STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Anderson County

Carmen T. Mullen, Circuit Court Judge

TERRANCE J. GOSS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000127

BRIEF OF PETITIONER

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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 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 from 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. Petitioner was convicted as indicted and he 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. On January 19, 2018, the PCR court issued an order of dismissal. App. 469 – 480. On March 15, 2021, this Court granted the petition for a writ of certiorari.

This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). "We review questions of law de novo, with no deference to trial courts." *Id*. at 180-81, 810 S.E.2d at 839-40 (citing *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527; *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

STATEMENT OF FACTS

On February 5, 2008, three masked men robbed the BP gas station on East Shockley Ferry Road in Anderson of nine hundred and twenty-seven dollars 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.

Video footage 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 footage 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, l. 2 – 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.

As seen, the robbery occurred in Anderson on February 5, 2008. 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. 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," Ronoke said. 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 claimed 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 one Jared Stevenson. 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 shell casings found at the BP. 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 telephone 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 video footage 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. Petitioner was sentenced to concurrent terms of imprisonment of fifteen years, five years, and five years, respectively. App. 485 – 487.

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1 The State introduced a recorded telephone 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 said Petitioner had reason to be afraid of being labeled a snitch, as illustrated by the fact that one of the witnesses in this case "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 tried 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.

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.

Petitioner filed an application for post-conviction relief (PCR) and a hearing was held before the Honorable Carmen Mullen on December 1, 2014. App. 401 – 413; 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 and gave to trial counsel prior to trial. App. 466; App. 38, ll. 20-23. In the written confession, Gilliard admitted to robbing the BP and he named his cohorts, who did not include Petitioner. App. 466.

Gilliard's statement was mentioned during pretrial motions. Trial counsel said a "statement of Sanchez G[i]lliard was given March 17, 2009, in which he claims that he, Derek J[ones] and Travis Patterson 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 day the robbery occurred, and the solicitor argued Gilliard was talking about one of the other BP robberies. App. 39, ll. 7-14. 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. In Gilliard's 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, Gilliard could not have been confessing to the first robbery, since only two perpetrators were involved there. Gilliard did not testify, and his confession was not introduced to the jury.

Petitioner testified that trial counsel was ineffective in failing to investigate and subpoena 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 with which Petitioner was charged, and that he gave the statement to trial counsel. App. 432, ll. 12-18. Trial 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 police was offered 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 admitted the confession into evidence 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."[4] App. 439, ll. 2-4.

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. Trial counsel also stated that Gilliard was a "multiple convicted felon. He's not somebody you want to put up in a case." App. 451, ll. 2-4. At trial, 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 "lost count." App. 278, ll. 5-25. The solicitor thought Gilliard had committed nine to eleven armed robberies in Anderson County. App. 278, ll. 8-13.

PCR counsel asked trial counsel if she made any effort *at all* to contact or investigate Gilliard, and trial 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.

[4] It is unclear to what the Assistant Attorney General was referring. Undersigned counsel spoke with PCR counsel Whisenhunt, who confirmed there was only one hearing held in this case—the December 1, 2014 PCR hearing.

App. 458, ll. 11-15. 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. However, trial 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 said that Gilliard did not provide the date. App. 277, ll. 3-8; App. 281, ll. 5-7.

Trial counsel did not confront Detective Gebing with the fact that the details of the robbery in this case matched Sanchez Gilliard's description of the robbery that he said he and two other men committed. Critically, counsel did not elicit Gilliard's statement that in the robbery Gilliard committed, three men—two with guns and one with a bag—were involved, the same scenario as this 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." 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. 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 it 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. App. 278, ll. 3-25.

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.

While detained pretrial, Petitioner discovered the existence of the exculpatory statement given by Sanchez Gilliard. Petitioner 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. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *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).

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 Gilliard's confession. App. 276, l. 24 – 277, l. 13; App. 281, ll. 5-6. However, her questioning only made the experienced police officer double down and continue to defend his position. Detective Gebing, who had fourteen years' experience in law enforcement, told the jury that he did not believe Gilliard committed the robbery in this case. 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 confession effectively substituted Detective Gebing's evaluation of Sanchez Gilliard's credibility for the jury's. However, the assessment of witness credibility is within the exclusive province of the jury. *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977).

Trial 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 convicted criminal, saying that he robbed the BP station and that Petitioner was not with him. "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*).

In *Edwards*, 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 accused's] co-defendant was not deficient performance or prejudicial." There, 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. Edwards' counsel also said he had serious doubts about Marshall'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*.

