

VOLUME II OF II

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Apr 01 2024

APPEAL FROM THE COURT OF APPEALS

S.C. SUPREME COURT

Appellate Case No.: 2018-001674

Opinion No. 6049, Heard 12/7/23 – Filed 1/31/24)

JOHN UPSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX

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friends with a Captain D's employee, and that Applicant's cell phone made two phone calls to Captain D's immediately before it was robbed on the night of the crime (see below). This evidence is not enough to be counteracted by any potential failure to point out his lack of a "lazy eye." Accordingly, there is no resulting prejudice.

Because Applicant failed to prove deficiency or prejudice, this Court should deny post-conviction relief.

Failure to challenge State's expert witness

Respondent submits the Court erred in finding Trial Counsel was ineffective for failing to present expert testimony to challenge the State's cell tower expert witness at trial because the record shows neither deficiency nor prejudice on this ground. Applicant was convicted of robbing a Captain D's restaurant in Aiken on November 27, 2013, around 10:00 P.M. Tr. 58.

At trial, the State presented testimony from Desra Sheryl Fraser, an intelligence research specialist for the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Tr. 147 – 162. Fraser testified about the location of the cell phone towers used by Applicant's cell phone on the night of the crime, as well as the phone calls made to and from the telephone during that time period. Fraser presented a map she created on which she plotted the location from which the telephone was used. Her testimony was not used to show that Applicant's phone was in use at or near the scene of the crime, but rather it was used to disprove Applicant's alibi, to show that he was not at or near the comedy show he and his witnesses claim he was attending on the night in question. She testified that the towers used to transmit a phone call placed at 9:48 P.M. from Applicant's phone likely showed that the cell phone was moving while the calls were being transmitted. Tr. 155, line 16 – 156, line 17.

Importantly, Fraser also testified that Applicant's cell phone made a phone call to Captain D's, the restaurant that was robbed, at 9:37 P.M. on the night of the crime. Tr. 151, line 4-6. The phone records then showed that Applicant's cell phone made another blocked phone call to Captain D's at 9:47 P.M. Tr. 151, line 22-23.

Trial Counsel cross-examined Fraser at trial, pointing out to the jury that there was no way for her to know that Applicant was actually with or using his cell phone at the times she was analyzing, and there was no way for her to know the content of the telephone conversations. Tr. 157-158. He questioned her on her ability to know if the phone was moving or stationary. Trial Counsel also introduced another cell tower map that she prepared but the State did not introduce to question her about why the cell tower locations were different from the State's maps. Tr. 160.

At the evidentiary hearing, Applicant presented testimony from Tom Slovenski, who was qualified as an expert witness in the field of mobile phone forensics. Slovenski testified that he had examined the exact cell tower data that the State's original witness, Fraser, used and testified about at trial, but he found problems with the way Fraser ran and presented the information. The Order Granting PCR summarized that the maps were generated by an "older software product" called Pin Link, which is very susceptible to human error, and "Mr. Slovenski testified that as a result the data did not match the testimony in Mr. Upson's case. It appeared that there was an over estimate of coverage regarding the cell phone towers in question." Order at 5.

Slovenski criticized the "pie method" used in Fraser's analysis, explaining that cell phone towers operate more like a cloud than a directional wedge. He testified that, in his preparation for the evidentiary hearing, he used new technology to analyze the data, which was, in his opinion, more accurate than Fraser's data run through Pin Link. The Order found that "contrary to the

testimony and presentation at Mr. Upson's trial, there was no data that showed him in the specific area of Captain D's." Order at 5. Slovenski testified that the State's map used at trial was "outdated and inaccurate." However, Slovenski testified that the new program he used to analyze the data before the evidentiary hearing did not exist at the time of the investigation or trial in April, 2014, and Pin Link was the standard technology that was used at the time.

Slovenski also testified that there is more accurate information stored by cell phone companies that would give them an exact location of the cell phone every fifteen minutes, but these records are only stored for about seven days before they are deleted. He testified that this data was not collected in this case. He explained that the investigating detective could have requested this information because it would have been within seven days, but he might not have known about it at the time of the investigation.

Respondent submits Trial Counsel cannot be deficient for failing to present Slovenski as an expert witness at trial to challenge Fraser's testimony because Slovenski's testimony was based on technology that did not exist at the time of trial in 2014. Attorneys are not required to be clairvoyant of future changes in the law, in facts, or in technology. See generally State v. Tapp, 398 S.C. 376, 385-86, 728 S.E.2d 468, 473 (2012) ("While our preservation rules require that objections to the admissibility of evidence be specific, they most certainly do not require clairvoyance."). South Carolina courts have "never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).

Likewise, Trial Counsel cannot be deficient for failing to find an expert who used a technology that did not exist at the time of trial. Pin Link, the system Fraser used in her trial testimony, was the current, accurate system used by law enforcement agencies at the time, as was

her "pie method" of charting cell tower data. Any criticism of these methods now, more than four years later, in an ever-changing and evolving technological world, should not be the basis for criticism of Trial Counsel's performance. Even if Slovenski himself had testified at Applicant's trial in 2014, his testimony would have been completely different than it was at the evidentiary hearing, because he would not have had access to the technology he claims is superior to Fraser's.

Trial Counsel thoroughly cross-examined Fraser at trial, pointing out inconsistencies in her maps for the jury and emphasizing that the use of Applicant's cell phone did not necessarily mean he was in a certain location. The Court's finding that he was deficient for failing to use non-existent technology at trial holds him to an entirely unreasonable standard. De Grant Gibbons also testified that he and Trial Counsel had someone within their office who knew how to read the cell tower data look at the evidence before the trial to help them prepare their argument. Trial Counsel's performance was clearly reasonable under prevailing professional norms at the time of trial. Accordingly, he cannot be deficient on this ground.

Secondly, there is no resulting prejudice from the failure to present Slovenski's testimony at trial because it would not have changed the outcome of the trial. While Slovenski opined that Fraser's cell tower data was used to place Applicant at the scene of the crime, the record and Public Defender De Grant Gibbons' testimony show that the State was using the records only to disprove Applicant's alibi, not to place him at the crime scene. Applicant presented alibi witnesses at trial, who testified that Applicant was at a comedy show during the crime. However, none of the alibi witnesses could testify that they physically saw Applicant at or around 10:00, during the comedy show. They all testified that they saw him before or after the show.

As discussed above, Fraser testified at trial that Applicant cell phone made two outgoing telephone calls to the Captain D's restaurant that was robbed very shortly before the robbery, which not only shows Applicant's connection to the scene of the crime and his interactions with someone within the restaurant, but also that his cell phone was making phone calls during the time that he was allegedly watching a comedy show. Finally, as also discussed in the sections above, Applicant was identified as the person who robbed the store by the victim who was held at gunpoint when she did her own independent investigation immediately following the crime. This evidence is very strong, and Respondent submits that any testimony used to challenge the cell tower data the State was using to disprove his alibi would not have made a difference in the jury's verdict.

De Grant Gibbons also opined that the cell tower data did not make much difference in the jury's verdict. He testified at the evidentiary hearing that he believed the phone records were so technical that the jury did not know what the State was trying to use them to say. He testified that the cell phone data would have been important if it had been "meaningful," but the State was only using it to disprove his alibi.

For these reasons, the record and testimony before the Court clearly show Trial Counsel was not deficient and there was no resulting prejudice from any alleged deficiency on this ground. Accordingly, this Court should deny post-conviction relief.

[conclusion and signature page to follow]

V.

For the reasons explained above, Respondent submits post-conviction relief was improperly granted and respectfully requests this Court to alter its judgment and deny Applicant's application for post-conviction relief.

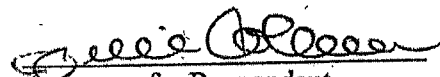
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August 20, 2018

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

JOHN LYDON UPSON, #229134,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2017-CP-02-0129

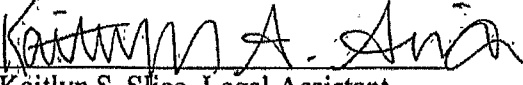
AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Alter or Amend Pursuant to Rule 59(e)** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

The Honorable R. Scott Sprouse
Presiding Judge, Second Judicial Circuit
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Tommy A. Thomas, Esquire
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DATED this 21st day of August, 2018.


Kaitlyn S. Spice, Legal Assistant
For Respondent

APP'X 507

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

John Lyndon Upson,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Case No.: 2017-CP-02-0129

ORDER DENYING DEFENDANT'S MOTION
FOR RECONSIDERATION

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Defendants's Motion, pursuant to Rule 59, SCRPC,¹ is DENIED.

AND, IT IS SO ORDERED.



R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina
August 24, 2018

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRPC.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2017-CP-02-00129

JOHN LYNDON UPSON,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable R. Scott Sprouse, dated August 7, 2018 and filed August 10, 2018, granting post-conviction relief to Respondent. The State filed a timely motion to reconsider, which was denied in an order dated August 24, 2018, filed August 29, 2018, and received by the State on September 10, 2018. A copy of the order on appeal is attached to this notice.

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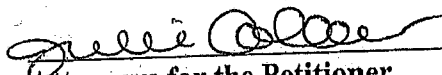
S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUN 27 2019

On Writ of Certiorari to Aiken County S.C. SUPREME COURT
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2018-001674

JOHN UPSON,

Respondent,

vs.

THE STATE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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The post-conviction relief judge reversibly erred by finding—in a legally- erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own.	10
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STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief judge reversibly err by finding—in a legally-erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own?

- A. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing either to seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or to challenge the admission of that evidence during trial when—just as the post-conviction relief judge found in his order incorrectly granting relief—the victim made the identification without the involvement of any suggestive circumstances created by law enforcement, which necessarily meant defense counsel could not have been deficient for failing to challenge the identification evidence through a pre-trial hearing request or a trial objection since there were no valid legal grounds supporting such a request or objection?
- B. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to cross-examine Alston in some unspecified manner about testimony indicating Upson had a "lazy eye" when defense counsel thoroughly attacked Alston's identification of Upson as the robber in an appropriate and reasonable manner throughout the trial and when no prejudice could have resulted from defense counsel's failure to question Alston about her "lazy eye" testimony in light of the fact the jurors had a full opportunity to view Upson's eyes throughout the trial, which enabled them to make their own determinations regarding the reliability of Alston's testimony even without any additional questioning?
- C. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own when the evidence the post-conviction relief judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding?

STATEMENT OF THE CASE

Procedural History

In December of 2013, Respondent John Upson was arrested following an investigation into an armed robbery that had occurred a few days earlier. In January of 2014, the Aiken County Grand Jury indicted Upson for one count of armed robbery and two counts of kidnapping. On April 15, 2014, a jury trial was commenced in the Aiken County Court of General Sessions with the Honorable Donald B. Hocker, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Upson as indicted. Following the verdict, the trial judge sentenced Upson to concurrent terms of imprisonment of twenty years for each of the three convictions. Upson then timely filed and perfected an appeal.

On appeal, the Court of Appeals unanimously affirmed Upson's convictions in an unpublished opinion. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). Thereafter, on June 17, 2016, remittitur was issued.

Subsequent to the issuance of the remittitur, Upson timely filed an application for post-conviction relief, and, in response, the State filed a return requesting an evidentiary hearing. On May 5, 2018, an evidentiary hearing was conducted in the Aiken County Court of Common Pleas with the Honorable R. Scott Sprouse, circuit court judge, presiding. At the conclusion of the hearing, the post-conviction relief judge took the matter under advisement. Thereafter, through an order filed on July 23, 2018, and an amended order filed on August 10, 2018, the post-conviction relief judge granted Upson's post-conviction relief application. The State then timely filed a motion to alter or amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and the post-conviction relief judge summarily denied the State's motion through an order filed on August 29, 2018.

Factual History

Summary of Upson's Crimes and the Evidence Discovered during the Ensuing Investigation

At around 10:00 p.m. on the night of November 27, 2013, Scott Hall was taking the trash outside to the dumpster behind the Captain D's restaurant he worked at in Aiken, South Carolina, when two men dressed in black clothing with bandanas partially covering their faces rapidly approached him, put a gun to his head, and forced him back into the restaurant. (App'x pp. 54-55; pp. 57-58; pp. 78-80; p. 89; p. 96). Once inside, the gunman ordered Hall to take him to the front of the restaurant where the safe was located while the other robber remained at the rear of the restaurant with Jameshia Alston, another of the restaurant's employees. (App'x pp. 52-54; p. 80). Terrified, Hall complied with the gunman's commands and led him to Devin Johnson, the restaurant's manager. (App'x p. 101). The gunman then ordered Hall to get onto the floor and directed Johnson to give him the restaurant's cash. (App'x p. 81). After that, the robbers forced Hall, Johnson, and Alston into a freezer at the back of the restaurant before rapidly absconding from the scene. (App'x p. 54; pp. 59-60; p. 66; p. 81; pp. 85-86; p. 91; p. 95).

Once the robbers were gone, Alston and the others left the freezer, and Johnson called 911 to report what had occurred. (App'x pp. 60-61; pp. 91-92). Shortly after that, officers from the Aiken Department of Public Safety responded to the scene and spoke with the restaurant's employees, who recounted the harrowing ordeal and provided general descriptions of the partially-masked robbers. (App'x p. 61; p. 68; p. 71; p. 76; p. 80; pp. 86-87; p. 92; p. 96; p. 100). Furthermore, Alston reported she recognized the robber who watched over her during the incident as a customer who had come into the restaurant a few days earlier and spoken with William Keels, another of the restaurant's employees. (App'x pp. 56-57; p. 61; p. 110; p. 112). However, Alston indicated she did not know the man's name at that time. (App'x p. 61).

At the conclusion of the investigation at the scene, Alston went home and independently began searching for the robber she recognized using the internet. (App'x pp. 56-57; p. 72; pp. 116-117). During the search, she examined Keels's Facebook page and, while looking through his list of friends on that website, instantly recognized one of Keels's friends as the robber upon seeing his picture. (App'x pp. 56-57; p. 65; pp. 73-74). Based on that, she was able to determine the robber was Upson, and she quickly alerted Detective Billy Royster of her discovery. (App'x p. 61; pp. 73-74; p. 102).

In response, Detective Royster arrested Upson in connection to the incident. (App'x pp. 102-103; p. 105; pp. 271-272). Upson was then indicted for armed robbery along with several counts of kidnapping, and he proceeded forward to trial. (App'x p. 6; pp. 273-278).

Relevant Details from Upson's Trial

During the course of trial, Alston testified for the prosecution and recounted the details of the terrifying robbery. (App'x pp. 52-77). Alston further identified Upson in the courtroom as one of the robbers, and she explained how she was initially able to identify him as one of the people involved. (App'x pp. 55-57; p. 61; pp. 65-66; pp. 72-75). Then, during defense counsel's cross-examination, Alston acknowledged she was frightened when she viewed the robber, conceded she only saw a partial view of the robber's face, and revealed she was shown a list of names as some point by the police. (App'x p. 75). However, she specifically confirmed she did not have Upson's name at the time she identified him through her independent research. (App'x p. 74). Thereafter, on redirect examination, the solicitor questioned Alston about her recognition of Upson's eyes as the robber's eyes, and she explained: "He has a lazy eye. It's kind of droopy, like that." (App'x p. 77). After that, defense counsel did not ask any further questions of the witness. (App'x p. 77).

Following Alston's testimony, Hall recounted his experiences on the night of the robbery, and, during his testimony, defense counsel questioned him about his lack of knowledge that money was actually stolen during the incident while also questioning him about his recollection of the physical appearance of the robbers. (App'x pp. 78-99). Furthermore, Detective Royster discussed the details of his investigation that culminated in Upson's arrest, and, during his testimony, defense counsel questioned him about various purported shortcomings with the investigation while further questioning him about Upson's height, which was inconsistent with Hall's description of the robbers' heights. (App'x p. 87; pp. 100-135).

Beyond that testimony, Desra Fraser, an intelligence research specialist with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, testified about how she assisted in the investigation by using PenLink software to analyze Upson's phone records, which had been obtained from his phone company. (App'x p. 103; p. 138; pp. 147-149). By using PenLink, Fraser indicated she generated maps of the locations where Upson was positioned when various calls were made on the night of the incident, and the maps were admitted into evidence. (App'x p. 149; p. 153). Additionally, Fraser stated some of the maps depicted "possible" movement at the time the calls were being made. (App'x p. 155). Furthermore, Fraser noted Upson's phone was used to call the Captain D's restaurant at 9:37 p.m. on the night of the crime and then was used again to call the restaurant at 9:47 p.m. with the caller identification information intentionally blocked during the second call. (App'x p. 151). Thereafter, on cross-examination, Fraser conceded she had no idea who was using Upson's phone when the calls were made. (App'x pp. 157-158). Likewise, she admitted she had no idea if the phone was actually moving during the calls. (App'x pp. 158-159).

Following the presentation of that testimony and evidence, the State rested, and defense counsel called three alibi witnesses to testify on Upson's behalf. (App'x p. 163; p. 174; pp. 183-203). During the testimony of those witnesses, one indicated he saw Upson before a comedy show that took place in downtown Aiken on the night of the incident, one indicated she saw Upson before and after the show, and the other indicated she saw Upson after the show. (App'x pp. 184-186; pp. 190-194; pp. 196-197; p. 199; p. 201). However, none reported seeing Upson during the course of the show, which purportedly began at some point after 8:00 p.m. or 9:00 p.m. and ended at some point between 10:30 p.m. and midnight. (App'x p. 194; p. 189; pp. 190-191; pp. 195-197; p. 199; p. 201; p. 203).

At the conclusion of the presentation of that testimony, the defense rested, and the parties presented their closing arguments to the jury. (App'x p. 204; pp. 210-238). During defense counsel's closing argument, defense counsel heavily relied on the testimony of the alibi witnesses in arguing Upson was not involved in the robbery. (App'x pp. 211-212; pp. 218-219). Furthermore, throughout the entirety of his closing argument, defense counsel repeatedly questioned the reliability of Alston's identification and conducted four separate demonstrations to illustrate to the jury how difficult it would have been for Alston to accurately identify Upson solely from a glimpse of the robber's nose and eyes. (App'x pp. 213-219). Conversely, during the State's closing argument, the solicitor challenged the reliability of the alibi witnesses based on their inability to provide concrete times and argued Alston's identification of the robber, whom she recognized from an earlier visit to the restaurant, was reliable. (App'x pp. 225-228; p. 230; p. 237). Furthermore, the solicitor conceded the maps of Upson's calls established Upson was downtown prior to the robbery, which was consistent with his claimed alibi, but noted the maps established he was not downtown after the robbery. (App'x p. 184; pp. 232-233).

Subsequently, at the conclusion of trial, the jury convicted Upson as indicted. (App'x p. 258; pp. 279-280). The trial judge then sentenced Upson to an aggregate twenty-year term of imprisonment. (App'x p. 269; pp. 281-283).

