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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Lexington County
The Honorable J. Mark Hayes, Circuit Court Judge

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BOYD RASHAEEN EVANS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2021-000786

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# BRIEF OF RESPONDENT

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## PETITIONER'S QUESTIONS PRESENTED

I. Did the Court of Appeals violate the standard of review by failing to defer to the PCR court's findings of fact and substituting its own view of the facts in denying Petitioner relief from his convictions and sentences?

II. Did trial counsel's deficient performance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution prejudice Petitioner where trial counsel failed to ask the alibi witness the critical question to establish an alibi – the time with which the alibi witness was with Petitioner on the date in question?

## STATEMENT OF THE CASE

On November 26, 2007, a Lexington County Grand Jury returned indictments against Boyd Rashaeen Evans (hereinafter "Petitioner") 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., p. 729-736). The charge of underage possession of a pistol was *nolle prossed.* (PCR App. p. 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 (hereinafter Mr. Miller) and the State was represented by assistant attorney generals Robert Maldonado and Joshua Underwood. (PCR App. p. 1). During trial, one count of kidnapping was dismissed by directed verdict for each defendant. (PCR App. p. 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. p. 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 firearm during a violent crime, all to be served concurrently. (PCR App. p. 623, lines 1-17).

Petitioner appealed his conviction. Ms. Katherine Hudgins filed an *Anders* brief on Petitioner's behalf on June 14, 2011. (PCR App. p. 625). Petitioner 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. p. 628). The Court of Appeals subsequently dismissed the *Anders* appeal on May 16, 2012. (PCR App. p. 638).

Petitioner then sought post-conviction relief ("PCR") by application filed February 20, 2013. (PCR App. p. 640). The State responded with its filed Return on April 28, 2015. (PCR App. p. 647) On September 28, 2015, PCR counsel for Petitioner, Kristy G. Goldberg, filed an Amended PCR Application. (PCR App. p. 653). An evidentiary hearing was held before the Honorable J. Mark Hayes, wherein testimony was provided by Petitioner, alleged alibi witness Yacia Montgomery, and trial counsel David Miller. (PCR App. pp. 655-656). Alleged alibi witness, Cherise Evans, did not appear at the evidentiary hearing and was not subpoenaed to do so by PCR counsel. Judge Hayes took the matter under advisement and later issued an Order of Dismissal on May 25, 2016. (PCR App. p. 719).

Petitioner filed a notice of appeal and perfected his PCR appeal by filing a Petition for Writ of Certiorari with this Court on January 20, 2017. Petitioner sought certiorari for two questions:

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?

Pursuant to Rule 243(l), this Court transferred the appeal to the Court of Appeals on October 30, 2017. The South Carolina Court of Appeals denied certiorari as to question two, granted certiorari as to question one, and ordered briefing from the parties by Order dated September 24, 2018. Petitioner filed his Brief of Petitioner on October 16, 2018, and Respondent filed its Brief of Respondent on February 19, 2019. The Court of Appeals considered the matter and issued an

unpublished per curium opinion affirming the PCR court's denial of relief on March 31, 2021. (Supp. App. p. 1); *Evans v. State*, No. 2016-001287, 2021 WL 1227794 (S.C. Ct. App. Mar. 31, 2021). Petitioner filed a Petition for Rehearing on April 15, 2021. The South Carolina Court of Appeals denied the Petition for Rehearing on June 25, 2021.

Petitioner next sought certiorari from this Court on July 26, 2021. The State filed its Return to the Petition on September 7, 2021. This Court granted certiorari for the appeal on November 10, 2021, and ordered briefing from the parties. Petitioner filed his Brief on December 15, 2021. This Brief of Respondent follows.

## STATEMENT OF FACTS

On July 26, 2007, at approximately 12:30am, four African-American individuals robbed the Pitt Stop located at 125 Rolling Meadows 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. p. 118, line 17 through p. 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).

