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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2015-001635

ANTHONY M. RIGGINS, ... Petitioner,

v.

STATE OF SOUTH CAROLINA, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

INDEX

ISSUES PRESENTED

I. The PCR court was correct in finding trial counsel provided effective assistance of counsel where trial counsel contested the identification testimony through cross-examination and where the issue was preserved for appeal because the identification witness testified directly after the Court's ruling in the Neil v. Biggers hearing.

II. The PCR court was correct in finding overwhelming evidence of Petitioner's guilt where the evidence against Petitioner included testimony that Petitioner was found running near the location of the crime in the same clothing the victim described him to be wearing ten to fifteen to twenty minutes after the robbery was reported, and the victim identified Petitioner with one hundred percent certainty while observing him in a well-lit parking lot approximately fifteen to twenty minutes after spending three minutes face-to-face with Petitioner.

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted for armed robbery on July 10, 2008. (R. pp. 249-50.) Represented by Kia T. Wilson he proceeded to trial before the Honorable John C. Hayes and a jury on June 20, 2013 (R. p. 1.). After a trial, which included testimony by the victim, Cody Mitchell (R. pp. 19-21, 40-62); the investigating officer, Henry Bresadola (R. pp. 64-66); the crime scene investigation and analysis expert, Joe Graham (R. pp. 68-80); and the apprehending officer, Randy Scott Miller, Jr. (R. pp. 80-89); a jury of Petitioner's peers found him guilty as indicted (R. p. 135). Following a sentencing hearing where the trial court noted this was Petitioner's fourth robbery conviction in eleven years, Judge Hayes imposed a sentence of thirty years. (R. p. 145, l. 17- p.146, l. 3.)

Petitioner appealed his conviction; however, after his appellate counsel submitted an Anders brief, Petitioner voluntarily withdrew his appeal and on April 2, 2014, this Court issued an order dismissing the appeal. (Supp. R. pp. 1-3.) On April 8, 2014, Petitioner filed his application for post-conviction relief (PCR). (R. p. 148.) Petitioner was appointed Tristan Shaffer as counsel. (R. p. 175.) Respondent filed a Return (R. pp. 176-184), and also filed a Rule 11 Letter with the Clerk in response to Petitioner's *pro se* filings claiming to amend his PCR application (R. p. 175). A PCR hearing was held on May 12, 2015, before the Honorable Michael G. Nettles. (R. p. 183.) At the hearing, Applicant testified (R. pp. 7-25), Applicant's father testified (R. pp. 25-27), and Applicant's trial counsel testified (R. pp. 27-42). Applicant made four allegations: (1) Neil v. Biggers[1] issues[2]; (2) failing to move to strike a juror who was a

[1] Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

[2] Allegations related to the Neil v. Biggers issue included trial counsel should have more effectively impeached the victim on his identification of Petitioner, trial counsel should have admitted the victim's statements and police reports referencing the victim's statements as evidence, and trial counsel should have preserved the issue

law enforcement officer; (3) failing to call Petitioner's father as a witness; and (4) failing to move for directed verdict on the basis of lack of evidence of Applicant's possession of a weapon during the commission of the robbery. (R. pp. 185, l.18- 186, l.1 and pp. 188, l. 23- 189, l. 1.)

After observing the witnesses, hearing argument by Petitioner and Respondent's counsel, and reviewing the record, the PCR court issued an order on June 26, 2015, hoding, in part, that counsel had not been ineffective in her cross-examination of the victim because she "conducted an extensive and thorough cross examination of the victim at the pre-trial hearing[,] [s]he cross-examined the victim on the circumstances of his identification, the inconsistencies of his written statement, and the lack of details in his report to police" (R. p. 242); a contemporaneous objection was not necessary where victim was the first witness after the trial court's ruling on the Neil v. Biggers hearing "because no evidence was taken between the trial court's ruling on the admissibility of the identification and the victim's testimony" (R. p. 243); and Petitioner had failed to establish prejudice because there was overwhelming evidence of Petitioner's guilt (R. p. 246).

Petitioner filed a petition for writ of certiorari and this return follows.

