

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Larry R. Patterson, Trial Judge  
The Honorable D. Garrison Hill, Post-Conviction Relief Judge

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Appellate Case No. 2015-001087

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LaChrisha Shentayle Miller, .....Respondent-Petitioner,

v.

State of South Carolina, .....Petitioner-Respondent.

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**PETITIONER-RESPONDENT'S RETURN TO  
PETITION FOR WRIT OF CERTIORARI**

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**SC SUPREME COURT**

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## QUESTION PRESENTED

1. 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

The Greenville County Grand Jury indicted Respondent-Petitioner (hereinafter “Respondent”) at the January 2008 term for two counts of attempt to obtain a controlled substance by fraud (2008-GS-23-0022, counts 1 and 2). (App.pp.353-56). Brian P. Johnson, Esquire represented Respondent.

After the State called the case to trial, Respondent was found guilty of the charges as indicted. On February 12, 2009, the Honorable Larry R. Patterson sentenced Respondent to concurrent sentences of one year on each count of attempt to obtain a controlled substance by fraud. (App.p.127; pp.351-52).

A notice of appeal was filed at the South Carolina Court of Appeals. Wanda H. Carter, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. (App.pp.129-40). The Court of Appeals dismissed the appeal. State v. Miller, Op. No. 2011-UP-228 (S.C. Ct. App. filed May 18, 2011). (App.pp.141-42).

Respondent filed an application for post-conviction relief (PCR) on May 27, 2011 (2011-CP-23-3652). (App.pp.143-83). A hearing was held at the Greenville County Courthouse on June 19, 2013. (App.pp.189-240). Respondent was present and represented by Kenneth C. Gibson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General’s Office represented Petitioner-Respondent (hereinafter “Petitioner”). In an order filed December 27, 2013, the Honorable D. Garrison Hill denied the application for post-conviction relief. (App.pp.242-50).

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<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Respondent filed a timely motion to reconsider and amend judgement (and a subsequent amended motion to reconsider and amend judgment). (App.pp.251-305). Petitioner submitted a return to the amended motion to alter or amend the order of dismissal. (App.pp.308-10). The parties reconvened for a hearing on Respondent's motion on February 24, 2015. (App.pp.311-40). On April 16, 2015, Judge Hill filed an order granting post-conviction relief and ordered a new trial. (App.pp.342-50).

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The appellate court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. See Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC.

## ARGUMENT

**The PCR judge did not err in finding Respondent did not meet her burden of proving trial counsel should have called an eyewitness identification expert at trial.**

Respondent argues the PCR judge’s finding and conclusion that she failed to meet her burden of proving trial counsel should have called an expert witness at trial “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.” (Pet. Cert., p.3). Certiorari is not warranted in this case because Respondent’s argument is without merit.

### A.

At the PCR hearing, counsel for Respondent argued trial counsel’s representation was deficient because he should have called an eyewitness identification expert as a defense witness at Respondent’s trial. (App.p.193; p.234).

Trial counsel testified there was an eyewitness in this case and the investigating agent was

“adamant that the witness . . . was adamant that [Respondent] was the one that committed the crime.” (App.pp.198-99; pp.199-200; p.212). Trial counsel testified he did not call an expert witness in eyewitness identification in this case because he did not believe it was necessary. (App.pp.213-14; p.221). Trial counsel testified the case hinged on the credibility of both the State and defense witnesses. (App.pp.221-22).

In denying Respondent’s application for post-conviction relief, the PCR judge found “trial counsel’s failure to call an eyewitness identification expert could have constituted prejudicial deficient performance.” The PCR judge held, however, that “PCR cannot be granted on such ground where the potential expert testimony has not been proffered.” The PCR judge cited Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) in support of this holding. (App.pp.349-50).

## **B.**

For an applicant to be granted PCR as a result of ineffective assistance of trial counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) (holding a PCR applicant must show both error and prejudice to win relief) (citation omitted).

“In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment.” Id. at 690, 104 S. Ct. at 2066.

In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. “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) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

### C.

The PCR judge did not err in finding Respondent failed to meet her burden of proof on this issue. Respondent failed to demonstrate both that trial counsel was deficient in his representation and that she suffered prejudiced as a result.

#### **Prejudice**

Respondent failed to meet her burden of demonstrating she suffered prejudice from the lack of expert testimony at her trial.

