

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Stephanie P. McDonald, Circuit Court Judge

RECEIVED

NOV 19 2014

S.C. Supreme Court

SHAWN PHILLIPS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014- 000304

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Whether the PCR court erred in failing to grant Petitioner post-conviction relief and a new trial where the trial judge admitted evidence of a prior armed robbery based on a witness's testimony that a gun stolen during that robbery was the gun used in the crimes for which Petitioner was charged when it was determined after Petitioner's trial that this witness's testimony was inaccurate?

- II. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel despite trial counsel's failure to investigate exculpatory evidence contained in a witness's statement that two other suspects were seen at the scene of the crime at the time of the gunshot?

- III. Whether trial counsel was ineffective in failing to object to a witness's in-court identification of Petitioner where the witness had initially identified another suspect in a photo lineup and only identified Petitioner after an impermissibly suggestive single person show-up procedure?

STATEMENT

Indictments

On April 7, 2008, Petitioner Shawn Phillips was indicted by the Charleston County Grand Jury for (1) murder; (2) armed robbery; and (3) criminal conspiracy. App. 1007-1008; 1015-1016; 1023-1024.

Trial and Guilty Verdict

Petitioner was tried before the Honorable James C. Williams, Jr. and a jury on August 5-7, 2008. App. 1. Petitioner was represented by Mark A. Peper, and the State was represented by Assistant Solicitors G. Rutledge Durant and D. Bruce Durant. Id.

On August 7, 2008, the jury found Petitioner guilty on all counts. App. 820, l. 13 – 821, l. 14. Judge Williams deferred sentencing until September 24, 2008. App. 831, ll. 7-22. Judge Williams sentenced Petitioner to forty years for murder, thirty years for armed robbery, and five years for criminal conspiracy with all sentences to run concurrent. App. 841, ll. 3-10; 1005; 1013; 1021.

Direct Appeal

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals. Chief Appellate Defender Joseph L. Savitz, III filed an appellant's brief pursuant to Anders v. California, 386 U.S. 738 (1967) on Petitioner's behalf, arguing that the Trial Court committed reversible error by failing to instruct the jury on mere presence where a charge on mere presence was consistent with Petitioner's defense of duress and necessary to explain that defense. App. 845-854. The Court of Appeals dismissed Petitioner's appeal on June 8, 2011. App. 855.

Application for Post-Conviction Relief, Evidentiary Hearing and Order of Dismissal

On September 28, 2011, Petitioner filed his application for post-conviction relief (“PCR”) App. 856-875. The State filed its Return on or about December 19, 2011. App. 876-882.

An evidentiary hearing was held before the Honorable Stephanie P. McDonald on July 26, 2012. App. 883-980. Petitioner was represented by Leigh Hunter¹, and the State was represented by Assistant Attorney General David A. Spencer. App. 883. Assistant Solicitor Bruce Durant, trial counsel Mark Peper, and Petitioner each testified at the hearing. 887-961.

Judge McDonald filed her Order of Dismissal denying Petitioner’s PCR application on January 21, 2014. App. 993-1004. This petition for writ of certiorari follows.

¹ Ms. Hunter passed way before the Order of Dismissal was filed, and Mark L. Archer was appointed to represent Petitioner. App. 993 n.1.

STATEMENT OF FACTS

Relevant facts of trial

The State's theory of the case was that Petitioner and Lennie Mickey, who all witnesses agreed was the orchestrator of the alleged incident, robbed and shot to death a carnival worker, Robert Vargo, after a prostitute associated with the two men lured Vargo into opening the door of his hotel room.

Shortly after 11:30 p.m. on November 8, 2006, Officer Candy Johnson of the North Charleston Police Department responded to a call from the Budget Inn. App. 164, l. 1 – 165, l. 1. She was dispatched to investigate an unresponsive male in Room 244. When she arrived, she observed a deceased male, later identified as Robert Vargo, lying on his back on the bed. It appeared someone had covered his head with a pillow and shot him in the head. App. 166, l. 12 – 168, l. 20. Officer Johnson did not find a gun at the scene. App. 170, ll. 13-14.

