

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC SUPREME COURT

The Honorable Clyde N. Davis, Circuit Court Judge

Appellate Case No. 2016-000469

Marcus Timmons

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. DID THE COURT OF COMMON PLEAS ERR IN HOLDING THAT THE EYE WITNESS' IDENTIFICATION OF APPELLANT WAS NOT UNRELIABLE AND SUGGESTIVE WHEN AT THE TIME OF THE CRIME, THE SUSPECT WAS WEARING A SKI MASK AND ONLY LOOKED AT THE EYEWITNESS FOR TEN SECONDS WHEN THE EYEWITNESS WAS NOT WEARING HER GLASSES?
- II. DID THE COURT OF COMMON PLEAS ERR IN HOLDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S COMMENT IN CLOSING ARGUMENT ABOUT APPELLANT'S REFUSAL TO SPEAK TO POLICE WHEN THE COMMENT IMPLIED THAT APPELLANT'S SILENCE WAS INDICATIVE OF GUILT?
- III. DID THE COURT OF COMMON PLEAS ERR IN HOLDING THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR REFUSING TO PURSUE RELIEF ON THE IMPROPER ADMISSION OF AUTOPSY PHOTOS AND THE PHOTOGRAPHIC LINEUP IN WAY OF AN *ANDERS* BRIEF WHEN THE AUTOPSY PHOTOS SERVED NO OTHER PURPOSE BUT TO INFLAME THE JURY AND THE PHOTOGRAPHIC LINEUP WAS IMPROPERLY ADMITTED UNDER *STATE V. TATE*?

STATEMENT OF THE CASE

On February 27, 1993, two men stole a vehicle in Columbia and headed to the Cayce/West Columbia area. At a Conoco station at approximately 1:30 or 2:00 a.m., the armed men demanded that a clerk inside unlock the doors to which the clerk refused. She later testified at trial that one man wore a ski mask. The men then headed to an E-Z Laundromat at approximately 2:30 a.m. where they detained two women and a twelve-year-old boy at gunpoint. They robbed one of the women of her handbag and car keys. She later testified that one of the men wore a ski mask and the other wore a "Duke" hat and had a bandanna covering his mouth.

At 3:00 a.m., Thomas Wise was found dead of a gunshot wound alongside Highway 321 near Cayce. Simultaneously, at 3:00 a.m., a Cayce law enforcement officer spotted a robbery in progress of a Pantry gas station and convenience store. He returned to the parking lot and saw two armed men leaving the store, before climbing a fence and fleeing. The officer testified one man wore a ski mask and the other a bandanna. The store clerk testified that the two men had pointed guns but left before he could open the register. The clerk later identified the ski mask, bandanna, and the two guns. The guns were later found in a nearby residence's yard. At 6:00 a.m., the police found the stolen car with its motor running in a parking lot near the convenience store where they found the stolen purse and a fingerprint belonging to Quincy Timmons, Appellant's cousin. Quincy pled guilty to all the charges stemming from the February 27th crimes.

Appellant was charged with the February 27th crimes and was tried by jury in Lexington County and was found guilty of all charges. After appeal, this Court reversed his convictions and awarded another trial. *State v. Timmons*, 327 S.C. 48, 488 S.E.2d 323 (1997). Appellant was tried again in August 2000, represented by Carey M. Ayer and Lisa Lee Smith. Appellant was found guilty on all charges. The Honorable H. Dean Hall sentenced the Appellant without the possibility of parole as follows:

Murder	Life
Two counts of Armed Robbery	25 years each, consecutive to murder
Attempted Arm Robbery	20 years, concurrent
Two counts of Criminal Conspiracy	5 years each, concurrent
Five counts of Pointing a Firearm	5 years each, concurrent
Possession of a weapon during the commission of a violent crime	5 years, concurrent

Appellant then sought direct appeal and was represented by Aileen P. Clare of the South Carolina Office of Appellate Defense. Clare requested to be relieved of counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting that the appeal lacked meritorious issues. The South

Carolina Court of Appeals dismissed his appeal in 2002. *State v. Timmons*, Op. No. 2002-UP-382 (S.C. Ct. App. filed May 29, 2002).