Following the robbery the police investigated and sought the arrests of Lywone Capers and Petitioner as two of the four suspects to the crime. The two individuals were extradited, charged, and jointly tried. The pertinent witnesses at Petitioner's trial testified as follows:

*Witness Michael Rhaney*

Michael Rhaney testified that he lives in a mobile park home called Rolling Meadows with his fiancé, Glynnessa Evans. Their home is approximately one mile from the scene of the crime: the Pitt Stop gas station where Mr. Rhaney worked. (PCR App. p. 254, lines 18-20; p. 258, lines 3-9; 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". He recalled the incident because Petitioner almost hit him by running a stop sign. (PCR App. p. 261, lines 1-24). Mr. Rhaney also saw the vehicle at his home during Petitioner's visit; he was able to recall the North Carolina state tags and remembered the tag number of "WPD 2995" for the vehicle. (PCR App. p. 289, lines 12-14; p. 274, lines 1-2; p. 15-22). 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 Petitioner driving earlier that afternoon. (PCR App. p. 262, lines 5-11; p. 263, lines 17-19). Upon examination of State's Exhibits 9-33, Mr. Rhaney confirmed that he recognized Petitioner in the robbery photographs by his skin tone, build, and the matching clothing worn by Petitioner that day. (PCR App. p. 258, lines 17-25; p. 260; p. 264, line 9 through p. 265, line 7).

*Witness Rosa Lugo*

Ms. Rosa Lugo testified that she was the manager of the Rolling Meadows mobile home park. She testified that in July of 2005, Petitioner lived in Rolling Meadows. (PCR App. p. 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. p. 296, lines 15-22; p. 297, lines 10-11). After this incident she testified that the same Ford Explorer nearly ran into her as it was leaving; this prompted her to take

down the license plate number. (PCR App. p. 297, lines 13-18). She wrote down the license plate number "WU 2895", "Explorer", and "North Carolina" and provided the note to a Lexington County deputy soon after. (PCR App. p. 298, line 1-22).

*Witness Glynnessa Evans*

Petitioner's sister, 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. p. 305, lines 19-21; p. 306, lines 16-19). Ms. Glynnessa Evans testified that on July 25, 2007, Petitioner, along with her cousins co-defendant Lywone Capers, Ton, and John, visited her home unexpectedly. (PCR. App. p. 308, lines 1-21). She testified that the group was driving a blue and gold Ford Explorer. (PCR App. p. 309, lines 10-12). On the day of the group's unexpected visit, Ms. Glynnessa Evans recalled that there was an incident wherein management responded to complaints of loud music. She spoke directly with management about the issue and was informed by management that Petitioner and the others would be forced to leave. (PCR App. p. 309 line 23 through p. 310, line 5).

She testified that her brother was wearing a black tank-top that day, and she recognized him and the other individuals from the Pitt Stop surveillance video by their clothing. (PCR App. p. 388, lines 12-16; p. 389, lines 12-16). She was also able to recognize the scar of the perpetrator in the States Exhibits 30-32 as matching Petitioner's scar.[1] (PCR App. p. 322, line 13 through p.

[1] The State also introduce into evidence photographs of Petitioner's scar taken by Detective Prestigacomo. (PCR App. p. 413, lines 2-25; p. 434, lines 6-11); Exhibits 40-50). In addition to the photographic and video evidence, Petitioner Evans' scar was shown in person to the jury. (PCR App. p. 437, line 2-24).

323, line 3). She further recognized Petitioner from the video based on his voice, his build, and his cut. (PCR App., p. 323, line 21 through p. 327, line 1).

