

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**S.C. SUPREME COURT**

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Certiorari to Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

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JARVIS STRIPLING,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000560

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PETITION FOR WRIT OF CERTIORARI

—————  
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## ISSUE PRESENTED

1. Whether the PCR court erred finding petitioner was not prejudiced by defense counsel's deficiency for (a) failure to request a *Biggers*<sup>1</sup> hearing and (b) subsequent failure to object to a key witness's in-court identification of petitioner as the shooter?
2. Whether the PCR court erred by failing to make findings regarding multiple allegations of defense counsel's failure to object and instead merely finding the testimonies of defense counsel and solicitor credible in their assertions that counsel's failure to make numerous objections did not impact the outcome of trial?

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<sup>1</sup> *Neil v. Biggers*, 409 U.S. 188 (1972).

## STATEMENT

A Spartanburg County Grand Jury indicted petitioner for the offenses of murder, first degree burglary, attempted armed robbery, possession of a weapon during the commission of a violent crime, and two counts of kidnapping. App. 433-42. Petitioner was tried before the Honorable J. Derham Cole, and a jury from November 6 – 8, 2018. App. 1-319. Charles Snyder, III, represented petitioner. App. 1. James Hunter and Allison Mabbs represented the state. App. 1.

The jury found petitioner *not* guilty of murder and possession of a weapon during the commission of a violent crime. App. 316, ll. 12-16. The jury found petitioner guilty of first degree burglary, attempted armed robbery, and two counts of kidnapping. App. 315, l. 19 – 316, l. 10. Petitioner was sentenced to concurrent terms of thirty years for first degree burglary, twenty years for attempted armed robbery, and thirty years for each count of kidnapping. App. 323, ll. 4-20.

Thereafter, petitioner filed an application for PCR. App. 326-331. On June 8, 2022, an evidentiary hearing was held before the Honorable William A McKinnon. App. 343-419. Susannah Ross represented petitioner and Chelsey Marto represented the state. App. 343.

On March 22, 2023, Judge McKinnon signed an order denying PCR. App. 420-32. The court found petitioner suffered no prejudice by defense counsel’s failure to move to suppress or object to the identification where petitioner’s co-defendant, Alicia Pilgrim testified at trial and where still shots from the surveillance video of the incident were entered at trial, featuring “specific neck and hand tattoos that matched” petitioner’s. App. 428. The court further found if a *Biggers* hearing had been requested, there was sufficient evidence to convict and therefore the result of trial “likely would not have changed.” App. 428.

Regarding defense counsel's failure to object to numerous instances of leading multiple witnesses and in some cases vouching for witnesses the court found "[defense] counsel and [solicitor] both credible in their assertions that even if leading questions were asked, they did not impact the outcome at trial." App. 429. The court declined finding any of the alleged instances of improper bolstering were objectionable. App. 430. However, the court found even if it were improper bolstering it would not have impacted the outcome at trial. App. 430. Additionally, the court noted "[c]ounsel is not expected to object to every single objectionable thing at trial to avoid findings of ineffectiveness." App. 429.

This petition for a writ of certiorari follows.

## ARGUMENT

1. The PCR court erred finding petitioner was not prejudiced by defense counsel's deficiency where counsel (a) failed to request a *Biggers* hearing and (b) subsequently failed to object to a key witness's in-court identification of petitioner as the shooter.

### **Relevant facts**

On February 11, 2017, Alicia Pilgrim and two men entered the home of Francisco Villar with a plan to take money from him because he was a known drug dealer. App. 55, l. 17-56, l. 11; 103, l. 3-109, 25. Surveillance cameras outside the home captured Pilgrim entering through the front door and shortly after two men carrying guns entering the back door of Villar's home. App. 55, l. 24-56, ll. Inside the home with Villar was his girlfriend Dixie Wright and another individual. Villar fired his weapon and one of the intruders returned fire and then left the home. App. 56, ll. 10-57, l. 4. Villar died as a result of the incident. App. 64, ll. 17-20; 79, ll. 13-14; 1166, ll. 7-17; 200, ll. 1-9.

At trial, defense counsel made no pretrial motions. App. 40, l. 21-41, l. 17. Throughout Dixie Wright's testimony on direct she referred to the intruders as petitioner and Rayshon Smith. App. 111-14. Additionally, Wright made an in-court identification of petitioner to the jury. App. 120, ll. 15-19.