Appellant then filed an application for post-conviction relief on February 25, 2003, raising the following issues: trial counsel rendered ineffective assistance of counsel for failure to make contemporaneous objection to preserve identification issue for appellate review. In an amended application, the Appellant raised the following issues: trial counsel rendered ineffective assistance of counsel for failure to contemporaneously object to unreliable identification testimony, failure to object to prosecutor's closing argument that constituted a violation of *Doyle v. Ohio*, 426 U.S. 610 (1979); ineffective assistance of appellate counsel for failure to raise the improper admission of autopsy photographs and for failure to pursue relief based on improper admission of the photographic lineup pursuant to *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986). A hearing was held on January 24, 2006 before the Honorable Clyde N. Davis in the Lexington County Court of Common Pleas. Melissa J. Kimbrough argued on behalf of Appellant and Sabrina C. Todd represented the State. At the close of the hearing, Judge Davis allowed for both Kimbrough and Todd to submit briefs on the issues raised within 30 days. For an unknown reason, the briefs were never filed and Judge Davis issued an order denying post-conviction relief on March 15, 2006. Appellant was never informed of the order and thus did not appeal the denial. Undersigned counsel moved for the court to grant the Appellant an appeal for the denial of his application for post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (S.C. 1991), which was granted by way of order filed on February 25, 2016.

ARGUMENT

I. THE COURT OF COMMON PLEAS ERRED IN HOLDING THAT THE EYE WITNESS' IDENTIFICATION OF APPELLANT WAS NOT UNRELIABLE AND SUGGESTIVE WHEN AT THE TIME OF THE CRIME, THE SUSPECT WAS WEARING A SKI MASK AND ONLY LOOKED AT THE EYEWITNESS FOR TEN SECONDS WHEN THE EYEWITNESS WAS NOT WEARING HER GLASSES.

In denying post-conviction relief (PCR), the court held that Appellant need not have objected to eyewitness Peggy Williams' testimony regarding her identification of Appellant for appellate preservation as the trial court had just ruled on its admissibility outside of the jury's presence and no evidence had been admitted between the hearing and her testimony. (Order, 6)¹. However, the court erroneously held that there was no legitimate basis for excluding Williams' identification of Appellant, (Order, 6) asserting that the testimony was properly admitted pursuant to *State v. Moore*, 343 S.C. 282, 540 S.E.2d 445 (2000) and *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Furthermore, the court gave no explanation in its order as to why it found the identification of Appellant not unreliable.

The court erred in so holding because Williams' identification of Appellant from a photographic line-up was unreliable, which rendered her in-court identification of Appellant at the first and second trial unreliable as well.

At the second trial, Williams' testified that she saw the suspect when he and another armed robber entered a Pantry gas station on February 27, 1993. (Trial Tr., 325). It was 3 o'clock in the morning and Williams had just returned from Checkers nightclub where she had consumed multiple glasses of wine. (Trial Tr., 327-328). Before the suspects' entry into the Pantry, Williams' had just had an argument with her friends who left her at the Pantry without a way home, and testified that she was upset, scared of her unknown whereabouts, and crying. (Trial

¹ See Exhibit 1, Order Denying Post-Conviction Relief, filed March 15, 2006

Tr., 331-332). Williams was walking into the Pantry to learn its address to call for a ride home, two armed men came in behind her and one masked man held up the clerk while the other restrained her. (Trial Tr., 337). Williams testified that the man who restrained her, who she ultimately identified as Appellant in a photographic lineup, was wearing a facial covering that concealed the lower part of his face. (Trial Tr., 273). However, in her statement to police following the robbery and at the first trial, Williams had stated that the suspect was wearing a ski mask, which only had openings for his eyes, nostrils and mouth. (Trial Tr., 274). Williams also testified that she was standing shoulder to shoulder with the suspect for approximately five to ten minutes, and although she repeatedly testified that she had focused on the man's eyes during this time, she was not wearing her glasses and the suspect looked at her only once for ten seconds. (Trial Tr., 314, 337, 338). Williams testified that she remembered the suspect's "doe shaped eyes."