*Witness Detective Prestigacomo*

Detective Prestigacomo testified that during his interview with Pitt Stop employees, Mr. Michael Rhaney requested to speak with him privately. Mr. Rhaney informed him that the robbery had been committed by his fiancé's cousins and initially named co-defendant Capers, Petitioner, and John. (PCR App. p. 402, line 24 through p. 403, line 11). Detective Prestigacomo showed 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. p. 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. p. 406, lines 10-15). He confirmed 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. p. 406, line 21-25). According to Detective Prestigacomo, Glynnessa Evans identified Petitioner in the video based upon a photo of the perpetrator's scar, and recognized the skin tone, build, and clothing of the perpetrators. (PCR App. p. 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. p. 408, lines 3-9). Upon questioning Mrs. Lugo, Detective Prestigacomo was informed that she saw Petitioner driving the vehicle that almost hit her and she identified Petitioner when shown a picture of him. (PCR App. p. 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. p. 408, lines 1-14). The *provided* tag numbers were not on file with the DMV. (PCR App. p. 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.[2] (PCR App., p. 408, line 1 through p. 409, line 1).

*Witness Cherise Evans*

Ms. Cherise Evans testified that she worked at Church's Chicken and Serenity Nursing in Charlotte in 2007. (PCR App. p. 534, lines 3-5). She testified that she is Petitioner's sister and lived with him in Charlotte during 2007. (PCR App. p. 533, lines 13-25). At that time she claimed that Petitioner Boyd and her mother would transport her to and from work, but also wavered on whether or not her mom drives at all due to physical limitations. (PCR App. p. 534, lines 8-15; p. 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. Cherise Evans responded: "Yes.", and that her brother, Petitioner, picked her up. (PCR App. p. 534, lines 16-23). She further testified that to her knowledge Petitioner had not left Charlotte over those dates. (PCR App. p. 534, line 24 through p. 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).

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[2] Mr. Miller testified later that "there was issues with a gentleman, Frederick Neal, who knows [Petitioner] as Black, he said he wasn't gonna testify." (PCR App., p. 696, lines 6-8).

*PCR Evidentiary Hearing*

During the PCR evidentiary hearing, Cherise Evans was expected to appear and testify. However, she failed to appear at the hearing for her own brother, and Petitioner's attorney had not subpoenaed her to testify. (PCR App. p. 660, lines 3-4; p. 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. p. 716, line 19 through p. 717, line 4).

Petitioner 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. p. 669, lines 20-25; p. 671, line 14 through p. 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. p. 673, lines 22-23).

Trial Counsel David Miller testified at the evidentiary hearing and testified that Petitioner's explanation to him was that he was in Charlotte the entire day. While Cherise testified that Petitioner, to her knowledge, had not left Charlotte, Mr. Miller testified on multiple occasions that he could not find any witnesses who could corroborate Petitioner's alibi. (PCR App., p. 692, line 21 through p. 693, line 11; p. 705, lines 15-16). Mr. Miller agreed that Ms. Cherise Evans was called as an alibi witness, and that she testified at trial Petitioner took her to work and picked her up. However, Mr. Miller testified that the details of such "[were] not made clear" to him, at which point he referenced the note in question. (PCR App., p. 702, line 14 through p. 703, line 4). Mr. Miller further testified:

> We either couldn't track down the people that he talked about and we did make obviously a valiant effort to do it. You know, if we could have done more, then it's my fault, but I don't know how we could have done more.
>
> . . .

> Let me just finish this way. We went through Cherise, we went through and we talked obviously with all of the family. Cherise was the only one who could provide him an alibi *to the extent that he took her to work and picked her up from work at the Church's Chicken, so that will complete my answer as to that.*

(PCR App., p. 696, lines 8-20)(emphasis added).

On cross-examination Ms. Goldberg reviewed the trial testimony elicited from Cherise Evans, and Mr. Miller conceded that Cherise was called as an alibi witness, but he did not ask her what time she was picked up from work. He instead relied upon her testimony that, to her knowledge, Petitioner had not left Charlotte that day. (PCR App. p. 706, line 7 through p. 707, line 20). At the end of his cross-examination, Mr. Miller returned to reference his handwritten note from the file. In so doing, he testified "I have a note right here just going back through my notes that were personal *that I made when I interviewed him* that – I have a note Cherise, Church's Chicken, 21st through 28th till close, Boyd picked up at one". (PCR App., p. 709, lines 3-6)(emphasis added).

