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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Aiken County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2024-000506

JOHN UPSON,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the Court of Appeals somehow err by concluding the PCR judge reversibly erred by finding 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?

STATEMENT OF THE CASE

Procedural History

In December of 2013, Petitioner 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On appeal, the Court of Appeals unanimously affirmed Upson's convictions in an unpublished opinion.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 ("PCR"), 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 PCR 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 PCR judge granted Upson's PCR 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 PCR 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 PCR judge's decision.

On appeal, the State filed a petition for a writ of certiorari in the Supreme Court, the Supreme Court transferred the matter to the Court of Appeals, and the Court of Appeals granted the State's petition on November 12, 2021. Thereafter, following briefing and oral argument, the Court of Appeals reversed the PCR judge's decision through a published decision. Upson v. State, 442 S.C. 359, 897 S.E.2d 564 (Ct. App. 2024). Subsequent to that, Upson filed a petition for rehearing, and that petition was denied. Upson then filed a petition for a writ of certiorari in the Supreme Court.

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 at 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 PCR Proceedings

Following an unsuccessful appeal, Upson sought 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 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).

[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).

[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).

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 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'x 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 PCR judge then took the matter under advisement. (App'x p. 466).

Subsequently, upon considering the matter, the PCR judge issued an order—and amended order—granting relief to Upson.[4] (App'x pp. 475-493). In granting relief, the PCR judge concluded defense counsel was deficient for: (1) failing to either seek a pre-trial hearing to

[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).

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

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 PCR judge concluded defense counsel's deficiencies resulted in some undefined prejudice to Upson. (App'x p. 493). The State then sought for the PCR judge to reconsider his ruling, but he summarily declined to do so. (App'x pp. 494-508). Following that, the State appealed. (App'x pp. 509-510).

Summary of the Decision the Court of Appeals Reversing the PCR Judge's Ruling

On appeal, the Court of Appeals reversed. Upson v. State, 442 S.C. 359, 362, 897 S.E.2d 564, 566 (Ct. App. 2024). In reversing, the Court of Appeals first considered the issue related to defense counsel's failure to request a Biggers hearing or otherwise object to Alston's identification testimony. Id. at 366, 897 S.E.2d at 568. After analyzing the matter, it concluded defense counsel's performance was not deficient because the process that led to Alston's out-of-court identification of Upson as one of the robbers did not involve any state action and, thus, could not have been unduly suggestive. Id. at 368, 897 S.E.2d at 569. Next, the Court of Appeals analyzed the issues related to defense counsel's failure to cross-examine a witness—again Alston—about her testimony indicating Upson had a "lazy eye." Id. at 369, 897 S.E.2d at 569-570. Upon doing so, it concluded: (1) defense counsel's performance did not fall below an objective standard of reasonableness—and, thus, was not deficient—because defense counsel thoroughly challenged Alston's identification throughout trial, including by using a tactic during closing argument designed to show how difficult it is to identify someone by just their eyes and nose; and (2) trial counsel's failure to cross-examine Alston about her "lazy eye" testimony

could not have been prejudicial under the circumstances involved because the jury had its own opportunity to evaluate the reliability of that testimony by viewing Upson during the trial. Id. at 369-370, 897 S.E.2d at 570. Third and finally, the Court of Appeals considered the issue related to the cell phone data. Id. at 370-371, 897 S.E.2d at 570-571. After doing so, it concluded defense counsel could not have been deficient for failing to enlist an expert to employ technology that did not yet exist. Id. at 371, 897 S.E.2d at 571. Furthermore, even assuming trial counsel was somehow deficient, it concluded Upson was not prejudiced because the expert testimony presented during the PCR evidentiary hearing did not undermine the way the State used the cell phone data during trial and did not create sufficient doubt in the outcome of the trial to satisfy the requisite prejudice standard. Id. at 371-372, 897 S.E.2d at 571.

STANDARD OF REVIEW

In PCR 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 PCR 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 PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR 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 Court of Appeals—while properly adhering to the applicable standard of review—correctly concluded the PCR judge reversibly erred by finding 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.