Nitesh Patel was the assistant manager at the Budget Inn and was working at the motel on November 7, 2006. App. 179, l. 1-22. He rented Room 244 to Vargo on November 7, 2006. App. 179, l. 23 – 180, l. 3. Patel recalled that Vargo arrived with a female in a red small SUV. The female never came into the office according to Patel. App. 181, l. 24 – 182, l. 6. Patel described the female as light skinned or perhaps Hispanic. App. 190, ll. 9-25. Patel did not recall ever seeing Petitioner prior to trial. App. 191, ll. 8-10.

Al Hallman, the forensic investigation supervisor with the North Charleston Police Department, processed the motel room where Vargo was found deceased for latent fingerprints. App. 193, l. 1 – 195, l. 12. Investigator Hallman made no fingerprint

identifications to any persons or defendants involved in the case, including Petitioner. App. 198, ll. 17-21. He found two fingerprints on a toilet lid which he identified as matching an Adasha Mapp, a black female. App. 198, ll. 17-21; 201, l. 25 – 202, l. 4; 203, l. 21 – 204, l. 11. Investigator Hall confirmed on cross-examination that he did not find any prints belonging to Petitioner. App. 204, ll. 16-18.

Prior to the remaining trial testimony, an *in camera* hearing outside of the presence of the jury was held to determine the admissibility of a prior armed robbery under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Alec Browne testified that on November 5, 2006 he was staying at the In-Town Suites on Savannah Highway. Around 8:45 p.m., he was lying in his bed watching television with the door propped open when two black males came inside, one with a gun. The men stole a loaded Colt Detective Special that had three rounds of star fire and three rounds of semi-wad cutter. The men had masks on so Browne could not identify their faces. App. 208, l. 1 – 211, l. 16. There was no way Browne could identify the men. App. 218, ll. 13 – 21.

Angela Agagas next testified during this *in camera* hearing. She was the girlfriend of Petitioner at the time. She said on the night of November 7, 2006 – the night Vargo was killed – Lennie and Petitioner had a short and silver gun with them. Angela claimed they got this gun from a robbery at the In-Town Suites. App. 223, l. 1 – 225, l. 6. She said she was in the car while Lennie and Petitioner committed the robbery at the In-Town Suites. App. 225, l. 25 – 226, l. 4. Angela further testified that Lennie had the gun when they got back from the robbery at the In-Town Suites and that Lennie also had this same gun on the night of November 7, 2006 at the Travel Lodge. App. 226, ll. 15-23; 227, ll. 17-21.

Angela was insistent that Lennie took the same silver gun stolen at the In-Town Suites to the robbery of Vargo at the Budget Inn. App. 229, l. 13 - 230, l. 10; 232, ll. 3-7.

The Trial Court ultimately ruled that the testimony about the prior armed robbery was admissible, finding clear and convincing evidence that Petitioner was involved in the In-Town Suites robbery based off of the testimony of Angela and her testimony that the gun stolen in the In-Town Suites robbery was the gun taken to the robbery of Vargo. App. 247, l. 6 - 248, l. 23. The Trial Court ruled it was highly probative to “allow the [State] to present evidence of the [armed robbery] in an effort to show the alleged murder weapon was in Petitioner’s hands immediately prior to the murder.” App. 248, ll. 9-13.

The jury returned, and Angela Agagas testified at trial against Petitioner. She had been seeing him and eventually had his child. She had a long criminal record, being convicted of counterfeiting and fraud in 1998 and strong arm robbery, forgery, breaking and entering of two motor vehicles, and assault and battery of a high and aggravated nature in 2001. At the time of trial, she had pending charges against her for armed robbery, grand larceny of a vehicle, and conspiracy. App. 259, l. 1 - 262, l. 25.

On November 6, 2006, Angela checked into the Travel Lodge in North Charleston with Petitioner and Lennie Mickey. Lennie used his id to check into the room. Lennie was one of Petitioner’s friends, and Angela met Lennie through Petitioner. The vehicle they had at the time was a red tracker. App. 263, l. 6 - 264, l. 10.

