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Nov 13 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

HENRY DUKES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000522

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ISSUES PRESENTED

1.

Whether the court erred denying post-conviction relief where Cornelius Ford testified at the *Neil v. Biggers*[1] hearing that he identified Petitioner when the detective opened his file to make notes and he just happened to see a photograph of Petitioner in the file, where counsel failed, during the *Biggers* hearing, to show the trial judge a video recording of Ford's interview that instead showed Ford opened and looked through the file while the detective was out of the room, and where there was a reasonable likelihood the result of the trial would have been different absent counsel's deficient performance?

2.

Whether the court erred in denying post-conviction relief where counsel failed to present evidence that Petitioner tested negative for gunshot residue, where counsel admitted his failure to present this evidence was not strategic, and where there was a reasonable likelihood the result of the trial would have been different absent counsel's deficient performance?

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[1] *Neil v. Biggers*, 409 U.S. 188 (1972).

STATEMENT

Procedural history

On August 21, 2008, an Horry County Grand Jury indicted Henry Dukes (Petitioner), for murder. Petitioner was tried before the Honorable Steven H. John and a jury, on July 20, 2011 and August 1 – 2, 2011. J. Eric Fox represented Petitioner. Jimmy A. Richardson, II, and Robert Paul Taylor prosecuted the case. Petitioner was convicted as indicted, and he was sentenced to serve forty-seven years' imprisonment.[2]

Petitioner directly appealed his conviction. *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013) (*cert. denied*, July 25, 2014). From there, this case has a complex procedural history. Petitioner filed his first post-conviction relief (PCR) application on September 23, 2011, while his direct appeal was pending. The State made a return and motion to dismiss without prejudice, and the Honorable Larry B. Hyman, Jr., granted the motion and dismissed the matter in an order filed November 30, 2011.[3]

Petitioner filed his second PCR application on July 9, 2013. The State made its return, and on February 11, 2016, a hearing was held on the matter before the Honorable D. Craig Brown. Tristan Shaffer represented Petitioner and Jessica Kinard represented the State. By order filed on March 10, 2016, Judge Brown denied relief and dismissed the application. PCR counsel did not serve notice of intent to appeal from the order, and it was undisputed Petitioner did not timely receive notice of the order of dismissal, and thus did not have the opportunity to request

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2 App. 773 – 774; App. 1; App. 394, ll. 16 – 21; App. 400, ll. 7-14; App. 775.

3 App. 516 – 523; App. 524 – 525; App. 526 – 527.

an appeal or to knowingly, intelligently and voluntarily waive the right to appeal. (It is this PCR that is the subject of belated *Austin* review.)[4]

While the second PCR application was pending, Petitioner filed a third application for PCR on August 8, 2014. The State made a return and motion to summarily dismiss, and by order filed September 3, 2014, the Honorable Larry B. Hyman, Jr., granted the motion and dismissed the matter.[5]

Petitioner filed a fourth application for PCR on February 24, 2017. Respondent made a return and partial motion to dismiss on June 29, 2017. Steven Fowler represented Petitioner; Johnny James represented the State. A hearing was scheduled but no testimony was taken. Instead, the State conceded Petitioner was entitled to relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). The State confirmed with Petitioner's 2016 PCR counsel, Mr. Shaffer, that Petitioner was not timely notified of the order of dismissal and thus did not have an opportunity to timely appeal or to knowingly, intelligently, and voluntarily waive his right to appeal. By order filed June 18, 2018, the Honorable Larry B. Hyman, Jr., granted Petitioner's request for *Austin* relief, found the remaining allegations were untimely and successive, and denied and dismissed those claims without prejudice. Unfortunately, once again no notice of appeal was filed.[6]

Petitioner filed a pro se habeas corpus application in federal court on April 26, 2019. (A detailed procedural history of the federal action is available at pp. 761 – 762 of the Appendix.)

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[4] App. 528 – 534; App. 535 – 538; App. 539; App. 574 – 580.

[5] App. 581 – 590; App. 591 – 594; App. 595 – 596.

[6] App. 597 – 604; App. 605 – 612; App. 613 – 620; App. 616.

