 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

James R. Barber, III, Circuit Court Judge

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S.C. Supreme Court

JARVIS GIBBS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000447

PETITION FOR WRIT OF CERTIORARI

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Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to claims of witness intimidation in testimony by the State's witness and in prosecutors' closing arguments when there was no evidence linking Petitioner to the alleged intimidation?

II.

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to the State's prejudicial misattributions of identification testimony to State's witness, Melissa Roberts, during closing argument?

STATEMENT

Indictment

Petitioner Jarvis Gibbs was indicted by the Kershaw County Grand Jury on October 8, 2008 for the offenses of Kidnapping and Use of a Firearm during a Violent Crime. App. 719-721. On November 11, 2009, the Kershaw County Grand Jury indicted Petitioner for Entering a Bank with Intent to Steal. App. 723-724.

Trial

On November 17, 2009, Petitioner's case was called for trial before the Honorable G. Thomas Cooper, and a jury. App. 1. Samuel Ogburn, represented Petitioner. Ronald W. Moak and Lir P. Derieg represented the State.

The jury found Petitioner guilty on all three charges. App. 4532, ll. 5-14. Judge Cooper sentenced Petitioner to eighteen years imprisonment for Kidnapping and Entering a Bank with Intent to Steal and to five years imprisonment for Use of a Firearm during a Violent Crime. App. 444, ll. 5-17. All sentences were order to be served concurrently. *Id.*

Direct Appeal

The South Carolina Court of Appeals dismissed his appeal in an unpublished opinion filed on November 28, 2011. *State v. Gibbs*, 2011-UP-511 (S.C. Ct. App. Filed November 28, 2011). App. 493.

PCR Application and Evidentiary Hearing

Petitioner filed an application for post-conviction relief (PCR) on March 26, 2012. App. 497. The State filed a return dated June 15, 2012. App. 505. Petitioner amended his application on June 3, 2013. App. 514.

An evidentiary hearing was held on June 6, 2013 before the Honorable James R. Barber, III. App. 519. Petitioner was represented by Tara D. Shurling, and Megan E. Harrigan, represented the State. *Id.* Judge Barber denied Petitioner relief by an order filed on January 17, 2014. App. 691.

Petitioner filed a Rule 59(e) Motion to Alter or Amend the order on February 3, 2014, which was served on the State on January 31, 2014. App. 707. A Return to Petitioner's motion was filed on January 31, 2014. App. 712. Judge Barber denied the motion by an order filed February 11, 2014. App. 716.

This petition for writ of certiorari follows.

ARGUMENT

I.

Petitioner's Sixth Amendment rights were violated when counsel failed to object to claims of witness intimidation in testimony by state's witness and in prosecutors' closing arguments when there was no evidence linking Petitioner to the alleged intimidation.

Relevant Facts

On July 25, 2008 at 10:55 A.M., the First Palmetto Bank branch in Camden was robbed. App. 109, ll. 17 – App. 110, ll. 10. Four tellers were working at the time of the robbery: Melissa Roberts, Leah Bailey, Brenda Fannin, and Keri Gainey. App. 103, ll. 11-22. The robbery lasted less than two minutes. App. 115, ll. 1-4. The robber was wearing gloves, a short sleeve white tee-shirt, and a ski mask that completely covered his face. *Id.* at 14-15. Video surveillance showed the robber was an African-American male, over six (6) feet tall, with no visible tattoos or scars on his exposed arms. App. 117, ll. 19-25; App. 136, ll. 2-5. The robber was observed by Fannin, the drive-through window teller, fleeing the bank on a bicycle. App. 137, ll. 11-12.

A police search of the area located a bicycle, which was taken by police. App. 193, ll. 8-15. A local resident and known drug user, Arthur Macklin, contacted police because he believed the bicycle was his. App. 164, ll. 6-10. Macklin stated that Petitioner had borrowed his bicycle on the day of the robbery. App. 163, ll. 6-18. Petitioner was found sitting on a park bench a couple of miles from the bank and taken into custody by Detective Boan of the Camden Police Department. App. 314, ll. 24 – App. 317, ll. 18. The money was never found. App. 294, ll. 9-14. The mask, the gloves, the duffle bag, and the gun used in the robbery were also never found. App. 293, ll. 23 – App. 294, ll. 25. There were no fingerprints or DNA evidence recovered from the scene. App. 97, ll. 19-24.

