ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Charleston County

G. Thomas Cooper, Circuit Court Judge

ALONDA DESAUSSURE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000137

PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding trial counsel effective where he failed to request funding for and obtain an eyewitness identification expert despite the necessity of such expert testimony to Petitioner's defense and the inadequacy of trial counsel to effectively defend the case without professional assistance?

STATEMENT OF THE CASE

On April 4, 2011, the Charleston County grand jury indicted Petitioner Alonda Desaussure for one count of armed robbery and one count of assault and battery first degree. App. 513 – 516 (Indictments). The case was originally set for trial in March 2013; however, on the first day of trial Desaussure made a motion to relieve his public defender, Mary Ford, which was granted. He retained private attorney, Aaron Mayer, later that month. App. 395, l. 21 – 396, l. 8; App. 447, ll. 4-14.

On June 21, 2013, the State filed its notice of intention to seek life without parole for the armed robbery charge, based on Desaussure's prior convictions. App. 357, ll. 9-17.

On July 8-10, 2013, Desaussure appeared before the Honorable Stephanie P. McDonald and a jury for a trial on the above offenses. Desaussure was represented by Aaron Mayer, and the State was represented by assistant solicitors Meg Haley and Spencer Compton. App. 1. The jury found Desaussure guilty of both offenses. App. 354, ll. 12-22. Judge McDonald sentenced him to the mandatory sentence of life without parole for armed robbery and the mandatory minimum of ten years for assault and battery, to be served concurrently. App. 358, l. 18 – 359, l. 6.

On September 24, 2013, Desaussure filed an application for Post-Conviction Relief (PCR). App. 362. The State filed its Return on February 11, 2014. App. 384. An evidentiary hearing was held on September 11, 2014, before the Honorable G. Thomas Cooper, Jr. Desaussure was represented by James Falk, and the State was represented by Assistant Attorney General Ashleigh Wilson. App. 390. The witnesses at the hearing included trial counsel Aaron Mayer, Ninth Circuit Public Defender Ashley Pennington, former trial counsel Mary Ford, and

eyewitness identification expert Lori Van Wallendael, Ph.D. App. 391 – 493. Desaussure did not testify. App. 491 – 492.

On December 15, 2014, Judge Cooper issued an Order of Dismissal denying Desaussure's PCR application. App. 499.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding trial counsel effective where he failed to request funding for and obtain an eyewitness identification expert despite the necessity of such expert testimony to Petitioner's defense and the inadequacy of trial counsel to effectively defend the case without professional assistance.

Relevant Facts

Trial Testimony

Petitioner Desaussure was charged with armed robbery and first degree assault and battery in association with an incident that occurred at Gilroy's Pizza Pub ("Gilroy's") in Charleston, South Carolina on Sunday, October 3, 2010 at approximately 9:00 p.m. Daniel Cobiella was the only worker at Gilroy's that night and was in the kitchen cleaning when he heard someone enter the empty restaurant. App. 104, ll. 5-24. He heard what he thought to be movement of the tip jar on the counter, which contained seven dollars in cash and coins and credit card receipts. App. 105, ll. 2-6; App. 109, ll. 4-8. When he came out into the restaurant, he saw that only the receipts remained in the jar and confronted the sole person inside the restaurant about the missing money. The man denied taking anything. Cobiella got between the man and the door as he tried to leave, and followed him outside where they continued to argue. An altercation ensued and Cobiella's face was injured. App. 105, l. 7 -- 106, l. 18. Whether the injury was the result of the use of a knife was disputed at trial.

The trial judge heard testimony from Cobiella in camera and allowed him to make an in-court identification of Desaussure, even though he was never asked to make a pre-trial identification and despite the highly suggestive nature of the courtroom. App. 80 – 100. At trial, Cobiella testified that he could only see the suspect's shoulder and side of his head when he was initially inside Gilroy's. App. 108, ll. 5-15. When he came around the counter, he was approximately twenty-five feet from the suspect and continued to get closer as they argued and

