

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Clyde N. Davis, Jr.

Appellate Case No. 2016-000469

Marcus Timmons,

Petitioner,

v.

The State of South Carolina,

Respondent.

**RESPONSE TO RETURN FOR
WRIT OF CERTIORARI**

RECEIVED

OCT 07 2016

S.C. SUPREME COURT

Respectfully Submitted,

William G. Yarborough, III
Attorney for Petitioner
522 N. Church Street
Greenville SC, 29601
Telephone (864) 331-1612
Fax (864) 370 0022

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ARGUMENT IN REPLY

- I. THE COURT OF COMMON PLEAS ERRED IN DENYING POST-CONVICTION RELIEF BECAUSE THERE IS INSUFFICIENT EVIDENCE OF PROBATIVE VALUE TO SUPPORT ITS FINDINGS THAT THE EYEWITNESS'S IDENTIFICATION OF PETITIONER WAS NOT UNRELIABLE AND SUGGESTIVE.

The findings of the post-conviction relief (PCR) court will be upheld unless there is insufficient evidence of probative value to support them. *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2009). Here, Respondent argues that the record contains probative evidence to support the PCR court's findings that the eyewitness's identification of Petitioner was neither unreliable nor suggestive. However, in so arguing, Respondent neither addresses the failure of the eyewitness's identification to pass muster under *Neil v. Biggers* nor how viewing Petitioner in the courtroom at the first trial contaminated her capacity to make an constitutionally permissible identification 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 and 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, Respondent fails to address that William's deficient opportunity to view the suspect in arguing that there is evidence to support the finding that her identification of Petitioner was not unreliable. Although Williams' testified that the Pantry was well lit (App. Vol I., p. 266), her inability to view the suspect was not remedied by the good lighting. At the time of robbery, Williams' 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. 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 constitutionally deficient to pick out Petitioner as the suspect from a line-up and identify the Petitioner at either trial.

As to Williams' degree of attention during the robbery, not only was she viewing the suspect through tears, but she also testified she was in a state of shock. (App. Vol. II., p. 348). Although Williams repeatedly testified she peered at the man's eyes during the entire five to ten minutes, her view of only his masked 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.

Moreover, Williams' prior description of the suspect and her testimony at both trials are largely inconsistent. First, Williams' description of the suspect's facial covering

changed 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. Williams also testified that she could not remember if the suspect wore a hat, which is also inconsistent with a ski mask and calls into question her degree of attention, her ability to view the suspect, and the duration of her gaze on the suspect. Furthermore, at one point she testified that she could indeed see his nose, but then later testified she could not remember if she had in fact been able to see his nose despite his mask. (App. Vol. II., p. 278-280). 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 Petitioner 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 Petitioner 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 previously held that the *Biggers* factors can undercut one another. *E.g. State v. Moore*, 343 S.C. 282, 289, 540 S.E. 445, 449 (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 Petitioner.

Furthermore, the United States Supreme Court has held that notwithstanding any suggestiveness of a photographic line-up, a court must nevertheless evaluate the reliability of the identification. *Biggers*, 409 U.S. at 198, 93 S.Ct. 375. Here, Respondent simplifies the interplay between analyses and findings of reliability and suggestiveness when the two are axiomatically linked. The reliability of an identification is the crux of the *Biggers* test because it is essential in evaluating irreparable misidentification.

Moreover, Respondent fails to consider the illegitimate basis for the court's refusal to exclude her testimony regarding the identification. Williams' identification of Petitioner was 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 neither 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, Respondent overlooks the interplay between Williams's view of Petitioner at the first trial and her confirmation of the prior identification at the second trial. 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 confirm the identification at the second trial. The chance that her confirmation at the second trial was based on her ability to view him at the first chance is too great to pass constitutional muster. Thus, 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, in arguing that there is evidence to support the court's findings on this ground, Respondent fails to address the court's lack of consideration the issues according to the framework set forth in *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986).

