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**SC SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County  
Michael G. Nettles, Circuit Court Judge

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ANTHONY M. RIGGINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001635

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PETITION FOR WRIT OF CERTIORARI

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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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## ISSUES PRESENTED

### I.

Whether the PCR court erred in finding trial counsel provided effective assistance of counsel where trial counsel presented no argument at the pre-trial Biggers hearing regarding suppression of the alleged victim's show-up identification and failed to preserve the issues related to the identification for appellate review on direct appeal?

### II.

Whether the PCR court erred in finding that there was overwhelming evidence of Petitioner's guilt such that any deficiency in trial counsel's representation was harmless where the only evidence against Petitioner was the unreliable, show-up identification of the alleged victim, which trial counsel failed to properly challenge and preserve?

## STATEMENT OF THE CASE

On July 10, 2008, the Horry County grand jury indicted Petitioner Anthony Riggins for the May 7, 2008 armed robbery of a Myrtle Beach motel. App. 249-250.

On June 20-21, 2013, Riggins appeared before the Honorable John C. Hayes, III, and a jury for trial. Riggins was represented by Kia T. Wilson, and the State was represented by George H. DeBusk, Jr. App. 1. The jury found Riggings guilty. App. 135. Judge Hayes sentenced Riggins to thirty years imprisonment. App. 146.

Riggins filed a Notice of Intent to Appeal. On November 22, 2013, Appellate Defender Lara Caudy filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), on Riggins' behalf. Riggins testified at the PCR hearing that Ms. Caudy advised him that she filed an Anders brief because his trial attorney did not properly preserve any issues for direct appeal, including suppression of the identification. App. 201, ll. 14-22. Riggins then filed a notice to withdraw his appeal. The Court of Appeals accordingly dismissed Riggins' direct appeal on April 2, 2014.

Riggins filed his post-conviction relief (PCR) application on April 8, 2014. App. 148 – 157. He subsequently filed two amendments to his application on May 21, 2014 and May 30, 2014. App. 158 – 173; App. 174. On June 4, 2014, the State filed a letter stating that it did not consider the amendments a part of the action because Riggins was appointed counsel at the time they were filed. App. 175. On January 13, 2015, the State filed its Return. App. 176 – 182.

On May 12, 2015, an evidentiary hearing was held before the Honorable Michael G. Nettles. Riggins was represented by Tristan Shaffer, and the State was represented by Assistant Attorney General Joshua L. Thomas. App. 183. One of the issues raised at the PCR hearing was whether trial counsel was ineffective in failing to preserve the issue of suppression of the show-up

identification for appellate review. App. 225, ll. 1-25; App. 185, l. 18 – 186, l. 1; App. 210, l. 21 – 212, l. 25; App. 215, l. 24 – 220, l. 18.

On June 26, 2015, Judge Nettles entered an Order of Dismissal denying Riggins' PCR application. App. 237 – 247 (Order of Dimissal). Judge Nettles found that the identification issue was "thoroughly argued" and preserved. App. 243 (Order of Dismissal, p. 7). He further found that any deficiency in trial counsel's performance was harmless in light of what it found to be overwhelming evidence of Riggins' guilt. App. 246 (Order of Dismissal, p. 10).

This petition for writ of certiorari follows.

## ARGUMENT

### I.

**The PCR court erred in finding trial counsel provided effective assistance of counsel where trial counsel presented no argument at the pre-trial Biggers hearing regarding suppression of the alleged victim's show-up identification and failed to preserve the issues related to the identification for appellate review on direct appeal.**

#### **Introduction**

Trial counsel Kia Wilson told the jury in her opening statement that “this is a case of mistaken identity” and she reaffirmed at the PCR hearing that the identification was the “main problem” in Riggins’ case. App. 39, ll. 4-6; App. 210, ll. 21-23. Yet, trial counsel failed to present *any* argument that the inherently suggestive and unreliable show-up identification should be suppressed at the Biggers<sup>1</sup> hearing. App. 18 – 19. Despite the lack of any argument in the record, the PCR court found that “[t]rial counsel thoroughly argued the suppression motion in a pre-trial hearing.” App. 243 (Order of Dismissal, p. 7). Trial counsel further failed to object to the admission of the identification testimony when it was presented at trial, failed to properly elicit testimony regarding the suggestiveness and unreliability of the identification before the jury, and failed to request an identification charge. Even so, the PCR court found that “trial counsel was not deficient because [the identification] issue was properly preserved for appellate review.” App. 243 (Order of Dismissal, p. 7). These findings by the PCR court were error, as the trial transcript plainly reveals the deficiencies in trial counsel’s representation.