moved down the street outside of the restaurant. App. 109, ll. 12-23; App. 111, ll. 1-21. Though the restaurant was well-lit inside, it was dark outside at the time of the incident except for a street light. App. 113, l. 19 – 114, l. 1; App. 116, ll. 4-14. There were not many people out on the street. Cobiella saw two people outside of Gilroy's and asked them to call 911. App. 116, ll. 4-9. Cobiella did not see any weapon on the suspect and claimed to have been focused "on the individual" during the altercation. App. 110, ll. 6-13; App. 116, l. 15 – 117, l. 4; App. 131, ll. 2-3. He could not recall what the suspect's bike looked like other than that it allegedly had a white bag on it. App. 114, ll. 10-14; App. 131, ll. 4-8.. Cobiella met with an officer at the hospital and described the suspect as "a black male, approximately six-foot-three in height, age approximately 50 years old, salt and pepper, close beard, close hair." App. 115, l. 21 – 116, l. 3; App. 127, ll.. 18-24; App. 130, ll. 14-17. He described the clothing as a "long navy or black top." App. 130, ll. 18-24. Cobiella made an in-court identification of Desaussure, who was sitting at the defense table, as his assailant. But, he admitted that no pre-trial identification procedure was ever conducted. App. 109, l. 24 – 110, l. 5; App. 133, l. 25 – 134, l. 2.

Adam Corbin was standing outside of Gilroy's smoking a cigarette at the time of the incident. He saw an African American male go inside of Gilroy's and take money from the tip jar. He saw him come out of the restaurant followed by the clerk, who asked Corbin to call the police. App. 135, ll. 3-19. The man had asked Corbin and his friend for money before entering Gilroy's. App. 137, ll. 13-23. He observed the physical altercation between Cobiella and the suspect from approximately thirty to forty feet away but did not see any weapon. App. 138, l. 6 – 139, l. 5. He described the suspect as being six-foot two or three inches tall, with a scruffy beard, wearing jeans and a dark, long sleeved T-shirt with a stripe around the elbow, and approximately 25 to 30 years old. App. 139, l. 18 – 140, l. 7; App. 143, ll. 2-11; App. 145, ll. 1-

6. Corbin could not describe the suspect's bike because it was too far away. App. 140, ll. 8-13. He was never asked to identify the suspect. App. 140, ll. 14-19.

Officer Jonathan Burns responded to the initial call at Gilroy's and unsuccessfully attempted to locate a suspect. Approximately three hours later, at 12:30 a.m., he made contact with Desaussure. The original description of the suspect that he received was "a black male, six-two, slender build, with a very low haircut and he had a bicycle with a plastic grocery bag tied to the front of it" and wearing a "dark colored shirt." Burns saw Desaussure walking on the sidewalk with his bicycle, which had a plastic bag tied to the front. However, unlike the description, Desaussure was wearing a multicolored shirt with a black short-sleeved t-shirt underneath. App. App. 156, l. 4 – 157, l. 6. None of the other clothing found in Desaussure's possession at the time of his arrest matched that description either. App. 306, ll. 1-18. After being stopped, Desaussure informed Burns that he had a large knife in his waistband. This raised Burns suspicion because he believed a knife was used in the altercation outside of Gilroy's. App. 157, ll. 7-19. However, DNA testing found no blood of the victim on the knife. Additionally, Silcott, the sole witness who claimed to have seen the weapon, confirmed that the knife seized by Burns was not the knife used by the suspect to assault Cobiella. App. 208, ll. 2-14; App. 267, l. 15 – 268, l. 16.

While Burns was speaking with Desaussure, Stephen Silcott road by quickly on his bicycle and yelled something out at Burns. While he could not recall the exact words used, Burns believed it was "like, Good job. You got him." Silcott then stopped his bicycle and came over to them and identified Desaussure as the "the person that committed the crime at Gilroy's." App. 157, l. 19 – 158, l. 2; App. 160, ll. 22 – 161, l. 7; App. 162, l. 5 – 163, l; App. 163, ll. 5-25.

Burns could not recall if Silcott went into any further detail about the alleged crime at Gilroy's and did not conduct any formal identification procedure. App. 164, ll. 1-17.

