ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable Carmen T. Mullen, Circuit Court Judge

TERRANCE J. GOSS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000127

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether the PCR court erred in finding trial counsel provided effective representation where petitioner asked counsel to investigate Sanchez Gilliard because he confessed, in writing, to robbing the store with two other men, not petitioner, where counsel said she did not interview Gilliard or call him as a witness because he was a "multiple convicted felon," since Gilliard's prior convictions for armed robbery only lend credibility to the theory that Gilliard committed the armed robbery rather than petitioner?

2.

Whether the PCR court erred in finding petitioner failed to prove prejudice where Sanchez Gilliard's written confession to police officers was properly introduced at the PCR hearing, since the proper introduction of such a writing is sufficient evidence to meet a PCR applicant's burden of proof under *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998)?

STATEMENT

On January 20, 2009, petitioner was indicted by an Anderson County Grand Jury for the offenses of armed robbery, conspiracy to commit armed robbery, and possession of a weapon during a violent crime. App. 481 – 484. He proceeded to trial before the Honorable R. Lawton McIntosh and a jury May 17 – 19, 2010. App. 1. Mary Jane Goodwin was appointed to represent petitioner and the state was represented by Rame Campbell. App. 1; App. 455, ll. 23-24.

On February 5, 2008, three masked men robbed the BP gas station on East Shockley Ferry Road in Anderson of $927 in just thirty-five seconds. App. 64, ll. 14-24; App. 77, ll. 13-15.

While Stephen Lattimore, the cashier, was employed at the BP, the store was robbed three times in a five-month period. App. 79, ll. 17-22; App. 231, l. 22 – 232, l. 2. This was the third in the string of robberies. App. 79, ll. 17-18. According to Lattimore, the first robbery was committed by two people, the second was by three people, and this robbery—the third—was committed by three people. App. 79, l. 23 – 80, l. 2.

A video of the robbery was captured by a security camera and was used by law enforcement in their investigation. App. 230, ll. 3-18. It showed that two of the robbers had guns and one had a backpack. App. 233, ll. 21-23; App. 64, ll. 19-22. The cashier was told to give the men money and get on the floor, and he did. App. 76, l. 18 – 77, l. 1. The robbers fired three warning shots and left. App. 78, ll. 8-16. No one was injured. App. 79, ll. 8-9.

According to Detective Gebing, one of the robbers on the video had a gun that looked like a "Kel-Tec." App. 235, ll. 2-4. Gebing thought the gun was a Kel-Tec because it looked like a rifle but shot .9 mm (pistol caliber) rounds. App. 235, ll. 2-4; App. 235, l. 24 – 236, l. 10. Detective Gebing issued a "be on the lookout" flyer to other police officers for this type of gun. App. 235, ll. 4-13.

The robbery occurred in Anderson on February 5, 2008. App. 481 – 482. On February 8, 2008, police were called to a dormitory at Greenville Technical College because Chris Ronoke, a student there, accidentally shot himself in the knee while trying to hide a gun from campus security officers. App. 104, ll. 4-8; App. App. 112, l. 8 – 113, l. 16. "I tried to pick it up with the bottom of my shirt so I wouldn't get my fingerprints on it or nothing and get rid of it, basically, and then it went off into my knee." App. 113, ll. 13-16.

Police officers found the gun Ronoke shot himself with, a Hi-Point pistol, in a closet along with a Kel-Tec .9 mm. App. 184, ll. 9-13; App. 186, ll. 13-20.

James Armstrong, a forensic technician with Greenville County Public Safety, testified that he compared the two guns found in the Greenville Tech dorm with fired cartridge casings that were collected from the BP robbery. App. 191, l. 25 – 192, l. 6; App. 194, ll. 4-8; App. 195, ll. 10-13; App. 197, ll. 13-19. Armstrong determined that one of the casings from the scene of the robbery was fired from the Hi-Point and two others were fired from the Kel-Tec. App. 199, ll. 8-13.

Armstrong was qualified as an expert in firearm identification and testified that the Kel-Tec gun was "fairly unique." App. 193, ll. 9-14; App. 195, ll. 5-7. Armstrong said the gun was unusual, but would not agree that it was highly unusual, just "not one you commonly see on a day to day use." App. 200, ll. 4-7.