The PCR court further erred in finding that Riggins failed to show prejudice “because the trial judge properly denied the suppression motion.” App. 243 (Order of Dismissal, p. 7). Trial counsel’s failures resulted in an inadequate presentation of the case to the jury. As a result, the jury

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<sup>1</sup> Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972).

was not given any charge on identification.<sup>2</sup> App. 121, l. 21 – 131, l. 6. Because the issues related to the identification were not properly preserved for review on direct appeal, no appellate court has reviewed the propriety of the Biggers ruling. Thus, contrary to the PCR court's ruling, Riggins was prejudiced by trial counsel's deficient representation.

### **Relevant Facts**

#### ***Counsel's Deficient Representation at the Biggers Hearing***

A pre-trial Biggers hearing was held to determine the admissibility of the alleged victim's identification of Riggins as the robber. App. 5, l. 12 – 18, l. 13. The only witness at the *in camera* hearing was the alleged victim, Chase Mitchell. Mitchell testified that he was in the back office of the Sea Palms Motel when an individual came inside, with his face covered, and began pacing back and forth by the front counter. When Mitchell asked him if he was okay, the man allegedly uncovered his face and responded "yeah, how about you go ahead and empty out the drawer." Mitchell also claimed that the person made a motion like he had a weapon. Mitchell said that he observed the person for three to five minutes in bright light and got "a good look" at his face, clothing, and build. According to Mitchell he identified Riggins as the robber fifteen to twenty minutes later in a parking lot less than a mile from the motel. App. 5, l. 12 – 10, l. 16. The description of the suspect in Mitchell's written statement is "very black oil[y] skin, 5'5' husky – shaved bald head – point flat wide nose. I love NY t-shirt w/ blue jeans (black)." App. 240 (Alleged Victim's Written Statement). However both of the officers' reports indicated that the suspect's face was covered and neither mentioned the suspect's nose. See App. 235 (Applicant's

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<sup>2</sup> Trial counsel did not request an identification charge and the trial court did not give an identification charge *sua sponte*.

Ex. 3, Bresadola's Incident Report); App. 234 (Applicant's Ex. 2, Miller's Supp. Incident Report).

Mitchell admitted at the *in camera* hearing that he did not get out of the police car to view the suspect at the show-up identification and that no light was on in the police car. Nonetheless, he claimed that the lighting was good and that he was one hundred percent certain that the person he identified in the parking lot was the same person who robbed him. He averred that he recognized the suspect by his distinct nose and clothing. App. 8, l. 22 – 9, l. 14. Trial counsel impeached Mitchell on his claim that he could see the robber's face with the police reports that indicated that the robber's face was covered. App. 10, l. 2 – 15, l. 20. In an attempt to deflect the impeachment, Mitchell said:

Well, at the time span that I saw him in, I – the robber, the robbery, he had such a distinct nose, and just facial features that I knew it was him. There was no lapse in time. I mean, this was not an hour or two hours later. I mean, it was definitely him, so no doubt about it. He still had the same clothes on.

App. 12, ll. 19-24. Rather than boosting the identification's reliability, this soliloquy by a flustered witness, regarding many of the exact factors that the trial court had to evaluate in determining reliability, is quite suspicious. Trial counsel should, and could, have argued to the trial court that Mitchell's testimony at the *in camera* hearing was not credible.

Immediately following the witness testimony at the Biggers hearing, and with no argument presented by the trial attorneys, the trial court issued its ruling. The court ruled that though a one-person show up identification "is by its very nature" "unduly suggestive," it was nonetheless reliable. He found that the witness' memory was still fresh at the time of show-up, that the suspect did not have time to alter his looks, that the witness had a full opportunity to view the suspect, that the description he gave was the same as the person he later identified, and that he was one hundred

percent certain at the time of show-up. Thus, he admitted evidence of the show-up identification and an in-court identification of Riggins by Mitchell. App. 18, l. 14 – 19, l. 8.