Silcott was a cashier at a Five Guys restaurant, who was returning from his break when he observed "two gentlemen arguing over some money that had allegedly been stolen from Gilroy's, and the victim was asking the suspect for the money back." App. 194, l. 13 – 195, l. 6. Silcott saw the two push and shove each other, until the other "pulled out a blade and swung his arms wildly and managed to connect with the face of the victim." App. 195, ll. 7-16. He was going to attempt to help the victim, but once he saw a knife he decided to return to Five Guys and not risk any danger to himself. App. 196, ll. 1-15; App. 198, l. 21 – 199, l. 1. He claimed to have been within three feet of the altercation and that it lasted approximately five minutes. App. 196, ll. 16-17l; App. 198, ll. 3-5. He noticed that the suspect had salt and pepper hair and was a tall and thin, African American. He described the hair as the suspect's strongest characteristic. App. 198, ll. 6-9; App. 203, ll. 1-4. However, once he saw the knife, Silcott became focused on that. He recalled that it was a common knife with a two and a half inch serrated blade and a thumb hole to unfold it. App. 199, l. 10 – 200, l. 9. He described the night as clear, the area as well lit, and his vision as unobstructed. App. 200, ll. 10-23.

Silcott also made an in-court identification of Desaussure as the suspect he saw holding the knife during the altercation at Gilroy's. App. 196, l. 18 – 197, l. 4. Though he failed to mention it to officers on the night of the incident, Silcott testified that while he was on his way to work at approximately 5:00 p.m. on the night of the incident, he also saw Desaussure outside of Pop's Pizza. He claimed that Desaussure asked him for some change. App. 197, ll. 5-25; App. 202, ll. 20-25. He only interacted with the individual for approximately five seconds at that time. App. 198, ll. 1-2.

While riding his bicycle home from work at approximately 11:30 p.m. or midnight, Silcott observed a man stopped near "a couple police cars." He yelled out "Okay, you got that piece of shit." App. 200, l. 24 – 201, l. 14. The officer called him over and asked him if he "recognize[d] this gentleman." App. 201, ll. 14-18. He told the officer "Yes. That's the man from Gilroy's that had, you know, been involved in a robbery earlier that evening." App. 201, ll. 19-21; App. 202, ll. 2-25. He also "said a few choice words to the suspect." App. 202, ll. 6-7. Silcott claimed to be one hundred percent sure that Dessausure was the suspect. App. 204, ll. 7-11. That was Silcott's first interaction with police with respect to the incident at Gilroy's, as he returned to work and did not speak to officers at the scene earlier that evening. App. 201, l. 22-24; App. 207, ll. 1-21.

At approximately 12:30 p.m., Sergeant Kelly Stone responded to the area where Burns stopped Desaussure. Burns pointed Silcott out to him, and indicated that he had made an identification. App. 217, ll. 5-15. He testified that no other line-ups of photo arrays were conducted because they "felt confident that that was the strongest ID, was from Mr. Silcott." App. 217, l. 24 – 218, l. 4. Investigator Richard Burckhardt went to Gilroy's when the incident was initially reported, met with Cobiella at the hospital, and later responded to the area where Burns stopped Desaussure at approximately 12:45 p.m. He indicated that the victim gave "a pretty good description of the individual who had attacked him." App. 249, l. 18 – 252, l. 15. The description given was an African American male with salt and pepper hair, ash in color, with some sort of facial hair, wearing dark striped cloths and in his forties. App. 254, l. 15 – 255, l. 7. Though there were no unique identifiers provided and Desaussure's shirt did not match the description, Burckhardt said that the individual stopped by Burns "matched the same physical

description pretty much head to toe that was offered to [him] by the victim." App. 157, ll. 1-6; App. 252, ll. 16-25; App. 306, ll. 1-18.

Request for Judicial Notice

Defense counsel requested that the trial court take judicial notice pursuant to Rule 201, SCRE, and Rule 803(18), SCRE, of any one of a list of articles discussing eyewitness testimony and allow him to read one of the articles into the record. App. 242, l. 24 – App. 243, l. 20; App. 244, ll. 12-20; App. 245, ll. 18-23. Rule 201(b), SCRE, provides;

> Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Rule 803(18), SCRE, states:

> Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. This rule is in addition to any statutory provisions on this subject.

The State opposed the request, arguing that defense counsel should have called an expert witness to testify regarding eyewitness identification and that this was not a proper subject for judicial notice. App. 244, l. 21 – 245, l. 9.