Summary of the Post-Conviction Relief Proceedings

Following an unsuccessful appeal, Upson sought post-conviction relief on a number of grounds, including on the basis his defense counsel was allegedly ineffective for failing to fully cross-examine Alston, request a pre-trial hearing about the identification evidence, object to that evidence during trial, and fully refute the State's case. (App'x pp. 352-356; pp. 357-364). In response, the State filed a return requesting an evidentiary hearing. (App'x 366-371).

During the ensuing hearing, Thomas Slovenski, an expert in mobile phone forensics, testified on Upson's behalf, and, during his testimony, several maps of Upson's phone calls on the night of the incident that had been admitted during trial were introduced into evidence along with some maps Slovenski had personally generated using a more modern program than the one available to Fraser when she created the maps used at trial. (App'x pp. 380-381; p. 383; p. 386; pp. 389-395; pp. 397-398; p. 402; pp. 468-474). Relying on his maps along with his belief the robbery had occurred around 10:40 p.m. to 10:47 p.m., Slovenski opined no calls were made from Upson's phone "that encompassed the incident location at the incident date and time."¹ (App'x pp. 383-384). Additionally, Slovenski asserted Fraser's maps could have been better while contending the program he used, which was not available until 2015, was better than the "good" one used by Fraser. (App'x p. 386; p. 402). Slovenski further indicated his program generated maps different from the maps generated using the "old methodology," which was the "pie method," and he stated he believed the maps generated by his program were more accurate

¹ Contrary to Slovenski's belief of when the robbery occurred, the victims testified during trial it took place around 10:00 p.m. or 10:15 p.m. (App'x p. 53; p. 58; p. 79).

than Fraser's maps, which he contended could have "potentially" suggested Upson was closer to the restaurant than he might have been at various times. (App'x p. 386; p. 390; p. 402). However, Slovenski conceded the program used by Fraser was commonly used at the time of Upson's trial, and he asserted he, in fact, would have used the "pie method" at the time of trial because "that was all that was available at that time." (App's pp. 401-402). Furthermore, Slovenski acknowledged some of the maps generated by Fraser had the same results as his maps, and he conceded the State never suggested during Upson's trial their maps showed Upson was at the scene of the crime at the time of the robbery. (App'x pp. 387-388; p. 403).

In addition to Slovenski's testimony, Upson testified on his own behalf and, based on his view of the trial testimony, opined Alston must have had a list of names at the time she identified him during her independent investigation following the robbery.² (App'x pp. 426-431). Furthermore, he asserted Alston's identification was based on him having a "lazy eye," which he claimed was inaccurate. (App'x pp. 431-432).

Following that testimony, Grant Gibbons, who assisted defense counsel with the trial, testified for the State about his recollection of the trial and indicated the defense strategy was to assert an alibi defense.³ (App'x pp. 438-440). However, he noted Upson's whereabouts could not be completely accounted for by the alibi witnesses. (App'x p. 440). Additionally, Gibbons indicated they reviewed the phone records, which he stated would have been meaningful only if they placed Upson at the scene of the crime, with a knowledgeable attorney to prepare for trial, and he stated Upson admitted to them he had called the restaurant before the robbery, which was

² Significantly, during his testimony, Upson also *confirmed* Alston's account of seeing him at the restaurant just days before the robbery. (App'x p. 427).

³ Notably, defense counsel had moved to Colorado by the time of the hearing, was not present for it, and was not permitted to testify by telephone following an objection from Upson. (App'x pp. 376-378).

reflected in the records. (App'x p. 151; pp. 441-442; pp. 446-447). Furthermore, in regard to the identification evidence, Gibbons explained no challenge was raised to it because no government action was involved in the out-of-court identification, which meant there was no basis upon which to challenge it. (App's pp. 442-444; p. 450). Likewise, Gibbons disagreed with Upson's interpretation of Alston's testimony, and he noted defense counsel thoroughly challenged Alston's identification to the jury in a "really effective" manner by demonstrating the difficulty in identifying people just from their eyes and noses. (App'x pp. 442-444; pp. 452-453).

Thereafter, once all the testimony and evidence had been introduced, the parties made their arguments for and against a grant of relief in Upson's case. (App'x pp. 456-466). The post-conviction relief judge then took the matter under advisement! (App'x p. 466).

Subsequently, upon considering the matter, the post-conviction relief judge issued an order—and amended order—granting post-conviction relief to Upson.⁴ (App'x pp. 475-493). In granting relief, the post-conviction relief judge concluded defense counsel was deficient for: (1) failing to either seek a pre-trial hearing to determine the admissibility of the identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own. (App'x pp. 492-493). Furthermore, without explanation or analysis, the post-conviction relief judge concluded defense counsel's deficiencies resulted in some undefined prejudice to Upson. (App'x p. 493). The State then sought for the post-conviction relief judge to reconsider his ruling, but he summarily declined to do so. (App'x pp. 494-508).

⁴ Interestingly, there do not appear to be any substantive differences between the original order and amended order. (App'x pp. 475-493).

ARGUMENT

The post-conviction relief judge reversibly erred by finding—in a legally-erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim’s testimony about her belief Upson had a “lazy eye” on cross-examination; and (3) failing to challenge the State’s testimony discrediting Upson’s alibi defense with an expert of his own.

In the case sub judice, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim’s testimony about her belief Upson had a “lazy eye” on cross-examination; and (3) failing to challenge the State’s testimony discrediting Upson’s alibi defense with an expert of his own. To the contrary, defense counsel was not deficient in any manner during Upson’s trial, and there was no reasonable probability the result of the proceeding would have been different but for the tactical decisions defense counsel made in carrying out his representation.⁵ As a result, the post-conviction relief judge erred as a matter of law by finding defense counsel was constitutionally ineffective, and his ruling was legally erroneous and without factual support. The State’s petition for a writ of certiorari should be granted, and the post-conviction relief judge’s grant of relief should be reversed.

Standard of Review

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief judge’s factual findings on appeal, the appellate

⁵ Notably, in granting relief, the post-conviction relief judge did not specifically find there was a reasonable probability the result of the proceeding would have been different but for defense counsel’s purported errors despite the fact such a finding was necessary for a grant of relief to be warranted and proper. (App’x pp. 491-493).

court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (“Under the proper standard of review, the appellate court’s ‘view’ must be limited to whether there is probative evidence to support the PCR court’s factual findings.”). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the post-conviction relief judge’s rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the post-conviction judge’s decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

Law Applicable to Ineffective Assistance of Counsel Claims

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) (“The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors.”). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”). Significantly, effective assistance of counsel does *not* mean perfect representation. See Burt v. Titlow, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688.

Meanwhile, counsel's assistance is considered to be constitutionally ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001). Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

Regarding the deficiency prong, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Id.; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the

then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to post-conviction relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. In order to for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112.

Application of the Relevant Law to Upson's Case

- A. The post-conviction relief judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing either to seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or to challenge the admission of that evidence during trial because—just as the post-conviction relief judge found in his order incorrectly granting relief—the victim made the identification without the involvement of any suggestive circumstances created by law enforcement, which necessarily meant defense counsel could not have been deficient for failing to challenge the identification evidence through a pre-trial hearing request or a trial objection since there were no valid legal grounds supporting such a request or objection.**

In his order granting relief, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for failing to either seek a pre-trial hearing to determine the

admissibility of the evidence of Alston's eyewitness identification of Upson as the robber or seek the exclusion of that evidence during trial. (App'x pp. 492-493). In reaching that conclusion, the post-conviction relief judge found "the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement" and who was subsequently presented with a list of names that included Upson's name "[w]hen she did speak with law enforcement[.]"⁶ (App'x p. 492). The post-conviction relief judge further found defense counsel failed to challenge the eyewitness identification evidence by seeking a pre-trial hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972), or by objecting to its admission during trial. (App'x p. 492). Based on those findings, the post-conviction relief judge—without further explanation or analysis—ruled Upson met his burden of proving defense counsel was both deficient and the deficiency resulted in some unspecified prejudice and, therefore, granted post-conviction relief to him. (App'x pp. 492-493).

Contrary to the post-conviction relief judge's legally-and-factually-erroneous conclusion, defense counsel was not constitutionally ineffective for failing to either seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or seek its exclusion during trial as defense counsel had no proper grounds upon which to request a pre-trial hearing or object due to the circumstances that actually led to Alston's out-of-court identification of Upson. Significantly, just as the post-conviction relief judge found in his order, Alston located Upson's photograph and identified him as one of the robbers through independent internet research

⁶ To the extent the post-conviction relief judge found Alston was presented with a list of names containing Upson's name, no evidence was ever presented—or identified by the post-conviction relief judge—to establish or support such a factual finding. (App'x pp. 75-76; p. 492). Instead, the unrefuted record from trial established Alston was only presented with a list of names *after* she independently identified Upson as one of the robbers and provided his information to Detective Royster, and no evidence or information was presented suggesting Upson's name was included in the list shown to Alston subsequent to her providing Upson's information to the detective. (App'x pp. 56-57; p. 61; p. 65; pp. 72-76).

conducted *prior to* her speaking to the detective about the identification, and her research efforts that led to the identification were *not* conducted with the assistance of or at the request of any law enforcement officers. Cf. State v. Tisdale, 338 S.C. 607, 613, 527 S.E.2d 389, 392 (Ct. App. 2000) (“[B]ecause the police were not involved in the media identifications in this case, the trial judge did not err in allowing the tellers’ identification testimony.”). Based on that, the events that led to Alston’s identification of Upson were simply *not* the product of any circumstances—suggestive or otherwise—created by government officials, which meant defense counsel did not have any grounds upon which he could have legally sought a pre-trial hearing in regard to the identification evidence or upon which he could have sought the exclusion of that evidence during trial. See Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (recognizing “a due process check on the admission of eyewitness identification” is applicable *only* “when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime”). Therefore, defense counsel’s failure to undertake actions for which no valid legal basis existed simply could not have constituted representation falling outside reasonable professional norms, and the post-conviction relief judge erred as a matter of law by concluding otherwise. See State v. Liverman, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (recognizing preliminary judicial inquiry regarding the reliability of identification evidence is only required when “it is contended that an identification is obtained under unnecessarily suggestive circumstances *arranged by state action*” (emphasis added)); cf. Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (holding a post-conviction relief judge’s grant of relief based on defense counsel’s failure to raise an objection to be without factual support where “there was no sustainable objection” defense counsel could have made).

Moreover, notwithstanding the fact there was no legal basis upon which defense counsel could have challenged the admissibility of the identification evidence, the post-conviction relief judge did not identify any reasons as to why or how the circumstances of Alston's out-of-court identification of Upson were unnecessarily and unduly suggestive or created a substantial likelihood of misidentification. Without such reasons identified or present in the record, there was simply no basis upon which to conclude the eyewitness identification evidence in Upson's case was so manifestly suspect that the extreme sanction of exclusion would have been warranted. See Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983) (instructing the exclusion of evidence is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect"). Thus, there were no grounds upon which the post-conviction relief judge could have found defense counsel's purported deficiency in regard to the identification evidence resulted in the prejudice necessary to warrant a grant of relief since the post-conviction relief judge did not even find the evidence would have been inadmissible had defense counsel attempted to prevent its admission in some manner. See Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness *and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.*" (emphasis added)).

Accordingly, for the foregoing reasons, the post-conviction relief judge erred as a matter of law in concluding defense counsel was constitutionally ineffective for failing to either seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or seek its exclusion during trial, and his ruling granting relief was legally and factually erroneous. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (recognizing a post-conviction relief judge's decision

will be reversed when it is controlled by an error of law). The State's petition for a writ of certiorari should be granted, and the post-conviction relief judge's ruling should be reversed.

B. The post-conviction relief judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing to cross-examine Alston in some unspecified manner about testimony indicating Upson had a "lazy eye" because defense counsel thoroughly attacked Alston's identification of Upson as the robber in an appropriate and reasonable manner throughout the trial and because no prejudice could have resulted from defense counsel's failure to question Alston about her "lazy eye" testimony in light of the fact the jurors had a full opportunity to view Upson's eyes throughout the trial, which enabled them to make their own determinations regarding the reliability of Alston's testimony even without any additional questioning.

In his order granting relief, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for failing to challenge Alston's testimony regarding Upson's purported "lazy eye" through cross-examination.⁷ (App'x pp. 492-493). In reaching that conclusion, the post-conviction relief judge indicated he was "particularly concerned" with the "lazy eye" testimony and asserted Upson "clearly" did not have a "lazy eye" based on his own personal study of Upson's facial features during the post-conviction relief proceedings. (App'x pp. 492-493). For that reason, the post-conviction relief judge indicated he was "concerned" the "lazy eye" testimony "evidence[d] a misidentification that led to [Upson]'s conviction." (App'x p. 493). Notably though, the post-conviction relief judge did *not* identify any specific questions he believed defense counsel should have asked of Alston on cross-examination or explain in any manner how he believed the "lazy eye" testimony should have been challenged. (App'x pp. 492-493). He further made no reference to the fact Alston did not simply say Upson's had a "lazy eye" but further explained she viewed his eyes as being "droopy." (App'x p. 487; pp. 492-493).

⁷ Throughout his order, the post-conviction relief judge repeatedly referred to Alston incorrectly as "Austin." (App'x p. 52; p. 489).

Instead, he simply concluded—without explanation or analysis—both deficiency and prejudice had been established in regard to the “lazy eye” testimony. (App’x p. 493).

Initially, contrary to the post-conviction relief judge’s ruling, defense counsel was not deficient for failing to specifically cross-examine Alston about the “lazy eye” testimony because he did, in fact, thoroughly challenge Alston’s identification of Upson as the robber in a variety of different ways. Specifically, during the trial, defense counsel challenged the reliability of the identification by eliciting testimony from Alston establishing the robbers’ faces were partially covered and she was only able to see Upson’s eyes and nose. He then attempted to exploit that testimony by repeatedly attacking the reliability of the identification throughout his closing argument and by conducting a “really effective” demonstration for the jury in an effort to show just how difficult it would be to accurately identify even a well-known person solely from a view of the person’s eyes and nose. In light of the fact defense counsel did thoroughly challenge Alston’s identification of Upson as the robber in the manner he believed would be the best and most effective means of doing so, defense counsel was not deficient or objectively unreasonable for failing to *also* challenge the identification in a different manner by questioning Alston—in some unspecified way—about her testimony regarding Upson’s purported “lazy eye.” See Strickland, 466 U.S. at 688-689 (recognizing there typically exists a “range of legitimate decisions regarding how best to represent a criminal defendant” and instructing defense counsel must have “wide latitude” in making tactical decisions).

Moreover, as to the “lazy eye” testimony specifically, it remains entirely unclear what questions the post-conviction relief judge believed defense counsel should have asked of Alston about that particular subject matter as none have so far been identified. However, through her testimony, Alston indicated she believed Upson had a distinctive “lazy eye,” and she quickly

qualified that statement by explaining she perceived his eyes as being “droopy.” Therefore, had defense counsel sought to challenge Alston’s “lazy eye” testimony on cross-examination, he would have simply given Alston an opportunity to further explain what she meant by her testimony, and she very well might have explained—just as she appears to have done—her view of a “lazy eye” was an eye that was “droopy,” which, notably, would have been consistent with what the phrase “lazy eye” is perceived by many to mean.⁸ Compare “Amblyopia,” available at <https://en.wikipedia.org/wiki/Amblyopia> (explaining amblyopia is “a disorder of sight due to the eye and brain not working well together” that “results in decreased vision in an eye that *otherwise typically appears normal*” and noting the disorder is also called “lazy eye” (emphasis added)); with “Ptosis,” available at [https://en.wikipedia.org/wiki/Ptosis_\(eyelid\)](https://en.wikipedia.org/wiki/Ptosis_(eyelid)) (explaining ptosis is a medical condition involving drooping of the eyelid and noting the condition is sometimes referred to as “lazy eye”). As a result, defense counsel simply could not have provided objectively unreasonable representation by failing to ask some so-far-unidentified questions of Alston that would not have necessarily elicited any testimony remotely favorable to his client. See Ward v. Whitley, 21 F.3d 1355, 1362 (5th Cir. 1994) (“It is a basic rule of cross-examination: Never ask a question for which you do not know the answer.”); see also Strickland, 466 U.S. at 689 (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”).

However, even assuming defense counsel was somehow deficient for failing to ask some unspecified questions about Alston’s “lazy eye” testimony, defense counsel’s failure to conduct further questioning could not have resulted in any prejudice to Upson because the jurors—just like the post-conviction relief judge—had a full and direct opportunity to personally view Upson

⁸ Significantly, Upson clearly *does* appear to have “droopy” eyelids in the photograph of him available through his inmate records. (App’x p: 285).

for themselves and make their own determination as to whether Alston's testimony about Upson's "lazy" and "droopy" eyes negatively impacted the reliability of the identification. Cf. State v. Odom, 412 S.C. 253, 268, 772 S.E.2d 149, 156 (2015) (finding "the jury's ability to view [Odom]'s appearance in the courtroom" contributed to an error being rendered harmless); State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (1996) ("Because the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification, the identification is not unreliable."). Under those circumstances coupled with the fact defense counsel thoroughly attacked the reliability of Alston's identification in other ways, defense counsel's failure to conduct some unidentified probing of the "lazy eye" testimony simply could not have created a reasonable probability the result of the trial would have been different, which was needed for a grant of post-conviction relief to be warranted. See Strickland, 466 U.S. at 693-694 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Accordingly, as defense counsel was not objectively unreasonable for failing to specifically challenge the "lazy eye" testimony and no prejudice could have resulted from his failure to do so, the post-conviction relief judge erred as a matter of law by finding defense counsel was constitutionally ineffective for failing ask some unspecified questions of Alston in regard to her description of Upson's eyes. See Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998) ("As to allegations of ineffective assistance of counsel, the applicant must show his counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different.").

The State's petition for a writ of certiorari should be granted, and the post-conviction relief judge's ruling should be reversed.

C. The post-conviction relief judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own because the evidence the post-conviction relief judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding.