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on appeal by objecting to the statement before the jury. (R. pp. 185, l. 18- 186, l. 1.) Notably, there was never any allegation that an identification charge should have been made.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court should reverse the post-conviction relief court if there is no probative evidence to support the lower court's ruling or if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), *cert. denied*, 552 U.S. 944 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. The PCR court was correct in finding trial counsel provided effective assistance of counsel where trial counsel contested the identification testimony through cross-examination and where the issue was preserved for appeal because the identification witness testified directly after the trial court's ruling in the Neil v. Biggers hearing.

The PCR Court found trial counsel conducted "an extensive and thorough cross examination" of the victim's identification of Petitioner (R. 242) and held that "[t]rial counsel did not need to make a contemporaneous objection to the victim's identification because no evidence was taken between the trial court's ruling on the admissibility of the identification and the victim's testimony" (R. 242). Additionally, because the trial court properly denied the suppression motion, Applicant also failed to establish any prejudice by trial counsel's alleged ineffectiveness. As such, the PCR Court's order denying Petitioner relief was correct and should be affirmed.[3]

[3] Petitioner raises for the first time an allegation that trial counsel was ineffective for not requesting a jury instruction on identification. This issue was not raised to nor ruled upon by the PCR court. Therefore, this issue is not preserved for this Court's review. It is well settled that an issue that has not been presented to or passed upon by the trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); State v. Sheppard, 391 S.C. 415, 423, 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting issues and arguments on appeal). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011).

A. Relevant Facts

On May 7, 2008, a man described as a black male, wearing jeans and a white t-shirt with the phrase "I love NY" printed on the front, rang the buzzer to the front office for the Sea Palms Motel. (R. p. 6, ll. 7-16; p. 44, ll. 9-10; p. 166.) Employee Chase Mitchell walked to the front office and found the man, sweating and pacing, covering his face with a shirt, and "muffling [sic]." (R. p. 44, ll. 11-13.) Chase Mitchell asked the man to repeat himself; at which time, the man dropped the covering from his face, made a lunging motion, and said "how about you go ahead and empty out the drawer." (R. pp. 44, l. 11- 45, l. 3.) Mitchell, seeing movement near the man's pants or under his shirt, believed the man to be holding what Mitchell believed to be a gun. (R. pp. 44, l. 11- 45, l. 3.) Mitchell gave the man $40.00, and the man turned to leave. (R. p. 47, ll. 4-9.) As the man neared the door to exit, he suddenly turned towards Mitchell and demanded Mitchell lay on the floor. (R. pp. 47, l. 21- 48, l. 1.) Mitchell, faced with a man shorter than him but holding what he thought to be a gun, followed instructions, and believing the man "was going to shoot [him] because [sic] just with the actions that he was doing," "basically [got] on [his] knees pleading with him." (R. p. 48, ll. 1-21.) The suspect left the front office and ran away from the ocean towards Kings Highway along 7th Avenue. (R. p. 48, ll. 21-25; p. 49, ll. 1-3.) The robbery lasted approximately three minutes. (R. p. 46, ll. 1-3.)

Mitchell reported the robbery to police and described the suspect as a male with very black and oily skin, 5'5" tall, husky build, shaved bald head, pointed flat wide nose, wearing black jeans and a white t-shirt with "I love NY" printed across the front. (R. p. 166.) Having the victim's description of the assailant, about one mile away from the crime scene, Officer Randy Scott Miller, Jr. observed a suspect matching the description running across the road away from the motel and the ocean. Officer Miller detained the man until the victim was driven over and

asked to identify him. (R. pp. 81, l. 21 – 82, l. 17.) The victim was brought over to Officer Miller's location, which was on Kings Highway, and observed the man sitting on the ground in a "very well-lit" parking lot with his hands cuffed behind his back, wearing jeans and an inside-out white t-shirt with the "I love NY" logo still visible through the shirt. (R. pp. 51-53.) The victim identified the man, Petitioner, as the robber. (R. p. 52, ll. 11-18.) Both in pre-trial and before the jury, the victim identified Petitioner as the man who robbed him and whom he identified in that "well-lit parking lot" with "one hundred percent certainty." (R. p. 18, ll. 6-9; p. 52, ll. 11-16.)