The trial judge found that what Rule 803(18), SCRE, references are periodicals "when they are established as a reliable authority by the testimony or admission of a witness or by other expert testimony or by judicial notice." She found that the Rule was not applicable without "some kind of expert witness that says this is what we rely on." App. 243, l. 21 – 244, l. 11. Further, she did not find that judicial notice was proper regarding a matter that experts continued to debate. App. 245, ll. 10-17. She accordingly denied defense counsel's request to take judicial

notice of and allow the reading of the articles related to eyewitness identifications. App. 245, ll. 24-25.

Evidentiary Hearing on Post-Conviction Relief

Mary Ford was the public defender assigned to represent Desaussure. App. 446, l. 18 – 447, l. 3. She was relieved as counsel on the first day of trial in March 2013. App. 447, ll. 4-9. Based on her review of the discovery, she believed that it was necessary to hire an eyewitness identification expert witness and retained Dr. Brian Cutler to testify at Desaussure's trial. App. 447, l. 18 – 448, l. 3. Ford retained the expert because the only evidence against Desaussure was an eyewitness identification once the knife seized from him by police was ruled out as being involved in the incident. She cited potential problems with Silcott's identification and the circumstances surrounding it as matters that she thought an expert would be important to explain. App. 448, ll. 4-13.

When asked if she would have considered going to trial without an expert witness, Ford responded:

> I mean I think there was enough that the I.D. lacked so much in credibility that I could have easily attacked it on my own because a lot of other things didn't match up and I think I could have easily done that. But, considering that that one I.D. is all that the State had as far as evidence, **I do feel like an expert was necessary, yes.**

App. 451, l. 21 – 452, l. 2 (emphasis added). She further stated:

> I think that there was a lot for me to work with, but I don't -- if an expert, if it's possible to have an expert I don't see any reason not to have the expert. **To me this case screamed for an expert.**
>
> . . .
>
> And **as soon as I got the case that's the first thing I recognized.**

App. 453, l. 23 – App. 454, l. 8 (emphasis added).

Trial counsel Aaron Mayer was retained in March 2013 by a friend of Desaussure and substituted as counsel in March 2013. App. 395, l. 21 – 396, l. 8; App. 447, ll. 10-14. Mayer is a solo practitioner in Charleston, South Carolina. He was admitted to the South Carolina bar in 2011, though he is also licensed in North Carolina and Florida. App. 395, ll. 6-20. Dessaussure's trial was the first jury trial in General Sessions court in South Carolina in which Mayer had ever participated. His jury trial experience included serving as "second chair" to the prosecutor in an assault case in North Carolina while he was in law school. App. 397, l. 9 – 398, l. 6.

Mayer admitted that his competency to represent a criminal defendant had been questioned in the past by Judge Kristi Lea Harrington. App. 398, l. 7 – 399, l. 1. He had attempted to obtain an order for funds to obtain a DNA expert for his client, Bryant Loyal. App. 495 (Petition to Authorize Funds for Independent DNA Review). The PCR court admitted into evidence an Order to Pay State's Costs filed on May 29, 2013 in Loyal's case, in which Judge Harrington found that "Mr. Mayer does not possess the required legal knowledge, skill, thoroughness, and preparation required under our Rules of Professional Conduct" and was "unable to provide competent representation to the Defendant." The Order relieved Mayer as counsel. App. 398, l. 7 – 410, l. 3; App. 497 (Order to Pay State's Costs).

With respect to Desaussure's case specifically, Mayer could not recall if he met with Desaussure himself before or after executing a contract and receiving the initial payment of five-hundred dollars.[1] App. 396, ll. 4-6. The friend informed him that Desaussure's public defender was relieved on the first day of trial. He recalled that they were upset that the identification

[1] According to Mayer, no additional payments toward his fee were ever made. App. 410, ll. 20-23.

expert was not there on the first day of trial, though Mayer explained to them that the expert's presence would likely have been unnecessary that day. Mayer claimed that he discussed with Desaussure's friend "the importance of having an expert witness to testify about the flaws and the problems associated with eyewitness identification in their first conversation." He told both Desaussure and his friend that if they wanted a free expert, they needed to stay with the public defender's office and that they would be responsible for the cost of any expert that he retained, which he estimated would be between one thousand and three thousand dollars. Even so, they expressed their desire to retain a private attorney. App. 396, l. 9 – 397, l. 3; App. 411, l. 4 – 415, l. 4.

