ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

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S C Supreme Court

The Honorable Larry B Hyman, Jr , Circuit Court Judge
2009-CP-22-0546

The Honorable J Michael Baxley Circuit Court Judge
2007-CP-22-1332

CLARENCE GIBBS,

PETITIONER,

v

STATE OF SOUTH CAROLINA,

RESPONDENT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Petitioner was indicted in Georgetown County in June 2005 for kidnapping, armed robbery, and possession of a weapon during commission of a violent crime (App p 496-504) On September 6-8, 2006, Petitioner proceeded to trial before the Honorable Paula H Thomas (App p 1-494) The jury found him guilty, and Judge Thomas sentenced him to twenty years for armed robbery, twenty years, concurrent, for kidnapping, and five years, consecutive, for the weapon charge (App p 493, line 22 – p 494, line 1) A notice of appeal was timely filed, and an appeal was perfected The South Carolina Court of Appeals affirmed the convictions on June 27, 2007 (2007-UP-333), and the case was remitted to the circuit court on July 13, 2007

Petitioner subsequently filed two identical Applications for post-conviction relief, one on October 4, 2007, and one on November 8, 2007 (App p 505-511) The State made a Return on December 7, 2007, and the two Applications were merged under case number 2007-CP-22-1332 (App p 512-17) An evidentiary hearing was held on June 13, 2008 before the Honorable J Michael Baxley (App p 518-563) Judge Baxley denied post-conviction relief in an Order dated July 8, 2008 (App p 566-77) No appeal was filed

On April 13, 2009, Petitioner filed another Application for post-conviction relief (App p 579-95) The State made a Return and Motion to Dismiss on May 9, 2009 (App p 596-600) Petitioner then filed a Reply and requested a belated PCR appeal (App p 601-11) The State made an Amended Return requesting an evidentiary hearing regarding the belated PCR appeal issue (App p 612-13) Counsel was thereafter appointed to represent Petitioner, and a hearing was held before the Honorable Larry B Hyman, Jr , on July 29, 2009 (App p 614-25) By Order dated August 13, 2009, Judge Hyman granted the request for a belated appeal from Judge Baxley's denial of Petitioner's first PCR application A notice of appeal was timely served and filed On September 8, 2011, this Court granted the belated appeal and granted certiorari to review Judge Baxley's order denying post-conviction relief

ARGUMENT

I **The PCR judge properly found that Petitioner was not prejudiced by counsel's failure to preserve for appeal his objections to the identifications where the identifications were properly admitted at trial and their admission would have been affirmed on the merits**

Relevant Facts

Petitioner was charged with the armed robbery of a Piggly Wiggly store near his home in Georgetown County (App p 24, p 537) There were three victims involved, all employees of the store, and two ultimately identified Petitioner as the robber while the other did not (See App p 29-38) Detective Sparkman testified that he spoke with all three victims after the robbery and received descriptions of the robber (R p 25) The victims all described the robber as a middle-aged black male, wearing dark clothes and a hat, with black-and-gray hair and black-and-gray facial hair (App p 28, lines 19-25, p 2-17) All three stated that the robber held a gun inside his jacket, which had a noticeable gray lining (App p 177, p 199-201, p 232, p 253-54) A jacket positively identified by all three victims was found in Petitioner's bedroom and was introduced at trial (App p 172-79, p 201, p 253, p 266-67)

Two separate photo lineups with six pictures in each were presented to the victims approximately ten days after the crime (App p 25-28) The first lineup contained a picture of Petitioner but the second did not (App p 27-29, p 36) At the time of trial, the second lineup, which had also been used in an unrelated case, had been lost (App p 43, lines 5-23) However, Detective Sparkman, Sergeant Church, and two of the victims testified that the photos in the second lineup were similar to the photos in the first lineup, and all of the photos were of black males generally matching the description given by the victims (See App p 28-29, p 43, lines 5-23, p 46, lines 11-18, p 69-70, p 263-65)

Victims Morton and Fowlkes identified Petitioner from the first lineup, each indicating that they were absolutely sure of their identification (App p 29-32, p 69-74, p 79, p 87-89) After making their identifications from this lineup, the victims were asked to come to the police station for a "show-up" of Petitioner (App p 70-71, p 92-93) Upon viewing Petitioner behind a one-way mirror and hearing his voice, both Morton and Fowlkes confirmed that Petitioner was indeed the robber (App p 33-34, p 39-41, p 72-73, p 92-93, p 198, p 251)

