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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-000241

State of South Carolina, ..... Petitioner,

v.

Norman Mitchell, #293197, ..... Respondent.

**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether the PCR court erred by granting relief where it disregarded established precedent and adopted a new standard specific to eyewitness identification cases, where there is no evidence of probative value to support the finding that Counsel were ineffective, and where there is overwhelming evidence of guilty which would preclude a finding of prejudice.

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was indicted during the June 2008 term of the Richland County Grand Jury for Carjacking (2008-GS-40-1238) and Failure to Stop for a Blue Light (2008-GS-40-1239). He was represented by James H. May, Esquire, and Brian R. Shealey, Esquire. On February 4-7, 2009, Applicant proceeded to a jury trial before the Honorable L. Casey Manning, where he was convicted as indicted. Judge Manning sentenced Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45 on the Carjacking charge and to three (3) years' imprisonment for the Failure to Stop for a Blue Light charge. Applicant filed post-trial motions, which were heard and denied by Judge Manning on March 3, 2009.

Petitioner filed a notice of appeal and was represented by Appellate Defender Katherine Hudgins. Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentence by unpublished opinion. State v. Norman Lee Mitchell, 2012-UP-010 (Ct. App. filed January 25, 2012). Thereafter, Applicant petitioned the South Carolina Supreme Court for certiorari. The South Carolina Supreme Court denied Applicant's petition by Order dated June 20, 2013. The Remittitur was sent on June 21, 2013.

Petitioner filed an application for post-conviction relief on October 1, 2013. A hearing was convened on July 14, 2015, where Petitioner was represented by Kristy G. Goldberg, Esquire. The Honorable G. Thomas Cooper, Jr. granted Petitioner relief by order filed December 29, 2015. The State filed a Motion to Reconsider on January 19, 2016, which was denied by order filed January 29, 2016.

## STANDARD OF REVIEW

“[W]e review questions of law *de novo*, and ‘will reverse the decision of the PCR court when it is controlled by an error of law.’” Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (citing Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012)).

The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

**The PCR court disregarded established precedent and adopted a new standard specific to eyewitness identification cases. When applying the applicable precedent, there is no evidence of probative value to support the finding that Counsel were ineffective. Lastly, any deficiency could not have been prejudicial because there is overwhelming evidence of Respondent's guilt. Therefore, the PCR court erred in granting relief.**

The PCR court erred in granting Respondent relief. First, the PCR court applied a new standard to review whether counsel was ineffective in failing to challenge eyewitness identification. Second, when applying the appropriate precedent, Counsels' cannot be found to be deficient. Finally, there is no evidence that if an eyewitness identification expert testified at trial that the result would have been different because the evidence overwhelmingly supports the jury's verdict in finding Respondent guilty. The State asks this Court to grant certiorari to correct these errors.

### How the Issue Arose

Respondent was tried and convicted for carjacking a woman at the Time Warner office in downtown Columbia. (App. p. 49-51). A show-up lineup was conducted where the victim positively identified Respondent as the assailant. (App. p. 58-62). A Neil v. Biggers hearing was conducted to determine the reliability of the victim's identification. (App. p. 49-119). The victim testified at the hearing that she was sitting in her vehicle outside of the Time Warner office while her son went inside to pay his bill, a man got in the car, put a gun to her head, and ordered her to get out of the car. (App. p. 77-81). The victim further testified that when she was taken to the scene where Respondent was apprehended, she immediately recognized him as the man who put the gun to her head and stole her car. (App. p. 82-84).

Judge Manning concluded the identification was not unduly suggestive and was reliable. Specifically, the victim had ample opportunity to see the perpetrator during the carjacking, her degree of attention was specific and direct, the time between the crime and the show-up was small, and the victim's level of certainty was high. (App. p. 119).

The victim then testified before the jury about the crime including her identification of Respondent after he was apprehended. She stated that she was "110 percent sure" Respondent was the man who held her at gunpoint and stole her car. (App. p. 157-172). The victim's son, William Gilmore, testified that he went into the Time Warner office, the victim remained in the passenger seat, he left the driver's window down, and he left his cellphone on the dash. (App. p. 259-272). William Gilmore's cell phone was recovered after Respondent was arrested. (App. p. 272).

Officers testified to their investigation of the carjacking and circumstances leading to Respondent's apprehension within minutes of the incident. Officer Casha Nicole Calloway testified that she responded to an emergency call of a possible armed robbery at the Time Warner office. (App. p. 225). When she arrived at the location, she learned there was a carjacking and put a BOLO out for the stolen car. (App. p. 226). Witness Michael Brandon testified that he observed Respondent fleeing from police officers that day and saw him throw a cell phone, identified at trial as the victim's son's phone, under a parked car. (App. p. 189-194).