Mayer never contacted public defender Ford to discuss her perspective of the case, but understood from speaking with Desaussure's friend that they had intended to call an identification expert. App. 416, l. 25 – 417, l. 14; App. 450, ll. 20-22. He agreed that the case "absolutely" called for an eyewitness identification expert. App. 420, ll. 4-6. However, he never contacted any potential identification expert or even found out who the public defender had intended to call as an expert. App. 419, l. 18 – 420, l. 3. It was not until approximately one month before the trial that Mayer realized that Desaussure's family and friends were not going to have the funds for an expert witness. App. 412, l. 18 – 413, l. 16; App. 421, ll. 4-10. He failed to ask the court for funds for an expert, based on his experience in Loyal's case. App. 415, l. 25 – 416, l. 8. He never told Desaussure that there was a possibility to get funds from the Commission on Indigent Defense to fund an expert either; in fact, he represented to him that the only way to get a free expert was to remain represented by the public defender's office. He did not conduct any further investigation into funding for an expert in Desaussure's case. App. 423, l. 23 – 424, l. 16. He stated that once he and Desaussure "made a decision to go forward at trial

without the expert, that it was his "strategy" to "chip away at the identification of these eyewitnesses." App. 434, ll. 7-13. He conducted research regarding identifications, asked the trial court to take judicial notice of articles regarding identifications, and argued that the cross-racial nature of the identification may have affected its reliability. App. 429, l. 17 – 431, l. 6.

Ashley Pennington, the Ninth Circuit Public Defender, testified that though it was not a frequent occurrence, he has known of cases where private attorneys sought funds from the Commission on Indigent Defense to pay for an expert witness. App. 442, l. 21 – 443, l. 18. When private attorneys contact him about it, he has told them that there is precedent for it that he believes the Commission has been responsive to providing funding when the Circuit Court has found that there was a due process need for an expert witness. App. 444, ll. 7-20.

Dr. Lori Van Wallendael, Ph.D., testified at the PCR hearing as an expert in eyewitness identification. App. 457, l. 11 – 461, l. 6. Dr. Wallendael is an associate professor and associate chair of the psychology department at the University of North Carolina at Charlotte. App. 457, ll. 20-24. She had been qualified as an expert in South Carolina approximately six to eight times in the past and written eight published materials specific to eyewitness and earwitness reliability. While she has only testified as a defense expert, Dr. Wallendael has also worked with the Charlotte-Mecklenburg police department to develop better identification practices. App. 459, l. 3 – 462, l. 20.

After reviewing Dessaure's case, she testified that there were "definitely' reliability concerns regarding the eyewitness identifications in his case. App. 462, l. 21 – 463, l. 5. Had she been called as an expert witness in Desaussure's case, Dr. Wallendael would have discussed how memory works, the difficulties of cross-racial identification, possible weapons focus effect, and what kinds of best practice procedures could and should have been followed. She would have

also advised defense counsel regarding matters to inquire about on cross-examination of the witnesses and officers. App. 469, l. 21 – 471, l. 2.

She was concerned that the identification by Silcott was "uncontrolled" and characterized it as even more lacking than an inherently suggestive "show up" procedure. There were no cautionary instructions given to Silcott, which are very important in identification procedures. Dr. Wallendael rejected the notion that the spontaneity of Silcott's identification lessened its suggestiveness based on the circumstances of the identification, which included his having seen a person who roughly matched the description of someone he observed earlier being questioned by police in the vicinity of the incident. App. 463, l. 7 – 464, l. 7; App. 478, ll. 3-18 Additionally, the identification was cross-racial, which is very difficult to make and often results in overconfidence by the witness. App. 464, ll. 8-13. The distance and lighting factors may have also impeded the witness' opportunity to form an accurate memory, which often amounts to only a glance by the time the person realizes that what they are witnessing might be a crime. App. 464, ll. 14-17; App. 467, ll. 2-16. Additionally, with respect to Silcott, she discussed the weapon focus effect, whereby a victim or witness is less likely to remember other details about an event because their attention was on the weapon. App. 465, l. 21 – 467, l. 1. Dr. Wallendael was particularly struck, "almost stunned," that no additional identification procedures were ever done with the victim or other potential witnesses. App. 464, ll. 18-23. She also testified regarding the correlation between false convictions and eyewitness identifications. App. 467, l. 17 – 468, l. 7.