Three months after the robbery, Williams was called to the law enforcement center to view a line-up in an effort to identify the suspects. (Trial Tr., 318). Williams testified she picked Appellant from the photographic line-up based on his "doe shaped eyes" and claimed that the eye shape was unique and distinctive. (Trial Tr., 343, 264). Two years after the photographic line-up, Williams testified at the first trial but did not make an in-court identification of Appellant. (Trial Tr., 283). Seven years after the photographic and five years after the first trial, Williams made an in-court identification of Appellant at the second trial.

A defendant is deprived of due process by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293 (1967). An in-court identification of the accused is inadmissible if an out-of-court identification created a very substantial likelihood of misidentification. *Manson v. Brathwaite*,

432 U.S. 98, 97 S.Ct. 2243 (1977). In determining admissibility, a court must first determine whether the identification process was unduly suggestive, next notwithstanding any suggestiveness, it must ascertain whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Neil v. Biggers*, 409 U.S. at 198, 93 S.Ct. 375. In this case, the trial court erroneously applied the factors of *Neil v. Biggers* to determine the admissibility of Williams' testimony: (1) the witness' opportunity to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty the witness demonstrated in the identification; and (5) the time elapsed between the crime and identification. 409 U.S. 188, 199-200 (1972).

Applying the first of the *Biggers* factors, Williams' deficient opportunity to view the suspect rendered her identification of Appellant unreliable. Although she testified that the Pantry was well lit (Trial Tr., 262), her inability to view the suspect was not remedied by the good lighting. Williams was also not wearing her glasses, and although she testified she is near-sighted and was able to view the suspect, her vision was so poor that she could not clearly see the clerk who was only five to seven feet from her. Regardless of the sufficiency of her vision, Williams could only view the suspect's mouth, nostrils and eyes through his mask. Moreover, she only viewed the suspect straight on for ten seconds in her scared, disoriented, and possibly impaired state. Thus, she stared at a man's masked profile for only a mere five to ten minutes. Therefore, Williams' opportunity to view the suspect was insufficient to pick out Appellant as the suspect from a line-up, let alone pass constitutional muster for police to charge Appellant partially based on this identification.

As to Williams' degree of attention during the robbery, not only was she upset, looking at the suspect through tears, but she also testified she was in a state of shock. (Trial Tr., 344).

Although Williams repeatedly testified she peered at the man's eyes during the entire five to ten minutes, his mask and her view of only his profile undermines any degree of focus and attention she may have paid to the man's face and eyes. Thus, Williams' testimony fails under the second *Biggers* factor.

Regarding the accuracy of Williams' prior description of the suspect and her testimony at both trials, her descriptions are largely inconsistent. First, Williams' description of the suspect's facial covering change from a ski mask that left few openings, to a partial covering only concealing the lower half of the suspect's face. Although she testified that the facial covering had openings like a ski mask, Williams also testified that that the mouth covering muffled the suspect's voice, which is inconsistent with a ski mask's mouth opening. Williams also testified that she could not remember if the suspect wore a hat, which is inconsistent with a ski mask and also calls into question her degree of attention, her ability to view the suspect, and how long that view lasted. Furthermore, at one point she testified that she could indeed see his nose, but then later testified she could not remember if she had indeed been able to see his nose despite his mask. (Trial Tr., 274, 276). Williams was even shown State's Exhibit 4, a ski mask, and still could not remember if the suspect was indeed wearing a ski mask. Her inability to give a consistent description of the suspect not only demonstrates her identification's insufficiency under the *Biggers* third prong, but also undermines any basis for the other *Biggers* factors. Thus, although she repeatedly stated that she was 100 percent certain Appellant was the suspect, her inconsistent descriptions of the suspect render her assertions insignificant and insufficient to pass constitutional muster.