Testimony of Arthur Macklin

At trial, Macklin claimed that Petitioner borrowed his bicycle on the day of the robbery. App. 163, ll. 6-18. However, when the State produced the bicycle they had in evidence, Macklin was unable to definitively say that it was his bicycle. App. 169, ll. 5-14; App. 183, ll. 13-24. Macklin further claimed, without objection by counsel, that he was assaulted by a group of unknown individuals and seriously injured after being identified by police in a local newspaper article. App. 169, ll. App. 175, ll. 3. Specifically, the State asked: “[n]ow when you talked to the police, were you concerned about something . . . [w]ere you worried about something?” App. 169, ll. 15-16. Macklin, in a rambling response, replied: “[w]hat I’m worried about is my life, is my safety. Something happened . . . I got hurt behind that [sic]. After I talked to the detectives, I was knocked out . . . I was supposed to be killed.” App. 170, ll. 1-9.

Macklin continued, “some guys jumped on me and knocked me out and they were supposed to shoot and kill me,” finally he declared, “[the police] put [my name and the robbery] in the paper and I got hurt behind [sic] that.” *Id.* at ll. 11 – App. 171, ll. 11. Macklin erroneously invoked the Fifth Amendment in an effort to avoid testifying. App. 173, ll. 18-19. The prosecution pushed Macklin on a possible link between the assault and the robbery inquiring, “***And you got assaulted because of that?***” App. 171, ll. 12-13. (*emphasis added*). Macklin replied affirmatively. *Id.* Macklin then backtracked, stating that he did not know the identity of his assailants. *Id.* at ll. 22-24. On cross-examination, Macklin eventually conceded that he was never contacted or threatened by Petitioner. App. 184, ll. 13-24.

Closing Argument

The State used Macklin's testimony on his fear and the prior assault in its final closing argument to allege that Macklin's testimony was evidence of Petitioner's guilty mindset and should be afforded significant weight despite its inconsistencies. Assistant Solicitor Moak stated.

You know, [Macklin] actually tried to take the Fifth up here on a couple of questions. You know, he did not want to be here. Once we got done with him, you know, he essentially told the same thing to you that he told to [the detective] back on July 25, 2008. ***And what happened because he talked to [the detective] and told him the story? He got beat up. He got knocked out. He said his whole face was swole [sic] up. He didn't want to be here. He didn't wanted [sic] to get hurt. He didn't [want] to get killed.***

But guess what? He was here. He told the same story. He even said -- if you remember, I asked him, if he wanted to be here, do remember what he said the Sheriff's Department finally caught up with him to serve him that subpoena to be here? 1:30 Monday morning. ***You know, he was trying not to get up there.***

But what did he do? He told the truth. He told the same story, you know. Is the statement consistent? It is the same thing that he told Lee Boan back on July 25th, 2008. That is consistent.... The truth is the truth. And I submit Arthur Macklin was telling the truth.

App. 403, ll. 18 – App. 404, ll. 20 (*emphasis added*). As with Macklin's testimony, this statement passed without objection from counsel.

PCR and Evidentiary Hearing

At the evidentiary hearing, counsel was unable recall if he considered objecting to Macklin's testimony or the prosecutor's use of that testimony in closing argument. App. 542, ll. 19 – App. 548, ll. 8. Counsel conceded that the testimony and comments in closing arguments invited the jury to conclude, without any supporting evidence, that Petitioner had beaten Macklin to keep him from cooperating with law enforcement. *Id.* Counsel testified that his strategy was to highlight Macklin's drug abuse and the inconsistencies in his testimony on cross-examination. App. 543, ll. 3-5. However, counsel admitted that he did not know if the jurors were aware of Macklin's reputation as

a crack-head and was unable to identify where in the trial transcript he asked Macklin about drug use. *Id.* at 12-16. Further, counsel claimed that he believed Macklin's testimony did not harm Petitioner because Macklin struggled to identify the bicycle as his. *Id.* at 18-19. When asked what relevance Macklin's assault and continued fear of bodily injury had on the case, counsel responded, "[y]ou'd have to ask the solicitor on that." App.543, ll. 18-24. Counsel also believed that he adequately discredited Macklin's fears by getting him to admit that he did not know his assailants and that Petitioner had not threatened him. App. 609, ll. 7-14.