The federal district court held the matter in abeyance for Petitioner to exhaust his state remedies available under *Austin*.[7]

On October 21, 2019, Petitioner again filed an application for post-conviction relief and requested belated appellate review of his PCR hearing. The State filed its return, partial motion to dismiss, and concession to *Austin* relief. On April 19, 2021, the PCR court, Honorable Benjamin Culbertson, issued a conditional order granting *Austin* relief and dismissing the remaining allegations, and Petitioner filed a response. On June 10, 2021, Judge Culbertson sent a letter asking the State to schedule a hearing.[8]

On June 2, 2022, a hearing was held before the Honorable H. Steven DeBerry, IV. James Falk represented Petitioner and Chelsea Marto represented the State. The State again conceded Petitioner was entitled to *Austin* review. On February 22, 2023, the court issued an order granting relief pursuant to *Austin* and dismissing the PCR application. The court noted the State's 2017 concession that Petitioner was entitled to belated appellate review based on its communications with Petitioner's prior PCR counsel that Petitioner was not timely notified of the order of dismissal. The order concluded that, "This Court finds Applicant wanted an appeal from his prior PCR action and did not waive this right. The State consented to his request. Accordingly, Applicant is entitled to a belated appeal of his prior PCR matter."[9]

This *Austin* petition for writ of certiorari follows. *See King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992) (delineating procedure where review of denial of PCR sought based on defendant's failure to waive right of appellate review of prior denial).

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[7] App. 621; App. 621 – 669; App. 668 – 669.

[8] App. 670 – 676; App. 677 – 686; App. 687 – 688; App. 689 – 698; App. 699 – 713; App. 714.

[9] App. 715; App. 720, ll. 2-8; App. 758 – 772; App. 761; App. 766.

Killing

Petitioner was tried for the murder of Andrico Gowens (Decedent), a drug dealer who sold cocaine and crack cocaine. Decedent was shot and killed at his "drug house" in Horry County at approximately nine o'clock on the morning on November 2, 2007.[10]

The trial of this case was notable in its lack of law enforcement testimony. Only two police officers testified during the entire murder trial, and their testimony was brief: one officer, a patrol officer, said he was dispatched to the scene and saw Decedent's body and a shell casing on the floor. A second officer, a narcotics officer, said she was in the neighborhood earlier that morning doing surveillance on Decedent's home in preparation for her agency's plan to serve a search warrant on the "drug house" the next day.[11]

No other law enforcement officers were called at trial. No forensic analysts or the like were called either. All of the other witnesses (save the doctor who autopsied Decedent's body) were civilian lay witnesses. No physical evidence connected Petitioner with the crime. The keystone in the State's case against Petitioner was the testimony of the decedent's best friend, Cornelius "C-4" Ford (Ford). Ford had a lengthy criminal history which included convictions for distribution of crack cocaine (several counts), possession of cocaine (two counts), possession or distribution of controlled substances (several counts), and driving under suspension.[12]

Ford claimed that he had slept at Decedent's place the night before the murder, and that he woke up and was smoking a joint when someone knocked on the door. According to Ford, the

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10 App. 773 – 774; App. 151, ll. 1-15; App. 211, l. 4 – 212, l. 2; App. 160, ll. 1-3.

11 App. 191, l. 25 – 193, l. 12; App. 208, l. 4 – 211, l. 15.

12 App. 127, ll. 15-18; App. 116, ll. 10-11; App. 140, l. 3 – 142, l. 3.

visitor was Petitioner. Ford claimed Decedent let Petitioner in, and the two men had a brief conversation before Petitioner said, "F-that; give it up," pulled out a pistol, and shot at Decedent twice. Ford alleged Petitioner then turned the gun on him (Ford) and pulled the trigger twice, but it only clicked. According to Ford, Petitioner then ran away.[13]

Ford called his father, Rasheed Muhammad (Muhammad), and told him Decedent had been shot. Ford claimed he also called 911 but hung up because he panicked. However, no 911 calls were introduced at trial. The parties would later argue over whether Ford even checked to see if his "best friend" was still alive.[14]

According to Muhammad, he went over to the house and saw Decedent shot on the floor. By then, Decedent had no pulse. Muhammad said Ford was still there and was upset, so he told Ford to wait outside. Muhammad called 911. When law enforcement arrived, Ford was gone. Muhammad made no mention of Ford to law enforcement, and instead, Muhammad admittedly fabricated an explanation of how he found the body. Muhammad did not tell the police his son was a witness.[15]

Identification

Law enforcement contacted Muhammad again later in the day and asked if he had a son named Cornelius Ford, and asked him to bring Ford to the police station. Approximately six to eight hours after the shooting, Ford and Muhammad finally appeared at the police station, and Ford was interviewed by a detective, Detective Addison. Addison was in Afghanistan during

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13 App. 123, l. 17 – 127, l. 2.