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.*

Here, Respondent fails to refute the parallels in the present case to *Tate*. At trial, the State had no need to introduce the line-up because Williams identified the Petitioner at

the second trial, and both she and Detective Blackwell testified about the line-up identification. (App. Vol. II., p. 322-328, 366-373). Moreover, coupled with the repeated testimony regarding the first trial, the photographic line-up was introduced amidst circumstances that implied Petitioner had been previously involved in criminal activity, or in the least, had been tried before. Although trial counsel, the State, and witnesses referred to the first trial as “the hearing”, the resulting implication was that Petitioner had been previously brought before a court of law, and the ambiguous label of “hearing” was insufficient to remove that inference from the jury’s minds. This improper and unnecessary implication is underscored by the photograph’s mug shot characteristics under the final *Tate* prong. The photographic line-up from which Williams identified Petitioner 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. (App. Vol. II., p. 327). 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 served a law enforcement purpose. Additionally, even though the numbers on the line-up here differ somewhat from the date and law enforcement agency name in *Tate*, the suggestiveness of the line-up aligns with the spirit of *Tate*’s reasoning to preclude such line-ups.

II. THE COURT OF COMMON PLEAS ERRED IN DENYING POST-CONVICTION RELIEF BECAUSE THERE IS INSUFFICIENT EVIDENCE OF PROBATIVE VALUE TO SUPPORT ITS FINDINGS THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR’S COMMENT IN CLOSING ARGUMENT THAT PETITIONER’S SILENCE INDICATED GUILT.

It is well settled that it is improper for the prosecution to refer to or comment on a

defendant's exercise of a constitutional right, regardless of whether it is direct or indirect. *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 arguing that there is sufficient evidence to deny relief on this ground, Respondent overlooks the resulting prejudice from the State's closing argument and ignores the context in which it was made.

In the present case, the prosecutor improperly used Petitioner'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 basis or constitutional justification. 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.

(App. Vol. III., p. 630-631).

In so commenting, the State directly created a link between Petitioner's silence and guilt of the crimes charged. Moreover, Respondent fails to address how the resulting prejudice was exacerbated by the improper nexus between Petitioner's silence and Quincy's evasion of police. Comments 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. The improper closing argument was prejudicial in light of the paucity of evidence presented against Petitioner. Quincy pled guilty to the crimes Petitioner was charged with—the robberies and murder of Thomas Wise—and testified that Petitioner was not with him he committed these crimes. (App. Vol II., p. 412-414). Moreover, no evidence was presented to place Petitioner at the crime scene. Neither Petitioner’s fingerprints nor footprints were found at the crime scene. Detective Wright testified that seized items suspected to be used in the crime were not Petitioner’s. William’s’ eyewitness testimony and identification were wholly unreliable. (App. Vol. III., p. 609-610). Thus, Respondent’s argument that Petitioner has failed to demonstrate prejudice on this ground is unsound. In light of the resulting prejudice, Respondent also fails to address that at the PCR hearing, trial counsel admitted that failing to object to the prosecutor’s comments was not a part of any trial strategy. (App. Vol. III., p. 744).

Additionally, Respondent focuses disproportionately on *Miranda* warnings in arguing that certiorari should be denied on this ground. First, it is unclear from the record whether or not Petitioner was given *Miranda* warnings. Thus, there is insufficient evidence in the record to support Respondent’s argument that there is evidence to support the court’s finding that no *Doyle* violation occurred. But even assuming he was given *Miranda* warnings, Respondent overlooks the custodial setting in which Petitioner refused to speak. Months after the robbery, Petitioner and his cousin, Quincy Timmons, were passengers of a vehicle driven by Stacy Wright, who was pulled over for suspected crimes not at issue at Petitioner’s trial. (App. Vol. III., p.738, Vol. II., p.387). Upon being stopped, Quincy ran from police and police detained Petitioner and Wright to ascertain their identities and involvement. (App. Vol. II., p. 386-387). The right to remain silent 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 analyzes the totality of the circumstances and 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). Specifically, the determination centers on whether a reasonable man placed in the specific circumstances at hand would have felt he was free to leave. *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (S.C. 1997).