During cross-examination in the pre-trial Neil v. Biggers hearing, trial counsel challenged the victim on the lighting conditions. (R. p. 9.) She also challenged the victim on his statements to law enforcement, pointing out that the statements said Petitioner's face was covered during the robbery. (R. pp. 10-14.) After considering the direct and cross-examination of the State and the trial attorney, the trial court ruled that while a one-person show up identification is by its very nature unduly suggestive, it still found by clear and convincing evidence that the identification was reliable. (R. p. 18, ll. 13-18.) The trial court outlined its reasoning in support of its ruling as follows: the show-up occurred shortly after the crime, it was also very near to the crime scene, Petitioner did not have time to alter his looks, the witness had full opportunity to view the criminal at the time of the crime, the victim's attention was direct, the victim conversed with Petitioner during the crime, the description given by the victim and the actual description of the person the victim identified were the same, the victim was one hundred percent certain of his identification, the clothing on Petitioner was the same as what the victim had identified, and the length of time between the crime and the confrontation was "very, very short." (R. pp. 18, l. 19-19, l. 9.)

The first witness called by the State after the Neil v. Biggers hearing and opening statements was the victim. (R. p. 43.) On direct, the victim testified that although Petitioner's face was covered when he first encountered him in the front office, Petitioner lowered the covering and the victim was able to see Petitioner's face. (R. p. 46, ll. 8-14.) The victim explained that Petitioner was about one foot away from him, that they interacted for about three minutes, and that the lighting in the office was very bright. (R. pp. 44-46.) The victim testified that it was about fifteen to twenty minutes before he identified Petitioner, that the parking lot in which he identified Petitioner was well-lit, that he was about three feet away from Petitioner when he identified him, that Petitioner was wearing the same clothes except his shirt was inside out, and that the victim was one hundred percent certain the man he identified was the same person who had robbed him fifteen to twenty minutes prior to the identification. (R. pp. 50-52.)

On cross-examination, trial counsel challenged the victim with his inconsistent statements as to where Petitioner's hands were during the robbery. (R. pp. 57-59.) On recross-examination, trial counsel emphasized how frazzled the victim was during the crime and secured the victim's confirmation that he was not able to see below Petitioner's waist once Petitioner leaned towards him and thus could not see if he had a weapon. (R. pp. 62, l. 17-64, l. 2.) And on cross-examination of Officer Miller, trial counsel identified and highlighted the discrepancy of the distance between the victim and Petitioner during the identification; Officer Miller admitted the distance was closer to ten feet than the three feet the victim had testified to. (R. p. 87, ll. 21-25.) In closing, trial counsel argued to the jury that there were no photos of the clothing Petitioner was wearing the night of the crime, no fingerprints that matched Petitioner, no weapons found on Petitioner when he was found only fifteen minutes later. Trial counsel argued the victim was confused and noted his statements to police differed, and emphasized no physical

evidence corroborated his statements. (R. pp. 117, l. 9 – 120, l. 2.). Before the trial court instructed the jury, trial counsel fought for and received a jury charge on petit larceny, which was a charge she wanted in case the jury believed this was a theft without a weapon. (R. pp. 97, l. 18-102, l. 9; p. 215, ll. 1-5.)

B. Trial counsel was not ineffective and therefore this petition must fail.

Trial counsel was not ineffective for failing to demand the opportunity to make arguments to the trial court where she effectively argued through cross-examination during the Neil v. Biggers hearing and where the Court clearly outlined both his ruling and the reasoning for his ruling on the record. See Simpson v. Moore, 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case." (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998))). Furthermore, because the victim was the very first witness in the trial and no further evidence was admitted between the trial court's ruling on the Neil v. Biggers motion and the identification coming in, it was not ineffective assistance for trial counsel not to make a contemporaneous objection during the victim's testimony before the jury. State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001). Trial counsel challenged the victim's account during cross-examination at pre-trial, in front of the jury, during the directed verdict motion, and in her closing argument. Trial counsel, therefore, did not provide ineffective assistance of counsel in this case. Furthermore, even if this Court were to find trial counsel's performance was deficient, the PCR court was still correct because Petitioner cannot establish any prejudice from trial counsel's alleged ineffectiveness.

C. Regardless, Petitioner cannot establish prejudice because to do so he must prove the show-up identification was unduly suggestive and unreliable under a totality of the circumstances analysis.