Petitioner and Travis Patterson were charged with the February 5th robbery. App. 243, ll. 19-24. According to Chris Ronoke, he saw petitioner and Travis Patterson with these types of guns on the night of the robbery. App. 106, l. 14 – 107, l. 1; App. 116, l. 24 – 117, l. 15. Another witness testified he dropped petitioner off at the Greenville Tech dorm with a Kel-Tec before Ronoke shot himself. App. 152, ll. 6-7; App. 156, ll. 18-19; App. 158, ll. 16-20. However,

petitioner told police that the gun belonged to Jared Stevenson, and that as told to him by Ronoke, the gun went off while Ronoke was taking it from Jared Stevenson's brother. App. 129, ll. 9-12; App. 130, ll. 3-7.

Rob Gebing, a detective at the Anderson County Sheriff's Office with fourteen years' experience in law enforcement, said he decided to charge petitioner and his codefendant Travis Patterson with the February 5th robbery based on their connection to the guns, since the guns were matched to the shell casings found at the scene. App. 244, ll. 2-15; App. 228, ll.1-7. The solicitor told the jury that the case against petitioner was "circumstantial." App. 299, ll. 7-16. The state also introduced a jail phone call recording[1] and a letter[2] that it argued were incriminating.

The jury deliberated for over four hours and asked a number of questions—it asked to be re-charged on conspiracy, it asked to replay and repeatedly asked to watch again and pause the

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[1] The state introduced a recorded phone call made by petitioner from the detention center. App. 259, ll. 9-11; App. 261, ll. 17-23. The solicitor claimed petitioner was recorded saying, "We done did this robbery. Don't own up to them guns in Greenville." App. 309, ll. 1-2. However, the defense explained that petitioner was expressing his frustration that his codefendant called him a snitch, and that petitioner was recorded saying his codefendant was "talking about **I'm the one told** that me and him done an armed robbery." App. 326, ll. 13-18 (emphasis added). Trial counsel acknowledged that petitioner had reason to be afraid of being labeled a snitch, and said one of the witnesses "was beaten almost to death at the jail the night after he . . ." testified. App. 452, ll. 15-21.

[2] The state also introduced a letter written by petitioner that it claimed was evidence of guilt, but the defense argued the letter did not contain a confession. App. 201, ll. 1-15; App. 248, l. 21 – 251, l. 5; App. 307, l. 6 – 308, l. 23; App. 324, ll. 16-18. The state argued the letter was incriminating because "not once is there a denial of being involved in this robbery," and because petitioner told his codefendant they "need to be on the same page." App. 307, ll. 12-25. In the letter, petitioner tries to reassure his codefendant that he would not "snitch" on his codefendant and two named others. App. 249, ll. 1-8. The defense argued the letter merely showed that petitioner did not want his codefendant to think he had snitched on anyone. App. 324, l. 20 – 325, l. 20.

video of the robbery, it asked to see petitioner stand up,[3] and it asked to re-hear testimony. App. 352, l. 20; App. 372, l. 11; App. 352, l. 22 – 359, l. 18. App. 362, l. 6 – 365, l. 11; App. 369, l. 11 – 371, l. 13; App. 368, ll. 12-20. Ultimately, petitioner was found guilty of armed robbery, conspiracy to commit armed robbery, and possession of a weapon during a violent crime, and was sentenced to concurrent terms of imprisonment of fifteen years, five years, and five years, respectively. App. 485 – 487.

On August 23, 2012, after exhausting his direct appeal remedies, petitioner filed an application for post-conviction relief (PCR). App. 401 – 413. On March 11, 2013, the state made its return. App. 414 – 420. A hearing was held on the matter before the Honorable Carmen Mullen on December 1, 2014. App. 421. Linda Whisenhunt represented petitioner and John W. Whitmire represented the state. App. 421.

It was undisputed at trial and at the PCR hearing that petitioner obtained a confession given to police and written by one Sanchez Gilliard, which petitioner received from another inmate. App. 466; App. 38, ll. 20-23. Gilliard confessed to robbing the BP and named his cohorts, who did not include petitioner. App. 466.