Angela testified that Lennie had a short, silver gun on him when they checked into the Travel Lodge. Angela claimed the gun came from a previous robbery that Lennie and Petitioner were involved in a couple of days prior at the In-Town Suites on Savannah Highway. Angela said she was in the car with Lennie and Petitioner when they committed

the robbery at the In-Town Suites. According to Angela, Lennie maintained possession of this gun that he took from the In-Town Suites robbery. App. 264, l. 11 – 266, l. 10.

On November 7, 2006, Lennie and Petitioner went to a store and when they came back to the Travel Lodge motel, they came back with a girl named Alana Niesen. This was the first time that Angela had met Alana. App. 266, ll. 11-22. The four sat around the motel room, and Alana got high. Angela claimed that both Lennie and Petitioner asked Alana if she knew anyone they could rob. Alana was skeptical at first, but then finally told them that just left a guy at a nearby hotel whom they could probably rob. App. 267, l. 1 – 268, l. 1. According to Angela, Lennie and Petitioner wanted Alana to help them get into the guy's hotel room, but Alana did not want any part of it. She did not want the guy to know that she had set him up. App. 268, ll. 2-7.

Angela testified that Petitioner called up a girl that he knew and asked if she would help them out. Lennie, Petitioner, and Alana then left to pick up this girl and bring her back to the hotel room. Her name was Sandra Barnes. She often went by the nickname B.G. App. 268, ll. 8-24.

Alana then called the guy she knew and told him she had a girl for him. Alana took Lennie, Petitioner, and Sandra to the motel where the guy was staying and pointed out which room he was staying. They returned back to the Travel Lodge after about five minutes. App. 270, ll. 8-17.

Angela said that Lennie, Petitioner, and Sandra left to return to the Budget Inn to go commit the robbery while she and Alana stayed at the Travel Lodge. App. 270, l. 18 – 271, l. 1. The plan, according to Angela, was that Sandra was going to knock on the door, and when the guy opened it, Lennie and Petitioner were going to go in and rob him. App. 271,

ll. 2-8. Angela claimed that Lennie had the same gun stolen from the In-Town Suites robbery. App. 269, l. 24 – 270, l. 7; 271, ll. 9-12. Angela said the three left late at night for the Budge Inn, between 10:45 p.m. and 11:15 p.m. App. 271, ll. 13-18.

Angela testified that Sandra was only gone a few minutes. Sandra apparently told Angela that Lennie and Petitioner were in the man's hotel room. Approximately five to ten minutes later, Petitioner returned to the Travel Lodge. Angela claimed Petitioner appeared upset and said that Lennie had shot the man. When Lennie got back to the room, he was "pretty pumped up" and ready to get out of there. The five of them packed up their stuff. Angela and Petitioner left in a red tracker, and Lennie, Sandra, and Alana left in a red Durango. App. 271, l. 18 – 272, l. 25.

Alana Neisen first met Robert Vargo on November 6, 2006. She was introduced to him by her drug dealer. They met at the Motel Six on Ashley Phosphate Road, and she stayed the night getting high with Vargo, her brother, and her drug dealer. App. 330, l. 7 – 331, l. 3.

On November 7, 2006, Alana received a call from Vargo because he needed a ride to a different hotel. She picked him up in a red Dodge Durango. App. 331, ll. 11 – 23. She eventually took him to the Budget Inn and remained in the car while he checked in. App. 331, l. 24 – 332, l. 7. She helped him bring his items to his room. When Alana got to his room, there were already two other guys with Vargo in the room. These two other guys were selling drugs to Vargo. App. 332, l. 8 – 334, l. 5.

Alana left and was going to go see her drug dealer at the American Lodge which was right next to the Travel Lodge. When she pulled into the American Lodge, she met Lennie, Petitioner, and two other people sitting in the backseat of the car. They were in a

red tracker. App. 334, l. 9 – 335, l. 25. This was the first time Alana had ever met Lennie and Petitioner. They wanted to know if she wanted to make some money, and she believed they were potential customers. They exchanged cell phone numbers with Alana. App. 336, ll. 9-15.

