

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Kristi F. Curtis, Circuit Court Judge

CHAVIAS JAHMAL JENKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000244

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Jul 23 2024

S.C. SUPREME COURT

ISSUE PRESENTED

Whether the PCR court erred in finding counsel was effective when he failed to object to a police officer's improper bolstering and vouching testimony about a photographic lineup protecting against false identifications when counsel's trial strategy depended on raising reasonable doubt about the accuracy of the identification of petitioner as the assailant?

STATEMENT

On September 13, 2013, Maria Davila arranged to buy a cell phone on Craigslist. App. 175, l. 19 – 176, l. 14. After arriving at the meeting location, Davila was forced into her vehicle by an armed individual who then drove her around Charleston County at gun point. App. 178, l. 14 – 183, l. 10. After robbing Davila of money and a cell phone, the assailant then abandoned Davila and her vehicle in a rural area. App. 178, l. 14 – 183, l. 10. While no forensic evidence existed connecting petitioner to these crimes, he was charged with armed robbery, kidnapping, carjacking, and possession of a weapon during a violent crime on the strength of Davila's identification of petitioner as her assailant. App. 550 – 557.

Petitioner was originally connected to the crimes through a "tip" that his girlfriend, Candace Singleton, had information about the robbery. App. 263, ll. 13 - 23. Investigators then obtained petitioner's name off a prescription pill bottle they observed while questioning Singleton in the hotel room she shared with petitioner. App. 265, l. 24 – 266, l. 12. Armed with a potential suspect, a photographic lineup was prepared, with Davila being "uncertain" but eventually picking petitioner out as the assailant. App. 250, l. 4 – 255, l. 20. At trial, Davila identified petitioner as her assailant. App. 204, l. 5 – 205, l. 1. However, her original description of the assailant was generic with no reference to hair style, skin tone, complexion, or the shape or feature of his face. App. 214, l. 12 – 215, l. 10. Neither petitioner's fingerprints nor his DNA were recovered from Dalia's vehicle, despite police arriving on scene shortly after the assailant fled the scene and despite the fact that the assailant spent considerable time in the vehicle and occupied the driver's seat. App. 180, l. 4 – 181, l. 22; 340, ll. 3 – 20; 348, l. 23 – 349, l. 17.

During his original trial, officer Travis Repman was allowed to testify that the manner of the photographic lineup presented to the victim was the "most reliable false positive way to show

a lineup.” App. 250, ll. 20 – 21. Repman then testified that presenting the photographic lineup in the manner used was “the best chance to have the right person selected.” App. 251, ll. 1 – 2. The only objection voiced to this line of questioning was that the state had not qualified Repman as an expert witness. App. 250, ll. 17 – 19.

Petitioner was tried before the Honorable Kristi Harrington and a Charleston County jury from August 24 through 26, 2016. App. 33. Petitioner was represented by Luke Malloy and Mary Ford, while Nina Savas and Alex Ziegler appeared on behalf of the state. App. 33. Following a guilty verdict, Judge Harrington sentenced petitioner to 22 years for armed robbery, 22 years for kidnapping, 20 years for carjacking, and 5 years for possession of a weapon, all sentences to run concurrently. App. 558 – 561.

On direct appeal, Chief Appellate Defender Robert Dudek filed an Anders¹ brief raising the issue concerning the qualification of Repman as an expert witness as that was the sole objection asserted by trial counsel during trial.² The Court of Appeals dismissed the appeal. State v. Jenkins, No. 2016-002191 (S.C. Ct. App. May 1, 2019). Petitioner timely filed an application for PCR. App. 452. The application was amended before the evidentiary hearing to include allegations surrounding counsel’s failure to object to the bolstering testimony of Repman. App. 465. An evidentiary hearing was held before the Honorable Kristi Curtis on June 23, 2022. App. 469. James Falk appeared on behalf of petitioner, and Samantha Weidauer represented the state. App. 469. Trial counsel Luke Malloy and solicitor Nina Savas presented testimony. By order dated January 17, 2024, Judge Curtis denied the application for relief. App. 535 - 549.

This petition for *certiorari* follows.

¹ Anders v. California, 386 U.S. 738 (1967).

² The Anders brief is listed in C-Track under 2016-002191. *See* <https://ctrack.sccourts.org/public/caseView.do?csIID=63351>.

ARGUMENT

The PCR court erred in finding counsel was effective when he failed to object to a police officer's improper bolstering and vouching testimony about a photographic lineup protecting against false identifications when counsel's trial strategy depended on raising reasonable doubt about the accuracy of the identification of petitioner as the assailant.