Pursuant to *Miranda*, a reasonable man in Petitioner’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 usually do amount to custodial interrogations that require *Miranda* protection, their holding contemplates a brief traffic 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. (App. Vol. II., p. 385-386). The vehicle also contained evidence suspected to be used in crimes that Quincy pled guilty to and crimes to which Petitioner has denied involvement. Therefore, not only was Petitioner in custody for *Miranda* purposes, but his interaction with the responding officer constituted interrogation under *Miranda*.

Additionally, Respondent gives too much weight to Petitioner’s silence as to his identification in arguing that certiorari should be denied on this ground. Because the jury was shielded from hearing about Petitioner’s other alleged criminal activity that was not at

issue at trial, the questions about his identity were not the only questions asked. At the time, the police were investigating the robbery and other crimes springing from the robbery. Thus, by considering only Petitioner's refusal to give his name as the basis for arguing against certiorari, Respondent is not considering the totality of the circumstances.

III. THE COURT OF COMMON PLEAS ERRED IN DENYING POST-CONVICTION RELIEF BECAUSE THERE IS INSUFFICIENT EVIDENCE OF PROBATIVE VALUE TO SUPPORT ITS FINDINGS THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR REFUSING TO PURSUE RELIEF ON THE IMPROPER ADMISSION OF AUTOPSY PHOTOS AND THE PHOTOGRAPHIC LINEUP.

Autopsy photographs

In arguing that denial of PCR relief was justified on this ground, Respondent improperly focuses on the inability to produce the actual photographs at the hearing when their inflammatory and unnecessary admission into evidence is patent from the record. Autopsy photographs are not *per se* inadmissible and South Carolina courts have held that they are admissible for limited purposes, such as corroborating testimony, demonstrating circumstances of the crime and actions of the perpetrator, and assisting in identifying the nature of a particular injury. *E.g.*, *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, 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. Respondent relies on the expert witness's use of the photographs to explain his findings about Wise's injuries; however, the photographs were not so necessary to surpass the balancing test of SCRE 403. Wise was shot once in his torso-abdominal area above his left hip, and although pellets did scatter throughout this portion of his body (App. Vol. III., p. 554-560), an explanation without the photographs would have been sufficient for the jury to understand the nature of the injuries.

Moreover, a photograph of single gunshot wound adds little to the common understanding of a gunshot fatality. 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 so unusual to warrant photographs. Moreover, this is not a case in which the ascertainment of the specific murder weapon or projectile of the bullet is at issue where 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 were whether Petitioner was involved in the crimes charged. Autopsy photographs play no role in assisting the jury in deciding the identification of Petitioner. Therefore, Respondent's argument that there is evidence to support the finding that this issue was not meritorious for appeal is unfounded.

Photographic lineup

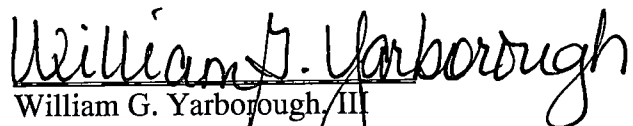
As previously discussed, the most significant, if not sole issue, at trial was whether Petitioner was involved in the crimes. Therefore, the improperly admitted photographic lineup and supporting testimony Williams' testimony were meritorious issues for appeal. In

arguing to the contrary, Respondent fails to address the similarities between the present case and Tate, the multitude of factors that rendered the eyewitness identification unreliable, and the resulting prejudice in light of the identification issue at trial.

CONCLUSION

For the foregoing reasons, Petitioner's petition for writ of certiorari should be granted and Petitioner should be awarded a new trial.

RESPECTFULLY SUBMITTED THIS 3rd day of October, 2016.



William G. Yarborough, III
Attorney for Petitioner
522 North Church Street
Greenville, SC 29601
(864)331-1612 Office
(864) 370-0022 Fax
WGYarborough@gmail.com

Greenville, South Carolina

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AFFIDAVIT OF SERVICE

I, Traci Trouton-Burr, certify on this date, October 3, 2016, I served the Appellant's Response/Reply To Return For Write of Cert in this action, originally dated October 3, 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

RECEIVED

OCT 07 2016

S.C. SUPREME COURT

Respectfully submitted,



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

SWORN TO before this 3
Day of October, 2016



Notary Public for South Carolina
My Commission expires: 4/9/24

October 3, 2016