Later, Alana called Petitioner and met up with them at the Travel Lodge. In the room were Lennie, Petitioner, Angela, and Sandra. App. 337, l. 15 – 338, l. 4. Alana got high, and later Lennie had a conversation with her asking her to go to hotel doors to knock on doors so he could rob people. Alana said Petitioner was not part of this conversation and did not do much talking that night. Petitioner and Angela were doing their own thing. App. 339, l. 2 – 340, l. 1.

Alana saw Lennie with a gun. He was waving it around “like he’s not scared of anybody.” App. 340, ll. 2-10. While Alana and Lennie were talking about robbing someone, she received a telephone call from Vargo who wanted to pay Alana for sex. App. 340, l. 14 – 341, l. 5. Alana relayed to Lennie and Petitioner that Vargo had money and was staying at the Budget Inn. They wanted Alana to go over to Vargo’s room and let them in. Alana refused, so it was decided that Sandra Barnes would go instead. Alana drove by the Budget Inn with Lennie and Sandra and pointed out Vargo’s hotel room. App. 341, l. 15 – 343, l. 10. Petitioner was not in Alana’s car when she drove Lennie and Sandra by Vargo’s motel room. App. 360, ll. 2-10; 361, ll. 5-21.

They returned to the Travel Lodge. Alana called Vargo back and let him know that she had a girl for him. After Alana made that call, Lennie, Petitioner, and Sandra left. Alana and Angela stayed behind at the Travel Lodge. About five minutes later, Sandra

returned and said she got them in the room and then she ran back. App. 343, l. 21 – 345, l. 7.

Alana testified that Lennie and Petitioner returned about ten minutes later. She said she asked them what did they do to Vargo and they said that they taped him and left him in the bathroom. App. 346, ll. 6-17.

Alana verified on cross-examination that Petitioner never asked her if she knew anyone they could rob. App. 359, ll. 14-23. The only person Alana had any conversation with about robbing someone was with Lennie. App. 359, l. 24 – 360, l. 1.

Alana also testified that when she learned from her brother that someone had been murdered at the Budget Inn, she freaked and called Petitioner. Petitioner was as shocked as Alana that someone had been killed. App. 380, l. 12 – 381, l. 24.

Sandra Barnes was a prostitute who knew Petitioner. App. 407, l. 1 – 409, l. 21. On the night of November 7, 2006, Sandra was at the Country Hearth hotel on Ashley Phosphate “handling business” when she received a call from Petitioner. He wanted to pick her up to make some money through her prostitution business. Petitioner picked Sandra up. He was with Lennie and Angela. App. 410, ll. 2-25.

While in the car with Lennie, Petitioner, and Angela, Sandra said that Lennie started talking about robbing people and wanted to rob some of Sandra’s clientele. App. 411, ll. 15-23. Sandra testified that Petitioner was not talking at that time. App. 412, ll. 1-2. Sandra said she did not have any clients that would have had money on them. App. 412, ll. 5-8.

They all went to the Travel Lodge where Sandra smoked some crack. App. 412, l. 9 – 413, l. 12. Sandra, Lennie, and Petitioner left the room to go get some drinks and

cigarettes from a gas station, and they ended up meeting Alana. Petitioner got Alana's number. App. 414, l. 5 – 415, l. 3. Alana eventually came over and ended up telling them about a guy she knew who worked at the fair and had a lot of money and crack. App. 415, l. 16 – 417, l. 11. Sandra alleged that they came up with a plan where she was supposed to go to this guy's room posing as a client and then Lennie and Petitioner would enter the room. Sandra did not want to go into the room so she just agreed to knock on the door. App. 418, ll. 2-8. Sandra saw a black gun on the bed. App. 417, ll. 14-19.