To establish prejudice on a claim that counsel was ineffective regarding the admittance of evidence, Petitioner must show that had his trial attorney challenged the evidence, there is a reasonable probability that he would have prevailed, and the evidence in question would have been excluded. Rollison v. State, 346 S.C. 506, 509-10, 552 S.E.2d 290, 292 (2001). Here, had trial counsel made additional argument in support of her effective cross-examination at the Neil v. Biggers hearing, the testimony would not have been excluded because the lineup was not unduly suggestive or unreliable. Even preserving this issue for appellate review, Petitioner's convictions would have been affirmed on appeal. Therefore, there is no reasonable probability that the result of the proceeding would have been different. Cherry, supra.

Single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). However, identifications obtained from show-ups are not automatically excluded and may be admissible if found to be sufficiently reliable. Id. In State v. Brown, the Court of Appeals thoroughly analyzed the show-up identification procedure:

> [A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the subject has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching. The closer in time and place to the scene of the crime, the less objectionable is a showup. A show-up may be proper even though the police refer to a suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Although show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime.

> Single person show-ups are disfavored because they are suggestive by their nature. However, an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. Suggestiveness alone does not mandate the exclusion of evidence. Reliability is the linchpin in determining the admissibility of identification testimony.

356 S.C. 496, 503-504, 589 S.E.2d 781, 785 (Ct. App. 2003) (internal citations omitted).

In determining the admissibility of evidence of an out-of-court identification, a court must conduct a two-prong inquiry into the matter. See Neil v. Biggers, 409 U.S. 188, 199-200 (1972) (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). That inquiry involves first ascertaining whether the identification process was unduly suggestive and then determining whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. State v. Govan, 372 S.C. 552, 558, 643 S.E.2d 92, 95 (Ct. App. 2007); see State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) ("Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed."). A trial judge should only exclude the identification evidence if there is "'a **very substantial** likelihood of irreparable misidentification.'" Perry v. New Hampshire, ___ U.S. ___, ___, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted). Significantly, the exclusion of evidence is a "drastic sanction" and should be "limited to identification testimony which is manifestly suspect." Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983).

Amongst the various identification procedures, single person show-ups are disfavored because they are inherently suggestive. Blassingame, 338 S.C. at 251, 525 S.E.2d at 541.

However, "[m]ost eyewitness identifications involve some element of suggestion[,]" and suggestiveness alone does not mandate the exclusion of identification evidence. Perry, 132 S. Ct. at 727; see State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) ("Suggestiveness alone does not mandate the exclusion of evidence."). Accordingly, there is no bright line rule concerning show-ups, and the admissibility of an identification made during a show-up is controlled by the particular facts and circumstances of each individual case. Gibbs v. State, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013); see Perry, 132 S. Ct. at 720 ("An identification infected by improper police influence, our case law holds, is not automatically excluded.").

If a show-up is conducted, the show-up may be proper where it occurs: (1) shortly after the alleged crime; (2) near the scene of the crime; (3) while the witness' memory is still fresh; (4) when the suspect has not had time to alter his looks or dispose of evidence; and (5) when it may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching. Brown, 356 S.C. at 503-504, 589 S.E.2d at 785; see also Willis v. Garrison, 624 F.2d 491, 493-494 (4th Cir. 1980) (acknowledging show-ups are inherently suggestive but recognizing prompt on-the-scene show-up identifications can promote fairness by enhancing the reliability of the identifications and permitting the expeditious release of innocent suspects).

However, even assuming the particular show-up procedure used in a case is found to be unduly suggestive, the witness' identification may still be admissible if the State can prove by clear and convincing evidence that the identification is reliable notwithstanding the suggestiveness of the show-up. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. "Reliability is the linchpin in determining the admissibility of identification testimony." Brown, 356 S.C. at 504, 589 S.E.2d at 785. To determine whether the identification is reliable, a court must look to: (1)

the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Govan, 372 S.C. at 559, 643 S.E.2d at 96; see also State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984) ("The reliability of an identification is determined by the facts."). "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." Perry, 132 S. Ct. at 720.

D. Like Govan and Mansfield, the show-up identification in this case was reliable under the totality of the circumstances such that Petitioner has failed to establish any prejudice.