The South Carolina Supreme 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, the Supreme 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), the South Carolina Supreme Court addressed whether counsel was ineffective for failing to call witnesses whose testimony could have supported Stokes' defense, and it held that counsel was not ineffective 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 legitimate strategy. *Id*.

Unlike the attorneys in *Edwards* and *Stokes*, in this case, trial counsel never spoke with or observed the demeanor of Sanchez Gilliard to form an opinion of his credibility. Gilliard was in a known location—the South Carolina Department of Corrections—where trial counsel could have easily scheduled an appointment or a telephone call to speak with him. Trial counsel

claimed 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, trial 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.

"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). Here, although counsel claimed she wanted last closing argument, she did not identify any reason why her argument would be more effective if made during final argument than if followed by a reply.

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*, 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 since he confessed to robbing the store with two other men, not Petitioner. Petitioner had the Sixth Amendment right to have his counsel make an informed strategic decision on whether to present Gilliard as a defense witness.

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 Stanford's 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*. The Supreme 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*.

That was not the case here. 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 in this 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. at 691. "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, 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 in this case—video footage of this robbery showed 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 did not impair his credibility for purposes of 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 here.

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. 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, an applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

An accused's offer of evidence concerning a third party's commission of the crime "must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." *State v. Gregory*, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (internal quotations, citation and alteration omitted) (cited with approval in *Holmes v. South Carolina*, 547 U.S. 319, 328 (2006)). *Id*. "[B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as

tends clearly to point out such other person as the guilty party." *Id*. (internal quotations and citation omitted). Here, Sanchez Gilliard's confession that he and two other men, not Petitioner, robbed the BP on East Shockley Ferry Rd., under the same circumstances as those alleged in this case, would have been admissible third party guilt evidence, since it raised a reasonable inference of Petitioner's innocence. *Gregory*, 198 S.C.at 104, 16 S.E.2d at 534.

As seen, the jury deliberated for over four hours. The solicitor admitted the case against Petitioner was circumstantial. Petitioner provided trial counsel with Gilliard's statement that Gilliard robbed the BP station under the same circumstances as those alleged in this case while Gilliard was assisted by two other men who were not Petitioner. Petitioner asked his counsel to investigate the matter. Counsel's failure to investigate was unreasonable and deficient. Petitioner was prejudiced because had counsel presented evidence to the jury that Gilliard admitted to robbing the BP with two other men, not Petitioner, where two of the men had guns and one man had a bag, there is a reasonable probability the outcome of the trial could have been different. *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 properly introduced the statement of Sanchez Gilliard at his PCR hearing. While Gilliard would likely have to testify in person at trial, the State conceded the confession's admissibility for purposes of the PCR hearing when it did not object to the document's admission. Petitioner was prejudiced because Gilliard's confession casts reasonable doubt on Petitioner's guilt.

"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). 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.

The South Carolina Supreme 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 determined 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. The Supreme 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. The Supreme 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 this case is like 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. The Supreme 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. The Supreme 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. "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), the Supreme 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 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 admitted the confession 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. App. 439, ll. 2-4.

Petitioner respectfully asserts he has shown prejudice. Although Sanchez Gilliard did not testify, Petitioner did not engage in "mere speculation" or "pure conjecture" such as nullified prejudice claims in *Clark* and *Glover, supra*—rather, he introduced a substantive document for consideration by the PCR judge. S.C. Code Ann. § 17-27-80 provides, in relevant part, that the PCR court "may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." Here, Petitioner admitted such "other evidence" without objection.

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 there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

In his confession, Sanchez Gilliard admitted he and two other men (not Petitioner) robbed the BP on East Shockley Ferry Road and Gilliard said that he had a bag and got the money while the other two men had guns. "Ace and Coot ran straight in and they had guns. I just had a bag and got the money." App. 466. This statement matches the description of the events portrayed on the video footage of the robbery in this case. The video footage showed that two of the robbers had guns and one had a backpack. App. 64, ll. 19-22. App. 233, ll. 14-23. Had counsel subpoenaed Sanchez Gilliard to testify, and had 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, Gilliard's confession casts reasonable doubt on Petitioner's guilt.

The case against Petitioner was circumstantial and the jury's deliberations were lengthy. Petitioner respectfully submits that had trial counsel investigated and subpoenaed Sanchez Gilliard, so that the details of his confession were fully put before the jury, there is a reasonable probability the result of the trial would have been different. *Strickland v. Washington,* 466 U.S. at 694.

CONCLUSION

Based on the foregoing arguments, this Court should reverse the decision of the PCR court and grant Petitioner a new trial.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of April, 2021.