### *Counsel's Deficient Representation at Trial*

In her opening statement, trial counsel told the jury: "I would let you know that my client's defense is that he was not the person, that this is a case of mistaken identity." App. 39, ll. 4-6. However, during Mitchell's testimony before the jury, defense counsel failed to raise many of the points that she addressed during his testimony at the pre-trial hearing. Mitchell again admitted that it was dark outside at the time of show-up identification. But, trial counsel failed to question him regarding his ability to see the robber's face or the inconsistencies between the written documentation and his supposed memory almost five years later at trial. App. 53, l. 14 – 59, l. 16.

Officer Henry Bresadola testified that he and Agent Miller responded to the motel after receiving a notification from dispatch. According to Officer Bresadola, after they got a description of the suspect, Agent Miller rode off to look for the suspect while he stayed and took Mitchell's written statement. Approximately thirty minutes passed between Mitchell's statement and Mitchell being taken by another officer to conduct the show-up identification. App. 64, l. 23 – 66, l. 17. Mitchell's written statement was entered into evidence at the PCR hearing and reflects a time of "20:27," which is 8:27 p.m. in standard time. App. 236 (Applicant's Ex. 4, Alleged Victim's Statement). Officer Bresadola's report states that Mitchell "stated that the suspect was 'sweaty, oily and **holding his shirt over his nose like he had something on his face.**'" App. 235 (Applicant's Ex. 3, Bresadola's Incident Report) (emphasis added).

Agent Randy Scott Miller testified at trial that he arrived at the motel at approximately 8:45 p.m. App. 81, ll. 3-7. He met with the victim and received the following description: "black male, shorter, five foot range, stocky build, bald head, wearing bluejeans, a white t-shirt

with I Love New York written on it.” App. 81, ll. 12-21. **Neither Agent Miller’s in-court testimony nor his written report mentions the suspect’s nose as being a part of Mitchell’s description.** App. 80, l. 18 – 90, l. 12; App. 234 (Applicant’s Ex. 2, Miller’s Supp. Incident Report). According to Agent Miller, after receiving the description he “left the hotel and went to comb the area for the suspect.” App. 81, ll. 18-24. He saw Riggins, determined that he “match[ed] the description,” and detained Riggins pending the show-up identification.<sup>3</sup> Contradicting Mitchell’s *in camera* testimony that he was three feet away, Agent Miller recalled that Mitchell was approximately ten feet from Riggins during the show-up identification.<sup>4</sup> App. 87, ll. 11-24; App. 8, l. 24 – 9, l. 2. These inconsistencies were not brought to the attention of the jury.

It was not until the directed verdict motion that trial counsel even drew the court’s attention to the inconsistencies in Mitchell’s testimony – the argument that she should have made at the pre-trial hearing. Such argument was futile by that point because the trial court is concerned with the existence of evidence rather than its weight in deciding a motion for directed verdict. See State v. Ladner, 373 S.C. 103, 121, 644 S.E.2d 684, 693 (2007) (“[T]he trial court is only concerned with the existence of the evidence, not its weight, when deciding a directed verdict motion.”). Even so, trial counsel’s remarks at the directed verdict stage were limited and failed to reference any case law. App. 91, l. 8 – 92, l. 4; App. 214, ll. 11-14.

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<sup>3</sup> Although not an issue in this case, counsel failed to raise the issue of whether there was reasonable, articulable suspicion for a Terry stop of Riggins, who was merely a black male in the vicinity of the alleged robbery.

<sup>4</sup> Agent Miller said that Sergeant Joyce and possibly detectives Verder and Graham were also present at the show-up. App. 81, l. 16 – 90, l. 11; App. 8, l. 24 – 9, l. 3. Detective Graham gave no testimony regarding the identification and neither Joyce nor Verner testified at all. App. 68, l. 6 – 80, l. 14.