Counsel said this "statement of Sanchez G[i]lliard was given March 17, 2009, in which he claims that he, Derek J[ones] and Travis Patterson[4] did the robbery that my client is on trial up here for today . . ." App. 38, l. 20 – 39, l. 2. However, the confession did not indicate which

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[3] There was discussion about the height of the robbers. Compared to the marks on the gas station door, Detective Gebing said the man with the long gun is "above the six foot mark by a couple of inches. The other guy is just below it by a couple of inches. And then the third guy, the shortest one with the backpack, he is a good bit below the six foot mark." App. 234, ll. 9-22. According to Detective Gebing, petitioner is about 6'4", Sanchez Gilliard is 5'11", Derrick Jones and Travis Patterson are both 6'. App. 275, ll. 12-15; App. 279, l. 24 – 280, l. 4.

[4] As discussed above, Travis Patterson was petitioner's codefendant in the case at hand.

day the robbery occurred, and the solicitor argued Gilliard was talking about one of the other BP robberies.[5] App. 39, ll. 7-14. Sanchez Gilliard did not testify and his confession was not introduced.

Petitioner testified at the PCR hearing that trial counsel was ineffective in failing to investigate and subpoena potential defense witness Sanchez Gilliard. App. 431, l. 24 – 432, l. 9. Petitioner explained that he got Gilliard's statement from an inmate who said Gilliard was bragging about committing the armed robbery that petitioner was charged with, and that he gave the statement to trial counsel. App. 432, ll. 12-18. Counsel agreed she received the confession prior to trial. App. 457, ll. 14-17.

Petitioner said that he asked trial counsel "to talk to [Gilliard] and investigate," but he did not know whether counsel had done so. App. 435, ll. 3-12. Counsel said, "I can't remember if I talked to [Gilliard] or not." App. 450, l. 25 – 451, l. 1.

Sanchez Gilliard's written confession to law enforcement was entered as an exhibit at the PCR hearing. App. 466 – 468; App. 438, l. 25 – 439, l. 1; App. 278, ll. 3-4. The PCR court found the statement properly admitted into evidence at the PCR hearing and the state did not object to its admission. App. 438, l. 10 – 439, l. 1. The state agreed that Gilliard's confession had been authenticated. The Assistant Attorney General said, "Authenticity was laid last week." App. 439, ll. 2-4.

In the confession, Gilliard says he, Travis Patterson, and Derrick Jones robbed the BP on East Shockley Ferry Road, and that he had a bag and got the money while the other two men had guns. App. 466. Gilliard did not provide a date for the robbery. App. 466.

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[5] In Gilliard's hearsay statement, he says, "I heard [the BP] was hit a couple more times and I know Coot [Derrick Jones] talked about being in on it." App. 466. However, Detective Gebing said he had interviewed Derrick Jones and indicated he did not believe Jones committed any of the BP robberies. App. 279, ll. 9-23.

Trial counsel said she did not attempt to call Sanchez Gilliard as a witness because he was a felon, and because having the last closing argument "was much more valuable than Sanchez Gilliard." App. 451, l. 25 – 452, l. 5. Counsel said Gilliard was a "multiple convicted felon. He's not somebody you want to put up in a case." App. 451, ll. 2-4. Detective Gebing said Gilliard was serving two hundred and seventy years in prison and had pleaded guilty to so many armed robberies that Detective Gebing had "lost count."[6] App. 278, ll. 5-25.

PCR counsel asked trial counsel if she made any effort **at all** to contact or investigate Gilliard, and counsel said she had not.

> Q. Did you make any other efforts to kind of look into Mr. Gilliard to see if he would match the culprit on the video?
>
> A. He is a known convicted felon, so I did not. As I said, I don't remember interviewing him.

App. 458, ll. 11-15.