A. How the issue was raised at PCR.

During his original trial, officer Travis Repman testified, without objection, that the photographic lineup presented to the victim was the “most reliable false positive way to show a lineup.”³ App. 250, ll. 20 – 21. Repman then bolstered the photographic lineup in the manner used was “the best chance to have the right person selected.” App. 251, ll. 1 – 2. Trial counsel also did not object when Repman explained why a witness was not asked about a numeric scale of certainty:

Because that person is so afraid at the time and when you are looking at these different photos although you may pick the right person out and you feel it's the right person you still may never believe a hundred percent in your head that that's them because you don't a hundred percent know that person.

App. 251, ll. 8 – 13.

At the PCR evidentiary hearing, trial counsel admitted he failed to object to the improper bolstering of the identification by Repman:

Q. Okay. So your objection was that he was not an expert but he was qualifying, testifying as one?

A. That's correct.

³ Trial counsel's objection prior to this testimony was that Redman had not been qualified as an expert. App. 250, ll. 17 – 18. That objection was in response to Repman's testimony concerning why the photographs were presented one at a time. Petitioner's Anders brief on direct appeal raised the issue of Repman's qualification as an expert to provide this testimony as that was the sole basis for trial counsel's objection. See State v. Jenkins, No. 2016-002191 (S.C. Ct. App. May 1, 2019). <https://ctrack.sccourts.org/public/caseView.do?csIID=63351>.

Q. But when Officer Repman said it is believed that this is the most reliable false positive way to show a lineup would you not agree that he is now bolstering the lineup?

A. I agree with that.

Q. Was that covered by, do you think that that's covered by your objection you didn't object to that statement as being bolstering, is that correct?

A. That's correct.

App. 491, ll. 1 – 12.

While this testimony was asserted as prejudicial during petitioner's direct appeal, the basis for the objection was centered on Repman's status as an expert witness since that was the only objection asserted by trial counsel. The Anders brief is filed in C-Track under 2016-002191.

B. How the PCR court ruled.

The PCR court ruled that trial counsel's lone objection, that Repman had not been qualified as an expert, sufficiently covered the concerns regarding bolstering. App. 543. In making this ruling, the PCR court cited the deference required when trial counsel articulates a valid strategic reason for a decision. App. 543. The PCR court also noted a lack of prejudice as a basis for denying relief. App. 543.

C. How the PCR court erred.

An objection that a witness has not been qualified as an expert does not cover testimony from the witness that bolsters other testimony or evidence, such as the reliability of a photographic lineup. Trial counsel's objection during trial leading up to the improper testimony, that Repman had not been qualified as an expert, was in response to a question from the solicitor regarding why a photographic lineup was presented "one at a time." App. 250, ll. 14 – 15. While the trial court overruled the objection in relation to that question, the improper bolstering and additional

comments regarding the accuracy of the identification was not covered by an objection on Repman's status as either a lay or expert witness. No witness, either expert or lay, is allowed to improperly bolster or vouch for the credibility of another witness or evidence. *See Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (noting that the expert witness "unmistakably conveyed to the jury her belief that Victim was telling the truth about the abuse" and also noted police investigator's testimony "also conveyed to the jury her impression that Victim was telling the truth" and that such vouching "was patently inadmissible, and there was no strategic reason for trial counsel not to object.").

Generally, "the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain 'the assessment of witness credibility ... within the exclusive province of the jury.'" *State v. Taylor*, 404 S.C. 506, 514–15, 745 S.E.2d 124, 128 (Ct. App. 2013). This Court has warned against the dangers of allowing police officers to interject opinions about credibility or the value of evidence, such as the accuracy of a lineup procedure. *See State v. Ellis*, 345 S.C. 175, 177–78, 547 S.E.2d 490, 491 (2001) (finding error in allowing police officer to provide the jury his conclusion regarding the position of victim at the time of a shooting); *see also State v. Lindsey*, 394 S.C. 354, 360, 714 S.E.2d 554, 557 (Ct. App. 2011) (finding error in the admission of police officer's notes as inadmissible hearsay that improperly bolstered testimony).

By allowing Repman to comment on the quality of the method used in the photographic lineup to eliminate false identification, trial counsel allowed Repman to vouch for the accuracy of Davila's identification. "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity[] or where a prosecutor implicitly vouches for a witness's veracity by indicating information not presented to

the jury supports the testimony.” State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). Thus, allowing an investigator to opine that a witness’ testimony was consistent with earlier statements improperly vouches for the witness. *See State v. Geter*, 434 S.C. 557, 569, 864 S.E.2d 569, 575 (Ct. App. 2021) (holding such a question “serves no other purpose than to bolster [witness]’s trial testimony and puts an improper imprimatur on [witness]’s testimony as truthful.”).

