

THE 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

NORMAN L. MITCHELL,

RESPONDENT,

v..

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211
(803) 734-1343

ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

approximately ten minutes after she initially arrived at the Time Warner office. (R., pp. 3-6, 10-14).

The victim testified she was sitting in her car outside the Time Warner office while her son went inside to pay his bill, and a man got in the car, put a gun to her head, and ordered her to get out of the car. Due to recent back surgery, the victim was not able to get out of the car quickly, so the man came around the front of the car, pulled her out by her arm, and then drove away. The victim stated she could see clearly and got a good look at the man's face. (R., pp. 29-33).

The victim further testified that when Officer Calloway took her to the scene where Mitchell was apprehended, she immediately recognized him as the man who put a gun to her head and stole her car. She stated she was "very, very, very positive" he was the man. (R., pp. 34-36).

The circuit court denied the motion to suppress, finding the totality of the circumstances indicated the victim's identification was reliable. The court specifically found 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. (R., p. 71).

The victim then testified before the jury about the events of February 1, 2008, including her identification of the perpetrator after he was apprehended. She positively identified Mitchell as the man who held her at gunpoint and stole her car that day, stating she was "110 percent sure." (R., pp. 72-87).

The victim's son testified he and the victim were going to pick up a puppy the day of the carjacking, and he was driving. When he went into the Time Warner office, the victim remained in the passenger seat of the car, and he left the driver's window down

and his cell phone on the dash. After Mitchell was apprehended and the victim's car recovered, the police returned the cell phone to him. (Supp. R., pp. 7-20).

Police officers testified regarding their investigation of the carjacking and the circumstances leading to Mitchell's apprehension approximately fifteen minutes after the incident. Officer Calloway testified about the initial BOLO, and the victim's identification of Mitchell after he was apprehended. (R., pp. 104-124, 126-130, 131-147). Another witness testified he saw Mitchell running away from the police that day, and observed him throw a cell phone, identified at trial as the victim's son's phone, under a parked car. (Supp. R., pp. 1-6).

After the circuit court denied his directed verdict motion,² Mitchell testified he came from Charleston to Columbia by bus on February 1, 2008, to attend a Super Bowl party. When he arrived at the bus station at the corner of Harden and Gervais Streets, he called the person who was supposed to pick him up and learned the person was unavailable because he was attending a roll call in Lexington County.

Mitchell stated he then walked outside the bus station to find a ride, and a man walked up to him and offered to give him a ride for \$10. After Mitchell got in the car, the man offered to "rent" him the car for an additional \$10. Mitchell testified he dropped the man off at a house on Cherokee Street, and was driving away when the police got behind him and turned on the blue lights. He stated he got scared because he was driving without a license, so he tried to get away and finally jumped out of the car and ran. (R., pp. 148-149, 150-180, 181-198).

The jury convicted Mitchell of both carjacking and failure to stop for a blue light, and the circuit court sentenced him to life imprisonment on the carjacking conviction and

²Mitchell conceded the failure to stop for a blue light, and only moved for directed verdict on the carjacking charge.

three years incarceration on the failure to stop conviction.³ (R., pp. 199, 200-202). This appeal followed.⁴

By opinion issued January 25, 2012, the South Carolina Court of Appeals affirmed Mitchell's conviction, holding the circuit court properly considered the appropriate factors and found the victim's identification was sufficiently reliable. (Appendix, pp. 1-3). The Court of Appeals denied Mitchell's Petition for Rehearing by Order filed March 2, 2012. On June 1, 2012, Mitchell filed a Petition for Writ of Certiorari to the Court of Appeals, seeking review of the Court of Appeals opinion.

³The State sought the life without parole sentence based on Mitchell's three prior convictions of first degree burglary.

⁴The failure to stop conviction and sentence is not challenged on appeal.

ARGUMENT

There was ample evidence to support the circuit court's denial of Petitioner's motion to suppress the victim's identification testimony.