Discussion

Where ineffective assistance of counsel is alleged as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set. *Id.* First, Petitioner must show that counsel's performance was deficient. Under this prong, the proper measure of counsel's performance is whether the attorney provided representation within the range of competence required in criminal cases; courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

The second prong of the *Strickland* test requires a showing that the deficient performance of counsel prejudiced Petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[a] reasonable probability is a probability sufficient to

undermine confidence in the outcome of trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficient Performance

Counsel’s representation was deficient because his failure to object to Macklin’s testimony regarding the prior assault and his fear of testifying allowed the State to improperly imply, without any supporting evidence, that Petitioner had intimidated Macklin in an effort to prevent his testimony. See *Strickland*, 466 U.S. at 694; see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

To be admissible, allegations of witness intimidation must be connected to the defendant. *State v. Rogers*, 96 S.C. 350, 80 S.E. 620 (1914) (unsigned letter sent to witness with a coffin drawn on it was meant to intimidate but was inadmissible because state could not meet its burden of establishing the defendant as the source of the letter). The reasonable inference drawn from witness intimidation is that the testimony sought to be silenced would be damaging to the defendant. *State v. Edwards*, 383 S.C. 66, 70, 678 S.E.2d 405, 407 (2009)(courts should adopt a cautious approach for the admissibility of witness intimidation evidence as it serves to discourage witness intimidation while minimizing the potential for false claims of intimidation.). Intimidation evidence is so impactful on a jury because it corroborates the allegation that the defendant is the perpetrator and shows consciousness of guilt. *Id.*, 383 S.C. at 72, 678 S.E.2d 405, 408 (citing *United States v. Hayden*, 85 F.3d 153, 159 (4th Cir. 1996)). Establishing that the defendant is the source of the intimidation is essential as it provides the necessary reliability for admissibility. *Id.*, 383 S.C. at 73, 678 S.E.2d 405, 408.

In the context of a PCR action, this Court’s decision in *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510 (1994), provides a framework for granting Petitioner’s relief. In *Mincey*, this Court held

that counsel's failure to object to prosecutor's comments in closing argument suggesting that a defense witness testified falsely because of intimidation by the defendant constituted ineffective assistance of counsel. *Id.* 314 S.C. 355, 357-358, 444 S.E.2d 510, 511. The court found that the testimony of the two witnesses was crucial to the defense and the State presented no evidence that defendant intimidated the witnesses. *Id.* Thus, the prosecution's unsupported statement regarding intimidation exceeded the evidence presented at trial and improperly undercut the defense. *Id.* The failure of counsel to object constituted deficient performance and prejudiced the defendant necessitating a remand. *Id.*

In the present case, counsel's failure to object to Macklin's testimony regarding his fears and the prior assault constituted deficient performance as does counsel's failure to object to solicitor's comments in closing argument referencing the same. As in *Rogers, Edwards, and Mincey*, the State presented no evidence linking Petitioner to Macklin's fears or the assault. Nevertheless, the State argued in its closing that, as a result of speaking with the police and identifying Petitioner, Macklin was beaten. App. 403, ll. 18 – App. 404, ll. 20. The State's desired inference was that Macklin's testimony should be given significant weight because Petitioner tried to stop him from testifying. *Id.*

An additional and especially important inference for the State was, that any inconsistencies in Macklin's testimony were the result of the alleged intimidation and were unrelated to Macklin's drug use, faulty memory, or police manipulation. *Id.* Counsel candidly admitted that the State never produced any evidence linking Petitioner to the assault on Macklin. App. 609, ll. 8-20. Counsel believed that Macklin was not a credible witness because of his past drug use and his inconsistent testimony. *Id.* While counsel believed Macklin was a flawed witness, he was unable to articulate a valid trial strategy behind failing to object to the clearly inadmissible testimony which would have prevented the jury from learning about Macklin's fears and the assault at all. App. 543, ll. 20 – App.