Wright testified she gave four separate statements to law enforcement about the incident. She admitted at trial that in those statements she never named petitioner as one of the intruders.<sup>2</sup> App. 117, ll. 20-25; 125, ll. 1-25; 126, ll. 1-7. Wright recalled one of the intruders had his face

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<sup>2</sup> In her initial interviews with law enforcement, Wright immediately named Alicia Pilgrim and Rayshon Smith as two of the individuals involved in the home invasion. App. 103, ll. 4-8; 112, ll. 2-19; 117, l. 3-118, l. 7; 131, ll. 20-25. Wright first told police that the other person involved was "PD Red." App. 117, 20-118, l. 15; 124, ll. 8-17.

covered but at some point, the covering slid down revealing a tattoo on his neck. App. 111, l. 18-23; 118, l. 21-119, l. 2. Wright said during one of the interviews with law enforcement she was shown petitioner's "mugshot" and she recognized him as someone she had met once during a drug deal with Villar. App. 112, ll. 11-113, l. 5; 123, ll. 13-124, l. 3; 129, ll. 16-23. Even then, when she identified an unrelated photograph of petitioner, Wright did not say petitioner was involved in the incident. App. 125; 128, ll. 17-22; 129, l. 21-131, l. 13. She explained the more evidence she saw the more certain she became that petitioner was one of the intruders, specifically the one that shot Villar. App. 131, l. 17-132, l. 12.

Wright contended that, although she was not totally sure petitioner was in the home right after the incident, at the time of trial she was one hundred percent certain the man was petitioner. App. 132, l. 7-133, l. 6. She testified she was firmly convinced because in the still shots taken from the surveillance video there were "little, small things," that were similar to petitioner such as his "complexion," "hairline," and "his hands." App 132, l. 24-133, l. 6.

Investigator Louis Nelson testified during his investigation petitioner became a suspect. App. 167, ll. 19-21. Nelson said that when he met with Wright he showed her a "regular photograph" of petitioner and Wright identified him but Nelson did not claim she told him petitioner was involved in the incident. App. 169, ll. 7-18. Investigator Chris Taylor also spoke with Wright about petitioner's involvement, and he testified she "wasn't sure when [he] asked her." App. 181, ll. 1-18. During deliberations the recording of Wright's testimony was replayed for the jury at their request. App. 313, l. 1-314, l. 15.

At petitioner's evidentiary hearing defense counsel Charles Snyder, III testified regarding his representation of petitioner. App. 375-92. Snyder said there were three things that were important to the verdict in this case: (1) the testimony of Dixie Wright, (2) the testimony of

Alicia Pilgrim, and (3) the surveillance camera video. App. 377, ll. 11-23. He admitted that he did not request a *Biggers* hearing nor object to Wright's in-court identification of petitioner. However, Snyder contended that her testimony regarding identification was central to his argument during closing. App. 386, ll. 3-15.

## **Discussion**

The PCR court failed to make a specific finding as to deficiency and only found there was no prejudice. Nevertheless, defense counsel was deficient for failing to request a *Biggers* hearing or otherwise object to Wright's identification of petitioner. Petitioner was prejudiced where but for counsel's failure to move to suppress the identification pretrial or otherwise contemporaneously object there was a reasonable probability the result of trial would have been different.

The two-prong test which a defendant must meet in order to establish a claim of ineffective assistance of counsel are 1) that counsel's representation fell below an objective standard of reasonableness; and 2) that, but for counsel's error, there is a reasonable probability the result would have been different. *Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113 (1991). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* [quoting *Strickland v. Washington*, 466 U.S. 668 (1984)]; *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989).

An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of

irreparable misidentification.” *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004); *see also Neil v. Biggers*, 409 U.S. 188, 198 (1972).

Trial courts use a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from “unnecessarily suggestive” police procedures. *Biggers*, 409 U.S. at 198–99, 93. If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless “so reliable that no substantial likelihood of misidentification existed.” *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 199, 93).

To determine whether an identification is reliable, it is necessary to consider the factors set forth in *Biggers*: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation. *Biggers* at 199-200.

Had defense counsel requested a *Biggers* hearing Wright’s identification likely would have been suppressed. First, Wright’s identification was the result of an “unnecessarily suggestive” police procedure where Wright testified she was shown a mugshot of petitioner during one of her interviews with law enforcement. Her identification of petitioner was tainted by law enforcement showing her a mugshot of petitioner, someone she had met once very briefly.

Second, under the *Biggers* factors Wright’s identification was *not* reliable. Wright stated that the intruder had their face covered “most of the time” and the covering only dropped for a

“brief moment.” App. 111, 18-21. The incident was extremely hectic and traumatic as it resulted in the death of Wright’s boyfriend, Villar. Regarding the Wright’s degree of attention, she testified, “I seen his face but only for a brief second. **I wasn’t paying much attention with everything that was going on.** I just looked up for a brief moment, and you know, dropped by head.” App. 125, ll. 1-4. (emphasis added). Wright testified that she described both the intruders’, complexion height and weight, during her interviews with law enforcement but gave no detail regarding those descriptions during her testimony. App. 117, ll. 4-9. However, Wright did admit she named PD Red and not petitioner. App. 117, ll. 20-25. Wright also admitted she was not sure during the confrontation that the person was petitioner it was only after she had spoken with law enforcement on numerous occasions and saw more evidence that she was convinced the intruder was petitioner.