Mitchell contends the Court of Appeals erred in affirming the circuit court's denial of his motion to suppress the victim's identification testimony because it was based on an unduly suggestive and unreliable show-up. Specifically, he asserts the Court of Appeals erred in failing to address the fact the victim knew Mitchell had been arrested driving her car, which combined with the show-up required suppression of the identification evidence.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827, 829 (2001); State v. Govan, 372 S.C. 552, 643 S.E.2d 92, 94 (Ct. App. 2007). Admissibility of identification testimony is committed to the trial judge's discretion, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion, or prejudicial legal error. Govan, 643 S.E.2d at 94; State v. Brown, 356 S.C. 496, 589 S.E.2d 781, 784 (Ct. App. 2003).

A. Out-of-Court Identification

There is a two-prong inquiry to determine the admissibility of an out-of-court identification. State v. Traylor, 360 S.C. 74, 600 S.E.2d 523, 526 (2004). The court must first ascertain whether the identification process was unduly suggestive, and if so, determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*; *see also* State v. Moore, 343 S.C. 282, 540 S.E.2d 445, 447 (2000). "The query posited is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure may have been suggestive." State v. Carlson, 363 S.C. 586, 611 S.E.2d 283, 290 (Ct. App. 2005) (*quoting* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 [Ct. App. 1999]). One-on-one identifications are inherently suggestive and generally disfavored, but may be

proper when they occur shortly after, and near the scene of, the alleged crime, because the witness' memory is still fresh, the suspect has not had time to alter his looks or dispose of evidence, and a show-up may expedite the release of innocent suspects and enable the police to determine whether to continue searching. State v. Hoyte, 306 S.C. 561, 413 S.E.2d 806, 807 (1992); *see also* State v. Frazier, 394 S.C. 213, 715 S.E.2d 650, 654 (Ct. App., 2011); Govan, 643 S.E.2d at 95-96; Brown, 589 S.E.2d at 785; 22A C.J.S. Criminal Law §803.

In the instant case, the victim testified she got a good look at her attacker's face, and "was remembering every bit of it." (R., pp. 31-33, 78-79). The show-up occurred within fifteen minutes of the carjacking, near the scene of the crime and when the victim's memory was still fresh.

Mitchell asserts the fact the victim heard police radio transmissions about chasing a car matching the description of her car rendered her out-of-court identification unreliable. This assertion ignores the fact that the victim's car was **not** at the scene of the show-up. (R., pp. 13, 26-28, 37-38, 48). Further, in spite of what she heard over the police radio, and even though Mitchell was the only person in handcuffs at the show-up location, the victim did not immediately identify him. Rather, she asked the police officer to get her closer because she could not see the man clearly, and she "wanted to make sure." (R., pp. 5-6, 21, 35-36, 136-137). Clearly, the fact Mitchell was in handcuffs did not taint the victim's absolute certainty he was the man who attacked her.

Finally, in addition to the certainty of the victim's identification, the police saw Mitchell driving the stolen car, a witness and a police officer saw him throw the stolen cell phone away while he was trying to run away after abandoning the car, and Mitchell's belongings were found in the victim's car. (R., pp. 106-113, 127-130). Thus, under the facts of this case, the show-up was not unduly suggestive. *See Govan*, 643 at 95 (show-

up was not unduly suggestive because it took place within forty-five minutes of the crime, it was held near the scene of the crime when the witness' memory was still fresh, the suspect was wearing clothing consistent with the clothing described by witnesses, and a police officer saw the suspect, who still had the gun in his possession when he was apprehended, drop the paper bag full of stolen money).

B. In-Court Identification

Even if the show-up was unduly suggestive, however, Mitchell's attempt to exclude the in-court identification fails under the second prong of the analysis.⁵ An in-court identification is admissible if the state can prove the identification is reliable by clear and convincing evidence it was based on information independent of the out-of-court procedure. Carlson, 611 S.E.2d at 290. To determine whether an identification is reliable, the court must consider the following factors: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the witness' level of certainty at the confrontation; and (5) the amount of time between the crime and the confrontation. State v. Liverman, 2012 WL 2018015, 4 (S.C., filed June 6, 2012) Brown, 589 S.E.2d at 785; *see also* In the Interest of Jamal Rashee A., 308 S.C. 392, 418 S.E.2d 326, 328 - 329 (Ct. App. 1992).