According to Sandra, Alana called her client and told him that she was sending a girl over. Lennie, Petitioner, and Sandra drove the red tracker to the Budget Inn while Angela and Alana stayed at the Travel Lodge. Once they parked, all three got out of the vehicle and went up to the man's room. Sandra said she had her hand ready to knock on the door, but the man already had the door cracked and pulled it open some more. Sandra claimed that Lennie and Petitioner rushed in, pushed her out of the way, and shut the door. Lennie went in first. Sandra went back to the Travel Lodge. App. 419, l. 19 – 422, l. 12.

Lennie and Petitioner returned back to the Travel Lodge about five or ten minutes later. Sandra claimed Petitioner was acting calm while Lennie was panicked and wanted to leave. App. 422, l. 19 – 423, l. 1. Lennie told Sandra that they tied up Vargo and put in the bathtub and had only gotten fifty dollars from him and no crack. App. 424, ll. 18-24.

Later, Sandra picked out from a photo lineup a man named Dominick Lamar Ballou as the man who went with Lennie inside of Vargo's hotel room. App. 430, l. 7 – 431, l. 5; 450, ll. 19-20; 663, ll. 4-6. When Petitioner was brought in for questioning, Petitioner was placed in an interview room and Sandra was placed into the observation room which had a two way mirror and asked if she could identify the person in that room. She then identified

Petitioner as the person with Lennie the night of the incident. App. 452, l. 11 – 453, l. 2. Petitioner was the only person in that room and the only person Sandra had a choice to select. App. 454, ll. 5-10.

Petitioner gave a statement to law enforcement in which he purportedly told investigators that he was hanging out with Lennie, Angela, Sandra, and Alana at the Traveler's Lodge. Lennie threatened that he was going to have to start shooting them unless they got some money. Petitioner left with Lennie and Sandra to go to the Budget Inn, but he never got out of the car. Lennie and Sandra got out of the car and Lennie continued to threaten Petitioner that he better not leave. Someone called "D" walked up. Lennie threw D a black cap and said "you know what time it is." Lennie, Sandra, and D walked out of Petitioner's sight. About three minutes later, Petitioner said he heard a pop like a gun shot. Petitioner tried to leave but Lennie and D ran up to the truck and got in. D told Lennie, "you shouldn't have shot the dude." D wanted to get out of the truck, but Lennie put a gun on him and said he was not going anywhere. App. 540, l. 8 – 541, l. 23.

Alec Browne testified before the jury that on November 5, 2006, he was staying at the In-Town Suites on Savannah Highway. Around 8:45 p.m., he was lying in his bed with the door propped open and two black males entered the room and robbed him. The men were wearing ski masks, so Browne could not identify them. There was no possible way he could pick the men out of a lineup. App. 304, l. 1 – 305, l. 3; 307, ll. 11-16.

During the robbery, a Colt Detective 38 Special was stolen. This gun was loaded with three rounds of star fire hollow point ammunition and three rounds of semi-wad cutter. App. 305, ll. 18-25.

Suzanne Cromer, a firearms and tool mark examiner with SLED examined the fired bullet found by law enforcement during the investigation of Vargo's homicide. App. 309, ll. 1-10; 311, l. 13 – 312, l. 3. During her examination of the projectile, she found that it was most consistent with a 38 special or a 357 magnum. App. 312, ll. 12-15. Cromer also testified the projectile recovered was consistent with the star fire round. App. 313, ll. 11-14.

Cromer testified that there were eight different types of firearms that potentially fired the bullet. App. 313, ll. 18-21. In her opinion, a Colt 38 special could have been one of the guns that fired the bullet. App. 314, ll. 22-25.

On cross-examination, Cromer conceded that she could not actually conclude affirmatively that the bullet was a star fire bullet, just that it was consistent with the makeup of such a bullet. App. 318, ll. 20-24. She also could not conclude with certainty what type of firearm fired the recovered bullet, and even in her list of the eight different types of guns that may have fired the bullet, Cromer admitted that this list was not limited to just these eight types and that there could be more types of guns that could have fired the bullet. App. 318, l. 25 – 319, l. 14.