In his order granting relief, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for failing to challenge the State's testimony that purportedly discredited Upson's alibi defense by presenting an expert to testify for the defense. (App'x p. 493). In reaching that conclusion, the post-conviction relief judge noted Upson presented expert testimony during the evidentiary hearing that "created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the 'pie method.'"⁹ (App'x p. 493). As to the substance of the doubt-creating testimony, the post-conviction relief judge indicated Slovenski, who was Upson's expert, was able to generate more accurate maps than those created with the "older" program used by Fraser, the State's witness. (App'x p. 489). Additionally, the post-conviction relief judge stated none of Slovenski's data "encompassed the location" where the robbery took place, which he found—incorrectly—was "contrary to the testimony and presentation" from the trial. (App'x p. 489). Furthermore, the post-conviction relief judge noted Slovenski had explained the "pie method" inaccurately involved the use of directional wedges while cell phone towers operated more like clouds. (App'x p. 489). Notably

⁹ Although the post-conviction relief judge repeatedly referred to the State's witness as an expert, the State's witness was not actually qualified as an expert witness during trial. (App'x pp. 147-163).

though, the post-conviction relief judge made no reference whatsoever to the fact Slovenski used a program not in existence until well after Upson's trial had concluded or to the fact Slovenski admitted he *personally* would have used the "pie method" at the time of Upson's trial due to fact it "was all that was available at that time." (App'x p. 386; p. 402). Moreover, the post-conviction relief judge ignored the fact many of the State's maps—by Slovenski's own admission—were consistent with the ones he generated and the ones he claimed were not appeared to have actually been largely consistent with his maps aside from having wedged-shaped areas highlighted as opposed to round-shaped ones. (App'x pp. 468-474). Likewise, the post-conviction relief judge ignored Slovenski's acknowledgement the State never argued its maps showed Upson was actually at the scene of the robbery at the time it was committed. (App'x p. 403). Finally, the post-conviction judge made no reference to the fact the solicitor *conceded* in closing argument the State's maps demonstrated Upson was, in fact, downtown prior to the robbery, which corroborated the claims made by several of his alibi witnesses as opposed to discrediting them. (App'x p. 184; pp. 232-233).

Contrary to the post-conviction relief judge's legally-and-factually-erroneous ruling, defense counsel was not—and could not have been—deficient for failing to present the expert testimony the post-conviction relief judge found he should have presented to call into question Fraser's testimony during trial. Critically, that is true because—just as Upson's expert readily acknowledged—the information presented during the evidentiary hearing to challenge the accuracy of Fraser's testimony *did not exist* until well after Upson's trial took place. Based on that fact coupled with the fact Upson's expert conceded he would have used the same "pie method" used by Fraser at the time of trial, defense counsel simply could not have been deficient for failing to avail himself of technology and evidence that was not yet in existence, and the post-

conviction relief judge's conclusion to the contrary was utterly illogical. See Tillman v. State, 244 S.C. 259, 264-265, 136 S.E.2d 300, 303 (1964) ("He is not required to be infallible, *nor to do the impossible*, since the defendant is entitled to a fair trial and not a perfect one or a perfect result." (emphasis added)); see also Thornes v. State, 310 S.C. 306, 309-310, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or *facts which did not exist*, at the time of the trial." (emphasis added)).

Beyond that, even if the impossible could have been achieved and the then-non-existent evidence identified by the post-conviction relief judge somehow could have been presented during trial, that evidence nonetheless could not have altered the result of the proceeding. That is true because the evidence Upson's expert introduced during the evidentiary hearing was largely consistent with the evidence introduced by the State during trial aside from being slightly more accurate due to advances in technology that only came about well *after* the trial took place. Similarly, just like the State's evidence, Upson's evidence showed he was in Aiken on the date of the incident without directly placing him at the scene of the robbery at the time it was committed, and the evidence in no way called into question Fraser's testimony establishing Upson suspiciously called the restaurant several times just before it was robbed, including one time while blocking his identifying information. Under those circumstances, the evidence presented by Upson to support his post-conviction relief claims was not sufficient to establish the requisite prejudice needed for him to be entitled to relief as it could not have impacted the outcome of trial. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Accordingly, as defense counsel was not—and could not possibly have been—deficient for failing to present evidence that did not yet exist and which could have had no impact on the

result of the trial, the post-conviction relief judge erred as a matter of law by finding defense counsel was constitutionally ineffective for failing to present expert testimony to challenge the State's evidence generated from Upson's phone records. See Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."); cf. Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 90-91 (1992) ("We cannot say that trial counsel was ineffective for failing to present evidence of a complex psychological phenomenon which had not yet been recognized by this Court, and which only recently had been identified by the scientific community."). The State's petition for a writ of certiorari should be granted, and the post-conviction relief judge's ruling should be reversed.

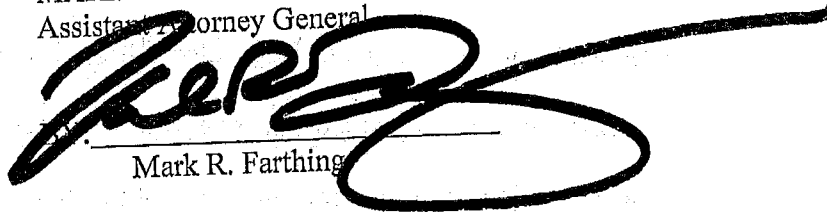
CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be granted and post-conviction relief judge's grant of relief should be reversed.

Respectfully submitted,

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June 27, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

CASE NO.: 2018-001674

JOHN UPSON,..... Respondent,

vs.

THE STATE,..... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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Petitioner's Statement of Issue

Did the Post-Conviction Relief Judge err by finding—in a legally-erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) Ailing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own?

- A. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing either to seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or to challenge the admission of that evidence during trial when – just as the post-conviction relief judge found in his order incorrectly granting relief – the victim made the identification without the involvement of any suggestive circumstances created by law enforcement, which necessarily meant defense counsel could not have been deficient for failing to challenge the identification evidence through a pre-trial hearing request or a trial objection since there were no valid legal grounds supporting such a request or objection?
- B. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to cross-examine Alston in some unspecified manner about testimony indicating Upson had a "lazy eye" when defense counsel thoroughly attacked Alston's identification of Upson as the robber in an appropriate and reasonable manner throughout the trial and when no prejudice could have resulted from defense counsel's failure to question Alston about her "lazy eye" testimony in light of the fact the jurors had a full opportunity to view Upson's eyes throughout the trial, which enabled them to make their own determinations regarding the reliability of Alston's testimony even without any additional questioning?
- C. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own when the evidence the post-conviction relief judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding?

Statement of the Case

Procedural History

Respondent is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. In January 2014, the Aiken County Grand Jury indicted Respondent for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire represented Respondent. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Respondent proceeded to trial before the Honorable Donald B. Hocker. The jury found Respondent guilty as indicted. Judge Hocker sentenced Respondent to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

Respondent filed a timely notice of appeal. John H. Strom, Esquire, of the Office of Appellate Defense perfected the appeal. The issue raised on appeal was whether trial court erred in denying Respondent's directed verdict motion where the evidence presented at Respondent's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson. The South Carolina Court of Appeals affirmed Respondent's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the Circuit Court on June 17, 2016.

In his application for Post-Conviction Relief, which was filed on January 23, 2017, Respondent alleged that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"

- a. "Failure to fully cross-examine Jameshia Alston."
- b. "Failure to ask for Neils v. Biggers hearing."
- c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright and Brenda Smith."
- d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Respondent."
- e. "Failure to object to Respondent being charged and standing trial for armed robbery when the 14th and 6th Amendments were violated by the confrontation clause."
- f. "Failure to object to in-court identification."
- g. "Failure to object to bolstering by the State during closing arguments."

The State filed its Return on May 16, 2017. Present at the evidentiary hearing, held on May 5, 2018 before the Honorable R. Scott Sprouse, was Julie Coleman, Esquire from the Office of the Attorney General representing Petitioner. Respondent was present and represented by his attorney, Tommy A. Thomas. Respondent testified on his own behalf and called Tom Slovenski. Petitioner called Second Circuit Public Defender De Grant Gibbons. At the close of the hearing, Judge Sprouse ordered, at the State's request and without objection from Respondent, that the record remain open for thirty (30) days in the event that lead trial counsel, who was not available for the hearing, wished to submit testimony.

An order granting post-conviction relief was signed by Judge Sprouse July 13, 2018, and amended order was signed August 10, 2018. The Court found, in part, the basis for granting post-conviction relief was:

The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the [Respondent's] claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.

Therefore, based upon the foregoing, the Court finds and concludes:

1. The identification of the [Respondent] was a key issue at trial.

2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the [Respondent's] name. Counsel for the [Respondent] failed to challenge this by either requesting a Neil v. Biggers hearing or by objecting to its admission at trial.

3. The Court is particularly concerned with the testimony regarding [Respondent's] "lazy eye." The testimony provided a significant basis upon which the State's witness relied in making her identification. Once elicited at trial, Counsel for the [Respondent] failed to challenge this on cross-examination.

a. The Court observed the [Respondent] at the evidentiary hearing and had the opportunity to personally study the [Respondent's] facial features. The Court found that the [Respondent] clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the [Respondent's] conviction.

4. The [Respondent] also asserted an alibi defense that the State discredited through expert testimony that Counsel for the [Respondent] failed to challenge.

a. At the evidentiary hearing, the [Respondent] presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the "pie method."

This Court specifically found and concluded that both prongs of Strickland have been met by the [Respondent]. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the [Respondent].

App. 475-483.

Appellant filed a Motion to Alter or Amend Pursuant to Rule 59(e) on or about August 20, 2018. App. 494-506. Judge Sprouse denied the Motion on August 24, 2018. App. 508. Appellant filed a Notice of Appeal on September 17, 2018.

Factual History

On November 27, 2013, a Captain D's restaurant in Aiken, South Carolina, was held up by two men in black clothing (described as hoodies) and bandanas covering their

faces. One robber took an employee, Scott Hall, whom they initially approached outside the restaurant, to the safe at the front of the store while the other stayed in the back with another employee, Jameshia Alston. Hall led the man holding him to the store's manager, Devin Johnson, who complied with his demands for cash. Afterward, the men forced the three employees into the freezer at the back of the restaurant. The employees left the freezer once the men left the restaurant and called 911. Alston reported that one of the men looked familiar and had been in the restaurant earlier that week, but she did not know his name.

Argument

The post-conviction relief judge did not err, as a matter of law or in a deficient manner, in ruling that trial counsel was ineffective for 1) failing to seek either a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; 2) failing to challenge the victim's testimony regarding Respondent's "lazy eye;" or 3) failing to challenge the State's testimony discrediting Respondent's alibi defense with an expert of his own.

- 1) The post-conviction relief judge's concerns about the admissibility of eyewitness testimony due to the inconsistencies in Alston's story regarding her Facebook research and conversations with law enforcement were valid, and trial counsel's failure to attempt to suppress this testimony or object when it emerged was deficient and prejudicial to the point where one cannot rely upon the outcome of the case.

Petitioner has cited many cases for the proposition that there was nothing suspect about Jameshia Alston's identification of Respondent as a perpetrator of the Captain D's robbery. The issue, however, is not so simple. At trial, and even through the evidentiary hearing, Respondent and his counsel questioned the timeline of events regarding Alston's discovery via Facebook of Respondent's identity and her exposure to the list of names from law enforcement.

Respondent admitted to visiting the restaurant where he spoke to an employee, William Keels, earlier that week. He had once dated Keels' sister, so the two had a brief conversation that Alston witnessed. At trial, Alston testified that she knew she recognized the robber, so she "went home and looked it up." App. 58;5-9. Respondent referred to this and subsequent testimony at the evidentiary hearing to show the potential confusion between Alston's research and information she may have received from law enforcement.

Specifically, the following passage is particularly telling:

Mr. Smith: You scrolled down through the pictures?

Ms. Alston: Yes, sir. I did.

Mr. Smith: Or, did you type in John Upson's name?

Ms. Alston: No, I went on William Keels' page and I found his name. And when I saw his picture I jumped up because I knew that was him. And then I, like, clicked on his name and I was scrolling through his pictures. As I was looking I jumped up again. I told my mom that was him.

...

Mr. Smith: Does he have a lot of pictures of other people on his –

Ms. Alston: I didn't look at that.

Mr. Smith: You didn't look at anybody else's picture?

Ms. Alston: No, sir. I just looked at his name, who I was looking for.

Mr. Smith: You were just looking for John Upson?

Ms. Alston: Yes, sir.

App. 73;1-25. Paraphrased by Respondent on App. 428;2-429;12. When reviewing the transcript, it is apparent that Alston contradicts herself. She states that she was scrolling through pictures on Facebook until she found Respondent's name. Then she jumped when she saw his picture. This testimony reads as if she knew his name and went to find his picture for confirmation. Additionally, Alston testified that she was shown a list of names (without photos) by law enforcement. App. 75;20-76;2. Based on her testimony, it is possible that her timeline could be confused. At the very least, it is enough to question the veracity and reliability of her identification.

For these reasons, trial counsel should have requested a hearing pursuant to Neil v. Biggers, 408 U.S. 188 (1972) or, at the very least, objected to the admission of this testimony during trial. The State argues that a Neil v. Biggers hearing would be inappropriate because there is no legal basis on which to make the motion due to its perceived lack of a suggestive circumstance created by government officials as required by the case. However, based on Alston's testimony, it is actually quite unclear whether she was affected by suggestive circumstances created by law enforcement. Her testimony shows confusion regarding whether she was looking for a name or a photo; therefore, if

she were looking for a name, where did she get it? From the list she admits law enforcement showed her?

Though the order granting post-conviction relief included a finding she conducted her independent Facebook research before speaking to law enforcement, both the trial and PCR transcripts show Alston's confusion regarding the timeline and, therefore, the involvement of law enforcement before she made her out-of-court identification. Had Alston seen the list of names before she conducted her Facebook search, she would have had a very short list of people about whom she could research and find photos. This would be in contravention of the cases cited by Petitioner that require suggestive circumstances created by government officials or state action. See Perry v. New Hampshire, 565 U.S. 228 (2012); State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). Because it was only after the Facebook search that Alston identified Respondent, trial counsel should have requested a pre-trial hearing to ensure that there were no improper actions taken by law enforcement. After all, "reliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. 98, 154 (1977).

At the very least, trial counsel should have objected or otherwise drawn attention to Alston's conflicting testimony when it was presented at trial. The most confusing parts of her testimony were on trial counsel's cross-examination, and trial counsel did very little, if anything, to elucidate these errors or call attention to her conflicting statements. While it is unclear how much of this testimony trial counsel received in pre-trial discovery, he could certainly have taken the opportunity to impeach Alston on her conflicting statements during cross-examination. With any criminal case, the issue of

identification is crucial and, in this instance, Alston was the only eyewitness to identify Respondent. With only one individual identifying Respondent while trial counsel is presenting an alibi defense, the credibility or lack thereof for this sole witness becomes even more critical. Trial counsel should have used every possible tool in his arsenal to attempt to exclude, suppress, or discredit Alston's testimony and, had he done so, he may have proven that Alston's identification was incorrect. His failure to do so created prejudice such that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). Petitioner's request for certiorari must be denied.

- 2) The post-conviction relief judge's concern about the validity of eyewitness testimony due to the incorrect "lazy eye" testimony was valid, and trial counsel's failure to address it in any form or fashion was deficient performance and prejudicial to Respondent.**

During trial, Alston testified that she recognized Respondent because of his "bald head and lazy eye." App. 58;1-3. In fact, she said "that's the thing that caught [her] eye." App. 58;1-3. This is, surprisingly, despite the fact the perpetrators of the robbery had their heads and faces covered. The post-conviction relief court held Alston's incorrect description of Respondent's eyes caused it "particular[] concern[]" because it could have led to a misidentification that resulted in Respondent's conviction.

The State argued that, essentially, this is an instance where common sense should have prevailed – the jury had the opportunity to observe Respondent in the courtroom throughout the trial and could clearly see that he does not have a lazy eye, just as the post-conviction relief judge did. Even assuming this is true and the jury observed this fact, it actually harms the State's argument because it further dents Alston's credibility. If

she was so certain that she had identified the perpetrator because of his lazy eye that she jumped up to tell her mother upon finding his photograph, how can we actually trust her identification if the man she points to in the courtroom does not have a lazy eye?

The State cites State v. Odom, 412 S.C. 253, 772 S.E.2d 149 (2015) and State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (1996) for the proposition that jurors' ability to observe defendants during trial and attach whatever credibility they deem necessary to a witness's identification. While that is true, it also leaves defense counsel open to exploit inconsistencies between the witness's description and the appearance of the defendant. In this case, the obvious fact that Respondent does not have a lazy eye should have been identified and exaggerated by trial counsel in order to discredit her testimony at every juncture.

As argued above, Alston's identification of Respondent is crucial to this case, and trial counsel should have taken every opportunity to discredit it. The State argues trial counsel "thoroughly attacked the reliability of Alston's identification in other ways," thus leaving it unlikely the failure to explore this avenue altered the course of the trial so as to create a reasonable probability that the result of the trial would have been different as required by Strickland v. Washington, 466 U.S. 668 (1984). PWC, 20. This is patently false. Had trial counsel gone down this path of questioning to directly challenge Alston's description of a bald head and lazy eye, he may have totally discredited her testimony and identification, thus preventing Respondent's conviction. It is clear from the phrasing of the order granting relief that this potential for misidentification was the court's main concern and foundation for finding ineffective assistance of counsel. Petitioner's request for certiorari must be denied.

- 3) **The post-conviction relief judge properly ruled that trial counsel failed to challenge the State's expert testimony at trial regarding cell phone tower data and, upon presentation of an expert at the evidentiary hearing, Respondent created significant doubt about the accuracy of the initial expert's testimony.**

At trial, the State presented an expert from the Bureau of Alcohol, Tobacco, and Firearms ("ATF") to analyze the cell phone data retrieved from Respondent's phone. In doing so, the State attempted to show Respondent was near the Captain D's at the time of the robbery. Though trial counsel had the cell phone data prior to trial, it was not analyzed by an expert nor was any expert testimony presented on behalf of Respondent. Second chair trial counsel testified that the information was discussed with someone in the office who was familiar with cell phone data, but no true expert opinion was sought. App. 441;9-13. He was not aware an expert would be called by the State because it was not until shortly before trial they became aware ATF was involved or an agent testifying. App. 447;25-448;2. He further testified he did not know if a motion for continuance was made or if any objection was possible, whether due to a discovery violation or otherwise. App. 448;16-449;16.

Regardless, trial counsel had information at hand that could have been analyzed and presented in the light most favorable to them. At the evidentiary hearing, Respondent presented such an expert in Tom Slovenski. He testified, initially, that the PenLink system used by ATF to analyze cell phone data with the pie method was highly susceptible to user error, more than other methods or manual analysis. App. 402;9-12. In fact, Slovenski testified he would have manually plotted the data using the pie method if he were analyzing the data at the time of trial because that was all that was available.

The State argues repeatedly that Slovenski used a method — TraX — that was unavailable at the time of trial to develop his testimony for the evidentiary hearing. While that is true, it was for the purpose of doublechecking the analysis done in 2013 due to the likelihood of incorrect results from PenLink. He testified extensively to the necessity of peer verification and “getting another examiner to look at what you’ve done.” App. 398;25-399;12. In fact, he testified you “have to” manually check results after using any program. PCR TR 39;10-15. The errors in the ATF report Slovenski pointed out were as simple as not having the name or phone number of Respondent on the documents, the date and time of reference, or even an indicator of the precise location of Captain D’s. App. 398;9-12;389;14-24. Furthermore, they did not use best practices in the industry, primarily meaning they did not reveal as specific enough detail as they should. App. 387;18-388;11. The thrust of the testimony was not about the program used, but about the veracity and reliability of the analysis presented at trial. Slovenski used a new method to verify the analysis presented by ATF based upon the call data in trial counsel’s possession and found the ATF analysis to be quite inaccurate.