Although trial counsel said she would not use Gilliard as a witness because he was a "convicted felon," the state had several convicted felons transported from the Department of Corrections to testify in its case in chief. The state called Jocastavious Timpson, Javaris Hill, and Derrick Jones, men who had been convicted of charges ranging from armed robbery to criminal sexual conduct with a minor to kidnapping. App. 202, ll. 9-11; App. 213, ll. 19-23; App. 220, l. 4-12. Two of the men were transported from prison, and the third was on probation. App. 202, ll. 6-8; App. 220, ll. 4-6; App. 213, ll. 19-20. The three convicts were questioned about their prior statements that petitioner possessed a Kel-Tec. App. 206, ll. 15-17; App. 214, ll. 2-6; App. 223, ll. 10-13.

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[6] The solicitor thought Gilliard had committed nine to eleven armed robberies in Anderson County. App. 278, ll. 8-13.

Counsel never attempted to speak with Gilliard to find out what he would say, but claimed she decided not to call him as a witness because, "I don't know that we needed to take the risk of calling people that you don't know what they're going to say." App. 459, ll. 8-10.

At trial, counsel questioned Detective Gebing briefly about Sanchez Gilliard's confession. App. 276, l. 24 – 277, l. 13; App. 281, ll. 5-6. Counsel elicited only that Gilliard had confessed to robbing the BP with Derrick Jones and Travis Patterson. App. 276, l. 24 – 277, l. 13. Detective Gebing said he "believed" Gilliard was talking about the second time the BP was robbed, not the third, but agreed that Gilliard did not provide the date. App. 277, ll. 3-8; App. 281, ll. 5-7.

Counsel did not question Detective Gebing about the details of the robbery with which petitioner was on trial matching Sanchez Gilliard's description of the robbery that he said he and other men committed. Critically, counsel did not elicit Gilliard's statement that in the robbery he committed, three men—two with guns and one with a bag, were involved—the same scenario as petitioner's case.

On January 19, 2018, the PCR court issued an order of dismissal. App. 469 – 480. In its order, the PCR court found that trial counsel was not deficient because she conducted a "reasonable and proper investigation." App. 476. The order stated: "Counsel tried and investigated the case to the best of her ability by pursuing the most advantageous trial strategy, which involved deciding not to call Sanchez Gilliard as a witness at trial due to credibility concerns." App. 476.

The order of dismissal also stated that petitioner did not show that he was prejudiced by counsel's failure to interview Gilliard or call him as a witness. App. 476. Petitioner "failed to present any other witnesses, including Gilliard, at the evidentiary hearing and produced no

evidence of what Counsel might have uncovered had she conducted any additional investigation, although [petitioner] admitted a copy of the Gilliard statement into evidence." App. 476. The order stated that Sanchez Gilliard's "statement was not corroborated by other testimony and came from an unreliable convicted felon," and cited *Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995), for the proposition that petitioner failed to show prejudice because Gilliard was not called as a witness. App. 476.

According to Detective Gebing, Sanchez Gilliard was never charged with robbing the BP station on East Shockley Ferry Road because "there wasn't enough corroborative detail to specifically say which date, which time . . ." and because Gilliard was sentenced to incarceration for other armed robberies. App. 278, ll. 3-25.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR court erred in finding trial counsel provided effective representation where petitioner asked counsel to investigate Sanchez Gilliard because he confessed, in writing, to robbing the store with two other men, not petitioner, where counsel said she did not interview Sanchez Gilliard or call him as a witness because he was a "multiple convicted felon," since Gilliard's prior convictions for armed robbery only lend credibility to the theory that Gilliard committed the armed robbery rather than petitioner.

Petitioner, while detained, discovered the existence of the exculpatory statement given by Sanchez Gilliard, provided it to trial counsel, and requested that she investigate the matter—but trial counsel did not attempt to investigate Gilliard or to call him as a witness. 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). The Sixth Amendment to the United States Constitution guarantees an accused the right to present a defense. U.S. CONST. amend. VI; *Washington v. Texas*, 388 U.S. 14, 19 (1967).

"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 jury did not have the opportunity to hear Sanchez Gilliard's testimony or his written statement. Rather than interviewing and calling Gilliard as a witness, counsel briefly cross-examined Detective Gebing about Sanchez Gilliard's confession. App. 276, l. 24 – 277, l. 13; App. 281, ll. 5-6. Detective Gebing, an officer with fourteen years' experience in law

enforcement, told the jury that he did not believe Gilliard committed the robbery with which petitioner was charged. App. 277, ll. 3-8. Gilliard's confession stated he robbed the BP with Derrick Jones and Travis Patterson, but Detective Gebing said he had interviewed Derrick Jones and indicated that he did not believe Jones committed any of the BP robberies. App. 279, ll. 9-23.