In State v. Mansfield, 343 S.C. 66, 69-70, 538 S.E.2d 257, 259 (Ct. App. 2000), this Court considered whether identification evidence obtained from a show-up identification procedure conducted at a police station was properly admitted during trial. In that case, a neighbor witnessed a man later identified as Mansfield attempting to break into a home in his neighborhood in the middle of the afternoon. Id. During the attempted break-in, the neighbor looked right at Mansfield's face and attempted to speak with him before Mansfield quickly exited the area. Id. at 70, 538 S.E.2d at 259. Thereafter, the neighbor contacted the authorities and correctly described Mansfield's height, race, skin tone, and shirt but incorrectly indicated that Mansfield was wearing white shorts and tennis shoes and had his hair in plaits. Id. A short time later, Mansfield was apprehended while wearing grey sweat pants pulled up to his knees and boots and with his hair in an afro. Id. at 70-71, 538 S.E.2d at 259. Following his apprehension, Mansfield was transported to a police station, and the neighbor identified him as

the attempted burglar. Id. at 71, 538 S.E.2d at 259. Subsequently, Mansfield sought the exclusion of the neighbor's identification of him as the perpetrator of the crime, the motion was denied, and Mansfield appealed. Id. at 71-72, 538 S.E.2d at 259-260. On appeal, this Court affirmed Mansfield's conviction after finding the neighbor's identification of Mansfield to be reliable under totality of the circumstances. Id. at 79-80, 538 S.E.2d at 263-264. In reaching that conclusion, this Court relied upon the following circumstances supporting the reliability of the identification: (1) the neighbor's attention was heightened; (2) the neighbor had a good opportunity to view the attempted burglar in good lighting; (3) the neighbor expressed certainty in his identification of Mansfield; (4) the neighbor's description of Mansfield was generally consistent even though there were slight discrepancies in the description of Mansfield's hair and clothing; and (5) the show-up was conducted less than an hour after the crime. Id.

Likewise, in State v. Govan, 372 S.C. at 555, 643 S.E.2d at 93, this Court again considered the admissibility of identification evidence obtained through the use of a show-up identification procedure. In that case, law enforcement officers responded to the scene of an armed robbery, and one of the victims described the suspect to the officers as a black male wearing a black jacket and a black hat or rag. Id. at 555, 643 S.E.2d at 94. Roughly forty-five minutes after the robbery, Govan, who fit the description of the armed robbery suspect, was apprehended after abandoning evidence and attempting to flee from the police. Id. at 556, 643 S.E.2d at 94. Following Govan's arrest, the victim was transported to Govan's location and identified him as the perpetrator of the robbery. Id. Subsequently, during trial, Govan moved to exclude any identification evidence, the trial judge denied his motion, and Govan appealed. Id. at 558, 643 S.E.2d at 95. On appeal, this Court initially found the victim's out-of-court identification of Govan was not unduly suggestive in light of the fact that it occurred near the

scene of the crime shortly after the crime was committed. Id. at 558-559, 643 S.E.2d at 95. Thereafter, this Court found the identification was reliable even if the show-up identification procedure was unduly suggestive because the victim viewed Govan in a well-lit building from close proximity during the robbery, the victim had heightened attention due to the circumstances of the crime, the show-up occurred shortly after the crime, and the victim expressed certainty regarding his identification. Id. at 559-560, 643 S.E.2d at 96. For those reasons, this Court found the show-up was not unduly suggestive and was reliable under the totality of the circumstances and affirmed the trial judge's decision to admit the identification evidence. Id. at 560, 643 S.E.2d at 96.

In the present case, the testimony from the victim would not have been excluded had trial counsel objected during the testimony before the jury or had counsel offered additional argument in addition to her cross-examination. Applying the factors outlined in Govan, the victim's identification of Petitioner during the show-up procedure was reliable. The victim had a good opportunity to view the suspect during the crime as he was within three feet of the suspect for approximately three minutes. The victim's attention was certainly elevated by the stress of the situation and the perceived presence of a firearm. Furthermore, the victim's description of the suspect's clothing was extremely accurate and directly matched the clothing Petitioner was discovered in within fifteen to twenty minutes of the incident less than a mile from the scene of the crime. Also, the victim's physical description of the suspect matched Petitioner's physical characteristics and appearance. Additionally, the victim was entirely certain regarding his identification of Petitioner, and the show-up procedure occurred within fifteen to twenty minutes of the robbery. Based on the circumstances of the procedures employed in this case, the victim's

out-of-court identification was clearly reliable and admissible. Petitioner cannot establish prejudice from trial counsel's purported deficiency.