### ***Counsel's Testimony at the PCR Hearing***

At the PCR hearing, trial counsel admitted that the "main problem" in Riggins' case was the identification. App. 210, ll. 21-23. Trial counsel recalled that there was a pre-trial hearing to address the identification. She testified:

I was pretty clear that I felt that the witness was not being as truthful as he could be which is why I kept trying to hammer home the point about the inconsistencies between what he wrote and what he said. I was hoping that -- I mean, clearly he was definite that he had seen Mr. Riggins and that he knew him, he knew his face in that short period of time, even though he admitted that he was frazzled, I think, was the word that I saw in the transcript. But he was very definite despite my attempts to impeach him that he saw what he saw and he knows -- that he knew what he saw.

App. 211, l. 22 – 212, l. 10. Though trial counsel pointed to Mitchell's admission that he was "frazzled," she failed to appreciate the fact that almost the entirety of her examination relevant to the identification was done only *in camera* and not in front of the jury. App. 219, l. 19 – 220, l. 18; App. 53, l. 14 – 54, l. 16. Thus, the jury was not aware that Mitchell originally claimed that the suspect's face was covered or that the suspect's nose was not mentioned in either of the officer's written reports. Instead, trial counsel's examination of Mitchell at trial focused almost exclusively on the alleged victim's ability to see whether the suspect had a weapon in his pants or shirt. App. 54, l. 17 – 59, l. 16; App. 62, l. 17 – 64, l. 4.

### **Discussion**

#### ***Deficiency of Trial Counsel***

The PCR Court erred in finding that trial counsel's conduct at the Biggers hearing was not deficient, that she thoroughly argued the suppression in a pre-trial hearing, and that the identification issue was properly preserved for direct appeal. Here, trial counsel was deficient in conducting only a *pro forma* suppression hearing, after which she failed to present any argument to the court. Trial counsel further failed to elicit testimony on many of the issues related to the

reliability of the identification before the jury. Those failures resulted in the identification issue being unpreserved for direct appeal.

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 that 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 the instant case, the PCR court found that “trial counsel thoroughly argued the suppression motion in a pre-trial hearing. App. 243 (Order of Dismissal, p. 7). On the contrary, a simple review of the trial transcripts reveals that trial counsel presented **no argument** at the Biggers hearing. See App. 5, l. 12 – 19, l. 9. The PCR court further found that trial counsel was not required to make a contemporaneous objection to the victim’s identification because his

testimony immediately followed the trial court's ruling on the suppression motion. App. 243 (Order of Dismissal, p. 7). That may have been sufficient had trial counsel already presented argument against the admission of the identification, but no such argument was presented in this case. Thus, the PCR court's reliance on State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 839-40 (2001), where trial counsel "argued to suppress" the evidence seized, is misplaced. The failure to present any argument left appellate counsel on direct appeal with no basis to argue that the trial court's ruling at the Biggers hearing was incorrect. Had it been raised, the appellate court would have likely cited to this state's precedent prohibiting appellate counsel from raising different arguments than those that were asserted at trial. Here, of course, there was no basis for suppression argued at trial.

#### ***Prejudice to Riggins***

The PCR court erred in finding that Riggins failed to show that he was prejudiced by the alleged deficiencies in trial counsel's representation because "the trial judge properly denied the suppression motion." App. 243 (Order of Dismissal, p. 7). Here, there was a substantial likelihood of misidentification warranting suppression of the identification. Further, assuming *arguendo* that admission of the identification was proper, trial counsel's failure to address the deficiencies in her cross-examination of the alleged victim before the jury prevented the jury for considering those factors in determining the weight to give the identification testimony. Riggins was further prejudiced because the jury was not properly instructed regarding the identification.

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). Thus, 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. Id. The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (citing Neil v. Biggers, 409 U.S. 188 (1972)). First, the court must determine whether the identification process was unduly suggestive. Next, it must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). Only if the procedure was suggestive need the court consider whether there was a substantial likelihood of irreparable misidentification. Id. at 287, 540 S.E.2d at 447–48.