This manner of eliciting information about Gilliard's statement effectively substituted Detective Gebing's evaluation of Sanchez Gilliard's credibility for the jury's.

Counsel's questioning of Detective Gebing regarding Gilliard's statement did not rectify her deficiency in failing to call Gilliard as a witness. Petitioner would have been better off with Sanchez Gilliard, a confessed armed robber, saying that he robbed the BP station and that petitioner was not with him.

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

In *Edwards v. State*, 392 S.C. at 453, 710 S.E.2d at 62, this Court found "trial counsel's decision to not interview and call as a witness [the defendant's] co-defendant was not deficient performance or prejudicial." Edwards' codefendant, Marshall, pleaded guilty to a murder with which the pair were jointly charged prior to Edwards' trial. *Id.* Marshall testified at Edwards' PCR hearing that he alone was the shooter, that Edwards was not involved, and that the shooting was an accident. *Id.* at 453-54, 710 S.E.2d at 62-63.

Edwards' trial counsel testified that he had observed Marshall's guilty plea, had gotten a copy of the transcript, and had decided not to call him because, "It wasn't an accident if he's pleading guilty to murder." *Id.* at 454-55, 710 S.E.2d at 63. Counsel also said he had serious doubts about the codefendant's ability to withstand cross-examination and observed that at his plea colloquy Marshall "was unable to give a consistent recitation of the facts." *Id.*

This Court in *Edwards* explained: "While our case law does provide that defense counsel must, at a minimum, interview potential witnesses . . ." criminal defense lawyers are not required to "interview *every* potential witness when they can articulate reasonable grounds not to." *Id.* at 457, 710 S.E.2d at 64-65 (emphasis in original). "So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient." *Id.* at 457, 710 S.E.2d at 65.

In upholding Edwards' conviction, this Court reasoned that although counsel did not interview Marshall, "he did observe Marshall at the plea hearing. Based on this observation, counsel concluded as a strategic matter that he was not going to call Marshall as a witness." *Id.* at 457-58, 710 S.E.2d at 65.

In *Stokes v. State*, 308 S.C. 546, 547-48, 419 S.E.2d 778, 778-79 (1992), this Court addressed whether counsel was ineffective for failing to call witnesses whose testimony could have supported Stokes' defense, and held that he was not where the PCR judge found the witnesses were "incredible and provided no information likely to have changed the trial's outcome." Stokes' counsel interviewed witnesses but found they lacked credibility, and said he only called those witnesses who were believable—this was held to be a legitimate strategy. *Id.*

Unlike the attorneys in *Edwards* and *Stokes*, petitioner's trial counsel never met with or observed the demeanor of Sanchez Gilliard to form an opinion of his credibility. Gilliard was in

a known location—he was incarcerated at the South Carolina Department of Corrections. Trial counsel said she did not subpoena Gilliard because she did not want to "take the risk of calling people that you don't know what they're going to say." App. 459, ll. 8-10. However, counsel never attempted to speak with Gilliard to find out what he would say. This circular reasoning does not excuse counsel's obligation to perform a reasonable investigation.

Trial counsel said she felt having last closing argument was more valuable than Sanchez Gilliard's testimony. App. 451, l. 25 – 452, l. 2. While this might be a valid trial strategy had counsel interviewed Gilliard or observed his demeanor, and determined whether his testimony was coherent, trial counsel did not do so. Counsel's choice of last closing over Gilliard's testimony was objectively unreasonable, since she had never interviewed or observed Gilliard, and he confessed to robbing the store with two other men, not petitioner.