Regarding the factual differences of the reports, Slovenski’s analysis shows Respondent farther from Captain D’s at the time of the incident than the ATF’s did. App. 395;9-14. Also, there are areas of overlap in several maps that were not identified or explained by Fraser, the ATF expert. App. 396;21-25. Ultimately, Slovenski testified that, without knowledge of cell phone data or the ability to analyze the maps and analysis presented by ATF, trial counsel would not have had the ability to ask appropriate questions to rebut this information. App. 399;13-16.

Ultimately, this is a question of reliability and accuracy of the information presented by ATF's expert. Trial counsel had the data, knew or should have known that they did not fully understand it, and did not bother to seek the assistance of an expert. The fact that TraX was used by Slovenski to analyze the data for the evidentiary hearing has no bearing on whether it was available in 2013, despite what the State argues. Many of the problems Slovenski enumerated dealt with the ability of a layperson to interpret the maps and analysis. Trial counsel, as a layperson in the field of cell phone data, would have also been at a disadvantage and would not have been able to adequately cross-examine Fraser at trial. The State pointed to several factors that it argues diminish the likelihood of prejudice to Respondent, such as how Slovenski acknowledged the State never argued the maps showed Respondent at the scene, or that the solicitor conceded in his closing that the maps showed Respondent downtown, where his alibi witnesses placed him. Regardless, this does not remove the likelihood that a more thorough and scientific analysis of these records on Respondent's behalf at the time of trial would have discredited Fraser's testimony. Because of the failure of trial counsel to fully research and use the cell phone data, this "trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Therefore, Petitioner's request for certiorari must be denied.

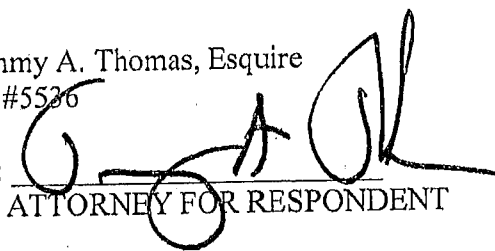
Conclusion

For all the foregoing reasons, it is respectfully requested that Petitioner's request for certiorari be denied and dismissed. If this Court sees fit to grant its petition for writ of certiorari, respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

Tommy A. Thomas, Esquire
Bar #5536

BY:

A handwritten signature in black ink, appearing to be 'Tommy A. Thomas', written over a horizontal line.

ATTORNEY FOR RESPONDENT

7588 Woodrow Street
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The South Carolina Court of Appeals

John Upson, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2018-001674

ORDER

This matter is before the Court on a petition for a writ of certiorari. Based on the vote of the panel, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT

BY

V. Claire Allen

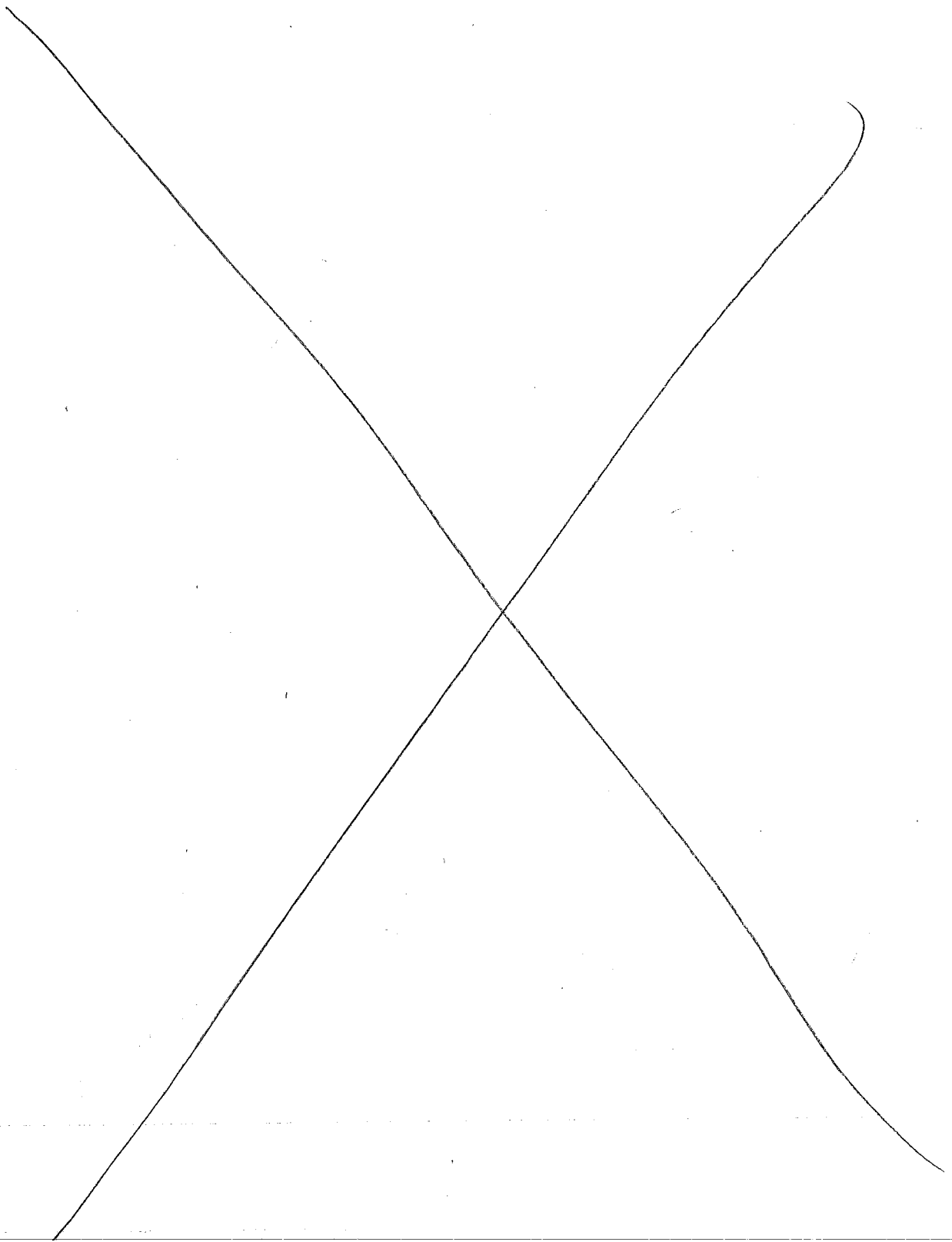
CLERK

Columbia, South Carolina

cc:

Tommy Arthur Thomas, Esquire
Mark Reynolds Farthing, Esquire
John Upson, 229134
The Honorable R. Scott Sprouse

FILED
Nov 12 2021



RECEIVED

Nov 22 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Aiken County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2018-001674

JOHN UPSON,

Respondent,

vs.

THE STATE,

Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief judge reversibly err by finding—in a legally-erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own?

- A. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing either to seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or to challenge the admission of that evidence during trial when—just as the post-conviction relief judge found in his order incorrectly granting relief—the victim made the identification without the involvement of any suggestive circumstances created by law enforcement, which necessarily meant defense counsel could not have been deficient for failing to challenge the identification evidence through a pre-trial hearing request or a trial objection since there were no valid legal grounds supporting such a request or objection?
- B. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to cross-examine Alston in some unspecified manner about testimony indicating Upson had a "lazy eye" when defense counsel thoroughly attacked Alston's identification of Upson as the robber in an appropriate and reasonable manner throughout the trial and when no prejudice could have resulted from defense counsel's failure to question Alston about her "lazy eye" testimony in light of the fact the jurors had a full opportunity to view Upson's eyes throughout the trial, which enabled them to make their own determinations regarding the reliability of Alston's testimony even without any additional questioning?
- C. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own when the evidence the post-conviction relief judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding?

STATEMENT OF THE CASE

In December of 2013, Respondent John Upson was arrested following an investigation into an armed robbery that had occurred a few days earlier. In January of 2014, the Aiken County Grand Jury indicted Upson for one count of armed robbery and two counts of kidnapping. On April 15, 2014, a jury trial was commenced in the Aiken County Court of General Sessions with the Honorable Donald B. Hocker, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Upson as indicted. Following the verdict, the trial judge sentenced Upson to concurrent terms of imprisonment of twenty years for each of the three convictions. Upson then timely filed and perfected an appeal.

On appeal, the Court of Appeals unanimously affirmed Upson's convictions in an unpublished opinion. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). Thereafter, on June 17, 2016, remittitur was issued.

Subsequent to the issuance of the remittitur, Upson timely filed an application for post-conviction relief, and, in response, the State filed a return requesting an evidentiary hearing. On May 5, 2018, an evidentiary hearing was conducted in the Aiken County Court of Common Pleas with the Honorable R. Scott Sprouse, circuit court judge, presiding. At the conclusion of the hearing, the post-conviction relief judge took the matter under advisement. Thereafter, through an order filed on July 23, 2018, and an amended order filed on August 10, 2018, the post-conviction relief judge granted Upson's post-conviction relief application. The State then timely filed a motion to alter or amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and the post-conviction relief judge summarily denied the State's motion through an order filed on August 29, 2018. Following that, the State timely initiated an appeal of the post-conviction relief judge's decision.

On appeal, the State filed a petition for a writ of certiorari in the Supreme Court, and the Supreme Court transferred the matter to the Court of Appeals. Following the transfer of the case, the Court of Appeals granted the State's petition on November 12, 2021.

STATEMENT OF FACTS

Summary of Upson's Crimes and the Evidence Discovered During the Ensuing Investigation

At around 10:00 p.m. on the night of November 27, 2013, Scott Hall was taking the trash outside to the dumpster behind the Captain D's restaurant he worked at in Aiken, South Carolina, when two men dressed in black clothing with bandanas partially covering their faces rapidly approached him, put a gun to his head, and forced him back into the restaurant. (App'x pp. 54-55; pp. 57-58; pp. 78-80; p. 89; p. 96). Once inside, the gunman ordered Hall to take him to the front of the restaurant where the safe was located while the other robber remained at the rear of the restaurant with Jameshia Alston, another of the restaurant's employees. (App'x pp. 52-54; p. 80). Terrified, Hall complied with the gunman's commands and led him to Devin Johnson, the restaurant's manager. (App'x p. 101). The gunman then ordered Hall to get onto the floor and directed Johnson to give him the restaurant's cash. (App'x p. 81). After that, the robbers forced Hall, Johnson, and Alston into a freezer at the back of the restaurant before rapidly absconding from the scene. (App'x p. 54; pp. 59-60; p. 66; p. 81; pp. 85-86; p. 91; p. 95).

Once the robbers were gone, Alston and the others left the freezer, and Johnson called 911 to report what had occurred. (App'x pp. 60-61; pp. 91-92). Shortly after that, officers from the Aiken Department of Public Safety responded to the scene and spoke with the restaurant's employees, who recounted the harrowing ordeal and provided general descriptions of the partially-masked robbers. (App'x p. 61; p. 68; p. 71; p. 76; p. 80; pp. 86-87; p. 92; p. 96; p. 100). Furthermore, Alston reported she recognized the robber who watched over her during the incident as a customer who had come into the restaurant a few days earlier and spoken with William Keels, another of the restaurant's employees. (App'x pp. 56-57; p. 61; p. 110; p. 112). However, Alston indicated she did not know the man's name at that time. (App'x p. 61).

At the conclusion of the investigation at the scene, Alston went home and independently began searching for the robber she recognized using the internet. (App'x pp. 56-57; p. 72; pp. 116-117). During the search, she examined Keels's Facebook page and, while looking through his list of friends on that website, instantly recognized one of Keels's friends as the robber upon seeing his picture. (App'x pp. 56-57; p. 65; pp. 73-74). Based on that, she was able to determine the robber was Upson, and she quickly alerted Detective Billy Royster of her discovery. (App'x p. 61; pp. 73-74; p. 102).

In response, Detective Royster arrested Upson in connection to the incident. (App'x pp. 102-103; p. 105; pp. 271-272). Upson was then indicted for armed robbery along with several counts of kidnapping, and he proceeded forward to trial. (App'x p. 6; pp. 273-278).

Relevant Details from Upson's Trial

During the course of trial, Alston testified for the prosecution and recounted the details of the terrifying robbery. (App'x pp. 52-77). Alston further identified Upson in the courtroom as one of the robbers, and she explained how she was initially able to identify him as one of the people involved. (App'x pp. 55-57; p. 61; pp. 65-66; pp. 72-75). Then, during defense counsel's cross-examination, Alston acknowledged she was frightened when she viewed the robber, conceded she only saw a partial view of the robber's face, and revealed she was shown a list of names as some point by the police. (App'x p. 75). However, she specifically confirmed she did not have Upson's name at the time she identified him through her independent research. (App'x p. 74). Thereafter, on redirect examination, the solicitor questioned Alston about her recognition of Upson's eyes as the robber's eyes, and she explained: "He has a lazy eye. It's kind of droopy, like that." (App'x p. 77). After that, defense counsel did not ask any further questions of the witness. (App'x p. 77).

Following Alston's testimony, Hall recounted his experiences on the night of the robbery, and, during his testimony, defense counsel questioned him about his lack of knowledge that money was actually stolen during the incident while also questioning him about his recollection of the physical appearance of the robbers. (App'x pp. 78-99). Furthermore, Detective Royster discussed the details of his investigation that culminated in Upson's arrest, and, during his testimony, defense counsel questioned him about various purported shortcomings with the investigation while further questioning him about Upson's height, which was inconsistent with Hall's description of the robbers' heights. (App'x p. 87; pp. 100-135).

Beyond that testimony, Desra Fraser, an intelligence research specialist with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, testified about how she assisted in the investigation by using PenLink software to analyze Upson's phone records, which had been obtained from his phone company. (App'x p. 103; p. 138; pp. 147-149). By using PenLink, Fraser indicated she generated maps of the locations where Upson was positioned when various calls were made on the night of the incident, and the maps were admitted into evidence. (App'x p. 149; p. 153). Additionally, Fraser stated some of the maps depicted "possible" movement at the time the calls were being made. (App'x p. 155). Furthermore, Fraser noted Upson's phone was used to call the Captain D's restaurant at 9:37 p.m. on the night of the crime and then was used again to call the restaurant at 9:47 p.m. with the caller identification information intentionally blocked during the second call. (App'x p. 151). Thereafter, on cross-examination, Fraser conceded she had no idea who was using Upson's phone when the calls were made. (App'x pp. 157-158). Likewise, she admitted she had no idea if the phone was actually moving during the calls. (App'x pp. 158-159).

Following the presentation of that testimony and evidence, the State rested, and defense counsel called three alibi witnesses to testify on Upson's behalf. (App'x p. 163; p. 174; pp. 183-203). During the testimony of those witnesses, one indicated he saw Upson before a comedy show that took place in downtown Aiken on the night of the incident, one indicated she saw Upson before and after the show, and the other indicated she saw Upson after the show. (App'x pp. 184-186; pp. 190-194; pp. 196-197; p. 199; p. 201). However, none reported seeing Upson during the course of the show, which purportedly began at some point after 8:00 p.m. or 9:00 p.m. and ended at some point between 10:30 p.m. and midnight. (App'x p. 194; p. 189; pp. 190-191; pp. 195-197; p. 199; p. 201; p. 203).

At the conclusion of the presentation of that testimony, the defense rested, and the parties presented their closing arguments to the jury. (App'x p. 204; pp. 210-238). During defense counsel's closing argument, defense counsel heavily relied on the testimony of the alibi witnesses in arguing Upson was not involved in the robbery. (App'x pp. 211-212; pp. 218-219). Furthermore, throughout the entirety of his closing argument, defense counsel repeatedly questioned the reliability of Alston's identification and conducted four separate demonstrations to illustrate to the jury how difficult it would have been for Alston to accurately identify Upson solely from a glimpse of the robber's nose and eyes. (App'x pp. 213-219). Conversely, during the State's closing argument, the solicitor challenged the reliability of the alibi witnesses based on their inability to provide concrete times and argued Alston's identification of the robber, whom she recognized from an earlier visit to the restaurant, was reliable. (App'x pp. 225-228; p. 230; p. 237). Furthermore, the solicitor conceded the maps of Upson's calls established Upson was downtown prior to the robbery, which was consistent with his claimed alibi, but noted the maps established he was not downtown after the robbery. (App'x p. 184; pp. 232-233).

Subsequently, at the conclusion of trial, the jury convicted Upson as indicted. (App'x p. 258; pp. 279-280). The trial judge then sentenced Upson to an aggregate twenty-year term of imprisonment. (App'x p. 269; pp. 281-283).

Summary of the Post-Conviction Relief Proceedings

Following an unsuccessful appeal, Upson sought post-conviction relief on a number of grounds, including on the basis his defense counsel was allegedly ineffective for failing to fully cross-examine Alston, request a pre-trial hearing about the identification evidence, object to that evidence during trial, and fully refute the State's case. (App'x pp. 352-356; pp. 357-364). In response, the State filed a return requesting an evidentiary hearing. (App'x pp. 366-371).

During the ensuing hearing, Thomas Slovenski, an expert in mobile phone forensics, testified on Upson's behalf, and, during his testimony, several maps of Upson's phone calls on the night of the incident that had been admitted during trial were introduced into evidence along with some maps Slovenski had personally generated using a more modern program than the one available to Fraser when she created the maps used at trial. (App'x pp. 380-381; p. 383; p. 386; pp. 389-395; pp. 397-398; p. 402; pp. 468-474). Relying on his maps along with his belief the robbery had occurred around 10:40 p.m. to 10:47 p.m., Slovenski opined no calls were made from Upson's phone "that encompassed the incident location at the incident date and time."¹ (App'x pp. 383-384). Additionally, Slovenski asserted Fraser's maps could have been better while contending the program he used, which was not available until 2015, was better than the "good" one used by Fraser. (App'x p. 386; p. 402). Slovenski further indicated his program generated maps different from the maps generated using the "old methodology," which was the "pie method," and he stated he believed the maps generated by his program were more accurate

¹ Contrary to Slovenski's belief of when the robbery occurred, the victims testified during trial it took place around 10:00 p.m. or 10:15 p.m. (App'x p. 53; p. 58; p. 79).

than Fraser's maps, which he contended could have "potentially" suggested Upson was closer to the restaurant than he might have been at various times. (App'x p. 386; p. 390; p. 402).

However, Slovenski conceded the program used by Fraser was commonly used at the time of Upson's trial, and he asserted he, in fact, would have used the "pie method" at the time of trial because "that was all that was available at that time." (App'x pp. 401-402). Furthermore, Slovenski acknowledged some of the maps generated by Fraser had the same results as his maps, and he conceded the State never suggested during Upson's trial their maps showed Upson was at the scene of the crime at the time of the robbery. (App'x pp. 387-388; p. 403).