After the State rested, Counsel May moved for a direct verdict on the carjacking charge and argued that discrepancies in the victim's description of Respondent warranted the motion being granted. (App. p. 295).

### Relevant Law

For an applicant to be granted PCR as a result of ineffective assistance of 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); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). 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)).

### Discussion

#### **A. The PCR court erred as a matter of law in disregarding established precedent and creating a new rule unsupported by any authority.**

The longstanding standard as to whether counsel was ineffective for failing to retain and present an expert at trial, as initially noted in the PCR court's order, is that counsel is *not* ineffective when he vigorously cross-examines the State's witnesses and attacks the accuracy of the evidence. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (holding trial counsel's failure to present an expert witness was not unreasonable under prevailing professional norms where counsel vigorously cross-examined and attacked the accuracy of the evidence). See also Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (holding the same). The PCR court erroneously disregarded the applicable case law and adopted a new standard that if "the identification concerns in [the] case are so severe and central to the heart of the conviction . . . that vigorous cross-examination of the victim alone [is] not sufficient to

challenge the accuracy of the identification in such a matter to ensure a just result.” (App. p. 658). The PCR court provided no legal authority whatsoever to support this new rule.

The new standard adopted by the PCR court requires that defense counsel call an eyewitness identification expert in nearly every imaginable case where identification may be the determinative issue. For example, when the State presents eyewitness testimony in an armed robbery case along with evidence that the defendant was apprehended while in possession of the victim’s wallet, defense counsel would be required to retain and call an expert witness to challenge the identification. The rule is unworkable and goes against the spirit and rationale of Strickland which envisions and encourages creative defense strategies. Strickland jurisprudence has intentionally refrained from establishing any “red lines” and has repeatedly announced that the actions shall be judged on a case by case basis. See Strickland 466 U.S. at 688-89, 104 S. Ct. at 2065 (“No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.”). Tying defense attorneys to such an unforgiving rule would not only discourage them from pursuing otherwise valid strategies, but it would improperly inject the court into the attorney-client relationship by mandating a strategy that may not be appropriate in every eyewitness case.

More troubling would be the scenario where defense counsel deems it in the best interests of his client to strategically not present a defense. Under the PCR court’s new rule, defense counsel would be required to forfeit his client’s right to not put up a defense to the charges if the case may be decided on an eyewitness’ identification. This would shift the burden and instead of

relying on challenges to the evidence, it would force defendants to present evidence to challenge an eyewitness identification. “A shifting burden of proof would impose a significantly greater onus on the defendant and, even more significantly, it would obliterate the presumption of innocence.” State v. Attardo, 263 S.C. 546, 552, 21 S.E.2d 868, 870 (1975). This imposition would also infringe upon Counsel’s ability to make the strategic decision to preserve last closing argument which this Court has recognized as a substantial right. See State v. Rodgers, 269 S.C. 22, 235 S.E.2d 808 (1977) (recognizing the right to open and close is “a substantial right, the denial of which is reversible error.”).

When examining the case law, Frasier articulated the applicable rule. It held that because “trial counsel vigorously cross-examined the State’s DNA experts and attacked the accuracy of the evidence . . . [w]e cannot say that his performance was unreasonable under prevailing professional norms.” Frasier at 306 S.C. at 161-62, 410 S.E.2d at 573. The PCR court attempted to distinguish this case from Frasier on a factual basis. The factual distinction is not relevant because it goes to a prejudice analysis, *not* a deficiency analysis. The longstanding rule reiterated in Frasier is that defense cannot be ineffective if he or she vigorously cross examines and otherwise challenges the evidence. This rule is the proper standard for determining whether defense counsel was deficient.

Similarly, Lorenzen is instructive. In Lorenzen, this Court reversed the PCR court’s grant of relief which found defense counsel ineffective for failing to call an expert witness.<sup>1</sup> This Court held that defense counsel was not deficient because “she vigorously cross-examined the State’s witnesses and attacked the accuracy of the evidence.” Lorenzen at 376 S.C. at 531, 657 S.E.2d at

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<sup>1</sup> No expert was presented at the PCR hearing, so the Court found there was no evidence to support the PCR court’s prejudice finding.

777. This Court found that no expert was required when defense counsel employed a reasonable strategy to challenge the State's evidence.