Through his petition for a writ of certiorari, Upson contends the Court of Appeals erroneously reversed the PCR judge's ruling granting relief for a variety of different reasons. Specifically, Upson maintains: (1) defense counsel was deficient for failing to either seek a pre-trial hearing to determine the admissibility of Alston's eyewitness identification evidence or challenge the admission of that evidence during trial because—despite the PCR judge's finding Alston conducted the independent Facebook research that led to the identification *prior to* speaking with law enforcement—there were purported "inconsistencies" that nonetheless warranted a pre-trial challenge or trial objection to that evidence; (2) defense counsel was constitutionally ineffective for failing to challenge Alston's testimony about her belief Upson had a "lazy eye" on cross-examination because Upson supposedly did not, in fact, have one; and (3) defense counsel was deficient for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own because the expert who testified at the PCR evidentiary hearing—after admittedly employing technology that did not yet exist at the time of trial—"created significant doubt" about the testimony presented during trial. Beyond that, Upson—in a largely conclusory fashion—maintains through his fourth and final allegation all of the PCR judge's findings and conclusions were supposedly "findings of fact and not errors of law" and, thus, the Court of Appeals improperly concluded the PCR judge's rulings were errors of law. Significantly, all of those contentions are inaccurate.

Initially, contrary to the first (and, by extension, fourth) of Upson's contentions, the PCR 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 Alston 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. Resultantly, the Court of Appeals correctly reversed the PCR judge's erroneous grant of relief on that basis.

Demonstrating that fact, Alston—just as the PCR judge found in his order—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 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 PCR judge erred as a matter of law by concluding otherwise.[5] 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)).

Accordingly, just as the Court of Appeals found, the PCR judge erred as a matter of law in concluding defense counsel was constitutionally ineffective for failing to either seek a pre-trial

[5] Notwithstanding the fact there was no legal basis upon which defense counsel could have challenged the admissibility of the identification evidence, the PCR judge *also* 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. (App'x pp. 492-493). 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 PCR 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 PCR 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)); cf. 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.").

hearing to determine the admissibility of the eyewitness identification evidence or seek its exclusion during trial, and his ruling granting relief was factually *and* legally erroneous. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (recognizing a PCR 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). Upson's petition for a writ of certiorari should be denied.

Next, contrary to the second (and, again by extension, fourth) of Upson's contentions, the PCR 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. Therefore, the Court of Appeals correctly reversed the PCR judge's erroneous grant of relief on that basis, too.

Demonstrating the soundness of the Court of Appeals's decision as to the deficiency prong of the applicable analysis, 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."[6] See Strickland

[6] Moreover, as to the "lazy eye" testimony, it remains entirely unclear what questions the PCR judge believed defense counsel should have asked of Alston about that particular subject matter as none have so far been identified. (App'x pp. 492-493). 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." (App'x p. 77). 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. 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," available at https://en.wikipedia.org/w/index.php?title=Ptosis_(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 Glover v. State, 318 S.C. 496, 499, 458 S.E.2d

v. Washington, 466 U.S. 668, 688-689 (1984) (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.").

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 PCR 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

538, 540 (1995) ("[M]ere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

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 PCR judge—just as the Court of Appeals correctly concluded—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 PCR applicant never makes any proffer of the evidence that purportedly should have been employed or elicited). Upson's petition for a writ of certiorari should be denied.

Finally, contrary to the third (and, once again by extension, fourth) of Upson's contentions, the PCR 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 PCR 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. Thus, the Court of Appeals correctly reversed the PCR judge's erroneous grant of relief on that basis as well.

Demonstrating that fact, defense counsel was not—and could not have been—deficient for failing to present the expert testimony the PCR 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 PCR judge's conclusion to the contrary was utterly illogical.[7] See Tillman v.

[7] 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 Harrington v. Richter, 562 U.S. 86, 111 (2011) ("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

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 PCR 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 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.").

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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.").

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 PCR judge—just as the Court of Appeals determined—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."). Upson's petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted Petitioner's petition for a writ of certiorari should be denied.

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