In addition to Slovenski's testimony, Upson testified on his own behalf and, based on his view of the trial testimony, opined Alston must have had a list of names at the time she identified him during her independent investigation following the robbery.² (App'x pp. 426-431). Furthermore, he asserted Alston's identification was based on him having a "lazy eye," which he claimed was inaccurate. (App'x pp. 431-432).

Following that testimony, Grant Gibbons, who assisted defense counsel with the trial, testified for the State about his recollection of the trial and indicated the defense strategy was to assert an alibi defense.³ (App'x pp. 438-440). However, he noted Upson's whereabouts could not be completely accounted for by the alibi witnesses. (App'x p. 440). Additionally, Gibbons indicated they reviewed the phone records, which he stated would have been meaningful only if they placed Upson at the scene of the crime, with a knowledgeable attorney to prepare for trial, and he stated Upson admitted to them he had called the restaurant before the robbery, which was

² Significantly, during his testimony, Upson also *confirmed* Alston's account of seeing him at the restaurant just days before the robbery. (App'x p. 427).

³ Notably, defense counsel had moved to Colorado by the time of the hearing, was not present for it, and was not permitted to testify by telephone following an objection from Upson. (App'x pp. 376-378).

reflected in the records. (App'x p. 151; pp. 441-442; pp. 446-447). Furthermore, in regard to the identification evidence, Gibbons explained no challenge was raised to it because no government action was involved in the out-of-court identification, which meant there was no basis upon which to challenge it. (App's pp. 442-444; p. 450). Likewise, Gibbons disagreed with Upson's interpretation of Alston's testimony, and he noted defense counsel thoroughly challenged Alston's identification to the jury in a "really effective" manner by demonstrating the difficulty in identifying people just from their eyes and noses. (App'x pp. 442-444; pp. 452-453).

Thereafter, once all the testimony and evidence had been introduced, the parties made their arguments for and against a grant of relief in Upson's case. (App'x pp. 456-466). The post-conviction relief judge then took the matter under advisement. (App'x p. 466).

Subsequently, upon considering the matter, the post-conviction relief judge issued an order—and amended order—granting post-conviction relief to Upson.⁴ (App'x pp. 475-493). In granting relief, the post-conviction relief judge concluded defense counsel was deficient for: (1) failing to either seek a pre-trial hearing to determine the admissibility of the identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own. (App'x pp. 492-493). Furthermore, without explanation or analysis, the post-conviction relief judge concluded defense counsel's deficiencies resulted in some undefined prejudice to Upson. (App'x p. 493). The State then sought for the post-conviction relief judge to reconsider his ruling, but he summarily declined to do so. (App'x pp. 494-508).

⁴ Interestingly, there do not appear to be any substantive differences between the original order and amended order. (App'x pp. 475-493).

STANDARD OF REVIEW

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the post-conviction relief judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the post-conviction relief judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief judge reversibly erred by finding—in a legally-erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim’s testimony about her belief Upson had a “lazy eye” on cross-examination; and (3) failing to challenge the State’s testimony discrediting Upson’s alibi defense with an expert of his own.

In the case sub judice, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim’s testimony about her belief Upson had a “lazy eye” on cross-examination; and (3) failing to challenge the State’s testimony discrediting Upson’s alibi defense with an expert of his own. To the contrary, defense counsel was not deficient in any manner during Upson’s trial, and there was no reasonable probability the result of the proceeding would have been different but for the tactical decisions defense counsel made in carrying out his representation.⁵ As a result, the post-conviction relief judge erred as a matter of law by finding defense counsel was constitutionally ineffective, and his ruling was legally erroneous and without factual support. The post-conviction relief judge’s grant of relief should be reversed.

Law Applicable to Ineffective Assistance of Counsel Claims

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) (“The Sixth and Fourteenth Amendments of the

⁵ Notably, in granting relief, the post-conviction relief judge did not specifically find there was a reasonable probability the result of the proceeding would have been different but for defense counsel’s purported errors despite the fact such a finding was necessary for a grant of relief to be warranted and proper. (App’x pp. 491-493).

United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors.”). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, ___ U.S. ___, 137 S. Ct. 1899, 1910 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’” (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel’s assistance is considered to be constitutionally ineffective only when “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) (“Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.” (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel’s representation fell below an objective standard of

reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); *see* Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); *see also* United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb").

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); *see* Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the *objective* reasonableness of counsel's performance, not counsel's subjective state of mind" (emphasis added)). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; *see* Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of

hindsight,” and will “evaluate the conduct from counsel’s perspective at the time” in light of the then-existing circumstances. Strickland, 466 U.S. at 689; see Shaw v. State, 276 S.C. 190, 195, 277 S.E.2d 140, 142 (1981) (“The actions and decisions of the trial counsel are not to be measured in terms of results[.]”). In order to establish counsel’s performance was deficient, the applicant must demonstrate “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. Thus, counsel’s performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply “deviated from best practices or most common custom.” Richter, 562 U.S. at 105; see Dunn v. Reeves, __ U.S. __, 141 S. Ct. 2405, 2410 (2021) (“[E]ven if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that *no* competent lawyer would have chosen.” (emphasis added and citation, internal quotations, and brackets in original omitted)); State v. Woullard, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) (“Defense counsel’s strategy must have been outside the realm of legitimate trial strategy so as ‘to make ordinary counsel scoff’ before a conviction will be reversed on the basis of ineffective assistance.” (citations omitted)).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691. In order for that burden to be met, counsel’s deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel’s unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386

S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (“To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel’s representation fell below an objective standard of reasonableness and, but for counsel’s errors, there is a reasonable probability the result at trial would have been different.”). Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.” Richter, 562 U.S. at 112 (emphasis added); see Strickland, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

Application of the Relevant Law to Upson’s Case

- A. The post-conviction relief judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing either to seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or to challenge the admission of that evidence during trial because—just as the post-conviction relief judge found in his order incorrectly granting relief—the victim made the identification without the involvement of any suggestive circumstances created by law enforcement, which necessarily meant defense counsel could not have been deficient for failing to challenge the identification evidence through a pre-trial hearing request or a trial objection since there were no valid legal grounds supporting such a request or objection.**

In his order granting relief, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for failing to either seek a pre-trial hearing to determine the admissibility of the evidence of Alston’s eyewitness identification of Upson as the robber or seek the exclusion of that evidence during trial. (App’x pp. 492-493). In reaching that conclusion, the post-conviction relief judge found “the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement” and who was subsequently presented with a list of names that included Upson’s name “[w]hen she did speak with law enforcement[.]”⁶ (App’x p. 492). The post-conviction relief judge further found

⁶ To the extent the post-conviction relief judge found Alston was presented with a list of names containing Upson’s name, no evidence was ever presented—or identified by the post-conviction

defense counsel failed to challenge the eyewitness identification evidence by seeking a pre-trial hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972), or by objecting to its admission during trial. (App'x p. 492). Based on those findings, the post-conviction relief judge—without further explanation or analysis—ruled Upson met his burden of proving both defense counsel was deficient and the deficiency resulted in some unspecified prejudice and, therefore, granted post-conviction relief to him. (App'x pp. 492-493).

Contrary to the post-conviction relief judge's legally-and-factually-erroneous conclusion, defense counsel was not constitutionally ineffective for failing to either seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or seek its exclusion during trial as defense counsel had no proper grounds upon which to request a pre-trial hearing or object due to the circumstances that actually led to Alston's out-of-court identification of Upson. Significantly, just as the post-conviction relief judge found in his order, Alston located Upson's photograph and identified him as one of the robbers through independent internet research conducted *prior to* her speaking to the detective about the identification, and her research efforts that led to the identification were *not* conducted with the assistance of or at the request of any law enforcement officers. Cf. State v. Tisdale, 338 S.C. 607, 613, 527 S.E.2d 389, 392 (Ct. App. 2000) (“[B]ecause the police were not involved in the media identifications in this case, the trial judge did not err in allowing the tellers' identification testimony.”). Based on that, the events that led to Alston's identification of Upson were simply *not* the product of any circumstances—suggestive or otherwise—created by government officials, which meant defense counsel did not

relief judge—to establish or support such a factual finding. (App'x pp. 75-76; p. 492). Instead, the unrefuted record from trial established Alston was only presented with a list of names *after* she independently identified Upson as one of the robbers and provided his information to Detective Royster, and no evidence or information was presented suggesting Upson's name was included in the list shown to Alston subsequent to her providing Upson's information to the detective. (App'x pp. 56-57; p. 61; p. 65; pp. 72-76).

have any grounds upon which he could have legally sought a pre-trial hearing in regard to the identification evidence or upon which he could have sought the exclusion of that evidence during trial. See Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (recognizing “a due process check on the admission of eyewitness identification” is applicable *only* “when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime”). Therefore, defense counsel’s failure to undertake actions for which no valid legal basis existed simply could not have constituted representation falling outside reasonable professional norms, and the post-conviction relief judge erred as a matter of law by concluding otherwise. See Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) (“One of the key circumstances a court must consider in its examination of counsel’s decision not to make a particular objection is whether there was any law to support the objection.”); State v. Liverman, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (recognizing preliminary judicial inquiry regarding the reliability of identification evidence is only required when “it is contended that an identification is obtained under unnecessarily suggestive circumstances *arranged by state action*” (emphasis added)); see also Roseboro v. State, 841 S.E.2d 706, 711 (Ga. Ct. App. 2020) (“When trial counsel’s failure to file a motion to suppress is the basis for a claim of ineffective assistance, the defendant must make a strong showing that the damaging evidence would have been suppressed had counsel made the motion.” (citation and internal quotations omitted)); cf. Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (holding a post-conviction relief judge’s grant of relief based on defense counsel’s failure to raise an objection to be without factual support where “there was no sustainable objection” defense counsel could have made).

Moreover, notwithstanding the fact there was no legal basis upon which defense counsel could have challenged the admissibility of the identification evidence, the post-conviction relief

judge did not identify any reasons as to why or how the circumstances of Alston's out-of-court identification of Upson were unnecessarily and unduly suggestive or created a substantial likelihood of misidentification. Without such reasons identified or present in the record, there was simply no basis upon which to conclude the eyewitness identification evidence in Upson's case was so manifestly suspect that the extreme sanction of exclusion would have been warranted. See Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983) (instructing the exclusion of evidence is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect"). Thus, there were no grounds upon which the post-conviction relief judge could have found defense counsel's purported deficiency in regard to the identification evidence resulted in the prejudice necessary to warrant a grant of relief since the post-conviction relief judge did not even find the evidence would have been inadmissible had defense counsel attempted to prevent its admission in some manner. See Johnson, 325 S.C. at 186, 480 S.E.2d at 735 ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness *and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.*" (emphasis added)); cf. People v. Caro, 442 P.3d 316, 340 (Cal. 2019) (rejecting Caro's claim her counsel was constitutionally ineffective for failing to make a suppression motion because Caro failed to establish such a motion "would have been meritorious" if it had been raised); State v. Jones, 715 S.E.2d 896, 904 (N.C. Ct. App. 2011) ("Because we conclude the photo identification evidence and the in-court identifications of defendant by the two witnesses were properly admissible, defendant's trial counsel did not err in failing to move to suppress or object to such evidence.").

Accordingly, for the foregoing reasons, the post-conviction relief judge erred as a matter of law in concluding defense counsel was constitutionally ineffective for failing to either seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or seek its exclusion during trial, and his ruling granting relief was legally and factually erroneous. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (recognizing a post-conviction relief judge's decision will be reversed when it is controlled by an error of law); see also State v. Schwaderer, 898 N.W.2d 318, 332 (Neb. 2017) ("As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument."); cf. Legare v. State, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998) (reversing a finding defense counsel was constitutionally ineffective for failing to pursue suppression of identification testimony because it was not supported by the record). The post-conviction relief judge's ruling should be reversed.

B. The post-conviction relief judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing to cross-examine Alston in some unspecified manner about testimony indicating Upson had a "lazy eye" because defense counsel thoroughly attacked Alston's identification of Upson as the robber in an appropriate and reasonable manner throughout the trial and because no prejudice could have resulted from defense counsel's failure to question Alston about her "lazy eye" testimony in light of the fact the jurors had a full opportunity to view Upson's eyes throughout the trial, which enabled them to make their own determinations regarding the reliability of Alston's testimony even without any additional questioning.

In his order granting relief, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for failing to challenge Alston's testimony regarding Upson's purported "lazy eye" through cross-examination.⁷ (App'x pp. 492-493). In reaching that conclusion, the post-conviction relief judge indicated he was "particularly concerned" with the "lazy eye" testimony and asserted Upson "clearly" did not have a "lazy eye" based on his own

⁷ Throughout his order, the post-conviction relief judge repeatedly referred to Alston incorrectly as "Austin." (App'x p. 52; p. 489).

personal study of Upson's facial features during the post-conviction relief proceedings. (App'x pp. 492-493). For that reason, the post-conviction relief judge indicated he was "concerned" the "lazy eye" testimony "evidence[d] a misidentification that led to [Upson]'s conviction." (App'x p. 493). Notably though, the post-conviction relief judge did *not* identify any specific questions he believed defense counsel should have asked of Alston on cross-examination or explain in any manner how he believed the "lazy eye" testimony should have been challenged. (App'x pp. 492-493). He further made no reference to the fact Alston did not simply say Upson's had a "lazy eye" but further explained she viewed his eyes as being "droopy." (App'x p. 487; pp. 492-493). Instead, he simply concluded—without explanation or analysis—both deficiency and prejudice had been established in regard to the "lazy eye" testimony. (App'x p. 493).

Initially, contrary to the post-conviction relief judge's ruling, defense counsel was not deficient for failing to specifically cross-examine Alston about the "lazy eye" testimony because he did, in fact, thoroughly challenge Alston's identification of Upson as the robber in a variety of different ways. Specifically, during the trial, defense counsel challenged the reliability of the identification by eliciting testimony from Alston establishing the robbers' faces were partially covered and she was only able to see Upson's eyes and nose. He then attempted to exploit that testimony by repeatedly attacking the reliability of the identification throughout his closing argument and by conducting a "really effective" demonstration for the jury in an effort to show just how difficult it would be to accurately identify even a well-known person solely from a view of the person's eyes and nose. In light of the fact defense counsel did thoroughly challenge Alston's identification of Upson as the robber in the manner he believed would be the best and most effective means of doing so, defense counsel was not deficient or objectively unreasonable for failing to *also* challenge the identification in a different manner by questioning Alston—in

some unspecified way—about her testimony regarding Upson’s purported “lazy eye.” See Strickland, 466 U.S. at 688-689 (recognizing there typically exists a “range of legitimate decisions regarding how best to represent a criminal defendant” and instructing defense counsel must have “wide latitude” in making tactical decisions); cf. Butler v. State, 541 S.E.2d 653, 659 (Ga. 2001) (“[T]he transcript reveals that counsel conducted a substantial cross-examination of the witness. What is more, a matter such as the cross-examination of a witness is most often grounded in matters of trial tactics and strategy and, in those instances, provides no basis for finding counsel’s performance deficient.”).

Moreover, as to the “lazy eye” testimony specifically, it remains entirely unclear what questions the post-conviction relief judge believed defense counsel should have asked of Alston about that particular subject matter as none have so far been identified. However, through her testimony, Alston indicated she believed Upson had a distinctive “lazy eye,” and she quickly qualified that statement by explaining she perceived his eyes as being “droopy.” Therefore, had defense counsel sought to challenge Alston’s “lazy eye” testimony on cross-examination, he would have simply given Alston an opportunity to further explain what she meant by her testimony, and she very well might have explained—just as she appears to have done—her view of a “lazy eye” was an eye that was “droopy,” which, notably, would have been consistent with what the phrase “lazy eye” is perceived by many to mean.⁸ Compare Wikipedia, “Amblyopia,” available at <https://en.wikipedia.org/w/index.php?title=Amblyopia&oldid=1050875062> (explaining amblyopia is “a disorder of sight in which the brain fails to process inputs from one eye” that “results in decreased vision in an eye that *otherwise typically appears normal*” and noting the disorder is also called “lazy eye” (emphasis added)); with Wikipedia, “Ptosis,”

⁸ Significantly, Upson clearly *does* appear to have “droopy” eyelids in the photograph of him available through his inmate records. (App’x p. 285).

available at [https://en.wikipedia.org/w/index.php?title=Ptoxis_\(eyelid\)&oldid=1054866799](https://en.wikipedia.org/w/index.php?title=Ptoxis_(eyelid)&oldid=1054866799) (explaining ptosis is a medical condition involving drooping of the eyelid and noting the condition is sometimes referred to as “lazy eye”). As a result, defense counsel simply could not have provided objectively unreasonable representation or otherwise been constitutionally ineffective by failing to ask some so-far-unidentified questions of Alston that would not have necessarily elicited any testimony remotely favorable to his client. See Ward v. Whitley, 21 F.3d 1355, 1362 (5th Cir. 1994) (“It is a basic rule of cross-examination: Never ask a question for which you do not know the answer.”); see also Strickland, 466 U.S. at 689 (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”); Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (“[M]ere speculation what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.”); cf. Vanover v. State, 433 S.C. 31, 44, 856 S.E.2d 160, 167 (Ct. App. 2021) (“We have no idea what Daughter’s answer or explanation for the Doe allegation would have been. Daughter did not testify at the PCR hearing. We do not see how we could find this alleged deficiency to be prejudicial without some sense of what Daughter’s explanation would have been.”).

However, even assuming defense counsel was somehow deficient for failing to ask some unspecified questions about Alston’s “lazy eye” testimony, defense counsel’s failure to conduct further questioning could not have resulted in any prejudice to Upson because the jurors—just like the post-conviction relief judge—had a full and direct opportunity to personally view Upson for themselves and make their own determination as to whether Alston’s testimony about Upson’s “lazy” and “droopy” eyes negatively impacted the reliability of the identification. Cf. State v. Odom, 412 S.C. 253, 268, 772 S.E.2d 149, 156 (2015) (finding “the jury’s ability to

view [Odom]'s appearance in the courtroom" contributed to an error being rendered harmless); State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (1996) ("Because the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification, the identification is not unreliable."). Under those circumstances coupled with the fact defense counsel thoroughly attacked the reliability of Alston's identification in other ways, defense counsel's failure to conduct some unidentified probing of the "lazy eye" testimony simply could not have created a reasonable probability the result of the trial would have been different, which was needed for a grant of post-conviction relief to be warranted. See Strickland, 466 U.S. at 693-694 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Accordingly, as defense counsel was not objectively unreasonable for failing to specifically challenge the "lazy eye" testimony and no prejudice could have resulted from his failure to do so, the post-conviction relief judge erred as a matter of law by finding defense counsel was constitutionally ineffective for failing to ask some unspecified questions of Alston in regard to her description of Upson's eyes. See Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998) ("As to allegations of ineffective assistance of counsel, the applicant must show his counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different."); see also Whitelock v. State, 825 S.E.2d 426, 435 (Ga. Ct. App. 2019) (explaining it is impossible to establish there is a reasonable probability the results of a proceeding would have been different but for defense counsel's failure to employ or elicit some evidence not presented

during trial if the post-conviction relief applicant never makes any proffer of the evidence that purportedly should have been employed or elicited). The post-conviction relief judge's ruling should be reversed.