Dr. Wallendael's main area of study is regarding juror reaction to eyewitness testimony. Jurors tend to be very persuaded by eyewitnesses due to the compelling narrative that they usually tell and the lack of any reason to question their honesty. Jurors believe in their own

memories, making them reluctant to question the accuracy of a witness' memory. App. 468, ll. 8--23. Jurors also rely heavily on witness confidence. In Desaussure's case, Silcott claimed to have seen him earlier that same evening, increasing his confidence but potentially decreasing the reliability of his identification. However, she admitted that repeated exposure can also increase accuracy. App. 469, ll. 2-20; App. 474, ll. 1-5.

Dr. Wallendael has spoken with attorneys after cases in which she testified and they indicated to her that jurors cited her testimony as important in their decision to acquit the defendant. App. 471, ll. 3-23. The PCR court read portions of Silcott's trial testimony to Dr. Wallendael and asked her if that was a "fair or reasonably good identification in [her] opinion," to which she responded that there were points in favor of a possibly accurate identification but there were also "red flags." App. 480, l. 2 – 484, l. 3. She then described the problems and inconsistencies with Silcott's testimony that she would have pointed out to the jury. App. 484, l. – 486, l. 15. Moreover, she opined that a jury needs to be provided with some explanation of the factors and research regarding identifications in order to be persuaded. Mere cross-examination and argument by a defense attorney would not be effective, which is why expert testimony on the subject of eyewitness identification is so valuable. App. 487, l. 3 – 489, l. 18.

Order of Dismissal

In its Order of Dismissal denying Desaussure's PCR application, the PCR found that Desaussure failed to prove ineffective assistance of trial counsel in failing to request funding for and obtain an eyewitness identification expert. In finding that trial counsel was not deficient, the PCR court found that he "articulated a valid strategy basis for his decision to proceed to trial without the aid of an eyewitness identification expert to testify for the defense." R. 506 (Order of Dismissal, p. 8). He further found that while retained counsel could have applied to the

Commission on Indigent Defense for funding for the expert, counsel's decision not to do so was "reasonable under professional norms." R. 509 (Order of Dismissal, p. 11). The PCR court found that Desaussure also failed to prove any prejudice, finding that (1) the nature of the expert testimony presented did not suggest a reasonable probability that the testimony would have affected the outcome of the trial "since the testimony include[ed] conclusions that were favorable to both Applicant and the State;" (2) the jury was given an identification instruction that highlighted potential factors affecting the accuracy of eyewitness identification; and (3) there was no testimony or evidence presented to show that a request for funding for the expert from the Commission on Indigent Defense would have been granted. R. 510 – 511 (Order of Dismissal, p. 12-13). Thus, the PCR court found that Desaussure was not entitled to relief.

Discussion

There was no physical evidence connecting Desaussure to the alleged offense. The State's sole evidence consisted of the out-of-court and in-court identifications of Desaussure by Silcott and the in-court identification of him by the victim, Cobiella. There was no physical evidence. Desaussure retained an inexperienced, private attorney just months before his trial. App. 395, l. 6 – 398, l. 6; App. 447, ll. 10-14. Trial counsel understood the importance of an eyewitness identification expert and that Desaussure was indigent, having previously qualified for representation by the public defender's office. App. 410, ll. 13-19; App. 420, ll. 4-6. He nonetheless took the case and claimed not have realized until approximately one month before trial that Desaussure's friends and family would not be able to pay for an expert. App. 412, l. 18 – 413, l. 16; App. 421, ll. 4-10. He failed to inform Desaussure that there was any other means to obtain funding for an expert and proceeded to trial without an expert witness. App. 423, l. 23 – 424, l. 16. It is not entirely clear from the PCR transcript whether trial counsel's failures to

request funding for an obtain an eyewitness identification expert were due to the failure of Desaussure's friend to pay the remainder of his legal fee or the result of genuine incompetence. Regardless, trial counsel's conduct was deficient and Desaussure was prejudiced by proceeding to trial without any expert witness where the State's case hinged on eyewitness identifications.