14 App. 173, ll. 115-24; App. 132, ll. 15-23; App. 135, ll. 15-22; App. 79, ll. 8-25; App. 347, l. 24 – 348, l. 2.

15 App. 175, ll. 1-12; App. 80, l. 1 – 81, l. 25; App. 83, l. 23 – 84, l. 3; App. 96, l. 9 – 100, l. 3.

trial, but his interview with Ford was video recorded. Importantly, this video recording was not played before the trial judge at the *Neil v. Biggers*, 409 U.S. 188 (1972), hearing.[16]

No law enforcement witnesses testified at the *Neil v. Biggers* hearing at all. Ford and his father testified. During the hearing, Ford claimed that while he was interviewed by Detective Addison, the detective opened his file to make notes and Ford happened to see several photographs, including a photograph of Petitioner. Then, according to Ford, he identified Petitioner to Addison from that happenstance photographic display. (Ford had apparently forgotten he was recorded in the interview room.) Ford's testimony on direct at the *Biggers* hearing was as follows.

> Q. *Okay. So they had opened up their file in order to make notes?*
>
> A. *Yes.*
>
> Q. *And contained in that file, your testimony is, is that's where the pictures were?*
>
> A. *Uh huh (indicating positive).*
>
> Q. Now, *the Detective was out of the room at that point*?
>
> A. *No. He was in the room.* He was—because he was about to get up to go get a book, I guess, or whatever, for me to identify him, but while he was getting up I seen the pictures. From my understanding they went by the house, or whatever. They had some pictures. And I seen the pictures and I end up pointing him out.
>
> Q. So on your own accord—your testimony is, on your own accord you saw the picture and you identified this Defendant, and that's how it transpired?
>
> A. Yes, sir.
>
> Q. *Now your video does not show this, does it*?
>
> A. *The video*?

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16 App. 85, l. 8 – 86, l. 3; App. 10, l. 25 – 11, l. 24; App. 160, ll. 1-20.

Q. Yes. In other words, the first room that you were in, in which you were being video-recorded, video and audio recorded, you moved from that room, didn't you?

A. Yes. We was talking in one room—

Q. All right. Why did you move to that—from that room?

A. I don't know. The Officer—we was in that room and they—*he told us to go to the next room.* I don't know.

Q. All right. *And that's the reason you were not video-recorded*?

A. *Yes sir.*[17]

Ford's father, Muhammad, testified that he was "at the far end of the table. There were pictures that were on the table." Muhammad equivocated when he was asked about exactly how Ford came to view the photographs.[18]

Defense counsel did not cross-examine Ford at the *Biggers* hearing about the fact that his recorded interview instead showed him opening the detective's file and perusing the photographs while the detective was out of the room. Nor did counsel show the recording to the trial judge at the *Biggers* hearing. Instead, defense counsel only argued the State had not met its burden under *Biggers* since the detective did not testify. Defense counsel did tell the judge that Detective Addison's report stated he had presented Ford with photographs of several suspects, one at a time.[19]

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17 App. 35, l. 12 – 36, l. 16 (emphasis added); *see* App. 178, l. 12 – 179, l. 10.

18 App. 44, l. 11 – 45, l. 9; App. 48, ll. 15-20.

19 App. 50, l. 13 – 52, l. 10.

Critically, as defense counsel would later testify at the PCR hearing, although "Ford claimed to have just happened to have seen this photograph fall out of the officer's binder;" "we had the video recording," and

> *in fact, what you could see was the officer got up to leave for a moment, and Mr. Ford leaned up, grabbed the binder, rifled through it, selected it. It didn't look to be a recognition, it was just here are the photographs, I'll say it is this guy.* We had that, and . . . we played that for the jury.
>
> Q Was that consistent with his testimony at the *Neil versus Biggers* hearing?
>
> A No.
>
> Q What was his testimony at the *Neil versus Biggers* hearing?
>
> A I think that is where, if I recall, where he said—he claimed, oh, it was just, you know, happenstance that I saw this photograph.
>
> Q *At the Neil v. Biggers hearing, did you attempt to impeach him with the prior statement* [sic]?
>
> A *I don't recall if I did or not.*
>
> . . .
>
> Q Do you know if you impeached him, do you recall, of the prior statement [sic]?
>
> A I'm sure I did.
>
> Q And he had a prior written statement as well?[20]