Petitioner argues this case is similar to State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000) (PWC, pp. 13-15); however, the facts of that case are easily distinguishable. Moore involved a witness who was not the victim of the crime, who could not describe even the build of one of the assailants, and who admitted to never seeing the faces of either of the assailants she identified in a show-up identification ninety minutes after observing them leaving the scene. Here, the person who identified Petitioner was the victim of the crime. This victim stood directly before Petitioner for approximately three minutes and this victim conversed with Petitioner, at one point getting "on [his] knees pleading with" Petitioner. The victim not only described Petitioner's clothing, he also described Petitioner's color, clothing, hair style, nose shape, height, and build. And fifteen to twenty minutes after having pleaded with Petitioner, the victim was able to observe and confirm that Petitioner was the same man who robbed him minutes before. This case differs significantly from Moore. Petitioner has failed to establish any prejudice.

Petitioner also argues that "weapon focus" impaired the victim's ability to make a reliable identification, noting that weapon focus is "when a weapon is visible during a crime, [it] can affect a witness's ability to describe a perpetrator." (PWC, p. 15 (quoting United States v. Greene, 704 F.3d 298, 308 (2013).) The victim in this case did believe Petitioner had a weapon during the robbery based on Petitioner's actions; however, the victim never claimed a weapon was visible during the crime and thus no visible weapon could have affected---and, in fact, did not affect---the victim's ability to describe the perpetrator.

Petitioner has failed to establish ineffective assistance of counsel or prejudice. As such, we respectfully request this Court deny this Petition for Writ of Certiorari.

II. **The PCR court was correct in finding overwhelming evidence of Petitioner's guilt where the evidence against Petitioner included testimony that Petitioner was found running near the location of the crime in the same clothing the victim described him to be wearing fifteen to twenty minutes after the robbery was reported, and the victim identified Petitioner with one hundred percent certainty while observing him in a well-lit parking lot approximately fifteen to twenty minutes after spending three minutes face-to-face with Petitioner.**

Additionally, Petitioner cannot establish any resulting prejudice from trial counsel's purported error because there is overwhelming evidence of his guilt. The victim of the robbery observed the suspect for three minutes while standing within three feet of the suspect. Immediately after the robbery, the victim described the suspect as a male with very black and oily skin, about 5'5", with a husky build, who had a pointy flat nose, and who was wearing black jeans a white "I love NY" t-shirt. About fifteen to twenty minutes after the victim reported the robbery, Petitioner was found running within a mile from the victim in the same direction the victim had seen Petitioner running from the motel. When stopped by law enforcement, Petitioner was sweating and matched the description of the suspect's build and was wearing jeans and an inside-out white t-shirt with the "I love NY" logo still visible through his shirt. The victim observed Petitioner in a well-lit parking lot only fifteen to twenty minutes after being threatened by Petitioner, and, as testified to by the victim at trial, the victim was one hundred percent certain Petitioner was the man who robbed him. Petitioner has therefore failed to establish prejudice where there was overwhelming evidence of his guilt. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (finding an applicant cannot establish prejudice where there is overwhelming evidence of his guilt); Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied,* 535 U.S. 1114 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding

reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Probative evidence supports the PCR court's findings that Petitioner failed to meet his burden to prove counsel's performance was deficient or Petitioner was prejudiced by the purported deficiency. Cherry, supra. Therefore, Respondent respectfully requests this Court deny this Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's ruling and deny the requested petition for writ of certiorari. Should this Court grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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June 20, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No.: 2015-001635

ANTHONY M. RIGGINS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copies of the Return to the Petition for Writ of Certiorari were served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Laura R. Baer, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 20th day of June, 2016.

Anne Mueller
Anne A. Mueller
Legal Assistant for Petitioner

SWORN to before me this
20th day of June, 2016.

Jacelyn M. Baker (L.S.)
Notary Public for South Carolina.
My Commission Expires: 12/16/2024