As for the last *Biggers* factor, Williams picked Appellant from a photographic line-up three months following the robbery and did not make an in-court identification of him until

seven years later. Furthermore, the *Biggers* test considers the totality of the circumstances and this Court has held that the *Biggers* factors can outweigh and undercut one another. *E.g. State v. Moore*, 343 S.C. 282, 289, 540 S.E. 445, 449 (S.C. 2000). Therefore, even if this lapse in time was sufficient, it is outweighed by the other factors that are conducive to a substantial likelihood of mistaken identification of Appellant.

Furthermore, the United States Supreme Court held that notwithstanding any suggestiveness of a photographic line-up, a trial court must nevertheless evaluate the reliability of the identification. *Biggers*, 409 U.S. at 198, 93 S.Ct. 375. Here, the court further erred by only considering suggestiveness of the photographic line-up and never considered its lack of reliability. (Order, 6). The reliability of an identification is the crux of the *Biggers* test because it is essential in evaluating irreparable misidentification, thus the court erred by neglecting this second component.

Moreover, the court erred in concluding that there was no legitimate basis for excluding Williams' testimony because she identified Appellant based solely on sex, race and eye-shape. As even if "doe shaped eyes" are so unique and distinctive to qualify as a distinguishing feature among the 18 African American men in the line-up, she never sufficiently described what constitutes such an eye shape, nor did she testify that no other man in the line-up shared this eye shape. Moreover, even if Williams had sufficient time and opportunity to clearly view the suspect's eye shape, due process and a fair trial require more of identifications than just mundane eye shapes.

Furthermore, because Williams' identification of Appellant from the photographic line-up was unreliable, her in-court identification at the second trial was also unreliable. Williams was never capable of accurately and consistently describing the suspect from her police

statement to her testimony at the first trial, thus Williams was incapable to reliably identify Appellant at the second trial. Even if Appellant was one of the robbery suspects, Williams was identifying Appellant in court at the second trial from her opportunity to clearly view him at the first trial. Trial counsel rendered ineffective assistance of counsel to raise this pivotal point because the source of the eyewitness' identification is the core of its reliability and should come from memory of the crime, not at trial. In turn, the court erred by failing to consider this identification complication in denying PCR relief.

Moreover, it is significant to note that Appellant couched the issue of the photographic line-up in the reasoning of *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986). But in denying relief, the court gave no explanation as to why the Appellant is not entitled to relief on this issue pursuant to *Tate*.

In *Tate*, this Court held that the trial court erred in its admission of a photographic line-up that included typical police photos of men in classic mug shot poses with a small placard bearing the date and agency name because such photos implied the defendant had a criminal record. *Tate*, 288 S.C. at 105, 341 S.E.2d at 381. Introduction of "mug shots" are reversible error unless: 1) the State had a demonstrable need to introduce the photograph; 2) the photograph is introduced in a way that does not draw attention to its source or implication; and 3) if such photograph is shown to the jury, it must not imply that the defendant had a prior criminal record. *Id.*; citing *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v. Denson*, 269 S.C. 407, 237 S.E.2d 761 (1977); citing *United States v. Harrington*, 490 F.2d 487 (2d Cir.1973)). In *Tate*, in so finding that the conditions were not met, this Court reasoned that the State had no demonstrable need to introduce the photographs because the victim identified the defendant in court and a police officer testified about her identification of the defendant from the

photographic line-up. *Tate*, 288 S.C. at 105, 341 S.E.2d at 381. Moreover, this Court found that the markings on the photograph, particularly the date, implied a prior criminal record to the jury, which resulted in prejudicial effect that greatly outweighed probative value. *Id.*