Here, the PCR court did not apply the correct standard to judge Counsels' performance. Instead, the PCR court announced a new standard not recognized by any jurisdictions. The PCR court resorted to creating a new standard because, as discussion below, the applicable law does not allow relief to be granted. Accordingly, the PCR court's order establishing a new standard is unsupported by any legal authority and requires reversal. The PCR court erred as a matter of law in failing to apply the proper precedent and in articulating a new, unworkable rule that is completely unsupported by the law.

**B. When applying the applicable precedent, Counsel were not deficient.**

Counsel were not deficient in their representation of Respondent. Counsel handled the identification issue reasonable and effectively. When applying the correct standard, Counsel were not ineffective because they vigorously challenged the victim's testimony and the eyewitness identification. There was no need to utilize an expert witness. Counsels' strategy prior to the Biggers ruling was clear: Counsel hoped to persuade the trial court to suppress the identification by arguing it was unduly suggestive and unreliable. (App. p. 543-46). Counsel Shealey aptly argued pre-trial that the identification should be suppressed for a number of reasons. (App. p. 110, line 11 – p. 117, line 5; p. 119, lines 4-24). After the motion to suppress the identified was denied Counsel reformulated a strategy to thoroughly challenge the identification. (App. p. 584). At both the Biggers hearing and before the jury, Counsel Shealey aggressively cross examined the victim on the factors affecting the accuracy of her identification. Counsel Shealey also questioned the victim on her age, subtly suggesting that she may not be as attentive or observant as a younger person. (App. p. 86, lines 8-10; p. 173, line 31 – p. 174,

line 1). The victim provided details surrounding her recent back surgery and the medications she was prescribed at the time of the incident. (App. p. 86, line 11 – p. 88, line 4; p. 174, lines 2-6). Counsel Shealey also questioned her on the fact that she wore glasses and did not see well. (App. p. 88, line 4 – p. 89, line 10; p. 177, lines 5-14). Counsel Shealey questioned the victim about feeling faint and how she almost passed out according to her son who also testified at trial. (App. p. 90, line 24 – p. 92, lines 8; p. 182, line 23 – p. 183, line 11). The victim was cross examined on a number of factors that Dr. McQuiston testified are important to eyewitness identifications such as confidence, weapon focus, exposure duration, stress, and fear.

Most important to our analysis, Counsel Shealey emphasized on cross examination the victim’s testimony that Applicant’s hair was long, nappy, and looked like it “needed a good shampoo.” (App. p. 181, lines 2-14). The victim’s testimony that the assailant had long unkempt hair was a critical point in the trial. Counsels’ strategy again shifted to where they “adopted [the victim’s] identification.” (App. p. 587). In response to the victim’s description of Respondent’s hair, Counsel introduced a booking photo of Respondent which showed that he was *bald* the day the crimes took place and did not have long unkempt hair. Counsel May testified the booking photo was introduced to further impeach the victim’s credibility and reliability in identifying Respondent as the assailant. (App. p. 587). Counsel May also argued these points in his closing argument.<sup>2</sup> He highlighted the victim’s testimony that Applicant’s hair was long and unkempt

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<sup>2</sup> In support of its ruling for relief, the PCR court found Counsel failed to renew their objection made pursuant to Biggers after Gilmore testified. (App. p. 661). The PCR court found that “Trial counsel . . . technically did not ask the Judge to reconsider the admissibility of the identification.” (App. p. 661). In fact, Counsel did renew all objections numerous times throughout the trial. (App. p. 378, lines 10-16). Notably, Counsel moved for a directed verdict on the grounds that Gilmore’s identification was not reliable. (App. p. 295, line 13 – p. 296, line 12). Counsel May also specifically renewed his objection pursuant to Biggers during the post-trial hearing. (App. p. 440, line 19 – p. 4, line 10).

The PCR court also found that Counsel did not preserve the identification issue for appeal. (App. p. 661). This finding is contrary to the South Carolina Court of Appeals’ opinion which found Counsel’s challenge of the show-up

when the booking photo proved that he was bald the day the crime took place. (App. p. 396, line 7 – p. 397, lines 8). He also argued that the victim’s identification was not accurate because she is a seventy-four (74) year old woman who just experienced a traumatic event. (App. p. 402, lines 22-25). Counsel May further argued during closing the identification was mistaken because the victim had an obstructed view of him (App. p. 402, line 21 – p. 403, line 21).