In this case, Repman improperly bolstered the out of court identification by Davila. Repman eliminated a “false” identification since he used the “most reliable false positive way to show a lineup.” App. 250, ll. 20 – 21. Repman bolstered the photographic lineup in the manner used as it was “the best chance to have the right person selected.” App. 251, ll. 1 – 2. Repman completed the job of building up Davila’s out of court identification by vouching for its accuracy since Davila was “so afraid at the time” and when she was “looking at these different photos although [she] may pick the *right person out and you feel it’s the right person* you still may never believe a hundred percent in your head that that’s them because you don’t a hundred percent know that person.” App. 251, ll. 8 – 13 (emphasis added).

D. Prejudice.

This case was entirely based upon Davila’s identification. During the photographic lineup, Davila was “uncertain” before eventually picking petitioner out as the assailant. App. 250, l. 4 – 255, l. 20. While Davila identified petitioner as her assailant, such in court identifications are hardly “unsuggestive” and would have been tainted by the photographic lineup. App. 204, l. 5 – 205, l. 1. Davila’s original description of the assailant was generic with no reference to hair style, skin tone, complexion, or the shape or feature of his face. App. 214, l. 12 – 215, l. 10. Neither petitioner’s fingerprints nor his DNA were recovered from Davila’s vehicle despite police arriving on scene shortly after the assailant fled the scene and despite the fact that the assailant spent

considerable time in the vehicle and occupied the driver's seat. App. 180, l. 4 – 181, l. 22; 340, ll. 3 – 20; 348, l. 23 – 349, l. 17. The solicitor echoed Repman's statements about the reliability of the photographic lineup by calling it the "least suggestive method." App. 383, l. 12 – 15.

The entire defense strategy centered on raising doubt about the accuracy of Davila's identification. App. 503, ll. 5 – 22. The improper bolstering and vouching of the out of court identification, without proper objection or challenge by trial counsel, in a case entirely dependent upon such identification, was prejudicial. See Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018); State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989).

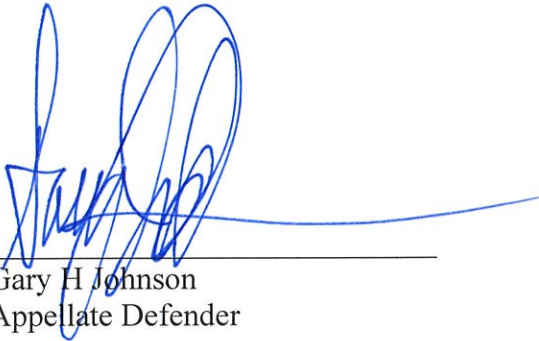
To establish prejudice, petitioner must demonstrate "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). As the Supreme Court of the United States explained in Strickland v. Washington, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id., 466 U.S. 668, at 695 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016).

Here, as in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), there is no physical evidence that connects petitioner with the crimes charged, and his conviction was based solely upon testimony infected with the ineffective assistance of counsel. As this Court noted in Smalls, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice—as we found it did in *Rosemond* and *Harris*—the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable probability ... the

factfinder would have had a reasonable doubt' cannot possibly be met." Smalls, 422 S.C. at 191, 810 S.E.2d at 845.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of *certiorari* to allow full briefing on this issue.



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of July, 2024.

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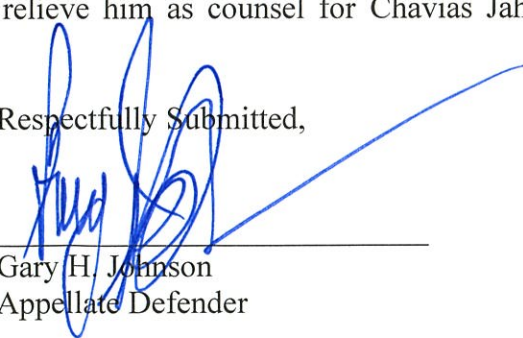
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Chavias Jahmal Jenkins states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Kristi F. Curtis, which was held on June 23, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Chavias Jahmal Jenkins.

Respectfully Submitted,



Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of July, 2024.

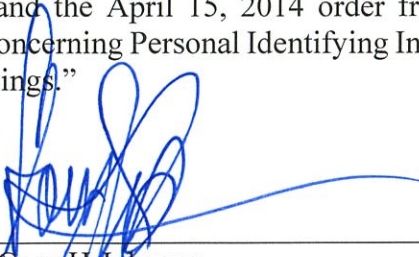
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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



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ATTORNEY FOR PETITIONER

This 23rd day of June, 2024.