As an eyewitness identification expert did not testify on Respondent’s behalf at the PCR hearing, any discussion regarding what they could have testified about at Respondent’s trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original) (citations omitted). Further, this Court has specifically extended the general rule set forth in cases such as Bannister to apply to the failure to produce expert

witnesses at PCR hearings. In Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008), this Court held that, as no expert witnesses testified at the applicant's PCR hearing, "it is merely speculative that these allegedly favorable witnesses would have aided in his defense." Id. at 530, 657 S.E.2d at 776-77 (citations omitted); see also Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the PCR applicant failed to have an expert witness testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

The holding in Lorenzen is directly applicable in this case. Though Respondent alleged trial counsel should have presented an expert witness in eyewitness identification during her trial, she failed to present (or even proffer) this expert testimony at her PCR hearing. Since the PCR court cannot speculate as to the potential impact an eyewitness identification expert witness may have had upon the outcome of the trial, Respondent failed to meet her burden of demonstrating she suffered prejudice.

### **Deficiency**

Regardless, Respondent also failed to meet her burden of demonstrating trial counsel's performance was deficient.

In order to meet her burden of proof and prevail on this issue, Respondent "must show that [her] trial counsel's performance was deficient, meaning that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [applicant] by the Sixth Amendment.'" Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). Respondent cannot demonstrate trial counsel made serious errors that undermined her Sixth Amendment right to effective counsel. As discussed supra, Respondent failed to produce any testimony to corroborate her claim that an

eyewitness identification expert would have changed the result of her trial. Further, while Respondent argues such an expert witness could have strengthened her argument about identification, trial counsel cross-examined the State's witnesses about this very issue at trial. The State's key witness was the pharmacy technician who identified Respondent as the person who presented the driver's license and false prescription. On cross-examination of this witness, trial counsel impeached her testimony with portions of her statement. (App.pp.40-44). Trial counsel also thoroughly cross-examined the investigating agent about how a photographic lineup for eyewitnesses can be useful (as the investigator admitted on direct examination that he had not prepared a lineup in this case). (App.pp.55-57). Trial counsel also had the investigator admit (1) some people use false identification to conceal their identity for things such as picking up fraudulent prescriptions and (2) he did not watch the pharmacy's surveillance videotape in this case. (App.pp.55-60). Further, trial counsel repeatedly attacked the credibility of the eyewitness identification by emphasizing the lack of a photographic lineup or surveillance video during his closing argument to the jury. (App.pp.100-03; p.105).

Based upon the foregoing, it is clear Respondent failed to demonstrate trial counsel's representation was deficient. The Lorenzen court, in making a similar determination, emphasized that PCR applicant could not prove the deficiency prong of Strickland "given [trial counsel] vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence." Lorenzen, 376 S.C. at 531, 657 S.E.2d at 777. As such, Respondent did not meet her burden of proving trial counsel's representation did not meet the standards guaranteed by the Sixth Amendment.

**D.**

Accordingly, Respondent failed to meet her burden of proving both prongs of the Strickland test. See Sellers, 362 S.C. at 188, 607 S.E.2d at 85. As Respondent failed to meet her burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying relief on this ground. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

**CONCLUSION**

For the foregoing reasons, Petitioner submits this Court should deny the Respondent's Petition for Writ of Certiorari. However, if this Court grants certiorari, Petitioner requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By:   
ATTORNEYS FOR PETITIONER-RESPONDENT

July 15, 2016

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
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The Honorable Larry R. Patterson, Trial Judge  
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LaChrisha Shentayle Miller, ..... Respondent-Petitioner,

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**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Petitioner-Respondent's Return to Petition for Writ of Certiorari upon Respondent-Petitioner by depositing a copy of the same in the United States mail, postage prepaid, and addressed to:

Kenneth C. Gibson, Esquire  
Post Office Box 5536  
Greenville, South Carolina 29606-5536

I further certify that all parties required by Rule to be served have been served. This 15th day of July, 2016.

  
KAREN C. RATIGAN  
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ATTORNEY FOR PETITIONER-RESPONDENT



ALAN WILSON  
ATTORNEY GENERAL

July 15, 2016

**RECEIVED**

JUL 15 2016

**SC SUPREME COURT**


The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: LaChrisha Shentayle Miller v. State of South Carolina**  
**Appellate Case No: 2015-001087**  
**Lower Court Case No: 2011-CP-23-3652**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petitioner-Respondent's Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

  
for

Karen C. Ratigan  
Senior Assistant Attorney General  
SC Bar #68331

KCR/jacc  
Enclosures

cc: Kenneth C. Gibson, Esquire  
Trisha Allen, Victim Services (without enclosure)