There was no DNA evidence belonging to Petitioner recovered at the crime scene. Investigators were unable to locate the weapon used. There were no fingerprints of Petitioner found at the scene. App. 635, ll. 6-13; 646, ll. 6-14.

Relevant Facts of PCR Evidentiary Hearing

Bruce Durant, one of the two solicitors at Petitioner's trial, testified at the PCR hearing. He testified that Lennie Mickey was tried first which resulted in a hung jury. Then Petitioner was tried and convicted. Then Lennie was tried again and convicted of the armed robbery. App. 890, ll. 7-13.

Durant admitted that during Lennie's second trial, the State found out that there was a discrepancy in the description of the gun stolen during the In-Town Suites robbery of Alec Browne and the description of the gun Angela Agagas gave as the gun used during the robbery of Vargo. Therefore, after Petitioner was tried and convicted, the State learned that Angela's testimony about the description of the gun was different from Alec Browne's testimony about the gun. Browne described the gun stolen from him as being dark blue, while Angela described the gun she saw Lennie with at the Travel Lodge as being silver. Based on that discrepancy, the trial judge in Lennie's second trial did not allow the admission of evidence of the prior armed robbery at the In-Town Suites on Savannah Highway. App. 890, l. 23 – 895, l. 4; 903, ll. 2-14.

Durant also acknowledged that Petitioner was never charged with the armed robbery at the In-Town Suites. App. 908, ll. 3 – 8.

Mark Peper, Petitioners' trial counsel, testified next. He said he did not recall seeing a statement from a witness named Dora Perkins who stated that she was at the scene of the crime when the gunshots went off and she saw two people, a black man and a white man. She also had identified photographs of a white male and a black male that she saw at the scene. App. 909, l. 23 – 911, l. 1; 982-988. Peper did not dispute that the State had most likely given him Dora Perkins' statement in discovery. App. 910, ll. 2-4; 935, ll. 21-23. Peper had no idea why he did not pursue her statement at trial. App. 935, ll. 24-25. He never made any attempt to interview her. App. 938, ll. 4-6. Petitioner testified that his trial counsel never discussed with him the statement of Dora Perkins which mentioned two other suspects. App. 956, ll. 5-7.

Peper also conceded he made a mistake in not challenging the suggestive single person show up where investigators put Petitioner in a room by himself and had Sandra Barnes identify him. App. 915, l. 1 - 916, l. 10.

At the conclusion of the PCR hearing testimony, counsel for Petitioner argued that his trial counsel was deficient, in particular by not objecting to Sandra Barnes' in-court identification of Petitioner when identification procedure used by investigators was impermissibly suggestive, particularly when Sandra initially identified another person named Dominique Ballou and there was evidence that someone who went by D was the person that was there. App. 976, l. 5 – 977, l. 2.

Petitioner's PCR counsel also argued that it was prejudicial for the jury to hear about a prior armed robbery which was not connected to the charges for which Petitioner was being tried. This prior armed robbery was excluded from Lennie Mickey's trial and he was not convicted of murder. Petitioner's PCR counsel also pointed out that the solicitor would have known Alec Browne's description of his gun as dark blue versus the description Angela gave at trial that the gun was silver. App. 977, l. 17 – 978, l. 5.

Finally, Petitioner's PCR counsel argued that his trial counsel was ineffective in failing to conduct any investigation as to the Dora Perkins' statement. App. 978, ll. 11-15.

The PCR court denied Petitioner relief on these grounds in its Order of Dismissal filed January 21, 2014. App. 993-1004.

ARGUMENT

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components.” Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice. Id. To satisfy the first prong, a defendant must show counsel's performance “fell below an objective standard of reasonableness.” Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001). “To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.” Id. at 571, 552 S.E.2d at 723.

The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). The appellate court will reverse if there is no probative evidence to support the PCR court's findings or the decision is controlled by an error of law. Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008).