Following a pre-trial Neil v Biggers hearing pursuant to defense counsel's suppression motion, the trial judge admitted the previous identifications of Victims Morton and Fowlkes and ruled that they could make in-court identifications (See App p 22-117) Later in the trial, counsel did not contemporaneously object to admission of the identification evidence, and this issue was found to be unpreserved for appellate review (See App p 530-31) Nevertheless, the PCR court properly concluded that Petitioner was not prejudiced by counsel's failure to contemporaneously object, because the trial court's admission of the identifications was proper and would have been upheld under the deferential standard of review on appeal

Argument

Under Neil v Biggers, 409 U S 188 (1972), there is a two-prong inquiry used to determine the admissibility of out-of-court identifications State v Brown, 356 S C 496, 503, 589 S E 2d 781, 784 (Ct App 2003) First, the court must determine if the identification process was unduly suggestive Id (citation omitted) Second, even where a suggestive procedure has been used, an identification may nonetheless be reliable, and therefore admissible in evidence, under the totality of the circumstances Id (citations

omitted) The following factors should be considered to determine the reliability of the identification "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the amount of time between the crime and the confrontation " Id (citing State v Mansfield, 343 S C 66, 538 S E 2d 257 (Ct App 2000)) The damaging effect of a suggestive identification should be weighed against these factors, and if the trial court finds that the witness' identification is reliable, the witness should be permitted to testify before the jury Id (citing Mansfield, *supra*) The admission of an eyewitness identification is in the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error State v Moore, 343 S C 282, 288, 540 S E 2d 445, 448 (2000)

In this case, after listening to extensive testimony in the pre-trial hearing, the trial court found that the identification procedure was not unduly suggestive because two non-suggestive photo lineups were viewed first and the subsequent show-up was merely confirmatory (See App p 113-15) The show-up, therefore, could not have tainted the previous photo lineup identifications (App p 115-16) The judge stated that she was not concerned about the loss of the second lineup, because the testimony she heard was sufficient to establish that the second photo lineup was sufficiently similar and was not unduly suggestive (App p 113-15) The judge further pointed out that, in any event, Petitioner was not identified from the lost lineup (See App p 113-16)

Even though she did not find the identification procedure unduly suggestive, out of an abundance of caution, the judge carefully reviewed all of the Neil v Biggers

reliability factors She concluded that the witnesses had a good opportunity to view the robber, that the witnesses' degree of attention was acute, that the prior descriptions were generally accurate, that both identifying witnesses were absolutely certain of their identifications, and that only a short period of time - ten days - had passed since the robbery (See App p 113-114) See State v Mansfield, 343 S C 66, 80, 538 S E 2d 257, 264 (Ct App 2000) (upholding admission of an identification where the witness's prior description was "on the whole" accurate), State v Patterson, 337 S C 215, 230, 522 S E 2d 845, 853 (Ct App 1999) (upholding admission of an identification made two weeks after the crime where, although the prior description was not very detailed, it was consistent with the defendant's appearance) The judge specifically found that "the image was still in the minds of these individuals" (App p 114, lines 13-14) The judge also pointed out that the lack of an identification by one of the three eyewitnesses did not render the two identifications inadmissible, instead it created an issue to be resolved by the jury (App p 116, lines 9-12) The court specifically concluded that due process had been satisfied because there was no substantial likelihood of misidentification (App p 116, line 23 – p 117, line 2)

The judge's conclusion regarding the admissibility of the identifications was supported by the testimony of the witnesses and would have been upheld under the deferential standard of review on direct appeal (See App p 24-106, p 184-260) See State v Moore, *supra* Notably, in its opinion affirming Petitioner's convictions, the South Carolina Court of Appeals commented on the thoroughness of the trial court's Neil v Biggers analysis with respect to both the lineups and the show-ups (See App p 574) See State v Gibbs, Op No 2007-UP-333 (S C Ct App filed 6/27/07) Accordingly,

Respondent submits that, since the trial court's admission of the identification testimony would have been upheld on the merits, Petitioner suffered no prejudice from counsel's failure to contemporaneously object The PCR judge's denial of relief on this ground should be affirmed

