

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

APPEAL FROM COUNTY OF GREENVILLE
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No.: 2015-001087
Lower Court Case No. 2011-CP-23-3652

LaChrisha Shentayle Miller,.....Respondent,

vs.

The State of South Carolina,Petitioner.

**RESPONDENT/PETITIONER'S CONDITIONAL CROSS-PETITION FOR
WRIT OF CERTIORARI**

Kenneth Gibson

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Attorney for Respondent/Petitioner

PRELIMINARY STATEMENT

Respondent/Petitioner respectfully files this conditional cross-petition for a Writ of Certiorari to review the Order of the Honorable D. Garrison Hill granting post-conviction relief and ordering a new trial. The Court should deny Petitioner/Respondent's Petition for Writ of Certiorari in this case and, if the Court does so, it need not consider this Cross-Petition. However, if the Court does grant Petitioner/Respondent's Petition for Certiorari, the Court should also grant this cross-petition so the Court can fully consider all of the relevant issues regarding whether Respondent/Petitioner received effective assistance of counsel.

QUESTION PRESENTED

Whether the PCR Judge erred in finding that Respondent/Petitioner had failed to properly proffer the proposed expert eyewitness testimony and thus the PCR Court could not grant post-conviction relief on Respondent/Petitioner's claim that Trial Counsel's failure to call an eyewitness identification expert constituted ineffective assistance of counsel?

STATEMENT OF THE CASE

In 2008 Respondent/Petitioner was indicted for 2 counts of attempting to obtain controlled substance by fraud (2008-GS-23-0022, counts 1 and 2) arising from an instance occurring in September 2007 at a Wal-Mart Pharmacy. (App.pp.353-56).

At trial Respondent/Petitioner's sole defense was that the crimes had been committed by a third-party and that an eyewitness identification of her was faulty and

incorrect. Trial Counsel, however, failed to call an expert on eyewitness identification to explain to the jury the various problems and fallibility of the eyewitness identifications.

Respondent/Petitioner was convicted on both charges, and after an appeal this Application for PCR followed.

At the PCR level, Respondent/Petitioner could not afford to hire an expert on eyewitness identification to testify before the Court. (App.pp.261-62; 315-16). In the alternative, Counsel for Respondent/Petitioner had Trial Counsel confirm the type of testimony that an expert on eyewitness identification could provide. (App.pp. 213-14). Counsel for Respondent/Petitioner also proffered various documents and cases to the Court that set forth what the substance of such testimony would be. (App.pp.276-303).

The PCR Court ultimately granted post-conviction relief to Respondent-Petitioner on other grounds, but denied it on Respondent/Petitioner's claim that Trial Counsel was ineffective due to his failure to call an expert witness on eyewitness identification. (App.pp.342-350). In denying the relief on those grounds the PCR Court recognized that given the claims involved that the failure to call an expert on eyewitness identification could constitute ineffective assistance of counsel. (App.p.349). But the PCR Court denied the relief due to the failure to call an actual expert on eyewitness identification before the PCR Court.

ARGUMENT

The PCR Court's basis for denying Respondent/Petitioner's request for post-conviction relief on the issue of failure to secure expert testimony is that Respondent/Petitioner failed to properly proffer the potential testimony before the PCR Court. This ruling however mistakenly presumes that the only way that a party may

proffer potential testimony is by presenting an expert to testify. In that presumption, the PCR Court is wrong.

In *Bruce R. Miller v. State*, 379 S.C. 108 (2008), this Court implicitly understood that. In *Bruce R. Miller*, just like here, PCR counsel contended that Trial Counsel was ineffective for failing to present expert testimony regarding eyewitness identification. However, PCR Counsel, just like here, failed to present any expert on eyewitness identification at the PCR hearing. Nevertheless the majority of this Court found that there was sufficient evidence in the record for trial counsel to be ineffective for failing to retain and call such a witness at trial even though an expert witness was not called to testify at the PCR hearing.