There is no dispute that Riggins was handcuffed and sitting on the ground when officers brought the alleged victim to the area to conduct the identification. App. 53, ll. 14-25. The trial court correctly found that this show-up procedure was “by its very nature unduly suggestive.” See State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000) (reversing trial court’s ruling that the show-up procedure was not unduly suggestive and noting that “[s]ingle person show-ups are particularly disfavored in the law”). However, the trial court erred in finding that the identification was otherwise reliable.

In State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000), our Supreme Court held that there was a substantial likelihood of irreparable misidentification under the totality of the circumstances such that the identifications by a robbery victim’s neighbor were unreliable as a matter of law. In Moore, Stephanie Davis testified that she was dropped off at her apartment by her father at approximately 11:15 a.m. and saw two men leaving her neighbor’s apartment. 343 S.C. at 285, 540 S.E.2d at 446. When she asked the men what they were doing, they got startled and ran. Id. at 285, 540 S.E.2d at 447. She called police and reported the suspects as two African-

American males and described their clothing. Id. Davis saw one of them from the side profile and described him as taller, darker, and thinner. Id. He was wearing a white hat, white t-shirt and blue shorts. Id. She saw braided hair when the white hat fell off and described him as thinner. Id. She saw the other man only from the back and described him as wearing a white t-shirt, either shorts or pants, and a black hat. Id. She could not say whether he was stocky or thin, only that he was the shorter of the two. Id.

Davis later identified Moore and Wideman as the suspects at a show-up identification conducted approximately ninety minutes later, identifying them by their clothing. Id. She also recognized one of the men as a man who lived in apartments near her sister. Id. Davis admitted on cross-examination that she had not really seen either man's face at the time of the initial confrontation. Id. at 285-86, 540 S.E.2d at 447.

The Moore Court noted that "whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." Id. at 288, 540 S.E.2d at 448. "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." 343 S.C. at 288, 540 S.E.2d at 448. "[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." Id. In evaluating the totality of the circumstances to determine if an identification is admissible, the following factors are considered:

[T]he opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 289, 540 S.E.2d at 448-49. The Moore Court found that only the last factor, the amount of time between the crime and the confrontation, was "established with any degree of reliability."

Id. Davis saw the suspects for only a brief period, her attention was not as acute because she was

not the victim of a crime, her degree of accuracy was tenuous, and her identification was based on a recognition of the hat and clothing. Id. at 289-90, 540 S.E.2d at 449.

In the present case, the trial court noted that the show-up occurred shortly after the crime, near the scene, while the witness' memory was fresh, such that the suspect did not have time to alter his looks. He further found that the alleged victim had time to directly observe the suspect and converse with him during the crime. He noted that the description given of the suspect matched Riggins and that the alleged victim was "a hundred percent certain at the time of the confrontation." App. 18, l. 14 – 19, l. 8.

However, the trial court failed to recognize – and trial counsel failed to point out – the many problems with the identification. The alleged victim, Mitchell, testified that he recognized Riggins as the suspect due to his facial features – in actuality only his nose – and the clothing he was wearing. He also claimed to be "a hundred percent sure" that his identification five years prior and at trial were accurate. App. 12, l. 19 – 13, l. 7. Mitchell's purported basis for the identification and expressed degree of certainty are suspicious in light of his testimony that the alleged robbery lasted only three to five minutes and neither of the officers' reports mention of distinct nose. App. 6, ll. 16-21. The suspect's face was covered for at least a portion of that short time. App. 10, ll. 4-16. Mitchell also claimed that Riggins was motioning as if he had a weapon under his shirt, which he believed to be a gun. App. 10, ll. 10-13; App. 44, l. 25 – 45, l. 3; App. 46, l. 24 – 47, l. 13; App. 63, ll. 5-17. "[W]eapon focus,' when a weapon is visible during a crime, can affect a witness's ability to describe a perpetrator." United States v. Greene, 704 F.3d 298, 308 (2013). "Weapon focus can impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration." Id. (internal quotations omitted).