Ford's testimony at the *Biggers* hearing included his claim that he had seen Petitioner twice before, although he told police he had only seen Petitioner once before. Ford stated he was in the hallway and the shooter was inside the house near the door, then came into the kitchen. The shooter and Decedent had a brief conversation before the shooter pulled out a gun and shot Decedent. It was approximately eight or nine o'clock in the morning. Ford said he told police the

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20 App. 548, l. 1 – 549, l. 15 (emphasis added).

suspect had a "funny accent" and a "big smile" or "big mouth." Ford claimed he was "a hundred percent" certain in his identification. Ford made the identification approximately six-and-a-half hours after the shooting.[21]

As seen, however, the critical information that Ford was lying about how he saw the photographs when he testified during the *Biggers* hearing was not pointed out to the trial judge at the *Biggers* hearing. The trial court found the identification reliable and permitted it to be introduced. The trial court that there was no "corrupting effect," "deliberate act," or "any act by the police of a suggestive manner . . . The seeing of the photographs was either done accidentally through the looking at a file or in a process that the Court finds was not suggestive in—in any manner . . ."[22]

It was only when he cross-examined Ford before the jury, after the judge had found the identification reliable, that counsel brought up what was on the video. Ford's cross-examination before the jury included the following testimony.

> Q. Okay. Now, at the conclusion, as I understand, you, in speaking with the Detective, you indicated that you could possibly pick out a picture of the shooter, correct?
>
> A. Yes sir.
>
> Q. Okay. And the Detective indicated, we'll go down into another room, little more comfortable, correct?

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21 App. 30, l. 7 – 33, l. 21; App. 34, ll. 3-19; App. 37, ll. 10-21; App. 41, ll. 12-18.

22 App. 54, ll. 16-24. The trial court's entire ruling is located at pp. 52 – 55 of the Appendix. Notably, the State stipulated at trial that Detective Addison said he showed Ford four photographs, one at a time. In addition to the arguments made on direct appeal regarding the necessity of the presence of the detective, the absence of the detective was also problematic since it appears Detective Addison may have believed that when he later showed Ford the four photographs in the second room, off-camera, and Ford immediately picked Petitioner, that this was a legitimate identification (when it instead was based on Ford opening and reviewing the file while Addison was out of the first room.) *See* App. 352, ll. 17-19.

A. Yes.

Q. Okay. *When was it that you then saw this picture that you identified*?

A. *When he was standing up when we was moving from one room to another*, it was some papers on the table and—

Q. I'm sorry, some papers on the table.

A. Yes sir.

Q. *And that's the room you were first in.*

A. *Yes sir.*[23]

Trial counsel then impeached Ford before the jury by showing the video.[24]

Gunshot residue

Petitioner had been temporarily living in a truck next to the home of Ronnie "Stank" Atkinson (Atkinson). Atkinson had previously been shot by Curtis "Rasta" Scott (Scott), who was Decedent's cousin. Scott was in Cornelius Ford's car when Scott shot Atkinson. Atkinson's mother testified at Petitioner's trial that the morning Decedent was shot and killed, police officers came by her house and performed gunshot residue tests on several men there—Petitioner, who was sleeping in his truck when officers arrived, Atkinson, who was taken to the police station, and another man.[25]

As seen, there was a dearth of law enforcement testimony in this case. No evidence ever came in about the results of the gunshot residue tests. However, the State did not object when

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23 App. 161, ll. 4-18.

24 App. 183, l. 5 – 184, l. 7.

25 App. 117, l. 8 – 119, l. 8; App. 122, ll. 19-25; App. 216, ll. 15-18; App. 219, ll. 8-25; App. 223, l. 14 – 224, l. 1; App. 226, l. 3 – 227, l. 8; App. 228, l. 12 – 230, l. 21.

trial counsel argued in closing that if Petitioner's gunshot residue test had been positive, the State would have introduced that evidence. The trial judge, however, instructed the jury multiple times that the arguments of the lawyers were not evidence.[26]

At the PCR hearing, trial counsel was questioned about his failure to elicit testimony that when Petitioner was tested for gunshot residue, the test results were negative. Counsel admitted he failed to get this evidence before the jury because he expected to do so through a State's witness. When the State did not call that witness, counsel had not himself subpoenaed the witness, so he could not introduce the evidence.