Counsel for Respondent/Petitioner believes that this Court, in ruling the way that it did in *Bruce R. Miller*, understood that all expert testimony is not the same. There are experts that provide analysis and opinion that are specific to the issues or evidence presented in individual cases. An example of this type of expert is one that conducts DNA testing and comparison. And then there are other types of experts that don't render opinions or provide specific analysis in a case but merely provide jury members with information that has been deemed by the Court to be helpful to those members in their efforts to come to a just conclusion to the case. An example of this type of expert is an expert in eyewitness identification.

In situations involving the first type of expert it makes absolute sense that it would be necessary for the expert to actually do the analysis and testify to his opinion or findings before the PCR Court. For example, if a Defendant were to allege that his lawyer was ineffective because he failed to have a specific sample of DNA tested, of

course it would be necessary for the Defendant to actually have an expert test the sample and testify before the Court so the Court would be able to determine whether Defendant was indeed prejudiced or not by Counsel's alleged failure.

But in situations involving the second type of expert, there really is no need whatsoever for a Defendant to actually have the expert testify before the Court. If a) the expert is one that would be merely providing information and not specific analysis and b) the testimony is in a field of expertise that the Courts have routinely admitted (such as experts in eyewitness identification) then there should be nothing speculative about the potential testimony.

However, even if *Bruce R Miller* had not been decided prior to the hearing of this case, PCR counsel submits that the necessary standard would have nevertheless been met. Here, while PCR Counsel did not present an expert in eyewitness identification before the PCR Court, Counsel did present more than sufficient information to the court to constitute a proffer of what the potential testimony would be. PCR Counsel had Trial Counsel testify about and confirm the nature and substance of what potential expert testimony regarding eyewitness identification would be. PCR Counsel also provided documents to the Court outlining the various problems with eyewitness identification in an effort to proffer to the PCR Court just what type of testimony would be expected from a potential witness. See *Give Jurors Facts on Eyewitness Testimony*, The Sun News; July 27, 2012 (App.276-78)); and the Expanded Jury Instructions on Eyewitness Identification as proposed by the NJ Supreme Court (App.pp.279-303).

Moreover, these matters are not new to the Courts in this State. This Court has addressed on a number of occasions the admissibility of experts in eyewitness

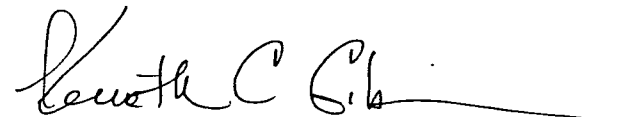
identification and the types of information that such experts provide. See *State v. Whaley*, 406 S.E.2d 369, 305 S.C. 138 (1991); *State v. Frazier*, 592 S.E.2d 621, 357 S.E.2d 621, 357 S.C. 161 (2004).

Accordingly, given the circumstances and the information presented to the PCR Court, Respondent/Petitioner submits that the potential testimony of an expert in eyewitness identification was sufficiently proffered to eliminate any material speculation. Accordingly, the PCR Court should have granted Respondent/Petitioner's application for post-conviction relief on this ground as well.

CONCLUSION

For the reasons stated above, to the extent that this Court grants the Petitioner/Respondent's Petition for Writ of Certiorari, it should also grant this, Respondent/Petitioner's Conditional Cross-Petition For Writ Of Certiorari, as well.

Date: April 20, 2016

A handwritten signature in cursive script, appearing to read "Kenneth C. Gibson", written in black ink on a white background.

Kenneth C. Gibson, Esq.

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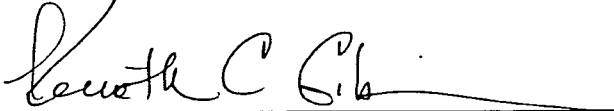
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PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve process and that on this day, he served copies of the attached **RESPONDENT/PETITIONER'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI** upon The State of South Carolina by mailing a true and correct copy to:

Karen Ratigan
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211.

Date: April 20, 2016


Kenneth C. Gibson, Esq.