The photographic line-up in the present case greatly mirrors the improperly admitted line-up in *Tate*. The State demonstrated no need to introduce the line-up because Williams identified the Appellant at the second trial, and both she and Detective Blackwell testified about the identification from the line-up. (Trial Tr., 318-324, 362-369). Moreover, coupled with the repeated testimony regarding the first trial, the photographic line-up was introduced amidst circumstances that implied Appellant had been previously involved in criminal activity, or in the least had been tried before. Although trial counsel, the prosecutor, and witnesses referred to the first trial as “the hearing”, the resulting implication was that Appellant had been previously brought before a court of law, and the ambiguous label of “hearing” was insufficient to remove that implication from the jury’s minds. This improper and unnecessary implication is underscored by the photograph’s mug shot characteristics, pursuant to the last *Tate* prong. The photographic line-up from which Williams identified Appellant was of usual law enforcement and mug shot fashion, with close-ups of solemn men. The photographs were also adorned with six digit numbers for each man. (Trial Tr., 323). Although neither Blackwell nor Williams testified as to the meaning of the numbers in the jury’s presence, the jury could easily infer that the numbers corresponded to some form of a police identification system. Additionally, even though the numbers on the line-up here are differ somewhat from the date and law enforcement agency name in *Tate*, the suggestiveness of the line-up in this case aligns with the spirit of *Tate*’s reasoning in precluding such line-ups.

Therefore, pursuant to *Tate*, the line-up’s suggestibility rendered its admission

constitutionally impermissible and thus, the court erred by failing to analyze this issue under *Tate* and ultimately erred in denying relief on this issue.

II. THE COURT OF COMMON PLEAS ERRED IN HOLDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S COMMENT IN CLOSING ARGUMENT ABOUT APPELLANT'S REFUSAL TO SPEAK TO POLICE WHEN THE COMMENT IMPLIED THAT APPELLANT'S SILENCE INDICATED GUILT, IN VIOLATION OF APPELLANT'S FIFTH AMENDMENT RIGHTS.

In a criminal trial, it is improper for the State to refer to or makes comments regarding a defendant's exercise of a constitutional right, regardless of whether they are made directly or indirectly. *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987); *State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Furthermore, the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent. *See Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

In the present case, the prosecutor improperly used Appellant's right to silence as a tool to imply guilt. In so doing, the prosecutor misled the jury by conjuring indications of guilt without proper evidentiary or constitutional basis. For example:

Now, what's taken out of that van six weeks later, and who was Marcus Timmons found with? His running buddy, his co-conspirator, his co-robber, co-killer...What does Quincy do? Quincy ran. What does Marcus does, or what doesn't he do? The police talk to him and he won't even give his name. Said he was grunting at them. Wouldn't even tell the officer who he was...They found his car, found his driver's license, the only they could identify him. Evidence of flight, guilty knowledge, guilty knowledge. Why do that unless you've got something to hide. What's found in that van? This red bandana, the bandana George Cullifer identified as being on the man at the Pantry, this half face ski mask. Peggy Williams testified his voice was muffled.

(Trial Tr., 626-627).

In making such comments, the prosecutor directly created a link between Appellant's silence and guilt of the crimes charged. The resulting prejudice was exacerbated by the prosecutor's improper nexus between Appellant's silence and Quincy's evasion of police. Comments or questions such as "guilty knowledge" and "Why do that unless you've got something to hide?" are blatant prosecutorial transgressions that *Doyle v. Ohio*, *State v. Johnson* and *State v. Goolsby* prohibit. Without this prohibition, the spirit of constitutional protections like the right to remain silent would be meaningless if they could be used as underhand comments just before jury deliberation.

In denying PCR relief on this issue, the court reasoned that the Appellant's silence to police's questions were fair game for closing argument because the Appellant had not been *Mirandized*. (Order 7-8). First, it is unclear from the record whether or not Appellant was *Mirandized*. Even if he was not, it is irrelevant because the Appellant's refusal to speak occurred during a custodial interrogation in which he should have been warned of his *Miranda* rights and thus was entitled to its protections.