C. The post-conviction relief judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own because the evidence the post-conviction relief judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding.

In his order granting relief, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for failing to challenge the State's testimony that purportedly discredited Upson's alibi defense by presenting an expert to testify for the defense. (App'x p. 493). In reaching that conclusion, the post-conviction relief judge noted Upson presented expert testimony during the evidentiary hearing that "created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the 'pie method.'"⁹ (App'x p. 493). As to the substance of the doubt-creating testimony, the post-conviction relief judge indicated Slovenski, who was Upson's expert, was able to generate more accurate maps than those created with the "older" program used by Fraser, the State's witness. (App'x p. 489). Additionally, the post-conviction relief judge stated none of Slovenski's data "encompassed the location" where the robbery took place, which he found—incorrectly—was "contrary to the testimony and presentation" from the trial. (App'x p. 489). Furthermore, the post-conviction relief judge noted Slovenski had explained the "pie method" inaccurately involved the use of

⁹ Although the post-conviction relief judge repeatedly referred to the State's witness as an expert, the State's witness was not actually qualified as an expert witness during trial. (App'x pp. 147-163).

directional wedges while cell phone towers operated more like clouds. (App'x p. 489). Notably though, the post-conviction relief judge made no reference whatsoever to the fact Slovenski used a program not in existence until well after Upson's trial had concluded or to the fact Slovenski admitted he *personally* would have used the "pie method" at the time of Upson's trial due to fact it "was all that was available at that time." (App'x p. 386; p. 402). Moreover, the post-conviction relief judge ignored the fact many of the State's maps—by Slovenski's own admission—were consistent with the ones he generated and the ones he claimed were not so appeared to have actually been largely consistent with his maps aside from having wedged-shaped areas highlighted as opposed to round-shaped ones. (App'x pp. 468-474). Likewise, the post-conviction relief judge ignored Slovenski's acknowledgement the State never argued its maps showed Upson was actually at the scene of the robbery at the time it was committed. (App'x p. 403). Finally, the post-conviction judge made no reference to the fact the solicitor *conceded* in closing argument the State's maps demonstrated Upson was, in fact, downtown prior to the robbery, which corroborated the claims made by several of his alibi witnesses as opposed to discrediting them. (App'x p. 184; pp. 232-233).

Contrary to the post-conviction relief judge's legally-and-factually-erroneous ruling, defense counsel was not—and could not have been—deficient for failing to present the expert testimony the post-conviction relief judge found he should have presented to call into question Fraser's testimony during trial. Critically, that is true because—just as Upson's expert readily acknowledged—the information presented during the evidentiary hearing to challenge the accuracy of Fraser's testimony *did not exist* until well after Upson's trial took place. Based on that fact coupled with the fact Upson's expert conceded he would have used the same "pie method" used by Fraser at the time of trial, defense counsel simply could not have been deficient

for failing to avail himself of technology and evidence that was not yet in existence, and the post-conviction relief judge's conclusion to the contrary was utterly illogical.¹⁰ See Tillman v. State, 244 S.C. 259, 264-265, 136 S.E.2d 300, 303 (1964) ("He is not required to be infallible, *nor to do the impossible*, since the defendant is entitled to a fair trial and not a perfect one or a perfect result." (emphasis added)); see also Thornes v. State, 310 S.C. 306, 309-310, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or *facts which did not exist*, at the time of the trial." (emphasis added)).

Beyond that, even if the impossible could have been achieved and the then-non-existent evidence identified by the post-conviction relief judge somehow could have been presented during trial, that evidence nonetheless could not have altered the result of the proceeding. That is true because the evidence Upson's expert introduced during the evidentiary hearing was largely

¹⁰ Notably, although he did not have the benefit of then-non-existent evidence and testimony at the time of trial, defense counsel did—in addition to reviewing the information related to Upson's phone records with a knowledgeable attorney as part of his trial preparations—thoroughly challenge Fraser's testimony by cross-examining her about the limited nature of the information Upson's phone records conveyed and about purported differences in some of the generated maps. (App'x pp. 157-162; p. 441). In light of that, defense counsel was able to—and did—take active steps to attack the reliability and value of Fraser's testimony even without offering the testimony of a defense expert. See Richter, 562 U.S. at 111 ("Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense."); cf. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) ("[C]ounsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (concluding trial counsel's decision not to present an expert witness to rebut the testimony of the State's expert witness constituted a legitimate trial strategy under the circumstances and reversing a ruling reaching a contrary conclusion), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); Frasier v. State, 306 S.C. 158, 160-161, 410 S.E.2d 572, 573 (1991) ("Petitioner . . . argues that trial counsel was deficient in failing to procure an expert witness to challenge the DNA evidence presented at trial. We disagree. The record reveals that trial counsel vigorously cross-examined the state's DNA experts and attacked the accuracy of the evidence. We cannot say that his performance was unreasonable under prevailing professional norms.").

consistent with the evidence introduced by the State during trial aside from being slightly more accurate due to advances in technology that only came about well *after* the trial took place. Similarly, just like the State's evidence, Upson's evidence showed he was in Aiken on the date of the incident without directly placing him at the scene of the robbery at the time it was committed, and the evidence in no way called into question Fraser's testimony establishing Upson suspiciously called the restaurant several times just before it was robbed, including one time while blocking his identifying information. Under those circumstances, the evidence presented by Upson to support his post-conviction relief claims was not sufficient to establish the requisite prejudice needed for him to be entitled to relief as it could not have impacted the outcome of trial. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Accordingly, as defense counsel was not—and could not possibly have been—deficient for failing to present evidence that did not yet exist and which could have had no impact on the result of the trial, the post-conviction relief judge erred as a matter of law by finding defense counsel was constitutionally ineffective for failing to present expert testimony to challenge the State's evidence generated from Upson's phone records. See Yarborough, 540 U.S. at 8 ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."); cf. Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 90-91 (1992) ("We cannot say that trial counsel was ineffective for failing to present evidence of a complex psychological phenomenon which had not yet been recognized by this Court, and which only recently had been identified by the scientific community."). The post-conviction relief judge's ruling should be reversed.

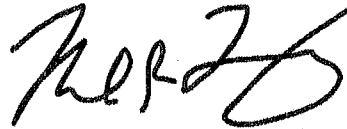
CONCLUSION

For all the foregoing reasons, it is respectfully submitted the post-conviction relief judge's grant of relief should be reversed.

Respectfully submitted,

ALAN WILSON
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ATTORNEYS FOR PETITIONER

November 22, 2021

RECEIVED

Feb 22 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ON WRIT OF CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

CASE NO.: 2018-001674

JOHN UPSON,..... Respondent,

vs.

THE STATE,..... Petitioner.

BRIEF OF RESPONDENT

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Petitioner's Statement of Issue

Did the post-conviction relief judge reversibly err by finding—in a legally-erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own?

- A. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing either to seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or to challenge the admission of that evidence during trial when — just as the post-conviction relief judge found in his order incorrectly granting relief — the victim made the identification without the involvement of any suggestive circumstances created by law enforcement, which necessarily meant defense counsel could not have been deficient for failing to challenge the identification evidence through a pre-trial hearing request or a trial objection since there were no valid legal grounds supporting such a request or objection?
- B. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to cross-examine Alston in some unspecified manner about testimony indicating Upson had a "lazy eye" when defense counsel thoroughly attacked Alston's identification of Upson as the robber in an appropriate and reasonable manner throughout the trial and when no prejudice could have resulted from defense counsel's failure to question Alston about her "lazy eye" testimony in light of the fact the jurors had a full opportunity to view Upson's eyes throughout the trial, which enabled them to make their own determinations regarding the reliability of Alston's testimony even without any additional questioning?
- C. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own when the evidence the post-conviction relief judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding?

Statement of the Case

Respondent is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. In January 2014, the Aiken County Grand Jury indicted Respondent for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire represented Respondent. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Respondent proceeded to trial before the Honorable Donald B. Hocker. The jury found Respondent guilty as indicted. Judge Hocker sentenced Respondent to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

Respondent filed a timely notice of appeal. John H. Strom, Esquire, of the Office of Appellate Defense perfected the appeal. The issue raised on appeal was whether trial court erred in denying Respondent's directed verdict motion where the evidence presented at Respondent's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson. The South Carolina Court of Appeals affirmed Respondent's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the Circuit Court on June 17, 2016.

In his application for Post-Conviction Relief, which was filed on January 23, 2017, Respondent alleged that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
 - a. "Failure to fully cross-examine Jameshia Alston."
 - b. "Failure to ask for Neils v. Biggers hearing."
 - c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright and Brenda Smith."

- d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Respondent."
- e. "Failure to object to Respondent being charged and standing trial for armed robbery when the 14th and 6th Amendments were violated by the confrontation clause."
- f. "Failure to object to in-court identification."
- g. "Failure to object to bolstering by the State during closing arguments."

The State filed its Return on May 16, 2017. Present at the evidentiary hearing, held on May 5, 2018 before the Honorable R. Scott Sprouse, was Julie Coleman, Esquire from the Office of the Attorney General representing Petitioner. Respondent was present and represented by his attorney, Tommy A. Thomas. Respondent testified on his own behalf and called Tom Slovenski. Petitioner called Second Circuit Public Defender De Grant Gibbons. At the close of the hearing, Judge Sprouse ordered, at the State's request and without objection from Respondent, that the record remain open for thirty (30) days in the event that lead trial counsel, who was not available for the hearing, wished to submit testimony.

An order granting post-conviction relief was signed by Judge Sprouse July 13, 2018, and amended order was signed August 10, 2018. The Court found, in part, the basis for granting post-conviction relief was:

The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the [Respondent's] claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.

Therefore, based upon the foregoing, the Court finds and concludes:

1. The identification of the [Respondent] was a key issue at trial.
2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the [Respondent's]

name. Counsel for the [Respondent] failed to challenge this by either requesting a Neil v. Biggers hearing or by objecting to its admission at trial.

3. The Court is particularly concerned with the testimony regarding [Respondent's] "lazy eye." The testimony provided a significant basis upon which the State's witness relied in making her identification. Once elicited at trial, Counsel for the [Respondent] failed to challenge this on cross-examination.

a. The Court observed the [Respondent] at the evidentiary hearing and had the opportunity to personally study the [Respondent's] facial features. The Court found that the [Respondent] clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the [Respondent's] conviction.

4. The [Respondent] also asserted an alibi defense that the State discredited through expert testimony that Counsel for the [Respondent] failed to challenge.

a. At the evidentiary hearing, the [Respondent] presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the "pie method."

This Court specifically found and concluded that both prongs of Strickland have been met by the [Respondent]. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the [Respondent].

App. 475-483.

Appellant filed a Motion to Alter or Amend Pursuant to Rule 59(e) on or about August 20, 2018. App. 494-506. Judge Sprouse denied the Motion on August 24, 2018. App. 508. Appellant filed a Notice of Appeal on September 17, 2018.

Statement of the Facts

On November 27, 2013, a Captain D's restaurant in Aiken, South Carolina, was held up by two men in black clothing (described as hoodies) and bandanas covering their faces. One robber took an employee, Scott Hall, whom they initially approached outside the restaurant, to the safe at the front of the store while the other stayed in the back with another employee, Jameshia Alston. Hall led the man holding him to the store's manager, Devin Johnson, who complied with his demands for cash. Afterward, the men forced the three employees into the freezer at the back of the restaurant. The employees left the freezer once the men left the restaurant and called 911. Alston reported that one of the men looked familiar and had been in the restaurant earlier that week, but she did not know his name.

Standard of Review

In post-conviction relief actions, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2051 (1984); Butler, 286 S.C. at 442. The proper measure of performance is whether the attorney provide representation within the range of competence required in criminal cases. The court presume the counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Counsel's assistance is considered constitutionally ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 687-88.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 286 S.E.2d at 625.

The standard of review in post-conviction relief cases is entirely dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). During review of factual findings made by the post-conviction relief court, the appellate court will defer to the findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Alternately, when reviewing a question of law, an appellate court will consider the matter de novo and is not required to defer to the post-conviction relief court's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

Argument

The post-conviction relief judge did not err, as a matter of law or in a deficient manner, in ruling that trial counsel was ineffective for 1) failing to seek either a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; 2) failing to challenge the victim's testimony regarding Respondent's "lazy eye;" or 3) failing to challenge the State's testimony discrediting Respondent's alibi defense with an expert of his own.

- 1) The post-conviction relief judge's concerns about the admissibility of eyewitness testimony due to the inconsistencies in Alston's story regarding her Facebook research and conversations with law enforcement were valid, and trial counsel's failure to attempt to suppress this testimony or object when it emerged was deficient and prejudicial to the point where one cannot rely upon the outcome of the case.**

Petitioner has cited many cases for the proposition that there was nothing suspect about Jameshia Alston's identification of Respondent as a perpetrator of the Captain D's robbery. The issue, however, is not so simple. At trial, and even through the evidentiary hearing, Respondent and his counsel questioned the timeline of events regarding Alston's discovery via Facebook of Respondent's identity and her exposure to the list of names from law enforcement.

Respondent admitted to visiting the restaurant where he spoke to an employee, William Keels, earlier that week. He had once dated Keels' sister, so the two had a brief conversation that Alston witnessed. At trial, Alston testified that she knew she recognized the robber, so she "went home and looked it up." App. 58;5-9. Respondent referred to this and subsequent testimony at the evidentiary hearing to show the potential confusion between Alston's research and information she may have received from law enforcement. Specifically, the following passage is particularly telling:

Mr. Smith: You scrolled down through the pictures?

Ms. Alston: Yes, sir, I did.

Mr. Smith: Or, did you type in John Upson's name?

Ms. Alston: No, I went on William Keels' page and I found his name. And when I saw his picture I jumped up because I knew that was him. And then I, like, clicked on his name and I was scrolling through his pictures. As I was looking I jumped up again. I told my mom that was him.

...

Mr. Smith: Does he have a lot of pictures of other people on his --

Ms. Alston: I didn't look at that.

Mr. Smith: You didn't look at anybody else's picture?

Ms. Alston: No, sir. I just looked at his name, who I was looking for.

Mr. Smith: You were just looking for John Upson?

Ms. Alston: Yes, sir.

App. 73;1-25. Paraphrased by Respondent on App. 428;2-429;12. When reviewing the transcript, it is apparent that Alston contradicts herself. She states that she was scrolling through pictures on Facebook until she found Respondent's name. Then she jumped when she saw his picture. This testimony reads as if she knew his name and went to find his picture for confirmation. Additionally, Alston testified that she was shown a list of names (without photos) by law enforcement. App. 75;20-76;2. Based on her testimony, it is possible that her timeline could be confused. At the very least, it is enough to question the veracity and reliability of her identification.

For these reasons, trial counsel should have requested a hearing pursuant to Neil v. Biggers, 408 U.S. 188 (1972) or, at the very least, objected to the admission of this testimony during trial. The State argues that a Neil v. Biggers hearing would be inappropriate because there is no legal basis on which to make the motion due to its perceived lack of a suggestive circumstance created by government officials as required by the case. However, based on Alston's testimony, it is actually quite unclear whether she was affected by suggestive circumstances created by law enforcement. Her testimony shows confusion regarding whether she was looking for a name or a photo; therefore, if she were looking for a name, where did she get it? From the list she admits law enforcement showed her?

Though the order granting post-conviction relief included a finding she conducted her independent Facebook research before speaking to law enforcement, both the trial and PCR transcripts show Alston's confusion regarding the timeline and, therefore, the involvement of law enforcement before she made her out-of-court identification. Had Alston seen the list of names before she conducted her Facebook search, she would have had a very short list of people about whom she could research and find photos. This would be in contravention of the cases cited by Petitioner that require suggestive circumstances created by government officials or state action. See Perry v. New Hampshire, 565 U.S. 228 (2012); State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). Because it was only after the Facebook search that Alston identified Respondent, trial counsel should have requested a pre-trial hearing to ensure that there were no improper actions taken by law enforcement. After all, "reliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. 98, 154 (1977).

At the very least, trial counsel should have objected or otherwise drawn attention to Alston's conflicting testimony when it was presented at trial. The most confusing parts of her testimony were on trial counsel's cross-examination, and trial counsel did very little, if anything, to elucidate these errors or call attention to her conflicting statements. While it is unclear how much of this testimony trial counsel received in pre-trial discovery, he could certainly have taken the opportunity to impeach Alston on her conflicting statements during cross-examination. It is important to note that, despite Petitioner's argument in its brief, the PCR court was not required to include specific questions or inquiries trial counsel should have asked in the order granting relief. It is not the job of the PCR court to outline how a case could have been handled better or with less prejudice to the applicant. Rather, "[t]he [PCR] court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. 17-27-80 (2014). A PCR court's "general denial of all claims not specifically addressed in the PCR court's order 'does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law.'" Simmons v. State, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (citing Marlar v. State, 375 S.C. 407, 409, 653 S.E.2d 266, 266 (2007)). These requirements were satisfied in the PCR court's order, despite Petitioner's argument to the contrary.

With any criminal case, the issue of identification is crucial and, in this instance, Alston was the only eyewitness to identify Respondent. With only one individual identifying Respondent while trial counsel is presenting an alibi defense, the credibility or lack thereof for this sole witness becomes even more critical. Trial counsel should have used every possible tool in his arsenal to attempt to exclude, suppress, or discredit Alston's

testimony and, had he done so, he may have proven that Alston's identification was incorrect. His failure to do so created prejudice such that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. At 117-118, 386 S.E.2d at 625. Petitioner's request for certiorari must be denied.

2) The post-conviction relief judge's concern about the validity of eyewitness testimony due to the incorrect "lazy eye" testimony was valid, and trial counsel's failure to address it in any form or fashion was deficient performance and prejudicial to Respondent.

During trial, Alston testified that she recognized Respondent because of his "bald head and lazy eye." App. 58;1-3. In fact, she said, "that's the thing that caught [her] eye." App. 58;1-3. This is, surprisingly, despite the fact the perpetrators of the robbery had their heads and faces covered. The post-conviction relief court held Alston's incorrect description of Respondent's eyes caused it "particular[] concern[]" because it could have led to a misidentification that resulted in Respondent's conviction.

The State argued that, essentially, this is an instance where common sense should have prevailed – the jury had the opportunity to observe Respondent in the courtroom throughout the trial and could clearly see that he does not have a lazy eye, just as the post-conviction relief judge did. Even assuming this is true and the jury observed this fact, it actually harms the State's argument because it further dents Alston's credibility. If she was so certain that she had identified the perpetrator because of his lazy eye that she jumped up to tell her mother upon finding his photograph, how can we actually trust her identification if the man she points to in the courtroom does not have a lazy eye?