## STANDARD OF REVIEW

"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).

Further, "[t]he standard for judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984); *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. *Strickland*, 466 U.S. at 669, 104 S. Ct. at 2055. Moreover, the Sixth Amendment does not require "'perfect advocacy,'" just "'reasonable competence'" given the circumstances at the time of trial. *Maryland v. Kulbicki*, 577 U.S. 1, 5, 136 S. Ct. 2, 5 (2015) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam)). "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 standard of review in PCR cases is dependent upon the specific issue presented. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). An appellate court "defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* Questions of law are reviewed *de novo*, with no deference to the trial court. *Id.*

## ARGUMENT

### I. The Court of Appeals did not violate its standard of review for a PCR appeal. There is no evidence within the record from Cherise Evans supporting the alleged 1AM pick-up note, and as a matter of law, Petitioner cannot satisfy his burden of proof for prejudice under *Bannister* and *Glover*.

As to matters of both law and fact, the Court of Appeals applied the correct standard of review in this matter and correctly affirmed the PCR Court's denial of relief. The record clearly sets forth that the only purported evidence presented to the PCR court concerning the time in which Cherise Evans was picked up by Petitioner was the handwritten note *created from an interview with Petitioner*, and that note is not specific as to the date and time in question for July 25th/26th. As such, there is no evidence demonstrating what Cherise Evans testimony on the matter might have been because Petitioner failed to secure her testimony at the evidentiary hearing. In the complete absence of such evidence, the Court of Appeals was correct to affirm the denial of relief. *Bannister* and *Glover* control, and Petitioner, as a matter of law, cannot demonstrate prejudice. The ruling of the Court of Appeals should therefore be affirmed.

"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, as a matter of law. *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)). This Court has reiterated this rule specific to the issue of alibi evidence. *Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 279–80 (2019). Quite simply, Petitioner has failed to present the testimony of Cherise Evans, in person or otherwise admitted pursuant to the rules of evidence, as to what time she was supposedly picked up by Petitioner. There is *no evidence* establishing this critical issue. The law is well established for this type of issue, and under that law, a close examination of the record in this case leaves no other conclusion than the one reached by the Court of Appeals.

**The Contents of the Record**

First, it is Petitioner's burden to present the alleged alibi evidence believed to have been deficiently excluded by counsel. Petitioner failed to do so, and any inadequacy in the record must be laid at the feet of Petitioner as a result. Cherise Evans, Petitioner's own sister, did not attend the evidentiary hearing, did not give advance warning that she could not attend, and was not under subpoena to attend. (PCR App., p. 659, lines 4-22). As the critical issue in this case is determining what alibi testimony or evidence Cherise Evans would have provided at trial had counsel questioned her further, her failure to appear and testify is fatal to Petitioner's claim because such testimony is not memorialized in any other admissible evidence.

Petitioner wants this court to rely upon Mr. Miller's handwritten note as if it were evidence that sets forth what *Cherise Evans* would have testified to. However, Mr. Miller explicitly states "I have a note right here just going back through my notes that were personal that I made *when I interviewed him that* -- I have a note Cherise, Church's Chicken, 21st through 28th till close, Boyd picked up at one." (PCR App., p. 709, lines 3-6) (emphasis added). This testimony demonstrates that the note was created from an interview with Petitioner, not from an interview with Cherise Evans. It cannot be reasonably or even liberally construed as a note taken from an interview with Cherise, *who is a woman.* In addition, Mr. Miller's repeatedly testified that he had no witness who could corroborate Petitioner's alibi. (PCR App., p. 693, lines 1-10; p. 705, lines 15-16; p. 710, lines 5-6). Such a statement could not be squarely given by Mr. Miller if his interview with Cherise Evans revealed a complete alibi in the form of Petitioner picking Cherise up at 1am on the night of the robbery. Petitioner claims that this argument is "disingenuous", but it is nothing more than reading the clear text of the record. And, the clear text of the record does not support Petitioner's argument that he presented evidence *from Cherise Evans* on the topic in dispute. It is no fault of the State that Petitioner failed to procure the attendance of the one absolutely essential witness to his case. [3]