544, ll. 4; App. 546, ll. 23 – App. 547, ll. 11-16; *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness); *see also Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (finding PCR Petitioner showed uncalled witness would have made a difference in trial because it would have cast doubt on victim’s identification of Petitioner).

Accordingly, the PCR court erred in finding that counsel was not deficient for failing to object to inadmissible testimony, and prosecution’s related closing argument, regarding allegations of witness intimidation by Petitioner as they were unsupported by any evidence produced at trial.

Prejudice

Petitioner was prejudiced by counsel’s deficient performance because Macklin was a crucial, but weak link between Petitioner and the bank robbery and his testimony on his fears and the earlier assault bolstered his credibility. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Macklin was unable to conclusively identify the bicycle seized by the police as his, but the State was able to rationalize his equivocation as being the result of intimidation and violence by Petitioner. App. 403, ll. 18 – App. 404, ll. 20. The record reflects Petitioner borrowed a bicycle from Macklin on the day of the bank robbery and the bank robber fled the bank on a bicycle. App. 196, ll. 21-23. Macklin initially believed he bicycle in the police case was his, but later doubted this identification.¹ App. 167, ll. 16-20.

The inference drawn from testimony of witness intimidation, like the implications of prior bad acts, is so poisonous to a defendant’s case, that evidence linking the defendant to the

¹Macklin testified that he never got the bicycle back from Petitioner or from the police. App. 184, ll. 18. The last time Macklin unequivocally saw his bicycle was when Petitioner borrowed it. *Id.* at ll. 24-25. On direct examination, the State referenced statements made or written by Macklin identifying the bicycle as his but these statements were never entered into evidence and Macklin denied making them. App. 167, ll. 6 – App. 168, ll. 14.

intimidation is necessary to insure reliability. App. 404, ll. 14-20; *Edwards*, 383 S.C. at 70, 678 S.E.2d at 407. For this reason, counsel's cross-examination of Macklin on the unknown identity of the assailants and Macklin's lack of contact with Petitioner failed to adequately protect Petitioner from the prejudice of Macklin's statements. Only a contemporaneous objection could have adequately protected Petitioner. Further, to the extent that Macklin eventually denied Petitioner had threatened him, the State's closing argument was even more unfairly prejudicial as it went beyond the evidence presented at trial and the insinuation that Petitioner had arranged the assault lingered into the juror's deliberations.

Counsel's failure to object to Macklin's clearly inadmissible testimony and the related statements in closing argument; prejudiced Petitioner and "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

II.

Petitioner's Sixth Amendment rights were violated when counsel failed to object to prosecutor's prejudicial misattributions of identification testimony to State's witness, Melissa Roberts, during closing argument.

Relevant Facts

Testimony of Melissa Roberts

During trial, the State also called Melissa Roberts to testify. App. 119, ll. 3-19. Of the four tellers, only Roberts identified Petitioner as the bank robber. App. 132, ll. 1-3. Roberts provided the police with a statement on the day of the robbery which does not mention Petitioner. App. 139, ll. 13-14. After a weekend of reflection and being told by police that Petitioner was in custody, Roberts identified Petitioner as the robber the following Monday.² App. 138, ll. 15 – 139, ll. 11. She claimed her identification was based on personal knowledge of the shape of Petitioner's head and his "mannerisms". App. 126, ll. 22-25; App. 132, ll. 15-20.

Her personal knowledge of Petitioner came from attending the same joint middle school-high school. App. 133, ll. 13-15. Roberts claimed to remember him from the eighth or ninth grade; over fifteen (15) years before the robbery. *Id.* at ll. 21-25; App. 134, ll. 6-15. Roberts was unable to recall if she and Petitioner had ever had a class together and believed that Petitioner was one grade

² It is unclear from the testimony at trial whether Roberts was told Petitioner was in custody before she identified Petitioner as the robber, or if she told Detective Boan that she believed Petitioner was the robber and then the detective told her that they had already arrested Petitioner. On direct examination she testified that she identified Petitioner before speaking with police on the Monday after the robbery. App. 132, ll. 1-20.