The State cites State v. Odom, 412 S.C. 253, 772 S.E.2d 149 (2015) and State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (1996) for the proposition that jurors' ability to

observe defendants during trial and attach whatever credibility they deem necessary to a witness's identification. While that is true, it also leaves defense counsel open to exploit inconsistencies between the witness's description and the appearance of the defendant. In this case, the obvious fact that Respondent does not have a lazy eye should have been identified and exaggerated by trial counsel in order to discredit her testimony at every juncture. As stated in the above section, despite Petitioner's insistence, the PCR court did not have to outline a list of questions or trial strategy that should have been utilized by trial counsel in order for the order granting relief to be complete.

As argued above, Alston's identification of Respondent is crucial to this case, and trial counsel should have taken every opportunity to discredit it. The State argues trial counsel "thoroughly attacked the reliability of Alston's identification in other ways," thus leaving it unlikely the failure to explore this avenue altered the course of the trial so as to create a reasonable probability that the result of the trial would have been different as required by Strickland, 466 U.S. 668. PWC, 20. This is patently false. Had trial counsel gone down this path of questioning to directly challenge Alston's description of a bald head and lazy eye, he may have totally discredited her testimony and identification, thus preventing Respondent's conviction. It is clear from the phrasing of the order granting relief that this potential for misidentification was the court's main concern and foundation for finding ineffective assistance of counsel. Petitioner's request for certiorari must be denied.

- 3) **The post-conviction relief judge properly ruled that trial counsel failed to challenge the State's expert testimony at trial regarding cell phone tower data and, upon presentation of an expert at the evidentiary hearing, Respondent created significant doubt about the accuracy of the initial expert's testimony.**

At trial, the State presented an expert from the Bureau of Alcohol, Tobacco, and Firearms ("ATF") to analyze the cell phone data retrieved from Respondent's phone. In doing so, the State attempted to show Respondent was near the Captain D's at the time of the robbery. Though trial counsel had the cell phone data prior to trial, it was not analyzed by an expert nor was any expert testimony presented on behalf of Respondent. Second chair trial counsel testified that the information was discussed with someone in the office who was familiar with cell phone data, but no true expert opinion was sought. App. 441;9-13. He was not aware an expert would be called by the State because it was not until shortly before trial they became aware ATF was involved or an agent testifying. App. 447;25-448;2. He further testified he did not know if a motion for continuance was made or if any objection was possible, whether due to a discovery violation or otherwise. App. 448;16-449;16.

Regardless, trial counsel had information at hand that could have been analyzed and presented in the light most favorable to them. At the evidentiary hearing, Respondent presented such an expert in Tom Slovenski. He testified, initially, that the PenLink system used by ATF to analyze cell phone data with the pie method was highly susceptible to user error, more than other methods or manual analysis. App. 402;9-12. In fact, Slovenski testified he would have manually plotted the data using the pie method if he were analyzing the data at the time of trial because that was all that was available.

Petitioner argues repeatedly that Slovenski used a method — TraX — that was unavailable at the time of trial to develop his testimony for the evidentiary hearing. While that is true, it was for the purpose of doublechecking the analysis done in 2013 due to the likelihood of incorrect results from PenLink. He testified extensively to the necessity of peer verification and “getting another examiner to look at what you’ve done.” App. 398;25-399;12. In fact, he testified you “have to” manually check results after using any program. PCR TR 39;10-15. The errors in the ATF report Slovenski pointed out were as simple as not having the name or phone number of Respondent on the documents, the date and time of reference, or even an indicator of the precise location of Captain D’s. App. 398;9-12;389;14-24. Furthermore, they did not use best practices in the industry, primarily meaning they did not reveal as specific enough detail as they should. App. 387;18-388;11. The thrust of the testimony was not about the program used, but about the veracity and reliability of the analysis presented at trial. Slovenski used a new method to verify the analysis presented by ATF based upon the call data in trial counsel’s possession and found the ATF analysis to be quite inaccurate.

Regarding the factual differences of the reports, Slovenski’s analysis shows Respondent farther from Captain D’s at the time of the incident than the ATF’s did. App. 395;9-14. Also, there are areas of overlap in several maps that were not identified or explained by Fraser, the ATF expert. App. 396;21-25. Ultimately, Slovenski testified that, without knowledge of cell phone data or the ability to analyze the maps and analysis presented by ATF, trial counsel would not have had the ability to ask appropriate questions to rebut this information. App. 399;13-16.

Ultimately, this is a question of reliability and accuracy of the information presented by ATF's expert. Trial counsel had the data, knew or should have known that they did not fully understand it, and did not bother to seek the assistance of an expert. The fact that TraX was used by Slovenski to analyze the data for the evidentiary hearing has no bearing on whether it was available in 2013, despite what the State argues. Crucial to this case is the fact that, even using TraX, the evidence presented at trial differed from the testimony given. Many of the problems Slovenski enumerated dealt with the ability of a layperson to interpret the maps and analysis. Trial counsel, as a layperson in the field of cell phone data, would have also been at a disadvantage and would not have been able to adequately cross-examine Fraser at trial.

The State pointed to several factors that it argues diminish the likelihood of prejudice to Respondent, such as how Slovenski acknowledged the State never argued the maps showed Respondent at the scene, or that the solicitor conceded in his closing that the maps showed Respondent downtown, where his alibi witnesses placed him. Regardless, this does not remove the likelihood that a more thorough and scientific analysis of these records on Respondent's behalf at the time of trial would have discredited Fraser's testimony. The entirety of the case law cited on this point regards the fact that trial attorneys are not required to be infallible or anticipate changes in the law, neither of which are Respondent's argument. Rather, Respondent argued and the PCR court agreed that the presentation of cell phone evidence was ineffective, inaccurate, and caused prejudice to Respondent. Because of the failure of trial counsel to fully research and use the cell phone data, this "trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Therefore, Petitioner's request for certiorari must be denied.

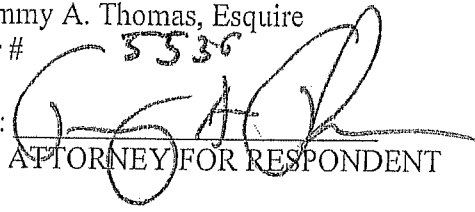
Conclusion

For all the foregoing reasons, it is respectfully requested that Petitioner's request for certiorari be denied and dismissed. If this Court sees fit to grant its petition for writ of certiorari, Respondent requests permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

Tommy A. Thomas, Esquire
Bar # 5536

BY:


ATTORNEY FOR RESPONDENT

7588 Woodrow Street
Irmo, South Carolina 29063



The South Carolina Court of Appeals

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December 08, 2023

Mr. Tommy Arthur Thomas, Esquire
PO Box 88
Irmo SC 29063

Re: John Upson v. State
Appellate Case No. 2018-001674

Dear Counsel:

Upon review of the records in the above-mentioned appeal, the Court requests that counsel submit a color copy of page 285 of the appendix. Please submit this document within ten (10) days of the date of this letter.

Very truly yours,

A handwritten signature in cursive script that reads "Catherine S. Harrison, deputy".

CLERK

cc: Mark Reynolds Farthing, Esquire



THOMAS LAW

RECEIVED

Dec 11 2023

SC Court of Appeals

December 11, 2023

Via Email

The Honorable Jenny A. Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

RE: John Upson v. State
Appellate Case No.: 2018-001674

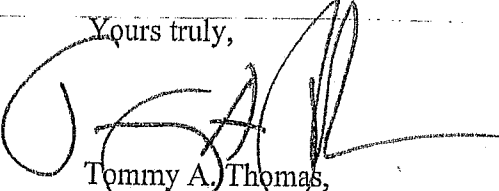
Dear Ms. Kitchings:

I am in receipt of your letter requesting that I provide you with a color copy of page 285 of the Appendix in the above referenced case. It is my understanding that the State does not have a color version of this document.

I have reached out to the Department of Corrections and was provided the attached color photo of John Upson from Deputy General Counsel, Christina Bigelow. It is my understanding that this color photo is the original photo from the classification summary report on page 285 of the Appendix.

Should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,



Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Mark R. Farthing, Esq. - Email

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610

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Upson, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2018-001674

ON WRIT OF CERTIORARI

Appeal from Aiken County
R. Scott Sprouse, Post-Conviction Relief Judge

Opinion No. 6049
Heard December 7, 2023 – Filed January 31, 2024

REVERSED

Attorney General Alan Wilson and Senior Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia, for Petitioner.

Tommy Arthur Thomas, of Irmo, for Respondent.

GEATHERS, J.: The State of South Carolina (the State) appeals an order from the post-conviction relief (PCR) court granting John Upson's PCR application for ineffective assistance of counsel. The State argues the PCR court erred in finding that trial counsel was constitutionally ineffective by (1) failing to challenge or

otherwise determine the admissibility of eyewitness identification evidence, (2) failing to cross-examine a witness who testified that Upson had a "lazy eye," and (3) failing to challenge the State's testimony discrediting Upson's alibi with an expert witness of his own. We reverse.

FACTS

John Upson was convicted in April 2014 of armed robbery and two counts of kidnapping and sentenced to twenty years' imprisonment for robbing a Captain D's restaurant.

Shortly after the restaurant had closed for the business day, Upson and another individual—both wearing black sweatpants, black hoodies, and bandanas covering their faces up to their eyes—entered and forced the employees into the freezer while they robbed the restaurant. Upson remained in the back of the restaurant near the freezer with the employees while the other individual, who was armed with a gun, took money from the front of the restaurant.

About a half-hour later, after the robbers left, the employees exited the freezer and called the police. When the police arrived, one of the employees, Jameshia Alston, gave a statement indicating that she recognized Upson's face—but did not know his name—because he had come into the restaurant two days prior, ordered a drink, and took a picture with one of her coworkers, William Keels.¹ Based on this recognition, Alston went home that night and scrolled through Keels's friends list on Facebook in the hopes of learning Upson's name.² Alston testified at trial that she conducted this Facebook search of her own volition and not at the behest of the police. Detective William Royster of the Aiken Department of Public Safety also testified at trial that he did not direct Alston to try to identify the robber on Facebook.

¹ At his PCR hearing, Upson admitted to this, testifying, "I was in [Captain D's] on Monday before three—two [or] three days before this happened. Came in, we ordered some fish, and I used to date William Keels's sister. Hadn't seen [Keels] since he was a teenager. Long story short, he came out, we talked, [and] we left the restaurant."

² Explaining how a Facebook friends list works, Alston testified at trial, "[One] can scroll through a [Facebook] friend[s] list. And I saw [Upson's] picture and I clicked on his name. I didn't know his name at the time[,] but I clicked on it because I knew his face."

While scrolling through Keels's friends list, Alston came upon Upson's profile picture and recognized him as one of the robbers. She then clicked on his page and subsequently downloaded two pictures from Upson's Facebook page and emailed them and Upson's name to Detective Royster. This led to Upson's arrest.

At trial, Upson's counsel asked Alston about her Facebook investigation. When trial counsel asked Alston if she was ever shown a police lineup, she replied that she had been shown "[a] list of names." Trial counsel did not ask when the police provided the list or whether Upson's name appeared on it.³ The PCR court later found that Alston "pulled a photograph from Facebook *before* speaking with law enforcement." (emphasis added).

Alston also testified at trial that she remembered Upson's "bald head" and his eyes because "[h]e has a lazy eye. It's kind of droopy, like that." Although trial counsel did not immediately challenge this characterization, he did hold up pictures of celebrities with their faces covered, except for their eyes and nose, throughout his closing argument and asked the jury if they could identify the celebrities to illustrate the difficulty Alston would have had identifying Upson.

Upson had relied on an alibi theory for his defense at trial—claiming that he was attending a comedy show and an after-party on the night the robbery occurred—and called three witnesses to support this theory. Even though each witness testified to seeing Upson either before or after the show, two of the witnesses did not specifically testify to seeing Upson *during* the show and the third witness specifically testified to *not* seeing him during the show.

To discredit Upson's alibi, the State utilized cell phone data to establish Upson's possible movement and call activity. One of the State's witnesses—though not qualified as an expert⁴—explained that the data showed Upson's cell phone had been used to make ten phone calls between 9:00 p.m. and 10:00 p.m. on the night of

³ Trial counsel did not pursue the point, and it was never mentioned again.

⁴ The witness was Desra Fraser, an intelligence research specialist for the Bureau of Alcohol, Tobacco, Firearms, and Explosives.

the robbery,⁵ including three to Captain D's.⁶ In its closing argument, the State pointed out that many of these calls would have been made from Upson's phone while Upson was purportedly attending the comedy show.

The State's witness also used raw data from Upson's phone carrier to generate a series of maps that were intended to show that Upson's phone could have been moving when the calls were made.⁷ Importantly, the State did not claim that this data showed Upson was at Captain D's at the time of the crime, only that it showed he was placing phone calls and potentially on the move while the comedy show was taking place.

The jury found Upson guilty of armed robbery and kidnapping, and the trial judge sentenced him to concurrent, twenty-year sentences for each conviction. Upson appealed to this court, and his convictions were affirmed on June 1, 2016. *State v. Upson*, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016).

Upson then filed a PCR application in 2017. The PCR court heard the matter in August 2018 and granted Upson PCR on the grounds that trial counsel was ineffective for (1) "fail[ing] to challenge [Alston's Facebook identification] by either requesting a *Neil v. Biggers*⁸ hearing or by objecting to its admission at trial," (2) failing to challenge Alston's "lazy eye" testimony,⁹ and (3) failing to challenge the State's expert testimony and cell phone data discrediting Upson's alibi. The PCR

⁵ The robbery took place around 10:15 p.m.

⁶ At least one of these calls was done by first dialing *67, which is a standard vertical service code (VSC) used to block caller ID when placing a phone call. *Vertical Service Codes*, North American Numbering Plan Administrator, https://nationalnanpa.com/number_resource_info/vsc_definitions.html.

⁷ The maps were generated using software called Pen-Link and the "pie method," which involves drawing pie-shaped wedges to simulate the area in which a cell phone pinging off the tower could be located.

⁸ 409 U.S. 188 (1972).

⁹ The PCR court also noted that it "had the opportunity to personally study [Upson]'s facial features" at the evidentiary hearing and found that "[Upson] clearly did not have a 'lazy eye.'" It then indicated its concern "that this evidences a misidentification that led to [Upson]'s conviction."

court found that "trial counsel's deficient performance . . . prejudiced [Upson]." Trial counsel had moved out of state by the time the PCR hearing was held, and the PCR court sustained Upson's objection to allowing trial counsel to testify by telephone. The PCR court left the record open for thirty days to allow the State to add trial counsel's testimony, but the State did not elect to do so. The State petitioned for a writ of certiorari, and this court granted it in November 2021.

ISSUES ON APPEAL

- I. Did the PCR court err by finding that trial counsel was ineffective for failing to challenge or otherwise determine the admissibility of eyewitness identification evidence?
- II. Did the PCR court err by finding that trial counsel was ineffective for failing to cross-examine a witness who testified that Upson had a lazy eye?
- III. Did the PCR court err by finding that trial counsel was ineffective for failing to challenge the State's cell phone data evidence that was used to discredit Upson's alibi?

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "However, [we] will reverse the [PCR] court's decision if it is controlled by an error of law." *Milledge v. State*, 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018). "We review questions of law de novo, with no deference to trial courts." *Smalls*, 422 S.C. at 180–81, 810 S.E.2d 836 at 839–40.

LAW AND ANALYSIS

To establish an ineffective assistance of counsel claim, PCR applicants must show "(1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). Deficiency "is measured by an objective standard of reasonableness." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 102 (2013). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466

U.S. 668, 690 (1984). To establish prejudice, a PCR applicant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

We reverse the PCR court's order. We will discuss each of the three grounds upon which the PCR court rested its ruling.

I. Trial Counsel's Failure to Challenge Alston's Out-of-Court Identification of Upson

The State argues that the PCR court erred in finding that trial counsel was ineffective for his failure to request a *Neil v. Biggers* hearing or otherwise object to the admissibility of Alston's Facebook investigation. We hold that the PCR court erred on this ground. Trial counsel's failure to request a hearing or otherwise object could not have constituted deficient performance because a witness's independent identification process in which the state is not involved cannot be said to be unduly suggestive.

In-court identifications are 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). There are two prongs that must be established to determine if an out of court identification is inadmissible: (1) whether the identification process was unduly suggestive, and (2) whether the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). "Only if [the procedure] was suggestive need the court consider the second question[.]" *Id.* (first alteration in original) (quoting *Jefferson v. State*, 425 S.E.2d 915, 918 (Ga. Ct. App. 1992)). "The fallibility of eyewitness evidence does not, *without the taint of improper state conduct*, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *State v. Liverman*, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (quoting *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012)). Furthermore, "[a] primary aim" of a *Neil v. Biggers* hearing is "to deter law enforcement use of improper lineups, showups, and photo arrays in the first place." *Perry*, 565 U.S. at 241. The "due process concerns [*Neil v. Biggers* guards against] arise only when law enforcement officers use an identification procedure that is *both* suggestive and unnecessary." *Id.* at 238–39 (emphasis added); *see also State v. Tisdale*, 338 S.C. 607, 612, 527 S.E.2d 389, 392 (Ct. App. 2000) (per curiam) ("[T]he impetus behind the harsh remedy of exclusion is police

deterrence. . . . Thus, we hold that [a *Neil v. Biggers*] analysis is inapplicable where there is a nongovernmental identification source.").

The PCR court found that Alston "pulled a photograph from Facebook *before* speaking with law enforcement." (emphasis added). It further found that Alston was later presented with a list of names that included Upson's name, but that trial counsel failed to challenge this by either requesting a *Neil v. Biggers* hearing or by objecting to its admission at trial.

Alston's testimony establishes that she was looking through Keels's Facebook friends list because she recognized one of the men in the robbery as the same man who had been in Captain D's days prior and who had taken a photo with Keels. When Alston recognized Upson's profile picture on Keels's friends list, she took note of the corresponding profile name. Alston made clear in her testimony that she was searching for a *picture* she recognized, not a *name* she had been given beforehand. Specifically, Alston explained that "[one] can scroll through a [Facebook] friend[s] list. And I saw [Upson's] picture and I clicked on his name. I didn't know his name at the time[,] but I clicked on it because I knew his face."

Combining this with the PCR court's finding that any list of names given to Alston by the police appeared only *after* Alston's Facebook investigation, the appendix contains no evidence that law enforcement had anything to do with Alston's identification of Upson; rather, she testified this was something she "decided to take it to [her] own and do it [herself]." We hold the PCR court erred in finding that this failure to challenge the identification constituted deficient performance.