The Fifth Amendment of the United States Constitution and Section 12 of Article I of the South Carolina Constitution provides the right against self-incrimination. U.S. Const. amend. V; S.C. Const. art. 1, § 12. This right attaches when a person is interrogated within police custody "or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Determining whether a person is in custody within the meaning of *Miranda* is determined by a totality of the circumstances analysis, which considers factors such as the individual's freedom to leave the scene, and the purpose, location and length of questioning. *See Berkemer v. McCarty*, 468 U.S. 420, 438-39, 104 S.Ct. 3138, 3149-150 (1984). The determination centers on whether a reasonable man placed in the specific circumstances at

hand would have understood he was in custody, as in whether a reasonable man would have felt he was free to leave. *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (S.C. 1997). Further, law enforcement must give *Miranda* warnings when the police subject an individual to interrogation while he is in custody or otherwise significantly deprived of freedom of action. *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612.

In the present case, because the Appellant was in custodial interrogation, the prosecution improperly used his silence to imply guilt regardless of whether his silence was pre-*Miranda* warnings. Months after the robbery, Appellant and his cousin, Quincy Timmons, were passengers of a vehicle driven by Stacy Wright, who was pulled over for suspected crimes not raised at Appellant's trial. (PCR Hr'g, 17; Trial Tr., 383). Upon being stopped, Quincy ran from police and police detained Appellant and Wright to ascertain their identities and involvement. (Trial Tr., 382-383). Pursuant to *Miranda*, a reasonable man in Appellant's situation would have not been free to leave when his cousin, faced with police apprehension for criminal activity, attempted to evade police by fleeing on foot just shortly after the stop. Moreover, although the United States Supreme Court has held that routine traffic stops are usually not seizures amounting to custodial interrogations that require *Miranda* protection, in so holding they had in mind a brief police stop where the vehicle occupants do not feel completely at the mercy of police. *Berkemer*, 468 U.S., at 437-39. In the present case, the stop was not a routine traffic stop but was part of law enforcement investigation into a string of armed robberies. (Trial Tr., 381-382). The vehicle also contained evidence suspected to be used in crimes that Quincy pled guilty to and crimes to which Appellant has denied involvement. Therefore, not only was Appellant in custody for *Miranda* purposes, but his interaction with the responding officer constituted

interrogation pursuant to *Miranda*. Thus, it is irrelevant that Appellant was not *Mirandized* at the time he refused to speak to police.

In denying relief on this issue, the court noted that one of the questions the Appellant refused to answer pertained to his identification information. (Order, 8). However, because the jury was shielded from hearing about Appellant's supposed other crimes not at issue at trial, the question about Appellant's identity was not the only question he was asked. At the time, the police were investigating the robbery and other crimes springing from the robbery. Thus, the court erred in considering only Appellant's refusal to give his name as the basis for denying relief. Additionally, in so denying relief, there was no obligation or requirement raised that citizens must give their name to law enforcement. Moreover, even if the Appellant was not entitled to protections from such comment pursuant to the precedent of this Court and the United States Supreme Court, in denying relief, the court gave no consideration as to the comments' resulting unfair prejudice and misleading effect on the jury.

Pursuant to *Strickland*, trial counsel rendered ineffective assistance of counsel for failing to object to the prosecutor's comments. An applicant seeking post-conviction relief alleging ineffective assistance of counsel must show that the counsel's performance fell below an objective standard of reasonableness, and it is reasonably probable that but for counsel's errors, the trial's result would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 694 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). The prosecutor not only misled the jury by his comments, but also rendered Appellant's right to remain silent meaningless, and therefore it was objectively unreasonable for trial counsel to fail to object. Furthermore, not only could the comments have been grounds for a mistrial, but there

is also a reasonable probability that but for the improper link between Appellant's silence and Quincy's fleeing, the outcome of trial would have been different. The State did not introduce overwhelming evidence that would have outweighed the commentary's prejudicial effect. For example, police did not find Appellant's fingerprints or footprints at the crime scene.