In *Jackson v. State*, 329 S.C. 345, 350, 495 S.E.2d 768, 770 (1998), Jackson alleged his counsel was deficient for failing to call his codefendant, Stanford, as a witness, since his statement supported Jackson's version of events. However, Stanford's statement was presented at trial through the testimony of a police officer. *Id.* Jackson's counsel had contacted Stanford's counsel prior to trial and was told any testimony given by him would be the same as his statement to police. *Id.* This Court found counsel was not deficient for failing to call Stanford as a witness and explained that Jackson "failed to show Stanford's testimony could have provided additional information to what was admitted through the police officer's testimony to assist in [Jackson's] defense." *Id.* at 351, 495 S.E.2d at 771. "[T]his same information was presented through the testimony of the police officer who took the statement." *Id.*

In *Jackson*, the "same information [as in the codefendant's statement] was presented through the testimony of the police officer who took the statement," unlike the case at hand.

Although counsel did briefly question Detective Gebing about Gilliard's confession, Gebing's testimony did not "present the same information" that was in Gilliard's confession. Counsel did not elicit that Gilliard said that in the robbery he committed, three men—two with guns and one with a bag—were involved, the same scenario as petitioner's case.

"[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.* (emphasis added).

Here, petitioner discovered and supplied his trial counsel with information that Sanchez Gilliard confessed to robbing the BP on East Shockley Ferry Road. Gilliard named the two other men who helped him rob the store—neither of those men were petitioner. App. 466. Petitioner asked counsel to investigate this information but she did not. App. 435, ll. 3-12. Although Gilliard did not provide a date for the robbery, he said he had a bag and got the money while the other two men had guns. App. 466. This is the same factual scenario as the robbery with which petitioner was charged—video of the robbery with which petitioner is charged shows that three men robbed the store, and one had a bag for the money while the other two had guns. App. 233, ll. 14-22.

Counsel's decision not to investigate Sanchez Gilliard's statement was unreasonable. Trial counsel said Gilliard was a "multiple convicted felon. He's not somebody you want to put up in a case." App. 451, ll. 2-4. However, Gilliard's history of armed robberies does not impair his credibility when he is admitting to the commission of another armed robbery. Sanchez

Gilliard's many convictions for armed robbery only lend credibility to the theory that he, not petitioner, committed the armed robbery at issue.

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.

Given that petitioner provided his counsel with another man's statement that he, rather than petitioner, robbed the BP station, and petitioner asked his counsel to investigate the matter, counsel's failure to investigate was unreasonable and deficient. *Strickland*, 466 U.S. at 691.

2.

The PCR court erred in finding petitioner failed to prove prejudice where Sanchez Gilliard's written confession to law enforcement was properly admitted at the PCR hearing, since the proper introduction of such a writing is sufficient evidence to meet a PCR applicant's burden of proof under *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998).

Petitioner introduced the statement of Sanchez Gilliard in a manner consistent with the rules of evidence at his PCR hearing. "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing **or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence.**" *Glover v. State*, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995) (emphasis added).

In *Glover*, the defendant "argued trial counsel was ineffective for failing to contact several witnesses who could have testified [Glover] was in Florida when the crimes were committed." *Id.* at 497, 458 S.E.2d at 539. Glover called two witnesses at the PCR hearing—one witness did not remember anything, and the other witness's placement of Glover in Florida still left him with time to drive back to South Carolina and commit the crime. *Id.* at 498, 458 S.E.2d at 540.

This Court found that the failure of Glover's trial counsel to call those two witnesses "did not result in prejudice to [Glover] as neither witness's PCR testimony established an alibi defense," and that "because the other witnesses [Glover] claimed could have provided an alibi defense did not testify at the PCR hearing, [Glover] could not establish any prejudice from counsel's failure to contact these witnesses." *Id.* at 498, 458 S.E.2d at 540.

This Court explained, "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence." *Id.* "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Id.* at 499, 458 S.E.2d at 540. This Court has held that "pure conjecture" is not enough to establish prejudice. *Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993).

Petitioner's claim in the case at hand is similar to that of the PCR applicant in *Pauling v. State*, 331 S.C. 606, 607, 503 S.E.2d 468, 469 (1998), who was tried for burglary and criminal sexual conduct. This Court found Pauling's counsel was ineffective for failing to call as a defense witness a nurse whose notes indicated that the victim said her vagina was not penetrated, and explained that by introducing the nurse's notes at the PCR hearing, Pauling met his burden of proof under *Glover*, although the nurse did not testify. *Id.* at 611, 503 S.E.2d at 471.