Further, the main identifier other than the dubious testimony that the suspect's nose was distinct was the suspect's clothing, supposedly an "I love NY" shirt. App. 15, ll. 6-13; App. 46, ll. 15-23; App. 240 (Alleged Victim's Written Statement). Officer Miller and Mitchell claimed that Riggins was wearing such a shirt inside out when he was detained and identified. Officer Mitchell stumbled over his description of the shirt, saying that "the writing had an I and then a big heart in red letters, and then I Love New York." App. 52, ll. 2-8; App. 84, ll. 21-25. Notably, the shirt was not taken into evidence and no picture was taken of the shirt. App. 88, ll. 6-21. Thus, based on the totality of the circumstances, the trial judge erred in finding that the suggestive identification was otherwise reliable.

Even if the identification testimony was properly admitted, trial counsel failed to ask many of the questions posed during the *in camera* Biggers hearing when Mitchell testified before the jury. See Relevant Facts, supra. Instead her examination before the jury focused on whether Mitchell believed that the suspect was armed. Compare App. 8, l. 17 – 15, l. 22, with App. 53, l. 13 – 59, l. 16; App. 62, l. 16 – 64, l. 4. Trial counsel's error was significant because even where the trial court ruled the identification admissible, it remained up to the jury to decide whether the State proved the identification beyond a reasonable doubt. See Statev. Motes, 264 S.C. 317, 326, 215 S.E.2d 190, 194 (1975) ("The trial, and the instructions given, adequately focused the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt"); State v. Gibbs, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013) (affirming the PCR court's findings "[g]iven the clarity of the jury charge requiring the State to provide identity beyond a reasonable doubt").

Though trial counsel made a nominal effort to argue against the reliability of the identification in her closing argument, she failed to elicit testimony to provide an evidentiary

basis for much of that argument. App. 119, l. 13 – 120, l. 20; see State v. Brown, 333 S.C. 185, 190-91, 508 S.E.2d 38, 41 (Ct. App. 1998) (“[O]nce reliability is established, it’s up to the jury to determine the strength of . . . testimony on the identification issue.” (internal quotations omitted)). Exacerbating her already deficient conduct, trial counsel further failed to request an identification instruction or to object when none was given. App. 97, l. 16 – 102, l. 12; App. 121, l. 21 – 131, l. 22.

The following “standard identification charge” was given by the trial court in State v.

Green:

An issue in this case is the identification of the defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant.

Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness.

You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past.

Once again, I instruct you, the burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime.

If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty.

412 S.C. 65, 74, 770 S.E.2d 424 (Ct. App. 2015). The Green Court found the above instruction was “as an accurate statement of the law in South Carolina.” Id. at 76, 770 S.E.2d at 430. In State v. Simmons, our Supreme Court “admonish[ed] the trial bench that in single witness

identification cases the court should instruct the jury that the burden of proving the identity of the defendant rests with the state.” 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992). Had trial counsel properly addressed the reliability of the identification at trial, Riggins would have been entitled to an identification charge.<sup>5</sup> Trial counsel’s inadequate examination of the witnesses before the jury may well have resulted in the trial court’s denial of a request for an identification charge, had such a request been made, as our Supreme Court has found no error in the failure to give such a charge where identification is not an “integral issue” at trial. See Speaks v. State, 377 S.C. 396, 660 S.E.2d 512 (2008).

Therefore, trial counsel’s representation was deficient because she failed to present any argument at the Biggers hearing, failed to elicit testimony regarding the reliability of the identification at trial, and thus failed to properly preserve the identification issue for direct appeal. Her deficient conduct prejudiced Riggins in that the motion to suppress was denied, there was little evidence before the jury regarding the reliability of the identification, and no identification instruction was given to the jury. As a result, Riggins was deprived of the effective assistance of counsel and is accordingly entitled to a new trial. The PCR court’s findings and ruling to the contrary were error.

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<sup>5</sup> Trial counsel’s comments regarding reliability in her closing argument were not an adequate substitute for a jury charge on identification. See State v. Woomer, 276 S.C. 258, 267, 277 S.E.2d 696, 701 (1981), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (“Even assuming, arguendo, that the statements of law by counsel during the course of a trial were legally correct, the adversarial nature of our trial system mandates that the jury have a complete statement of the law from the trial judge. Arguments of counsel simply cannot substitute for instructions by the court.”); Lee v. Clarke, 781 F.3d 114 (4<sup>th</sup> Cir. 2015) (“A court issued jury instruction carries the command and force of law in a way that a statement by counsel cannot, and thus prejudice that arises from a flawed or omitted jury instruction is not cured by mere argument.”); see App. 118, l. 21 – 120, l. 20.