The first prong of *Neil v. Biggers* requires finding that the identification process was unduly suggestive in order to exclude an identification. Because law enforcement was not involved in the process Alston employed to identify Upson, the process could not have been unduly suggestive. *See Perry*, 565 U.S. at 248 ("[W]e hold that the 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*." (emphasis added)). If the first prong fails, the court does not need to reach the second prong. *Id.* at 235 (upholding the trial court's conclusion that because the witness "spontaneously" and "without any inducement from the police" identified the defendant, the reliability of this identification was for the jury to consider); *State v. Dukes*, 404 S.C. 553, 557–58, 745 S.E.2d 137, 139 (Ct. App. 2013) ("If the court finds [an] identification did not result from impermissibly

suggestive police procedures, the inquiry [under *Neil v. Biggers*] ends there and the court does not need to consider the second prong."). Consequently, trial counsel's decision not to challenge Alston's identification cannot be said to have fallen below an objective standard of reasonableness.

II. Trial Counsel's Failure to Cross-Examine Alston's Testimony that She Recognized Upson from His Lazy Eye

The State also argues that the PCR court erred in finding that counsel was ineffective for failing to cross-examine Alston on her testimony that she recognized Upson in part due to his lazy eye. We reverse the PCR court on this ground—trial counsel thoroughly tested the mettle of Alston's identification testimony throughout the trial, notwithstanding any failure to directly challenge her testimony on cross-examination. Consequently, trial counsel was not ineffective on this ground.

Alston testified that she recognized Upson because "[h]e has a lazy eye. It's kind of droopy, like that." While trial counsel did not immediately challenge Alston's claim that Upson had a lazy eye on cross-examination, trial counsel *did* challenge the reliability of Alston's identification. During cross-examination, trial counsel elicited testimony from Alston that revealed that much of Upson's face was covered by a bandana and a hoodie during the robbery.

Furthermore, during closing arguments, trial counsel utilized a tactic with the jury whereby he held up photos of three celebrities' faces with everything covered except their eyes and nose. Trial counsel used this tactic to demonstrate the difficulty that Alston would have had identifying Upson, whose features were covered and whom Alston had seen only once before. Because trial counsel thoroughly challenged the reliability of Alston's identification testimony, trial counsel's performance did not fall below an objective standard of reasonableness. See *Huggler v. State*, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004) (holding that trial counsel was not ineffective for failing to cross-examine child witnesses on inconsistencies between direct testimonies and written statements when counsel instead chose to highlight the inconsistencies in closing), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Ard v. Catoe*, 372 S.C. 318, 336, 642 S.E.2d 590, 599 (2007) (Toal, C.J., dissenting) ("[Defendant]'s trial counsel adequately investigated the issue of gunshot residue on the victim's hands[,] and their failure to cross-examine the State's gunshot residue expert was neither deficient nor prejudicial to [defendant].").

The PCR court also found that Upson did not have a lazy eye based on its "opportunity to personally study" Upson during the hearing. However, the jurors had the same opportunity to study Upson at trial and decide for themselves if they believed Alston's description of Upson was consistent with his appearance in the courtroom. Based on the jurors' decision to convict, they could have either agreed with Alston's characterization of Upson's eyelid as "droopy," or simply disregarded this portion of her testimony and decided to convict in light of her other bases for recognizing Upson. Specifically, Alston also identified Upson by "his bald head" and recognized the visible portions of his face from his interaction with Keels in the restaurant days prior. This means that the failure of Upson's trial counsel to cross-examine Alston on her lazy eye description could not have been prejudicial even if it was deficient—either way, the jurors would have made their own determinations in this regard and decided how that affected the overall reliability of Alston's identification. *Cf. State v. Odom*, 412 S.C. 253, 268, 772 S.E.2d 149, 156 (2015) ("It is uniformly the rule that a defendant's physical appearance may be considered by the jury in determining his or her age." (quoting *State v. Lauritsen*, 261 N.W.2d 755, 757 (Neb. 1978))); *Melton v. Williams*, 281 S.C. 182, 186, 314 S.E.2d 612, 614–15 (Ct. App. 1984) ("Assessment of the credibility of witnesses is a question for the jury, not the court, and it is the jury that decides the weight to be afforded the testimony."); *Goss v. State*, 425 S.C. 101, 108, 820 S.E.2d 373, 376 (2018) ("When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder chooses to see and hear first-hand.").

III. Trial Counsel's Failure to Challenge the State's Cell Phone Data Evidence Used to Discredit Upson's Alibi

Finally, the State challenges the PCR court's finding that trial counsel was ineffective for not calling an expert witness to testify on Upson's behalf to challenge the cell phone data the State relied on to discredit Upson's alibi. We reverse the PCR court on this ground because regardless of whether trial counsel's failure constituted deficient performance, Upson suffered no prejudice.

During the PCR hearing, Upson called Thomas Slovenski, a mobile phone forensics expert, as a witness. Slovenski criticized the cell phone maps presented by the State's witness at trial as confusing. Slovenski also noted that Pen-Link's accuracy as a software is "depend[e]nt a good bit . . . on the person who's actually using Pen-Link" and that another piece of software called TraX was better. Slovenski ran the raw cell phone data the State's witness used through TraX, instead

of Pen-Link, but conceded that "[o]n a couple of the maps[,] [it] look[s] like [the State] got it correct, but then . . . there's one that I can show you that it's an anomaly."

Further, Slovenski acknowledged that Pen-Link was the only available software at the time of Upson's trial and that Slovenski himself would have used Pen-Link for interpreting the data and the pie method for presenting it—just like the State's witness did. TraX—the software Slovenski said was better—did not exist until 2015, after Upson's trial.

To the extent Upson argues otherwise, trial counsel could not have been deficient for failing to enlist an expert to employ a technology that did not yet exist. *See Tillman v. State*, 244 S.C. 259, 264–65, 136 S.E.2d 300, 303 (1964) ("[Counsel] is not required . . . to do the impossible[] since the defendant is entitled to a fair trial and not a perfect one[.]"); *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) ("Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable[,] professional judgment." (quoting *Strickland*, 466 U.S. at 690)).

However, even if trial counsel was deficient in some other capacity by failing to call an expert witness, Upson was not prejudiced by this deficiency. Slovenski's testimony was largely consistent with the evidence introduced by the State during trial. The State relied on cell phone data as strong evidence that calls were placed via Upson's phone to Captain D's just before the restaurant was robbed, all while he was allegedly attending a comedy show. The State also used it to show that Upson may have been moving around town during this time. Slovenski's ultimate conclusion was that he could not "confirm any data that shows [Upson's cell phone] being used at or in the immediate area of Captain D's at the time of the incident." This is consistent with the State's presentation of the cell phone evidence at trial—the State never argued its maps showed Upson was actually at Captain D's when the robbery was committed.

Slovenski's testimony did not challenge the State's framing of the takeaways from the data. It established only that a more modern method could have resulted in a more accurate map. It did not discredit the call log tied to Upson's phone. Nor did Slovenski establish that he would have utilized a different method than the State's witness did—he admitted he would have used the same pie method that was employed at trial. We hold this does not create a level of doubt in the outcome of the trial sufficient enough to show prejudice from trial counsel's decision not to retain a cell phone data expert of his own. *See Strickland*, 466 U.S. at 694 ("The

[applicant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

CONCLUSION

For the foregoing reasons, the PCR court's order is

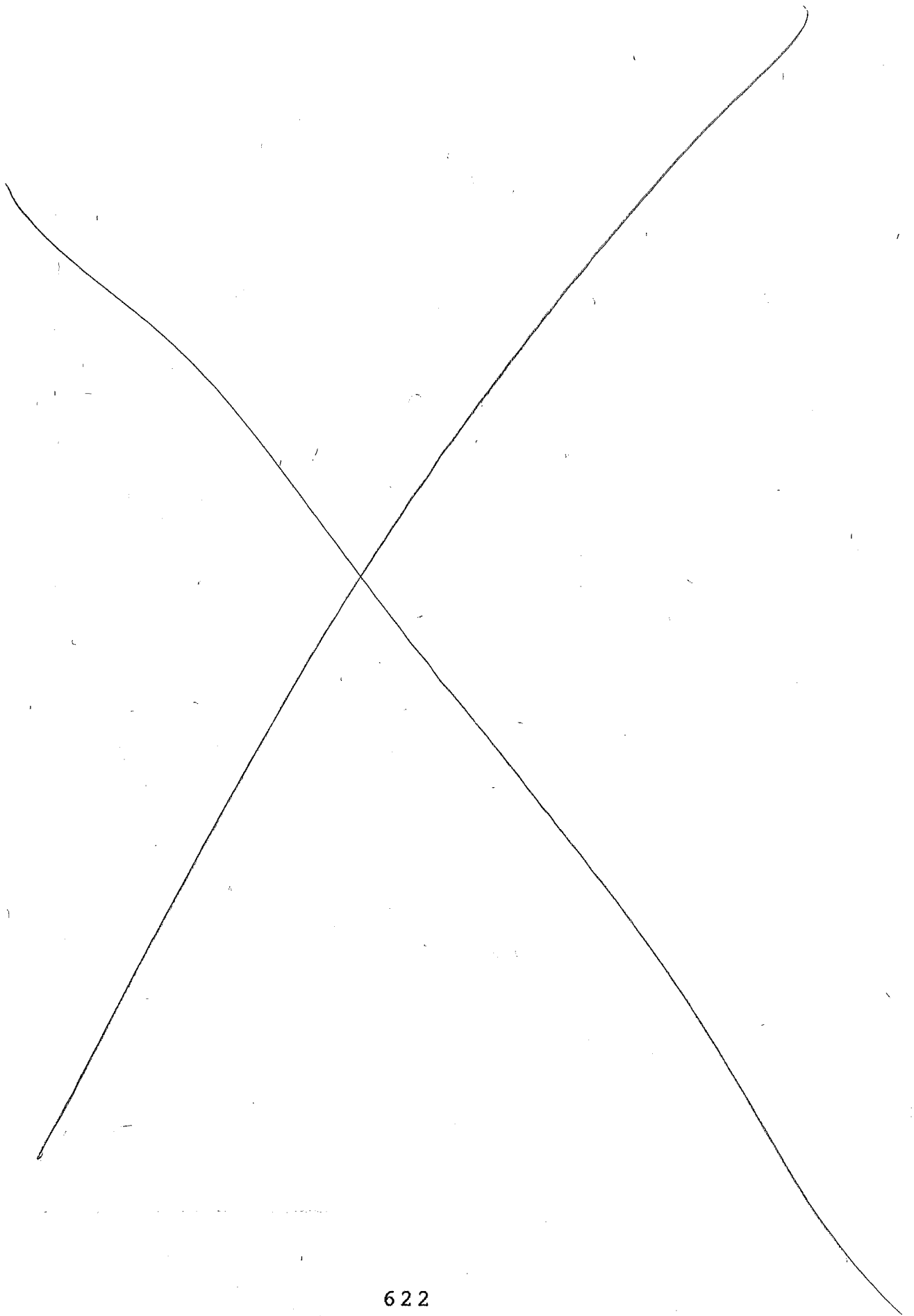
REVERSED.

THOMAS and KONDUROS, JJ., concur.

VED

124

Appeals



RECEIVED

Feb 14 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2018-001674

JOHN UPSON

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, John Upson ("Respondent") respectfully files this Petition for Rehearing. Petitioner requests that rehearing be granted regarding Opinion No. 6049 (Filed January 31, 2024 hereafter "Opinion" or "Op."), and that this Court issue a new opinion ruling in favor of Respondent or, failing that, order rehearing and further oral argument because:

The Court's opinion misapprehends facts central to its analysis and holding in the following grounds.

1. TRIAL COUNSEL'S FAILURE TO CHALLENGE ALSTON'S OUT OF COURT IDENTIFICATION OF RESPONDENT

The primary aim of a *Neil v. Biggers* hearing is "to deter law enforcement use of improper lineups, showups, and photo arrays." Perry, 565 U.S. at 241.

In this case, the PCR court found that Alston "pulled a photograph from Facebook *before* speaking with law enforcement." However, Alston also testifies that she was presented with a list of names that included Respondent's name. (App. p. 75, lines 20-21) Trial counsel failed to challenge Alston's out of court identification by either requesting a *Neil v. Biggers* hearing or by objecting to its admission at trial. This is where the problem begins.

Alston stated in her testimony that she was searching for a picture she recognized. Specifically, Alston explained that you can scroll through a Facebook friends list. And she saw his picture and clicked on his name. That she didn't know his name at the time but she clicked on it because she knew his face. But she also testified that "I just looked at his name, who I was looking for" (App. p. 73, Lines 1-25)

Alston testified that she had seen the Respondent before at Captain D's. Respondent admitted to visiting the restaurant where he spoke to an employee, William Keels, earlier that week. He had once dated Keels' sister, so the two had a brief conversation that Alston witnessed. At trial, Alston testified that she knew she recognized the robber, so she "went home and looked it up." (App. p. 58 lines 5-9)

Alston's testimony is problematic in that the perpetrators faces were covered except for their eyes. When reviewing the transcript, it is apparent that Alston contradicts herself. She states that she was scrolling through pictures on Facebook until she found Respondent's name. Then she jumped when she saw his picture. This testimony reads as if she knew his name and went to find his picture for confirmation. Additionally, Alston testified that she was shown a list of names (without photos) by law enforcement. (App. p. 75 lines 20 - p. 76 line 2) Based on her testimony,

it is possible that her timeline could be confused. At the very least, it is enough to question the veracity and reliability of her identification.

For these reasons, trial counsel should have requested a hearing pursuant to Neil v. Biggers, 408- U.S. 188 (1972) or, at the very least, objected to the admission of this testimony during trial. The order granting post-conviction relief included a finding she conducted her independent Facebook research before speaking to law enforcement. But both the trial and PCR transcripts show Alston's confusion regarding the timeline. The Courts analysis from both the PCR Court and this Court shows the complexity of this important issue. Without trial counsel requesting a *Neil v. Biggers* hearing or objecting at trial, it is impossible to know the answer to these questions. Trial Counsel created this issue by not requesting a hearing or making an objection which would have resolved this issue.

The Respondent would respectfully request that the Court reconsider the failure of trial counsel to address this issue.

2. TRIAL COUNSEL'S FAILURE TO CROSS-EXAMINE ALSTON'S TESTIMONY THAT SHE RECOGNIZED UPSON FROM HIS LAZY EYE

During trial, Alston testified that she recognized Respondent because of his "bald head and lazy eye." (App. p. 58 lines 1-3) In fact, she said, "that's the thing that caught [her] eye." (App. p. 58 lines 1-3) This is, surprising, despite the fact the perpetrators of the robbery had their heads and faces covered with only their eyes visible. The post-conviction relief court held Alston's incorrect description of Respondent's eyes caused it particular concern because it could have led to a misidentification that resulted in Respondent's conviction.

The PCR court also found that Respondent did not have a lazy eye based on its "opportunity to personally study" Upson during the hearing. This Court finds in its opinion that the jurors had the same opportunity to study Upson at trial and decide for themselves if they believed Alston's

description of Upson was consistent with his appearance in the courtroom. Alston also identified Upson by "his bald head". How is this possible when the perpetrators had their head and faces covered.

The Court cites State v. Odom, 412 S.C. 253, 772 S.E.2d 149 (2015) for the proposition that jurors' ability to observe defendants during trial and attach whatever credibility they deem necessary to a witness's identification. While that is true, it still leaves defense counsel open to exploit inconsistencies between the witness's description and the appearance of the defendant. In this case, the obvious fact that Respondent does not have a lazy eye should have been identified and used by trial counsel in order to discredit her testimony at every juncture. The Respondent would respectfully request that the court reconsider the impact of Counsel's failure to address these issues.

3. TRIAL COUNSEL'S FAILURE TO CHALLENGE THE STATE'S CELL PHONE DATA EVIDENCE USED TO DISCREDIT UPSON'S ALIBI

At trial, the State presented an expert from the Bureau of Alcohol, Tobacco and Firearms ("ATF") to analyze the cell phone data retrieved from Respondent's phone. In doing so, the State attempted to show Respondent was near the Captain D's at the time of the robbery. Though trial counsel had the cell phone data prior to trial, it was not analyzed by an expert nor was any expert testimony presented on behalf of Respondent.

At the evidentiary hearing, Respondent presented an expert, Tom Slovenski. He testified, initially, that the PenLink system used by ATF to analyze cell phone data with the pie method was highly susceptible to user error, more than other methods or manual analysis. (App. p. 402, lines 9-12) In fact, Slovenski testified he would have manually plotted the data using the pie method if he were analyzing the data at the time of trial because that was all that was available.

Petitioner argued repeatedly that Slovenski used a method – TraX – that was unavailable at the time of trial to develop his testimony for the evidentiary hearing. While that is true, it was for the purpose of double-checking his findings for the analysis done in 2013. His conclusions were never solely based on the use of a more modern technology. Slovenski's analysis shows Respondent farther from Captain D's at the time of the incident than the ATF's did. (App. p. 395 lines 9-14).

The Respondent would request that the Court reconsider this issue. The fact that Slovenski was able to validate his finding through a more modern technology does not take away from his finding using the same technology that existed at the time of trial.

4. THE FINDINGS AND CONCLUSIONS PRESENTED IN THE PCR COURT ORDER ARE FINDINGS OF FACT AND NOT ERRORS OF LAW

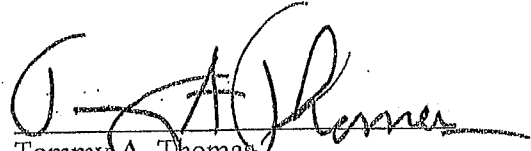
The standard of review in PCR cases depends on the specific issue before the Court. The Court should defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). However, the Court can reverse the [PCR] court's decision if it is controlled by an error of law. *Milledge v. State*, 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018). The Respondent asks the Court to reconsider its decision regarding the PCR Court finding and conclusions as they were finding of facts by the PCR Court.

CONCLUSION

For the reasons discussed above, as well as the prior filings and oral argument, all of which are incorporated herein, this Court should grant rehearing and issue a new opinion reversing its

decision and entering judgment in favor of Respondent as a matter of law. Failing that, this Court should order rehearing and further oral argument regarding this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tommy A. Thomas", written over a horizontal line.

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Irmo, South Carolina

February 14, 2024

The South Carolina Court of Appeals

John Upson, Respondent,

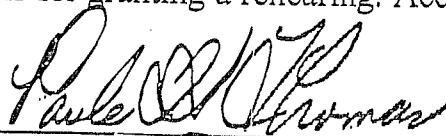
v.

State of South Carolina, Petitioner.

Appellate Case No. 2018-001674

ORDER

After careful consideration of the petition for rehearing, this court has discovered no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Tommy Arthur Thomas, Esquire

Mark Reynolds Farthing, Esquire

John Upson, 229134

The Honorable R. Scott Sprouse

FILED
Mar 01 2024