"A PCR judge's findings will not be upheld if such findings are not supported by probative evidence." Horton v. State, 306 S.C. 252, 255, 411 S.E.2d 223, 225 (1991). A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In Williams v. Martin, 618 F.2d 1021, 1025 (4th Cir. 1980), the Fourth Circuit Court of Appeals recognized that "an effective defense sometimes requires the assistance of an expert witness." The court cited its earlier decision in Jacobs v. United States, 350 F.2d 571 (4th Cir. 1965), in which it "recognized that the obligation of the government to provide an indigent defendant with the assistance of an expert was firmly based on the equal protection clause." 618 F.2d at 1025. Such an obligation arises "when a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance." Id.

Contrary to the PCR court's finding, trial counsel did not make any "strategic decision" not to call an expert witness and did not a make a "decision" not to apply for expert funding. See R. 506 and 509 (Order of Dismissal, p. 8 and 11). Once he learned that Desaussure could not afford an expert witness, trial counsel did not think that he could obtain funding through the Commission on Indigent Defense because he had tried to do so unsuccessfully in a prior case. App. 415, l. 25 – 416, l. 8. Notably, trial counsel's prior efforts included conducting research on Westlaw and emailing a former Commission employee, who never responded. This apparently left trial counsel "stymied" such that he never thought to contact the Commission itself or another practitioner. App. 408, l. 11 – 409, l. 9. While the shroud of "trial strategy" will often save an attorney's conduct from being found ineffective assistance of counsel, the strategy must be articulated and valid. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995) (noting that "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness" and finding counsel's professed strategy for failing to request an alibi charge invalid under an objective standard of reasonableness); Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) ("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) (finding counsel's failure to object because he did not want to confuse or upset the jury does not constitute valid strategy); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992) (finding counsel's failure to object to trial judge's improper comments inviting the jury to prematurely deliberate did not constitute valid strategy). Here, there was no real strategic decision made, but rather an inferior fallback plan that resulted from a lack of diligence on the part of trial counsel. See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (upholding finding of ineffectiveness where trial counsel failed to retain an independent gunshot residue expert and instead relied upon advice from the former supervisor of the State's expert).

Instead of making any effort to obtain funding for an expert through the Commission on Indigent Defense, which he did not advise Desaussure was even an option, trial counsel devised a new "strategy" to address the eyewitness testimony. That included an unsuccessful preliminary motion to preclude the in-court identifications, an unsuccessful request that the trial court take judicial notice of and allow him to read periodicals or scholarly articles into the record that was not appealed, argument, and cross-examination. His motion in limine and request for judicial notice to read documents into the record were not surprisingly denied. Trial counsel's belief that the trial judge would actually allow him to read into the record an article from Scientific American or the New York Times regarding identification alone was substantial evidence of his incompetence. App. 88, l. 23 – 100, l. 5; App. 242, l. 24 – 245, l. 25. His attempts at cross-examination and argument related to identifications were likewise inadequate. This was in part because certain relevant considerations simply could not be presented without the aid of an expert witness, including the difficulties of cross-racial identification, weapons focus effect, and the lack of correlation between accuracy and confidence. App. 487, l. 3 – 489, l. 18. Thus, there

was no basis for the PCR court's finding that counsel used "effective trial tactics and adequate cross-examination." App. 509 (Order of Dismissal, p. 11).

The testimony of Dr. Lori Van Wallendael, Ph.D., at the PCR hearing confirmed the need for and value of an identification expert at Desaussure's trial. R. 510 (Order of Dismissal, p. 12). Even trial counsel himself admitted that an identification expert was "absolutely" called for in this case. App. 420, ll. 4-6. Nonetheless, the PCR court found that the expert's testimony presented did not suggest a reasonable probability that it would have affected the outcome of the trial because portions of it were favorable to the State. R. 510 (Order of Dismissal, p. 12). Of course, given the consideration of the totality of the circumstances surrounding identifications, it is hardly surprising that there were some elements of the out-of-court identification that pointed to its reliability. But, there were additional elements and research surrounding identifications that cast doubt on the identification and would have aided in the jury's evaluation of the identification. Those included "the difficulties of crossracial identifications, the possible effect of a weapon, and the kinds of best practice procedures that could have been followed or should have been followed in regard to the identifications in the case or the lack of identifications" and "the actual relationship between confidence and accuracy." App. 470, l. 16 – 471, l. 2; App. 484, l. – 486, l. 15.