## II.

The PCR court erred in finding that there was overwhelming evidence of Petitioner's guilt such that any deficiency in trial counsel's representation was harmless where the only evidence against Petitioner was the unreliable, show-up identification of the alleged victim, which trial counsel failed to properly challenge and preserve.

The PCR court found that Riggins "has not demonstrated he was prejudiced by trial counsel's performance in any regard because there is overwhelming evidence of Applicant's guilt." The court wrote:

The victim testified he observed Applicant in the well-lit hotel lobby on 4th Avenue when Applicant demanded money making a representation of a weapon. He described Applicant as wearing an "I love NY" tee shirt. Fifteen minutes later, Police apprehended Applicant on 7th Avenue wearing an "I love NY" tee shirt turned inside-out. The victim positively identified Applicant as the man who robbed him. This evidence overwhelmingly implicates Applicant in this crime. Accordingly, the Court finds Applicant cannot demonstrate any of the above alleged errors of trial counsel contributed to his conviction. See Brown v. State, 383 S.C. 506, 518, 680 S.E.2d 909, 916 (2009) (no prejudice where there exists overwhelming evidence of guilt); Franklin v. Catoe, 346 S.C. 563, 574, 552 S.E.2d 718, 724 (2001) (same).

App. 246 (Order of Dismissal, p. 10).

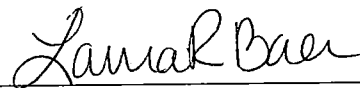
"Before an error can be held harmless, a court must find the error harmless beyond a reasonable doubt. That requires a court to determine whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." State v. Henson, 407 S.C. 154, 166-67, 754 S.E.2d 508, 515 (2014) (internal citations and quotations omitted). "Whether the improper introduction of [the] evidence is harmless requires the reviewing court to **look at the other evidence admitted at trial** to determine whether the defendant's guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached." State v. Brooks, 341 S.C. 57, 62-63, 533 S.E.2d 325, 328 (2000) (quoting State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) (emphasis added)).

The identification is the exact evidence that Riggins complains was improperly admitted due to trial counsel's ineffective assistance. See discussion supra, Issue I. Rather than looking at the evidence other than that complained of as improper, the PCR court primarily considered the alleged victim's identification. The "I love NY" shirt was the only other piece of evidence that allegedly connected Riggins to the crime, and even that required the jury to believe both the suspect and Riggins were wearing such a shirt despite the fact that it was neither collected nor photographed. App. 88, ll. 6-21. Moreover, there was no surveillance footage, no fingerprints, no DNA evidence, and no evidence that Riggins had the stolen money on his person. Thus, the PCR court failed to conduct a proper harmless error analysis. Had such an analysis been properly conducted, excluding the identification evidence, it would have been apparent that there was not overwhelming evidence implicating Riggins. See Arnold v. State/Plath v. State, 309 S.C. 157, 166, 420 S.E.2d 834, 839 (1992) ("To say that an error did not contribute to the verdict is, rather, to find that error unimportant **in relation to everything else** the jury considered on the issue in question, as revealed in the record." (emphasis added)).

CONCLUSION

Based on the foregoing, Petitioner Anthony Riggins respectfully requests that this Court grant a writ of certiorari and allow further briefing on these issues.

Respectfully submitted,



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Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of February, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Michael G. Nettles, Circuit Court Judge

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ANTHONY M. RIGGINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

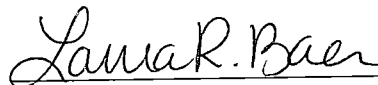
RESPONDENT

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CERTIFICATE OF SERVICE

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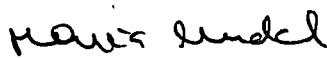
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Anthony M. Riggins, #305169, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 3rd day of February, 2016.



Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day  
of February, 2016.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.