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[3] Petitioner also attempts to suggest the State conceded to the interpretation of the evidence that Petitioner now wishes this Court to adopt. However, Petitioner's intermittent quotations from Mr. Schmeckpeper's arguments is not a fair representation of what was said. The totality of the Mr. Schmeckpeper's argument against keeping the record open reads as follows:

> Your Honor, I would object to holding the record open at this point. First off, I mean all the witnesses are here today. It doesn't mean that – *I haven't heard what Ms. Evans is gonna say*, I don't know if we're gonna need any additional witnesses to rebut what she's gonna say. In addition, Ms. Evans testified at trial. *From what I understand, Ms. Goldberg has an exhibit that she's gonna introduce*

The defects of Petitioner's arguments are not limited strictly to Mr. Miller's testimony demonstrating that his note did not originate from an interview with Cherise Evans. The content of the note itself is problematic in numerous ways and PCR counsel's questioning of Mr. Miller failed to prove the pivotal issue that Mr. Miller knew Cherise had a complete alibi to provide.

Regarding the deficiencies of the note itself, the content of the note is contradictive to the sworn testimony offered by Cherise Evans at trial. The note, vague as it is, suggests that Cherise worked at Church's Chicken every day between July 21st and July 28th. However, Cherise testified at trial that she specifically did not work on July 23rd and July 24th so that she could celebrate a family birthday. She even relied upon this testimony as the basis for why she could supposedly remember the date in question. (PCR App., p. 539, lines 1-6). Petitioner is urging this court to presume this note constitutes evidence from Cherise, but even this simple note is contradictory to her trial testimony in a substantial way.

Secondly, the note suggests that Cherise worked "through the 28th till close", but that does not articulate whether she worked *every day* until close or if she worked the night of July 25th until close. Thus, there is nothing to demonstrate definitely that she was getting off work in the early morning hours of July 26th when the robbery took place. Lastly, there is nothing to demonstrate

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> *that pretty much says what Ms. Evans is gonna testify to.* I don't think it's necessary to have her here. I understand this is Mr. Evans' only shot though, but we would object to any – holding the record open or any continuance.

(PCR App., p. 660, 14-25)(emphasis added). Mr. Schmeckpeper's argument was simply articulating what he had come to learn of Ms. Goldberg's intentions for the hearing. He did not concede the disputed issue of the case. Moreover, this argument comes ***before*** Mr. Miller has testified about the contents and origin of his note.

definitively that "Boyd picked up at one" refers to 1am, as opposed to 1pm. All of these issues are speculations that Petitioner wants this Court to adopt without actual evidence from Cherise on the topic.

Despite PCR counsel's questioning, the only facts to be taken from the record are that 1) PCR counsel testified that he did not find an alibi witness for Petitioner, 2) PCR counsel characterized Cherise Evans as only providing Petitioner an alibi "to the extent" he dropped her off and picked her up from work (not a perfect alibi), and 3) nothing in the record demonstrates that Cherise Evans told Mr. Miller anything more specific that would support Petitioner's claim. At times, Mr. Miller appeared hesitant to accede to the line of questioning from PCR counsel and even defensive of his particular phrasing of questions at trial, suggesting that his questioning of Cherise at trial was not deficient, but strategically purposeful. (PCR App., p. 707, lines 11-15; p. 707, line 21 through p. 708, line 2). Mr. Miller's PCR testimony does not suggest that he merely forgot to ask Cherise the pivotal question that would create a perfect alibi for his client, it suggests that he specifically avoided asking that question in favor of a vaguery.