II The PCR judge properly concluded that although counsel should have requested an alibi instruction, the absence of an alibi instruction did not prejudice Petitioner under the circumstances of this case

Defense counsel's primary strategy at trial was to focus the jury's attention on Sessions, the victim who testified that Petitioner was not the robber (See App p 433-35, p 440, line 20 – p 441, line 22, p 545, line 23 – p 546, line 5) Counsel called Sessions as the first defense witness (See App p 143, line 18 – p 180, line 10) In focusing the jury's attention on Sessions, counsel pointed out inconsistencies in the testimony of the two identifying victims and argued that Sessions' testimony asserting that Petitioner was not the perpetrator established all the reasonable doubt necessary to acquit Petitioner (App p 433-47, p 546) However, although he felt it was a secondary issue, counsel also decided to present Petitioner's alibi witnesses, including Petitioner's girlfriend, Petitioner's mother, and Petitioner himself (See App p 294-413) All three testified that Petitioner was at home watching television around the time of the crime, although Petitioner and his girlfriend went out briefly to a gas station earlier in the evening (See App p 296-302, p 326-32, p 358-364) After the defense rested, the State presented two reply witnesses called specifically to rebut the testimony of Petitioner's alibi witnesses (See App p 415-29)

During closing arguments, both defense counsel and the solicitor presented argument regarding the issue of alibi (See App p 441-47, p 451, lines 8-10, p 457,

lines 2-21, p 465-68) Petitioner's counsel argued that the alibi witnesses were credible and should be believed, but even if not, the State still failed to prove its case due to erroneous identifications and a lack of any other convincing evidence linking Petitioner to the crime (See App p 433-47) Meanwhile, the solicitor argued that the witnesses identifying Petitioner as the robber were credible and that the alibi witnesses were not credible (See App p 448-68)

Counsel admitted at the PCR hearing that a jury instruction on alibi was "called for" but was not given at trial (App p 533-34) The PCR judge found that counsel should have requested an alibi instruction since such a charge was warranted by the evidence at trial (App p 574) However, the PCR judge concluded that Petitioner was not prejudiced by the lack of an alibi charge because the other instructions were sufficient to inform the jury regarding the State's burden of proof and because the crucial issue in the case was witness credibility, not sufficiency of the alibi (See App p 574-75) The PCR judge's conclusion that Petitioner failed to show prejudice was not error

In Speaks v State, 377 S C 396, 660 S E 2d 512 (2008), the PCR judge found that trial counsel was ineffective for failing to request a jury instruction on identification This Court reversed and held that where the critical issue at trial was the credibility of the identification witnesses, rather than particular issues with respect to identification, an instruction on identification was not necessary Speaks v State, *supra*, at 400, 660 S E 2d at 514

Similarly, in Petitioner's case, an alibi instruction - such as the one suggested on page eleven of Petitioner's brief - would not have added anything of which the jury was not already fully aware The trial judge charged the jury that Petitioner was presumed

innocent and that he did not have the burden to prove himself innocent (App p 469-70) The judge charged that the State had to prove every element of each crime beyond a reasonable doubt (App p 470-71) The judge also instructed that the State had the burden of proving, beyond a reasonable doubt, the identification of Petitioner as the person who committed the crimes (See App p 474-75) The judge further charged that the State had to prove beyond a reasonable doubt the accuracy of the identification before Petitioner could be convicted (App p 474, lines 16-18) The judge again reiterated that the burden of proof, which was upon the State, specifically included the burden of proving beyond a reasonable doubt the identity of Petitioner as the person who committed the crimes (App p 475, lines 4-8) The judge admonished the jurors that if, after examining the testimony, they had a reasonable doubt as to the accuracy of the identifications, they were required to find Petitioner not guilty (App p 475, lines 8-11) The judge also charged the jury regarding its duty to gauge witness credibility (App p 473, line 22 – p 475, line 25)