Additionally, Detective Wright testified that seized items suspected to be used in the crime were not Appellant's, and William's' eyewitness testimony and identification were wholly unreliable. (Trial Tr., 605-606). Furthermore and perhaps most significant, Quincy pled guilty to the crimes Appellant was charged with, the robberies and murder of Thomas Wise, and Quincy testified that Appellant was not with him when he committed these crimes. (Trial Tr., 408-410). Therefore, trial counsel rendered ineffective assistance for the failure to object and strike the improper link between Appellant and guilty Quincy from the record. Moreover, the failure to object cannot be cured by a viable defense strategy. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)(finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). At the PCR hearing, trial counsel admitted that failing to object to the prosecutor's comments were not a part of any strategy. (PCR Hr'g, 23).

III. THE COURT OF COMMON PLEAS ERRED IN HOLDING THAT

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR REFUSING TO PURSUE RELIEF ON THE IMPROPER ADMISSION OF AUTOPSY PHOTOS AND THE PHOTOGRAPHIC LINEUP IN WAY OF AN *ANDERS* BRIEF WHEN THE AUTOPSY PHOTOS SERVED NO OTHER PURPOSE BUT TO INFLAME THE JURY AND THE PHOTOGRAPHIC LINEUP WAS IMPROPERLY ADMITTED UNDER *STATE V. TATE*.

The constitutional right to effective assistance counsel applies with equal force to appellate counsel. *E.g., Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (S.C. 1991).

Appellate counsel may withdraw from their advocacy role after conscientious examination of the record and filing a brief raising potentially viable issues. *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). For claims of ineffective assistance of counsel stemming from appellate counsel's submission of an *Anders* brief, the court will apply the *Strickland v. Washington* standard. *E.g.*, *Pantovich v. State*, No. 2015-MO-052.2015, WL50477791, at *1 (S.C. August 26, 2015)(citing *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (even if appellate counsel believes an appeal is without merit and files an *Anders* brief, the appellant may have been entitled to a merits brief, and the challenge to appellate counsel's performance should be reviewed under *Strickland*). Pursuant to *Strickland*, the appellant must show that appellate counsel's performance was deficient and, but for appellate counsel's errors, the result of the appeal would have been different. *Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001).

Appellate counsel rendered ineffective assistance of counsel by filing an *Anders* brief instead of pursuing the meritorious issues. First, appellate counsel was deficient for failing to raise the issue of the trial court's abuse of discretion in admitting autopsy photographs of the murder victim, Thomas Wise. The trial court admitted the photographs over trial counsel's objection even though the photographs served no probative purpose. Autopsy photographs are not *per se* inadmissible and South Carolina courts have delineated the purposes for which they may be admitted. Autopsy photographs have been deemed admissible if they serve to corroborate testimony, to show the circumstances of the crime and character of the defendant, or if they assist in identifying the nature of a particular injury. *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); *State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). However, in heeding SCRE 403, this Court has held that such photographs unfairly prejudice the defendant if they are admitted to

arouse sympathy from the jury and should be excluded if they are not necessary to substantiate material facts or conditions. *Torres*, 390 S.C., 623, 703 S.E.2d, 228.

In the present case, appellate counsel rendered ineffective assistance of counsel for failing to raise this issue because the photographs served no other purpose but to arouse emotions of the jury. Although the aforementioned list of admissible purposes is not exhaustive, the autopsy photographs fail to serve any of those listed and violates SCRE 403.

First, the autopsy photographs were not necessary to corroborate or explain the medical examiner's testimony regarding Wise's fatal injuries. Wise was shot once in his torso-abdominal area above his left hip, and although pellets did scatter throughout this portion of his body (Trial Tr. 550-556), an explanation of the scattering without the photographs is not so difficult for the jury to understand the nature of the injuries.