- I. The PCR court erred in failing to grant Petitioner post-conviction relief and a new trial where the trial judge admitted evidence of a prior armed robbery based on a witness's testimony that a gun stolen during that robbery was the gun used in the crimes for which Petitioner was charged when it was determined after Petitioner's trial that this witness's testimony was inaccurate.**

Petitioner is entitled to a new trial because after he was convicted, the State learned that there was a discrepancy in the description of the gun stolen from Alec Browne during the In-Town Suites robbery and Angela Agaga's description of the gun Lennie Mickey had at the Travel Lodge prior to the murder and robbery of Vargo at the Budget Inn. The Trial Court in Petitioner's case admitted evidence of this prior armed robbery based off of Angela's testimony that the gun stolen from Alec Browne was the gun Lennie had right before the robbery of Vargo. However, at Lennie second trial, the discrepancy in the description of the gun came to light, and the trial judge in that case excluded evidence of the prior armed robbery as now there was no connection between the gun stolen from the armed robbery of Alec Browne and the gun used in the Vargo robbery. Lennie was acquitted of murder.

Petitioner is likewise entitled to have evidence of this prior armed robbery excluded from his trial. The State concedes that Angela's description of the gun Lennie had at the Travel Lodge before the Vargo robbery does not match Alex Browne's description of the gun stolen from him during the In-Town Suites robbery as he described the gun as being dark blue and Angela described the gun as being silver. App. 890, l. 23 – 895, l. 4; 903, ll. 2-14. Without the gun connecting the two incidents, there is no clear and convincing evidence that Petitioner was ever involved in the prior armed robbery at the In-Town Suites as Browne repeatedly acknowledged that he could not identify the masked intruders. App. 208, l. 1 – 211, l. 16; 218, ll. 13 – 21; 304, l. 1 – 305, l. 3; 307, ll. 11-16.

Whether or not the solicitor knew at the time of Petitioner's trial that the guns did not match is not the only issue as the PCR court believed in its Order of Dismissal where it ruled that the prosecution did not knowingly use perjured testimony. The fact remains that there was a discrepancy in Alex Browne's description of the gun stolen from him and Angela's description of the gun Lennie had prior to the Vargo robbery. This discrepancy was significant enough for the trial judge in Lennie's second trial to exclude evidence of the prior armed robbery at the In-Town Suites, and Lennie was ultimately acquitted of murder in that trial. App. 996.

The Trial Court in Petitioner's case based his ruling permitting the admission of the prior armed robbery at the In-Town Suites on Angela's testimony that the gun from the In-Town Suites robbery was the same as the one Lennie had prior to the Vargo robbery. App. 247, l. 6 – 248, l. 23. It is now known that this testimony was inaccurate, and therefore, there was no basis for the Trial Court's ruling. The admission of the prior armed robbery, of which there was no clear and convincing evidence that Petitioner was involved, was inadmissible and highly prejudicial. Evidence that a defendant has committed other unrelated crimes or bad acts is inadmissible to prove the defendant's propensity to commit the crime with which he is charged. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). This is so because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts. State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984).

The jury in Petitioner's case heard evidence that he was involved in a prior armed robbery when he was being tried for murder, armed robbery, and criminal conspiracy and convicted Petitioner on all counts. The jury in Lennie's case did not hear evidence of this

prior armed robbery since it was properly excluded, there being no evidence that the gun stolen from the In-Town Suites was used in the Vargo robbery, and the jury acquitted Lennie of murder. It cannot be said beyond a reasonable doubt that evidence of this other prior armed robbery which was only admitted based on inaccurate evidence did not contribute to the jury's verdict in Petitioner's case.

Petitioner is entitled to the grant of post-conviction relief and a new trial which properly excludes evidence of this prior armed robbery for which there is no clear and convincing evidence that Petitioner was a participant.

II. The PCR court erred in finding that trial counsel rendered effective assistance of counsel despite trial counsel's failure to investigate exculpatory evidence contained in a witness's statement that two other suspects were seen at the scene of the crime at the time of the gunshot.