> Q Do you recall the results of the gunshot residue?
>
> A It was negative on Mr. Dukes. I believe it was negative on the third gentleman, and Mr. Atkinson, there was a presumptive positive on him.
>
> . . .
>
> Q . . . At any point, did the jury hear about the positive gunshot residue test of Mr. Atkinson?
>
> A I don't believe so.
>
> Q *They did hear that there was a negative on the client, correct*?
>
> A The way it played out, State did not call SLED. They are on the witness list, potential witness list. *The State did not end up calling anyone from SLED in regards to those results. They were not in evidence, and I had not subpoenaed anyone from SLED.* I was able to get out through another witness the fact that Mr. Dukes had been tested along with others and, therefore, was able to argue in closing that because no evidence was introduced that there was any positive results from Mr. Dukes, obviously the State would have brought that to the jury if there had been, So *I was able to argue the inference that it must have been negative because there wasn't shown any evidence of that*, but there wasn't anything about Mr. Atkinson's positive test.[27]

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26 App. 356, l. 19 – 357, l. 2; App. 343, ll. 12-15.

27 App. 430, l. 19 – 432, l. 22 (emphasis added).

A copy of the SLED report showing Petitioner's gunshot residue tests were negative was introduced at the PCR hearing and is located at pp. 570 – 573 of the Appendix.

Other evidence

Other notable evidence presented at trial included Ford's testimony the shooter wore a white coat, and testimony that Petitioner had a white coat during the time frame surrounding Petitioner's death. A woman visiting Decedent's neighbor saw a black man in a white coat running away from Decedent's house at approximately the same time Decedent was killed. The State also presented evidence of flight: that Petitioner was arrested in Miami. And it presented testimony of the ex-girlfriend of Petitioner's Miami cousin, who claimed that Petitioner told them he had to leave South Carolina because he killed someone.[28]

Direct appeal

Petitioner's direct appeal centered around the admission of the eyewitness identification, and in particular, the absence of the detective at the *Biggers* hearing. On direct appeal, Petitioner argued "the trial court erred in refusing to suppress an eyewitness's identification of Dukes for two reasons: (1) the pretrial hearing did not comport with due process because the detective who conducted the identification procedure was unavailable to testify; and (2) the identification procedure was impermissibly suggestive and created a substantial likelihood of misidentification." *State v. Dukes*, 404 S.C. 553, 555, 745 S.E.2d 137, 138 (Ct. App. 2013); *see* App. 448 – 449. The Court of Appeals affirmed the trial court's decision the identification procedure was not impermissibly suggestive, and this Court denied certiorari. *Dukes*, 404 S.C. at 563, 745 S.E.2d at 142, *cert. denied*, 404 S.C. 553, 745 S.E.2d 137 (2013). On direct appeal, of

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[28] App. 131, ll. 3-6; App. 222, l. 2 – 223, l. 3; App. 245, l. 24 – 250, l. 1; App. 295 – 296, l. 14; App. 271, l. 13 – 277, l. 18.

course, it was not apparent that Ford had lied about the critical matter of how he saw the photograph, since that was detailed in counsel's subsequent PCR testimony.

Order of dismissal

In its order of dismissal, the PCR court noted that "much discussion was had regarding the eyewitness testimony of Cornelius Ford and whether the identification he made at the police station was proper and admissible. This was the subject of a *Biggers* hearing before trial, and was ultimately admitted over trial counsel's very competent argument." The order of dismissal also noted Petitioner's testimony "that he thought the reason for going to trial was to get in some evidentiary elements that were not admitted or emphasized, such as his negative gunshot residue test . . ."[29]

The order of dismissal concluded, "[T]he Court finds Applicant failed to demonstrate that trial counsel was deficient in any way. The Court finds very credible trial counsel's testimony regarding his trial strategy and how he presented or attempted to present different items of evidence . . ." "Trial counsel had a valid and clearly articulable trial strategy that was in line with the prevailing norms of professional conduct . . ." "[A]ssuming *arguendo* that deficiency had been proven, Applicant failed to prove he was in any way prejudiced by trial counsel's representation. Applicant presented no evidence of trial counsel representing him in a manner that was anything but professional and beneficial. Therefore, Applicant has not demonstrated that a different attorney would have changed the result of his proceedings."[30]

This *Austin* petition for writ of certiorari follows.

