical evidence or notes as to the names he provided to trial counsel as witnesses. (PCR App. pp. 664, line 17-19).

Following this testimony, Yacia Montgomery was permitted to testify. She provided sufficient alibi testimony that is similar to that of Petitioner's, but curiously indicated that she was unaware of Petitioners arrest or incarceration until "recently". (PCR App. pp. 685, line 25 through pp. 686, line 6). Petitioner offered no further evidence which tended to show whether or not Yacia Montgomery was known by counsel as a potential witness.

Great deference must be given to a PCR Judge's findings where matters of credibility are involved since the reviewing court lacks the opportunity to directly observe the witnesses. *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521–22 (1993). Upon consideration of Petitioner's argument and the related testimony, the PCR Judge held:

> This Court finds that the evidence presented at evidentiary hearing indicates that Ms. Montgomery was not known to trial counsel until the day of the PCR hearing. Counsel offered credible testimony that he went through every alibi witness Applicant gave to him, but that Ms. Evans was the only one who could actually provide an alibi.

The Court ends the paragraph with the statement, "Applicant did not list Ms. Montgomery as one of the alibi witnesses he told counsel about." At first blush, this is seemingly an incorrect statement by Judge Hayes, but it is easily resolved by close examination PCR Counsel's phrasing of the question to Petitioner. PCR Counsel's question permitted Petitioner Evans to list witnesses he "intended" to name to trial counsel. (PCR App. pp. 664, lines 20-21). State's attorney, Patrick Schmeckpeper, did not provide that leeway during cross-examination, and in response, Petitioner did not name Yacia Montgomery. (PCR App. pp. 677, lines 3-19). Petitioner bears the burden of proof in this matter, and listing the witnesses Petitioner "intended to" name does not carry the

day.

Based on this evaluation of the evidence, the PCR Judge concluded that trial counsel had not been informed of Ms. Montgomery as a witness and therefore found neither deficiency nor prejudice in her exclusion at trial. There is more than sufficient evidence to satisfy the "any evidence" standard of review applicable to this matter and the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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By:

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July 5, 2017.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Mark Hayes., Circuit Court Judge

Boyd Rashaeen Evans,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2016-001287

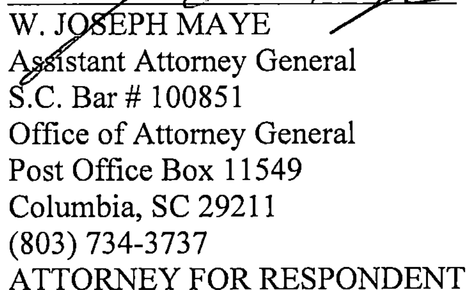
PROOF OF SERVICE

I, W. Joseph Maye, counsel for the Respondent, certify that I have today served the within Return to Petition for Writ of Certiorari on Petitioner by depositing a two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to:

Laura R. Baer, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

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

This 5th day of July, 2017.



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July 5, 2017

RECEIVED
JUL 05 2017
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk , Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Boyd Rashaeen Evans v. State of South Carolina
Appellate Case No. 2016-001287
Lower Court Case No. 2013-CP-32-0614

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari and Proof of Service in the above-captioned case.

Thank you for your assistance in this matter.

Sincerely,

W. Joseph Maye
Assistant Attorney General
SC Bar #100851

WJM/trb
Enclosures

cc: Laura R. Baer, Appellate Defender (w/ two copies of enclosure)
The Honorable S. Rick Hubbard, III, Solicitor, Eleventh Judicial Circuit (w/ a copy enclosure)
Trisha Allen, Victim Services (w/ a copy enclosure)