A witness named Dora Perkins gave a statement to investigators that she was at the Budget Inn the night Vargo was killed and she heard arguing and what sounded like a gunshot. She saw a black male and a white male walk past her. She identified photographs of the black and white males who she saw. Her statement and the photograph identifications made by Dora Perkins were admitted into evidence at the PCR hearing. App. 982-988.

Trial counsel was deficient in failing to investigate Dora Perkins' statement and use her testimony at trial that she observed someone other than Petitioner at the scene of the crime. Trial counsel admitted at the PCR hearing that the statement was exculpatory. App. 934, ll. 22-23. The PCR court noted in its Order of Dismissal that trial counsel agreed the statement was exculpatory. App. 997. The PCR court, however, found that trial counsel had a reasonable strategy for failing to pursue the statement. This ruling by the PCR court is not supported by the evidence. At the hearing, trial counsel recalled having no strategy as

to why he failed to pursue Dora Perkins' statement: "Why we decided not to pursue it at trial, I can't remember." App. 935, ll. 24-25.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

Petitioner's trial counsel failed in this duty. Petitioner was prejudiced by his trial counsel's failure to pursue this exculpatory evidence where there was no physical evidence linking Petitioner to Vargo's hotel room and Vargo was seen with two male drug dealers that day by Alana. App. 334, ll. 1-5. Petitioner is entitled to a new trial.

III. Trial counsel was ineffective in failing to object to a witness's in-court identification of Petitioner where the witness had initially identified another suspect in a photo lineup and only identified Petitioner after an impermissibly suggestive single person show-up procedure.

Trial counsel also rendered ineffective assistance of counsel to Petitioner by failing to challenge Sandra Barnes' in-court identification of Petitioner, and trial counsel conceded at the PCR hearing that this was a mistake on his part. App. 916, ll. 9-10. Sandra did not initially identify Petitioner as the person with Lennie at Vargo's hotel room but rather identified an individual named Domonique Ballou out of a photo lineup. App. 430, l. 7 – 431, l. 5; 450, ll. 19-20; 663, ll. 4-6. When Petitioner was brought in for questioning, Petitioner was placed in an interview room and Sandra was placed into the observation room which had a two way mirror and asked if she could identify the person in that room. She then identified Petitioner as the person with Lennie the night of the incident. App. 452, l. 11 – 453, l. 2. Petitioner was the only person in that room and the only person Sandra had a choice to select. App. 454, ll. 5-10.

This procedure used by investigators for Sandra's identification of Petitioner after she had already identified someone else was unduly suggestive and inherently reliable. "A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98 (1977)

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.

In State v. Liverman, 398 S.C. 130, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S. Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the

accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S. Ct. 375).

Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

Investigators in Petitioner's case used a disfavored single person show-up procedure for Sandra's identification of Petitioner. She had already identified someone else as the person accompanying Lennie. It was therefore highly suggestive of investigators to place Petitioner in a room by himself and have Sandra only view him and ask if that was the person with Lennie. The procedure unduly emphasized that the person in the police interrogation room must have been the person with Lennie. Sandra's out-of-court identification of Petitioner was not so reliable where she had already picked someone else out of a photo lineup.

Trial counsel's failure to object to Sandra's in-court identification of Petitioner as the person with Lennie at Vargo's hotel room was prejudicial to Petitioner where the in-court identification would have been suppressed or at least preserved for appeal. Sandra was the only witness at trial who actually placed Petitioner at the scene of Vargo's hotel room, and her identification was critical. Where her identification of Petitioner was obtained only after the use of impermissibly suggestive techniques by law enforcement,

trial counsel should have objected and trial counsel's failure to do so entitles Petitioner to a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Shawn Phillips respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Stephanie P. McDonald, Circuit Court Judge

SHAWN PHILLIPS,

PETITIONER,

V.


STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014- 000304

CERTIFICATE OF SERVICE

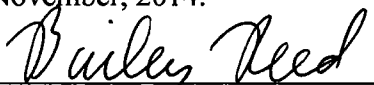
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 19th day of November, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of November, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.