The critical issue in this case was credibility, with respect to both identification and alibi (See App p 575) The primary issue for the jury to resolve was whether to believe the witnesses who identified Petitioner as the robber or the witnesses claiming Petitioner was at home at the time of the robbery Quite simply, a charge on alibi was not necessary to ensure the jury's proper consideration of this case, and the lack of an alibi charge did not adversely affect the outcome of trial (See App p 556-61) Compare Speaks v State, *supra*, see also Ford v State, 314 S C 245, 442 S E 2d 604 (1994) (even where counsel is ineffective for failing to ensure an alibi charge is given, there is a lack of the required prejudice if there is not a reasonable probability that the outcome of trial

would have been different had an alibi charge been given) The jurors were provided with three alibi witnesses, including Petitioner himself, and the State presented two reply witnesses to specifically rebut the testimony of Petitioner's alibi witnesses (See App p 415-29) There was no question that alibi was an issue for the jury's consideration Further, the judge's general instructions regarding the State's burden of proof, combined with the specific instructions regarding the State's burden of proof with respect to the identifications, were more than sufficient to inform the jury that the State had the burden to prove beyond a reasonable doubt that Petitioner was not at home at the time of the crime, but was present at the Piggly Wiggly and committed the crimes (See App p 125, line 10 – p 126, line 7, p 469, line 23 - p 471, line 17, p 474, lines 13-16, p 475, lines 3-11) It was also clear that if the jurors had any reasonable doubt regarding the credibility of the identification witnesses, Petitioner had to be acquitted (See App p 448, line 24 – p 449, line 12, p 474-75)

The PCR court correctly distinguished the cases of Roseboro v State, 317 S C 292, 454 S E 2d 312 (1995), and Riddle v State, 308 S C 361, 418 S E 2d 308 (1992) (See App p 575-76) In Roseboro, this Court found that the defendant was prejudiced by his attorney's failure to request an alibi charge since the evidence against him was entirely circumstantial and the solicitor's closing argument gave the impression that the defendant bore some burden of proof at trial Roseboro v State, *supra*, at 294-95, 454 S E 2d at 313-14 In Riddle, the sole theory of defense was alibi, and this Court found prejudice from counsel's failure to accept the judge's offer of an alibi charge because the combination of the solicitor's closing argument and the lack of an alibi charge suggested that it was impermissible for the jury to consider the defendant's alibi Riddle v State,

supra, at 363-64, 418 S E 2d at 309-310

In contrast, in Petitioner's case, considering the testimony of the three alibi witnesses, the State's reply witnesses called to rebut the testimony of Petitioner's alibi witnesses, and the arguments from both sides regarding the issue of alibi, it is clear that the jurors knew they were required to consider Petitioner's alibi defense (See App p 294-413, p 431-68) Further, contrary to Petitioner's argument, the solicitor's closing did not improperly imply that Petitioner bore some burden of proof, because the solicitor prefaced his critique of Petitioner's alibi with statements that Petitioner had no burden to put up any evidence (App p 457, lines 2-7) He also reminded the jurors that, in order to convict Petitioner, the State had to prove beyond a reasonable doubt that the two identifications were accurate and that the witnesses were not mistaken regarding their identifications (App p 448, line 24 – p 449, line 12)

In conclusion, unlike in Roseboro and Riddle, the jurors in this case were not misled into believing that Petitioner bore the burden of proof regarding alibi or that alibi was not an issue to be considered Also unlike in Roseboro and Riddle, the evidence in this case was not entirely circumstantial and alibi was not the primary defense theory (See App p 545, line 23 – p 546, line 25) The jurors in this case were well aware that, even if they did not believe Petitioner's alibi witnesses, Petitioner was still not guilty unless the State proved beyond a reasonable doubt that Petitioner was present and committed the crimes (See App p 125, line 10 – p 126, line 7, p 469, line 23 - p 471, line 17, p 474, lines 13-16, p 475, lines 3-11) Therefore, the PCR court properly ruled that, under the circumstances of this case, the absence of a specific instruction regarding alibi did not prejudice Petitioner

CONCLUSION

For the reasons discussed above, Respondent submits that the PCR court's denial of relief must be upheld

Respectfully submitted,

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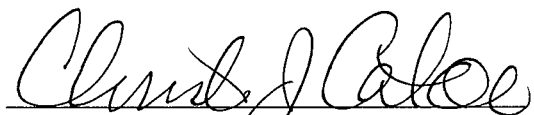

ATTORNEYS FOR RESPONDENT

April 9, 2012

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PROOF OF SERVICE

I hereby certify that I have served the **Brief of Respondent** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to

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This 9th day of April, 2012

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