**Review of the PCR Court's Holding**

A PCR court's *findings of fact* are entitled to deference, but only when there is evidence within the record to support them. The PCR court took the note in question at face value, and either failed to hear or failed to consider the testimony of how the note was created. In doing so, it concluded that "Applicant offered evidence that Ms. Evans would have said Applicant was picking her up from work at roughly the same time the armed robbery occurred." The PCR court thereby concluded that counsel was deficient for not questioning Cherise Evans further on when she was picked up from work. Relevant to Petitioner's first argument concerning deference to findings of

fact, the Court of Appeals noted that the issue before it was not whether counsel was deficient, but whether Petitioner satisfied his burden to demonstrate prejudice and present actual evidence of the witness in question so as render the content of Cherise Evans' further desired testimony more than mere speculation. In addressing this question the Court of Appeals reached one factual finding that did not give deference to the PCR court. Therein, the court stated:

> Trial counsel's notes from an interview with Petitioner indicate Petitioner picked up [Cherise Evans] from work in Charlotte around 1:00. He inferred that meant 1:00 PM but stated, "She was working at Church's, the 21st through the 28th, until close, so maybe that's one in the morning."
>
> . . .
>
> The only evidence presented at the PCR hearing to provide the substance of [Cherise Evans'] testimony – other than the trial transcript – was Petitioner's own testimony and trial counsel's note, which came from an interview trial counsel had with Petitioner, not [Cherise Evans].

(Supp. App. p. 4-5)

This holding can be interpreted as the Court of Appeals rightly denying deference to the PCR court for an unfounded factual finding. As the record demonstrates that the note was not the result of an interview with Cherise, it leaves the entire record lacking evidence from Cherise on the issue. However, it is also indicative of the Court of Appeals exercising *de novo* application of *Bannister v. State* – a legal precedent that the PCR court failed to consider. This is especially so given that the PCR court did not make any explicit finding of fact as to the origin of Mr. Miller's file note. The PCR court's holding was limited to: "Applicant offered evidence that Ms. Evans would have said Applicant was picking her up from work at roughly the same time the armed robbery occurred. This court is convinced that trial counsel had information (the time the alibi witness got off of work) in his file that would have strengthened the alibi defense." As such, the

Court of Appeals ruling can be construed to provide a new and specific finding of fact not articulated by the PCR court and demonstrates that the PCR court's holding was based upon speculative evidence in violation of *Bannister* and *Glover*. In either case, the Court of Appeals exercised its standard of review precisely as required.

Petitioner wants this Court to assume that Cherise Evans' supposed testimony, which is absent from the record, would have been the same as the speculation set forth in the notes taken from Petitioner's interview. Such a conclusion is contrary to the Supreme Court's holding in *Bannister*. *Id.* at 303, 509 S.E.2d at 809. In addition to presuming Cherise Evans would have testified consistently with the note taken from Petitioner's interview, Petitioner also desires the Court to assume that this note indicates a 1AM pickup, as opposed to 1PM. And, in addition to that presumption, Petitioner wants this 1AM pickup to be applied to the morning of July 26th, which the note does not specify. Cherise Evans has provide no evidence to such a conclusion. All of these presumptions could have been answered had Petitioner simply secured the presence of the necessary witness, but instead Petitioner is asking this court to reverse the jury's conviction on multiple strained conjectures of a note in defense counsel's file that did not come from the witness in question. In that regard, Petitioner's reliance upon *Walker*, *Weldon*, and *Martin* is misplaced. In each of these cases the witness testimony would have established a complete alibi if not for the failures of counsel regarding investigation or the calling of witnesses at trial, and such evidence was properly presented as required at the PCR evidentiary hearing as to the content of alibi testimony. These holdings did not involve the insufficiency of speculative evidence under *Bannister*. *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014); *Weldon v. State*, No. 2017-002000, 2021 WL 4566750 (S.C. Ct. App. Oct. 6, 2021); *Martin v. State*, 427 S.C. 450, 832 S.E.2d

277 (2019)(noting that alibi witness gave a statement to trial counsel containing the specific time she dropped the defendant off, that such information was in defense's file, and that counsel conceded having that information from her at his disposal for trial). The Court of Appeals correctly distinguished *Martin* on this basis. *Evans v. State*, No. 2016-001287, 2021 WL 1227794, at *3 (S.C. Ct. App. Mar. 31, 2021), cert. granted (Nov. 10, 2021).