Moreover, a single gunshot wound does not aid in demonstrating the circumstances of the crime or character of the assailant. Wise was shot alongside a highway and the resulting gunshot wound was made no more different or special by the outdoor location. The medical examiner did not testify that the location impacted the nature of the injury, or that the injury was unusually distinct. Moreover, this is not a case in which the ascertainment of the specific murder weapon or projectile of the bullet is at issue; cases in which autopsy photographs may assist the jury in determining a material fact. Wise's cause of death was definitively caused by a gunshot wound and was not an issue at trial. Conversely, the only issues at trial was whether Appellant was involved in the string of robberies and Wise's murder, issues that the autopsy photographs play no role in assisting the jury in deciding. Therefore, any probative value was substantially outweighed by their prejudicial effect.

The admission of the photographs ultimately served no other purpose but to inflame the jury. Thus, appellate counsel's failure to pursue this issue was objectively unreasonable according to prevailing professional norms. Because the State introduced insufficient evidence to prove Appellant was the assailant, *supra*, p. 20, the admission of the photographs prejudiced the Appellant. Consequently, appellate counsel prejudiced the Appellant for failing to pursue this claim. Appellant was tried alone, and the gory and graphic nature of the photographs inclined the jury to decide his guilt based on emotion, by punishing the only accused before them. Therefore, but for appellate counsel's failure to pursue relief on this issue, there is a reasonable probability that Appellant would have been successful on appeal.

Appellate counsel's *Anders* brief also constituted ineffective assistance of counsel by abandoning the improper admission of the photographic line-up under *State v. Tate* issue. Because the most significant, if not sole issue, at trial was whether Appellant was involved in the crimes, Williams' testimony regarding identification of Appellant as the suspect, and the admission of the photographic line-up were pivotal in sealing a guilty verdict. Appellate counsel was deficient for failing to raise these issues because Williams' testimony and identification were so unreliable, *supra* p. 8-13, and the line-up was improperly admitted under *Tate*. *Supra*, p.13-15. Coupled with the State's lack of evidence to prove guilt beyond a reasonable doubt, *supra* p. 20, these instances of the trial court's abuse of discretion prejudiced Appellant. In turn, appellate counsel prejudiced the Appellant for failure to seek relief by raising these issues.

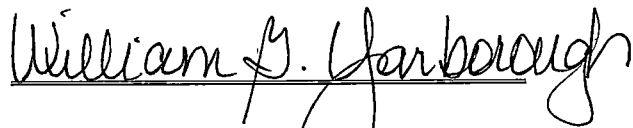
In denying PCR relief on these grounds, the court gave no explanation or analysis as to why appellate counsel was deficient for failing to pursue these claims, or why these issues lacked merit. (Order, 9-10). Furthermore, although Appellant is not entitled to discretionary appellate

review by the South Carolina Supreme Court, he is entitled to direct review of his conviction by the Court of Appeals, and is entitled to effective assistance of appellate counsel.

CONCLUSION

For the foregoing reasons, the PCR's court's order should be overturned and Appellant should be awarded a new trial.

RESPECTFULLY SUBMITTED THIS 24th Day of June, 2016.



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JUN 28 2016

SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
General Sessions Court

Honorable Judge Clyde N. Davis, Jr., Common Pleas Court Judge

Appellate No. 2016-000469

The State,

Respondent

v.

Marcus Timmons,

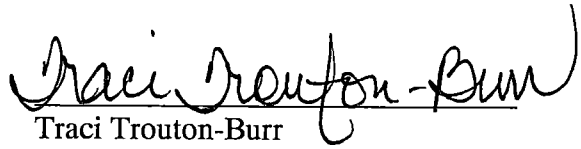
Appellant

AFFIDAVIT OF SERVICE

I, Traci Trouton-Burr, certify on this date, June 24, 2016, I served the Petition For Writ of Cert in this action, dated June 24, 2016, on Patrick Schmeckpeper, by mailing it to him/her at his/her work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:


Patrick Schmeckpeper
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211

Respectfully submitted,



Traci Trouton-Burr
Paralegal to William G. Yarborough, Esquire

SWORN TO before this 24
Day of June, 2016



Notary Public for South Carolina
My Commission expires: 4/19/24

June 24, 2016