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29 App. 576 – 577 (footnote omitted).

30 App. 578.

ARGUMENT

1.

The court erred denying post-conviction relief where Cornelius Ford testified at the *Neil v. Biggers*[31] hearing that he identified Petitioner when the detective opened his file to make notes and he just happened to see a photograph of Petitioner in the file, where counsel failed, during the *Biggers* hearing, to show the trial judge a video recording of Ford's interview that instead showed Ford opened and looked through the file while the detective was out of the room, and where there was a reasonable likelihood the result of the trial would have been different absent the deficient performance.

Petitioner established deficiency and prejudice where counsel failed to provide the trial judge with critical information that was in counsel's possession and went directly to the suggestiveness of the identification procedure. Ford was the only eyewitness to the shooting. Had the trial court been provided with video evidence that Ford lied during the *Biggers* hearing about how he saw the photograph of Petitioner that he subsequently identified to Detective Addison, it would have excluded the identification.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. am. VI. A two-pronged test for determining effective assistance of counsel was set forth in *Strickland*. The first prong requires an applicant show that counsel's performance was deficient; the second prong requires a showing that the deficient performance prejudiced the applicant to the extent there is a reasonable probability that, but for counsel's unprofessional

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31 *Neil v. Biggers*, 409 U.S. 188 (1972).

errors, the result of the proceeding would have been different. *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

The Due Process Clause protects "against the admission of evidence deriving from suggestive identification procedures." *Neil v. Biggers*, 409 U.S. 188, 196 (1972). "[T]he primary evil to be avoided is a very substantial likelihood of irreparable misidentification." *Id.* at 198 (internal quotations omitted). "An identification infected by improper police influence" must be excluded if there is a "'very substantial likelihood of irreparable misidentification.'" *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012) (quoting *Simmons v. United States,* 390 U.S. 377, 384 (1968)). "[I]n some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law." *Foster v. California*, 394 U.S. 440, 443 (1969). "[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire*, 565 U.S. at 248.

The danger of misidentification is increased if the police show the witness "pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." *Simmons v. United States*, 390 U.S. at 383. "[T]he witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." *Id.* at 383-84.

"When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-pronged inquiry to determine whether due process requires suppression." *State v. Wyatt*, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017) (citing *Biggers*, 409 U.S. at 200; *State v. Liverman*, 398 S.C. 130, 138 (2012)). "First, the court must determine whether the identification

resulted from 'unnecessarily suggestive' police identification procedures." *Id.* (citations omitted). "If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong." *Id.* (citations omitted). "If, however, the court determines the procedures were both suggestive and unnecessary, the court must then determine "whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *State v. Wyatt*, 421 S.C. at 311, 806 S.E.2d at 710 (citations omitted).

Detective Addison improperly failed to secure his file when he left the interview room. Ford's viewing of the materials in the detective's file caused a significant likelihood of misidentification. The identification in this case was impermissibly, and unnecessarily, suggestive due to improper law enforcement activity—the detective's actions in leaving his file unattended. *Perry v. New Hampshire*, 565 U.S. at 233. The eyewitness reviewed the materials in the detective's file while the detective was out of the room. The detective's failure to secure his file was capitalized upon by Ford and tainted the identification. As trial counsel testified, the video recording showed "Ford leaned up, grabbed the binder, rifled through it, selected it. It didn't look to be a recognition, it was just here are the photographs, I'll say it is this guy." App. 548, l. 1 – 549, l. 15.

Under the second prong of *Biggers*, whether a suggestive confrontation or "identification procedure was so unduly prejudicial as fatally to taint the conviction . . . is a claim which must be evaluated in light of the totality of surrounding circumstances." *Simmons v. United States*, 390 U.S. at 383. "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of

certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. at 199-200; *accord Manson v. Brathwaite,* 432 U.S. 98, 114 (1977).

In applying the above factors to this case, Ford gave a limited description of the shooter—that he had a big mouth and funny accent. Although Ford claimed the shooter spoke with Decedent for several minutes, Ford was not part of the conversation, and was instead in a hallway. Ford had a gun pointed at him after Decedent was shot, and his focus would have been on the weapon at that time. Ford's claim he was one hundred percent certain of the shooter's identity must be considered in light of the fact that Ford had already gone through the detective's file before making the identification. The fact that Ford left the scene before police arrived and only came to the police station hours later is also pertinent. The totality of the circumstances weighs in Petitioner's favor.