The limitations set forth by *Bannister* and *Glover* exist for a reason: Court's will not speculate as to the content of an absent witness in determining the prejudice for a claim of ineffective assistance of counsel. The Court of Appeals did not violate its standard of review in finding, as a matter of law, Petitioner has failed to demonstrate prejudice resulting from counsel's failure to question Cherise Evans further because Petitioner failed to provide evidence from Cherise Evans demonstrating what further questioning would have revealed.

Petitioner claims that counsel was ineffective for failing to procure the proper testimony from Cherise Evans; he cannot be rewarded with a new trial for *also* failing to procure the proper testimony from Cherise Evans. The holding of the Court of Appeals should be affirmed.

## II. The Court of Appeals did not err in finding evidence within the record to support the PCR Court's holding that there was a lack of prejudice from counsel's failure to further question Cherise Evans.

Petitioner's two questions presented are intertwined, and necessarily, Petitioner's second question presented is redundantly without merit, as the record shows Petitioner's failed to demonstrate prejudice as a matter of law. (*Supra*). However, the surrounding evidence presented at trial also demonstrates that the PCR court, and the Court of Appeals in affirmance, did not err in finding Petitioner failed to satisfy his burden to prove prejudice.

Petitioner contends that had the jury heard testimony from Cherise Evans that Petitioner

picked her up from work at approximately the same time the armed robbery took place, a fact not substantiated by the record (*Supra*), there would have been a reasonable probability of differing result at trial. Petitioner is mistaken. Petitioner's supposed alibi would not have been corroborated by any documentation or even by unbiased testimony. It was simply the testimony of his own sister, claiming to be picked up from work at the time in question, two and a half years after the fact. This is the type of "routine day" testimony that the jury could easily conclude was misremembered by the witness as to the specific date in question. As was found by the PCR court, and affirmed by the Court of Appeals, it is unlikely that such would have created a reasonable probability of differing result in the face of the evidence from the State.

The State presented three separate witness who saw Petitioner a mere ten hours before the crime; one was Petitioner's own sister, the other was his future brother-in-law, and the last was a property manager who was familiar with Petitioner as a former resident. Their respective testimonies are consistent. This already chips away from the credibility of Cherise Evans having no knowledge that Petitioner left Charlotte on July 25th. Additionally, the testimony of Mr. Rhaney, Glynnessa Evans, and Ms. Lugo are corroborated by the fact that all three identified the vehicle in question by description, and both Mr. Rhaney and Ms. Lugo recalled with near perfection the North Carolina license plate to a vehicle that matched the description of the one caught by video surveillance. That is corroborative evidence that cannot be fabricated and is not conditioned upon a witness's supposed motives or bias against Petitioner. Lastly, the testimony of Mr. Rhaney and Glynnessa Evans positively identified Petitioner from the video surveillance, and such evidence also allowed the jury to do so for itself by way of Petitioner's distinctive shoulder scar.

The evidence presented by the State is both strong and mutually corroborative in identifying the Petitioner as the culprit, placing the Petitioner within a mile of the crime scene mere hours beforehand, and in driving a vehicle matching the one videoed by surveillance cameras. As such, there is evidence within the record which supports the PCR court's conclusion that the supposed alibi testimony would not have created a reasonable probability of differing result at trial.

## CONCLUSION

For the reasons set forth above, the holding of the Court of Appeals should be affirmed.

Respectfully submitted,

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