The PCR court incorrectly found defense counsel’s failure to move to suppress or contemporaneously object to this evidence did not prejudice petitioner because of other evidence at trial. The other evidence was testimony of co-defendant Alicia Pilgrim and the still shots from surveillance video that were admitted at trial “featuring specific neck and hand tattoos that matched” those of petitioner. App. 428. Pilgrim’s testimony was largely self-serving and vigorously challenged by counsel where it was uncontested, she received a beneficial plea deal for her testimony. As for the still shots from the surveillance video, they do not clearly depict any tattoos. Wright’s testimony was central to the state’s case and incredibly damaging to petitioner. Wright’s identification of petitioner was vital to securing petitioner’s conviction at trial.

Even if the trial court had ultimately allowed Wright’s improper identification of petitioner. If defense counsel had not failed to request a *Biggers* hearing or contemporaneously

object, this issue would have been preserved for appellate review and petitioner would have been successful on appeal. *See Milledge v. State*, 422 S.C. 366, 380, 811 S.E.2d 796, 801 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant’s claim that counsel failed to preserve an issue for appellate review by viewing the “trial court’s ruling through the same lens that would be applied on appeal . . .”) (citation omitted).

2. The PCR court erred by failing to make findings regarding multiple allegations of defense counsel's failure to object and instead merely finding the testimonies of defense counsel and solicitor credible in their assertions that counsel's failure to make numerous objections did not impact outcome of trial.

### **Relevant facts**

Throughout Wright's and Alicia Pilgrim's testimonies the solicitor asked leading or otherwise improper questions. App. 132, l. 24-133, l. 6; 138, ll. 4-6; 139, ll. 11-12; 139, ll. 21-24; 150, l. 25-151, l. 2. Snyder failed to object. During Investigator Nelson's testimony Snyder failed to object on the basis of improper bolstering when Nelson testified Pilgrim was being truthful. App. 171, l. 4-172, l. 3. He failed to object to Nelson's testimony that petitioner was the shooter which was the ultimate jury question in this case. App. 174, ll. 8-13. During Investigator Taylor's testimony Snyder again did not object to Taylor's testimony that petitioner was the shooter. App. 182, ll. 18-20. Counsel failed to object to the investigators improper bolstering of state's witnesses. App. 171, ll. 4-21; 182, l. 10-17. Snyder finally objected to the solicitor's improper bolstering during the state's closing. App. 246, l. 22-247, l. 3.

Regarding his failure to object on several occasions Snyder testified "there were some times that I could've objected and there were some times where I did object." App. 378, ll. 23-25. He admitted that some of the objections he failed to make would have been sustained but insisted that it would not have changed the outcome of the trial. App. 379, ll. 3-8.

### **Discussion**

The PCR court erred in failing to make any findings, other than as to the credibility of Snyder and the solicitor, regarding petitioner's allegations that defense counsel failed to object to numerous instances of the solicitor leading state's witnesses and to improper bolstering.

This Court concluded in *Briggs v. State*, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017), that after *State v. Dawkins* was decided in 1989, **the law was “clear that no witness may give an opinion as to whether the victim is telling the truth.”**

Specifically, this Court held that after *State v. Dawkins* was decided:

[R]easonably competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose. When the testimony directly conveys the witness's opinion that the victim is telling the truth, it is obviously improper bolstering.

*Thompson v. State*, 423 S.C. 235, 243–44, 814 S.E.2d 487, 491 (2018).

The record reflects defense counsel failed to object on numerous occasions. The most damning are the instances where law enforcement witnesses improperly vouched for the truthfulness of other state’s witnesses and where they gave an opinion as to the ultimate jury question. Counsel Snyder’s failure to discern the prejudicial effect of law enforcement’s continual vouching for state’s witnesses and raise the proper objections lowered his representation to a level below an objective standard of reasonableness.

If counsel articulates a valid reason for employing certain trial strategy, such tactics will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). During counsel's testimony at the PCR hearing he readily acknowledged each time he failed to object but he failed to articulate *any* strategy for his failure to object. Accordingly, counsel was deficient in failing to object on numerous occasions. Petitioner was prejudiced where but for defense counsel's numerous errors in this regard, there is a reasonable probability the trial result would have been different.

**CONCLUSION**

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.



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Appellate Defender

ATTORNEY FOR PETITIONER

This 1<sup>st</sup> day of August, 2023.