At Pauling's trial, a doctor testified she performed a rape protocol examination on the victim, and Pauling's counsel tried to cross-examine the doctor by referring to the notes of a triage nurse. *Id.* at 608, 503 S.E.2d at 470. Pauling introduced the triage nurse's notes at his PCR hearing, which stated: "pt states pt did not penetrate the vagina," and argued his counsel "was ineffective because he was not prepared to present the triage nurse as a defense witness." *Id.* at 608-09, 503 S.E.2d at 470.

The state argued Pauling failed to meet his burden of proof because the nurse did not testify at his PCR hearing. *Id.* at 610, 503 S.E.2d at 471. This Court clarified that **where a PCR applicant "presented evidence as to the nature of the nurse's testimony by introducing her**

triage notes[,] [t]his evidence is sufficient under *Glover*." *Id.* at 611, 503 S.E.2d at 471 (emphasis added). "The State misconstrues *Glover*." *Id.* at 610, 503 S.E.2d at 471.

In *Jackson v. State*, 329 S.C. 345, 351, 495 S.E.2d 768, 771 (1998), this Court again explained that a PCR applicant need not produce a witness if the witness' testimony is otherwise properly introduced. "Citing *Glover,* the State claims respondent *must produce the witness* in order to show prejudice. The State is misreading the law. Under our case law, the applicant must produce the witness at the PCR hearing *or* otherwise introduce the witness' testimony in a manner consistent with the rules of evidence." *Id.* (emphasis in original).

Petitioner's introduction of Sanchez Gilliard's statement satisfied *Pauling*'s requirement that a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The PCR court found the statement properly admitted into evidence and the state did not object to its admission. App. 438, l. 10 – 439, l. 1. The state agreed that Gilliard's statement had been authenticated. The Assistant Attorney General said, "Authenticity was laid last week." App. 439, ll. 2-4.

Petitioner respectfully asserts he has shown prejudice. Although Sanchez Gilliard did not testify, petitioner did not engage in the type of "mere speculation" or "pure conjecture" that nullified prejudice claims in *Clark* and *Glover*—rather, he introduced Gilliard's statement in a manner consistent with the rules of evidence.

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.

"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).

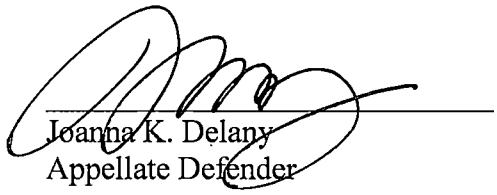
In his confession, Sanchez Gilliard says he and two other men—not petitioner—robbed the BP on East Shockley Ferry Road, and that he had a bag and got the money while the other two men had guns. App. 466. This matches the description of the events portrayed on the video of the robbery with which petitioner is charged. App. 233, ll. 14-22.

Had counsel subpoenaed Sanchez Gilliard to testify, and he testified consistently with his confession, his testimony would be that he robbed the BP with two other men and not petitioner on an unknown date. If Gilliard, a man who was convicted of so many armed robberies that Detective Gebing "lost count," did not testify consistently with his confession, the confession could have been used for impeachment. In either scenario, even if Gilliard was not clear on the date, a viable interpretation of his confession was that Gilliard's robbery was the robbery with which petitioner was charged.

Given the circumstantial nature of the case and the length of the jury's deliberation, Gilliard's testimony would have made a difference in the trial because it would have cast doubt on petitioner's identity as the perpetrator. Petitioner respectfully submits that had trial counsel subpoenaed Sanchez Gilliard, there is a reasonable probability the result of the trial would have been different.

CONCLUSION

Based on the foregoing arguments, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on these issues.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of October, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this 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."

Joanna K. Delany
Appellate Defender

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ATTORNEY FOR PETITIONER

This 3rd day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable Carmen T. Mullen, Circuit Court Judge

TERRANCE J. GOSS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Kelly Oppenheimer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Terrance J. Goss, #340914, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 3rd day of October, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of October, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028