However, on cross-examination, she admitted she knew by Monday, that Petitioner had been arrested. App. 138, ll. 15-25. Likewise, Boan testified that on the Monday after the robbery he returned to the bank and told the tellers that Petitioner had been arrested. App. 290, ll. 6-20. Boan further testified that he did not show Roberts a line-up because Roberts' told him she knew Petitioner. App. 296, ll. 9-22.

ahead of her. *Id.* at 16-17. Petitioner testified that he had stopped attending school in the ninth grade to begin a job training program and did not remember her. App. 134, ll. 6-7.

Roberts also stated that she knew Petitioner because her mother-in-law owned a restaurant or store, The River Deck Bar and Grill that Petitioner's family occasionally patronized. App. 134, ll. 15-23. Roberts believed that she had last seen Petitioner at the restaurant/store approximately five (5) years before the robbery. App. 135, ll. 2. Petitioner testified that he had never visited the subject store. App. 315, ll. 14-19. The prosecutor's closing arguments highlighted the difference between Roberts claiming Petitioner's family patronized the store/restaurant and Petitioner's statement that he never ate there. App. 380, ll. 5-7. At the PCR hearing, Petitioner's sister testified that her family never went to the store because it was full of racist decorations and still advertised that it was for "whites only". App. 630, ll. 10-24

Finally, Roberts testified that at an unspecified time prior to the robbery, Petitioner briefly visited the bank. App. 120, ll. 16 – App. 122, ll. 15.³ She did not give a date for his alleged visit or a provided timeframe for how many days, weeks, months or years the visit occurred before the robbery.

Testimony of Leah Bailey

In contrast to Roberts, Leah Bailey testified that she did not recognize the bank robber and believed that she could not identify the robber if she saw him again. App. 111, ll. 18 – App. 113, ll. 5. Nevertheless, when asked at trial if she noticed anyone suspicious in the bank before the robbery,

³ During trial the State put into evidence the video surveillance footage of the robbery. App. 120, ll. 20-24. Roberts testified that that the robber looked behind his back during the robbery in the direction of the branch manager's office and that during Petitioner's alleged earlier visit, she believed he stood in roughly the same area; this contributed to her belief that Petitioner was the bank robber. App. 129, ll. 5 – App. 131, ll. 4. No video surveillance of either Petitioner's alleged prior visit or of the visit by the unknown individual earlier on the week of the robbery described in Bailey's testimony has been produced.

Bailey responded that a suspicious individual had been in earlier during the week of the robbery on a very busy day. *Id.* Detective Boan testified that Bailey first told him about this individual on the Monday following the robbery; after Boan told her and Roberts that Petitioner had been arrested. App. 291, ll. 1-6. She could not describe his physical appearance in any way; including his race or height. *Id.* She believed that the suspicious individual may have been in a white tee-shirt. *Id.* However, she admitted that she would not recognize him if she saw him again and could not say if the suspicious person was the bank robber. *Id.* at 20-25. Like the other tellers, including Roberts, Bailey was able to see the robber's arms and did not remember the robber having any tattoos or scars. App. 116, ll. 1-10. Petitioner's arms are heavily tattooed. App. 546, ll. 5-22.

Closing Arguments

In the State's closing arguments, prosecutors misattributed the specific timeframe in Bailey's testimony about the vaguely described, suspicious individual to Roberts' more specific identity testimony about having previously seen Petitioner in the bank at an undetermined date prior to the robbery. App. 370, ll. 5-10; App. 407, ll. 2-4. For example, Assistant Solicitor Derieg stated in the State's closing argument, "Melissa Roberts, she recognized [Petitioner].... *[s]he had seen him earlier that week.*" App. 370, ll. 5-10 (*emphasis added*). In actuality, Roberts never testified that she saw Petitioner earlier during the week of the robbery. By way of further example, the State's contended during closing argument:

[Roberts] showed you the video [of the robbery]. She showed everything in there. And what did she show you? She showed you where [Petitioner], *the Defendant, stood a couple of days earlier*, by that potted plant at her manager's office. She showed you where on the bank video the robber, who she identified as the Defendant, as part of it [*sic*] turns and looks right back where he saw the manager, when he was there casing the bank....It is not just the shape of his head that helps her identify him, *she identified him because he was in there a couple of days earlier with no mask wearing what she said could have been even the same white*

shirt standing right back there where the manager's office was.... ***Leah Bailey even testified that she saw a guy back there, she didn't know him.***

App. 406, ll. 5 – App. 407, ll. 3 (emphasis added). Neither of these statements accurately summarizes the evidence or testimony of Roberts and Bailey. Neither of these statements drew objection from counsel.

PCR and Evidentiary Hearing

During the June 6, 2009 evidentiary hearing, PCR Counsel questioned counsel regarding his failure to object to prosecutor's closing argument claiming that Roberts had the chance to observe Petitioner without a mask only a few days before the robbery. App. 551, ll. 3-24. Counsel admitted that Roberts' testimony did not provide such a timeline and that it was improper for the prosecutor to argue that it had. App. 551, ll. 25 – App. 553, ll. 1. Counsel further conceded that he did not recall objecting to such testimony as exceeding the scope of evidence and could not provide a reason for failing to object. *Id.*

When asked if Roberts having seen Petitioner only days before the robbery would bolster her credibility and strengthen her identification, counsel demurred. App. 551, ll. 15-24. On cross-examination, counsel explained that his overall strategy with respect to Roberts' testimony was to highlight the incredulousness of her identification of Petitioner due to the paucity of her prior interactions with him. App. 589, ll. 10 – App. 591, ll. 18. However, counsel was unable to explain how allowing the prosecutors to improperly combine Bailey's recent timeframe regarding the unknown individual with the identification of Petitioner by Roberts effectively executed that strategy. App. 613, ll. 7 – App. 614, ll. 6.

Discussion

Deficient Performance

In the present case counsel's failure to object to the solicitors' closing arguments misattributing the specific timeframe for the presence of a vaguely described suspicious person in Bailey's testimony to Roberts constituted a deficient performance below professional standards. *See Strickland*, 466 U.S. at 694; *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Counsel has the authority to make certain tactical decisions involving trial strategy; such decisions must meet an objective standard of reasonableness. *See Roseboro* 317 S.C. at 294, 454 S.E.2d at 313 (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness"); *see also Thomas*, 308 S.C. at 124, 417 S.E.2d at 532 (finding PCR Petitioner showed uncalled witness would have made a difference in trial because it would have cast doubt on victim's identification of Petitioner). Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial. *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001) (counsel's failure to object to prejudicial hearsay because he did not want to "confuse or upset the jury" was not valid strategy).

At the PCR hearing, counsel noted that Roberts' confidence in her identification of Petitioner as the bank robber, based on comparing mannerisms and head shapes, was farfetched. App. 610, ll. 24 – App. 611, ll. 25. Her insignificant pre-robbery interactions with Petitioner and the brief, traumatic nature of the bank robbery made her identification incredible. App. 609, ll. 15 – App. 612, ll. 1. The interactions she testified to are remote in time and in familiarity: (1) one year of

attending the same joint middle school-high school over fifteen years before the robbery; (2) five years prior to the robbery, Petitioner's family occasionally patronized her in-laws restaurant/store; (3) at some point; either days, weeks, months, or years, before the robbery Petitioner visited the bank on a busy day and did not transact any business. *Id.*

None of the witnesses, including Roberts, were able to physically describe the robber with any degree of specificity. App. 591, ll. 11-18. Her ability to identify Petitioner is particularly suspect as she did not mention him in her initial statement to the police and seemed identify him only after being told he had been arrested. App. 290, ll. 6-20. Counsel believed Roberts was the state's star witness. App. 611, ll. 22-25. Roberts never testified, as the Solicitor claimed in closing argument, to what date Petitioner visited the bank in prior to the robbery. App. 551, ll. 3-19. Bailey testified that an individual of unknown race, size, height, and complexion stood in the back of the bank a few days before the robbery. App. 111, 18 – App. 113, ll. 5. Roberts testified that Petitioner previously visited the bank on a busy day “wearing a white tee-shirt or something of that nature”, but did not conduct business. App. 120, ll. 16 – App. 122, ll. 15. There was no video surveillance available from either of the alleged visits, so the jury was completely reliant on the witness' testimony.