Counsels’ strategy was first to suppress the identification, then to thorough challenge it, and then to adopt it. These strategies are reasonable and demonstrate Counsels’ ability to react to unanticipated developments during the trial. The victim was vigorously cross examined, and her identification of Respondent was thoroughly challenged throughout the trial. Counsel cannot be deemed ineffective for failing to present an expert on eyewitness identification if it was their strategy to adopt the victim’s identification. 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); see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (“Counsel’s strategy will be reviewed under an objective standard of reasonableness.”). Counsel May testified the victim’s description of Respondent’s hair was the theme of his closing. (App. p. 587). He noted that he even wore a stocking cap to demonstrate the implausibility of the State’s argument that the victim may have been mistaken about Respondent’s hair because he was wearing a stocking cap. (App. p. 587). In conclusion, Respondent asks this Court to overturn the PCR court’s ruling by applying the applicable law and considering that the victim’s identification had been

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identification preserved for review. The PCR court’s opinion is flawed further due to this error. The court of appeals issued an unpublished opinion affirming Judge Manning’s decision overruling Counsel’s objection to the victim’s identification. This ruling is law of the case. Proper objections were timely made and renewed appropriately. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

substantially impeached and challenged that Counsels' strategy was reasonable and well within the range of the professional norms.

**C. There is overwhelming evidence of Respondent's guilt, thus precluding a grant of relief.**

Finally, the PCR court erred in addressing the prejudice prong of Strickland. The PCR court's finding that the result of the trial would have been different but for Counsels' failure to call an eyewitness expert is not supported by the record and evidence before the Court.

Notably, the PCR court disregarded the ample evidence supporting the jury's verdict even excluding the identification evidence. The PCR court noted that Respondent was apprehended after fleeing in the victim's car and while in possession of the victim's cell phone but failed to address how this strong evidence could be overcome by an eyewitness identification expert. The PCR court made a finding that Applicant's version of events is plausible, even likely. The statement that Respondent's version of events is probable is not a valid ruling as it disregards the jury's finding of fact. Specifically, Respondent was seen driving the victim's car approximately seven (7) minutes after the authorities were notified. (App. p. 50, lines 13-15; p. 53, lines 1-7). Law enforcement attempted to stop the vehicle, but Applicant attempted to flee. (App. p. 198, line 12 – p. 201, line 6). "Flight from prosecution is admissible as evidence of guilt." State v. Walker, 366 S.C. 643, 654, 623 S.E.2d 122, 127 (Ct. App. 2005); see also State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005). "In South Carolina, we recognize that evidence of flight [is] proper [and] [w]e also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight." Id.; citing State v. Byers, 277 S.C. 176, 177 – 178, 284 S.E.2d 360, 361 (1981). After a brief car chase, Respondent jumped out of the vehicle on foot and tried to run away from officers. Respondent was seen discarding a cell phone which was later affirmatively identified as the victim's son's phone. (App. p. 192, lines 9-

16; p. 193, lines 1-5). Officer Casha Nicole Calloway responded to the scene and testified that the time between her arrival and when the victim identified Applicant was around ten (10) minutes. (App. p. 54, lines 12-17). Therefore, there is overwhelming evidence of Respondent's guilt that the PCR court overlooked that bars the granting of relief.

**CONCLUSION**

Because the PCR order is unsupported by law and facts, the State respectfully requests this Court to grant certiorari, vacate the order granting post-conviction relief, and affirm Respondent's convictions.

Respectfully submitted,

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By:   
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ATTORNEYS FOR RESPONDENT

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-000241

State of South Carolina, ..... Petitioner,

v.


Norman Mitchell, #293197, ..... Respondent.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of Petition for Writ of Certiorari and Appendix has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Laura R. Baer, Esquire  
S.C. Commission on Indigent Defense  
1330 Lady Street, Suite 401  
Columbia, SC 29201**

This 2<sup>nd</sup> day of November, 2016

  
FELICIA V. HAYES  
Legal Assistant For Respondent



ALAN WILSON  
ATTORNEY GENERAL

November 2, 2016

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S.C. SUPREME COURT

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

**RE: Norman Mitchell, #293197 v. State of South Carolina**  
**Appellate Case No. 2016-000241**  
**Lower Court Case No: 2013-CP-40-05967**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Petition for Writ of Certiorari and two (2) copies of the Appendix in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Clayton Mitchell  
Assistant Attorney General  
SC Bar No. 101443

JCM/fvh  
Enclosures

cc: Laura R. Baer, Esquire