Further, the PCR court's finding that a jury instruction on eyewitness identification was given was irrelevant to the issue of effectiveness of trial counsel. The value of a jury instruction without any underlying expert testimony regarding how to value and weigh the identifications is marginal at best. While certainly the identification instruction was proper based on trial counsel's attempts to draw out the infirmities in the identifications, it was no replacement for expert testimony. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006) ("If there is any evidence to support a jury charge, the trial judge should grant the requested charge.

The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law."). Dr. Van Wallendael discussed a jury's inability to fully appreciate the complexities of eyewitness identifications solely through cross-examination and agreement. App. 488, l. 9 – 489, l. 18. Further, the jury instruction given was the standard identification instruction. It provides no instruction on cross-racial identification or weapons focus and lists only a few factors that affect a witness' opportunity to observe an offender. App. 342, l. 23 – 343, l. 24. Desaussure's case, which undisputedly hinged on the identification testimony, required an expert to explain the various factors and research related to eyewitness identifications.

Lastly, the PCR court's requirement that Desaussure present testimony or evidence to show that a request for funding for the expert from the Commission on Indigent Defense would have been granted placed any undue burden on the applicant. R. 511 (Order of Dismissal, p. 13). It is unclear from the Order of Dismissal what sort of testimony or evidence would have satisfied the PCR court. He could not possibly be expected to call a judge to testify regarding whether they would have granted the request for funds had it been properly filed and argued. He did present was testimony from Ashley Pennington, the Ninth Circuit Public Defender, that such funds have been provided for indigent clients represented by private attorneys in the past. App. 442, l. 21 – 443, l. 18; App. 444, ll. 7-20. Desaussure also presented evidence regarding the need for an expert witness case through the testimony of both his prior public defender, trial counsel, and an eyewitness identification expert. Further, even the Order of Dismissal states that "retained counsel could have chosen to request funding." App. 509 (Order of Dismissal, p. 11). The creation of an impossible hurdle that Desaussure prove that such a request would have been granted was error. In any event, once Mayer took the case he was ethically bound to try the case

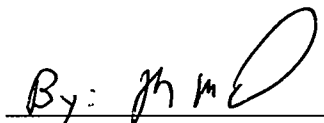
competently and effectively. He should not have taken a case resulting in life without parole, knowing an expert was needed, and proceeded in a half-cocked manner.

Therefore, Desaussure's trial counsel was deficient in failing to request funding for and obtain an eyewitness identification expert despite the necessity of such expert testimony to Petitioner's defense and the inadequacy of trial counsel to adequately defend the case without professional assistance. The PCR court erred in finding that trial counsel possessed any valid strategic reason for failing to call an expert witness, when the testimony was clear that counsel would have called such an expert had the funds been available. Further, trial counsel's secondary efforts regarding the identifications were far from "effective trial tactics and adequate cross-examination" as found by the PCR court. This deficient conduct was not saved by barebones jury instruction on identification. Additionally, the PCR court's finding that her testimony was somehow lacking because she admitted that there were some factors regarding the identifications that were favorable to the State was erroneous. The expert was clear about the detailed testimony that she could and would have provided at trial and the value that such testimony would have brought to Desaussure. Further, the court's finding that Desaussure failed to prove that a request for funding for an expert would have been granted goes beyond the Strickland standard. Here, there was a total failure of trial counsel to even mention that such a request was possible. Based on the foregoing, trial counsel rendered ineffective assistance of counsel and Desaussure is accordingly entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Alonda Desaussure respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,

By: 

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

G. Thomas Cooper, Circuit Court Judge

ALONDA DESAUSSURE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000137

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 J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Alonda Desaussure, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 12th day of August, 2015.

By: _____

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of August, 2015.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: Ooctober 24, 2021.