The video recording would have showed the trial judge Ford misled the court when he testified at the *Biggers* hearing that he was shown the photographs when the detective opened his file to make notes. Instead, the video showed Ford had already seen the photographs when the detective was out of the room. Trial counsel should have played this recording for the trial judge during the *Biggers* hearing. The identification would have been suppressed absent counsel's deficient performance *Simmons v. United States*, 390 U.S. at 383; *Foster v. California*, 394 U.S. at 443; *Neil v. Biggers*, 409 U.S. at 198; *Perry v. New Hampshire*, 565 U.S. at 238-39.

Counsel's deficient performance prejudiced Petitioner. "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96). "In addition, the PCR court should consider the strength

of the State's case in light of all the evidence presented to the jury." *Id.* Prejudice occurs where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cherry v. State*, 300 S.C. at 117–18, 386 S.E.2d at 625.

If the judge had suppressed the out-of-court identification, the jury could easily have found reasonable doubt. No forensic evidence connected Petitioner with the crime. Ford was the only witness who identified Petitioner as the shooter. If Ford's identification of Petitioner as the shooter had been excluded, the only evidence against Petitioner would be that he wore a white jacket and the shooter wore a white jacket, evidence of flight to Miami, and his alleged statement to his cousin's ex-girlfriend that he had killed an unspecified person in South Carolina. There is a reasonable likelihood the result of the trial would be different absent Ford's identification. Petitioner has proven error and prejudice. *Strickland*, 466 U.S. at 686; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

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The court erred in denying post-conviction relief where counsel failed to present evidence that Petitioner tested negative for gunshot residue, where counsel admitted his failure to present this evidence was not strategic, and where there was a reasonable likelihood the result of the trial would have been different absent counsel's deficient performance.

Petitioner demonstrated deficiency and prejudice where counsel failed to present favorable evidence to the jury that Petitioner was negative for gunshot residue shortly after the shooting. Counsel admitted his failure was not strategic—he said he did not subpoena the necessary witnesses to testify about the gunshot residue tests because he expected the State to do so. This was a thin case against Petitioner, and had counsel presented that evidence, the result of the trial may well have been different.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. am. VI. A two-pronged test for determining effective assistance of counsel was set forth in *Strickland*. The first prong requires an applicant show that counsel's performance was deficient; the second prong requires a showing that the deficient performance prejudiced the applicant to the extent there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

"Trial counsel's failure to subpoena witnesses can constitute ineffective assistance of counsel under certain circumstances." *Putnam v. State*, 417 S.C. 252, 263, 789 S.E.2d 594, 600 (Ct. App. 2016) (citing *Martinez v. State*, 304 S.C. 39, 41, 403 S.E.2d 113, 113–14 (1991)). *See Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 470 (1998) (counsel's failure to call the

triage nurse as a defense witness was deficient and petitioner was prejudiced by this deficiency). Petitioner was swabbed for gunshot residue the morning of the shooting. Petitioner's tests were negative. *See* App. 570 – 571. The jury never was never presented with this evidence. Although counsel argued the jury could infer Petitioner's tests were negative, counsel's argument was not evidence, as the trial judge instructed the jury. Counsel's performance was deficient—he should have subpoenaed the necessary witnesses to present this information to the jury. *Martinez v. State*, 304 S.C. at 41, 403 S.E.2d at 113–14.

"In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96). Prejudice occurs where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cherry v. State*, 300 S.C. at 117–18, 386 S.E.2d at 625.

No forensic evidence connected Petitioner with the crime. Ford, who was demonstrated to the jury to be a liar by video, was the sole witness who identified Petitioner as the shooter. The only other evidence against Petitioner was that he wore a white jacket and the shooter wore a white jacket, evidence of flight to Miami, and his alleged statement to his cousin's ex-girlfriend that he had killed an unspecified person in South Carolina. There is a reasonable likelihood the result of the trial would be different absent counsel's deficiency in failing to present the favorable gunshot residue evidence. Petitioner has proven error and prejudice. *Strickland*, 466 U.S. at 686; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari pursuant to *Austin v. State* and permit full briefing on the issues presented.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of November, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari pursuant to Austin v. State complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 13th day of November, 2023.