In closing arguments, the State sought to explain the incongruity between Roberts' certainty in her identification and the want of interaction with Petitioner justifying such certainty. Thus, the Solicitors' misattribution of Bailey's timeframe to Roberts bolstered the key weakness in Roberts' testimony, her lack of recent interaction with Petitioner. Counsel's failure to object to prosecutor's prejudicial misattributions of Bailey's testimony to Robert's identification testimony constituted deficient performance below the range of competence required in criminal cases.

Prejudice

Counsel's deficient performance in failing to object to prosecutor's misattribution of Bailey's testimony to Roberts was prejudicial, such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2068).

A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). Arguments must be confined to evidence in the record (and reasonable inferences therefrom), although failure to do so will not automatically result in reversal. *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996); *State v. Cannon*, 229 S.C. 614, 93 S.E.2d 889 (1956). A new trial is appropriate if the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *State v. Coleman*, 301 S.C. 57, 389 S.E.2d 659 (1990) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

In the present case, the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process because the State's closing argument reinforced the weakest portion of Roberts' testimony by erroneously attributing to her the one portion of Bailey's testimony that would enhance Roberts' identification. *Id.* The State's case against Petitioner was circumstantial. The money was never found and none of the items used in the robbery, other than perhaps the bicycle, were ever recovered. Robert's unwavering, but unrealistic identification of Petitioner was the linchpin of the State's case. On four occasions solicitors told the jury Roberts testified to seeing Petitioner at the bank only a few days before the robbery. App.370, ll. 5-10; App. 406, ll. 5 – App. 407, ll. 3. In truth, Roberts never provided a specific day, or even a range of dates for Petitioner's alleged visit to the bank.

The solicitors' misattributions were grossly unfair and prejudicial in light of the evidence presented at trial and the critical role Roberts' testimony played in the State's case. Counsel never objected; thus depriving Petitioner of the opportunity for a curative instruction. *Johnson*, 325 S.C. at 182, 480 S.E.2d at 733 (counsel not ineffective as solicitor's improper comments were cured by the judge's instructions to the jury). Counsel argued that his strategy was to highlight the implausibility of Roberts' identification. App. 611, ll. 22-25. However, this trial strategy was not an adequate defense for failing to object to inaccurate comments which serve only to improperly bolster a witness's credibility. *Dawkins* at 346 S.C. 151, 551 S.E.2d 260.

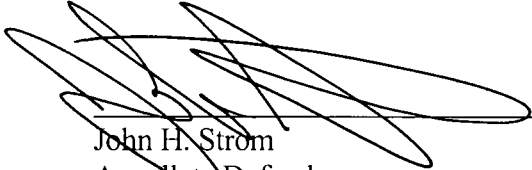
Counsel's representation was deficient and Petitioner was prejudiced by counsel's failure to object to the State's misattribution of identification testimony which impermissibly bolstered the key witness's identification of Petitioner. *Mitchell v. State*, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) (counsel's failure to object to the introduction of improper character evidence constituted ineffectiveness).

Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 566 – 581; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

Based on the foregoing reasons, Petitioner Jarvis Gibbs respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issues presented.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County
James R. Barber, III, Circuit Court Judge

JARVIS GIBBS,

PETITIONER,

V.

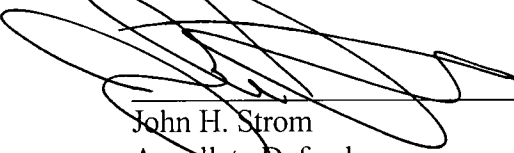
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000447

CERTIFICATE OF SERVICE

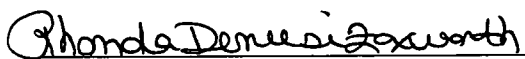
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of January, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of January, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.