The reliability of an identification depends on the facts of the case and must be determined by considering the totality of the circumstances. State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987); Rashee A., 418 S.E. 2d at 329. The ultimate question is

⁵Mitchell asserted in the Court of Appeals that the circuit court erred in failing to make a specific finding the show-up at issue was unduly suggestive before considering the relevant factors for reliability. Arguably, the circuit court simply presumed the show-up was unduly suggestive for purposes of Mitchell's motion, and proceeded to the second step of the required analysis.

whether the pretrial identification procedure was so impermissibly suggestive as to create a very substantial likelihood of misidentification. State v. Ford, 278 S.C. 384, 296 S.E.2d 866 (1982).

In Frazier, the victim came home and noticed her back door was open and blinds in the window adjacent to the door was askew. She then briefly observed the defendant face-to-face from ten feet away as he came down the stairs in her apartment. Approximately fifteen to twenty minutes later, a police officer drove the victim to a location where the defendant was detained (in handcuffs), and she identified him as the man she saw in her apartment. 715 S.E.2d at 652.

The circuit court denied the defendant's motion to suppress the victim's in-court identification as tainted by a unduly suggestive show-up. The Court of Appeals affirmed, finding the short period of time between the crime and the show-up, combined with the victim's level of certainty at the show-up, indicated the "out-of-court identification was sufficiently reliable such that no substantial likelihood of misidentification occurred." *Id.* at 654.

The carjacking in this case occurred during the daytime, and the victim was immediately next to, and in direct contact with, Mitchell as he put a gun to her head and forced her out of the car. The victim's attention was heightened at the time, and Mitchell's appearance at the time of the show-up, which occurred less than fifteen minutes after the carjacking, was consistent with the victim's description of him.⁶

⁶Mitchell asserts the victim's identification was unreliable because she described him as "a black man," and testified he had long, gummy or nappy hair even though Mitchell was bald. As discussed above, there was ample evidence the victim's identification was based on her observations of Mitchell during the attack. Further, discrepancies in the victim's description of her attacker's hair did not obviate the certainty of her identification. See Frazier, 715 at 654 (victim's incorrect description of defendant's jacket did not render her out-of-court identification unreliable)

Finally, at both the show-up and trial, the victim stated she was absolutely certain Mitchell was the man who put a gun to her head and stole her car. There was clear and convincing evidence the victim's in-court identification was reliable independent of the show-up. *See State v. Scipio*, 283 S.C. 124, 322 S.E.2d 15 (1984) (identification reliable, in part, because the victim observed the perpetrator standing within arms length for a four to four and a half minute period in a well lit store); *Govan*, 643 S.E.2d at 96 (no abuse of discretion in admitting restaurant employee's show-up and in-court identifications of defendant because the robbery occurred in a well lit building, the employee was immediately next to and in direct contact with the robber as he held her by the arm and put a gun to her head, her attention would have been heightened, the defendant's appearance at the show-up was consistent with the employee's prior description, and the employee stated she was certain the defendant was the robber).

Under the totality of the circumstances, the victim's out-of-court and in-court identifications were reliable, and the circuit court did not abuse its discretion in denying Mitchell's motion to suppress the identification testimony. Accordingly, the Court of Appeals properly affirmed Mitchell's carjacking conviction and sentence, and the Petition for Writ of Certiorari should be affirmed.

CONCLUSION

Based on the foregoing, Respondent respectfully submits the Petition for Writ of Certiorari to the Court of Appeals should be denied.

Respectfully submitted,

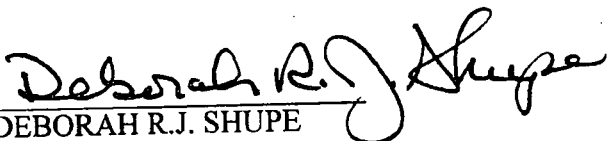
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: 
DEBORAH R.J. SHUPE

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 2, 2012

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
On Petition for Writ of Certiorari to the Court of Appeals
The Honorable L. Casey Manning, Circuit Court Judge
Appellate Case No. 2012-210591

THE STATE,

Respondent,

vs.

NORMAN LEE MITCHELL,

Petitioner.

PROOF OF SERVICE

I, Deborah R.J. Shupe, certify I served the within Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing two copies in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify all parties required by Rule to be served have been served.

This 2nd day of July, 2012.


DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

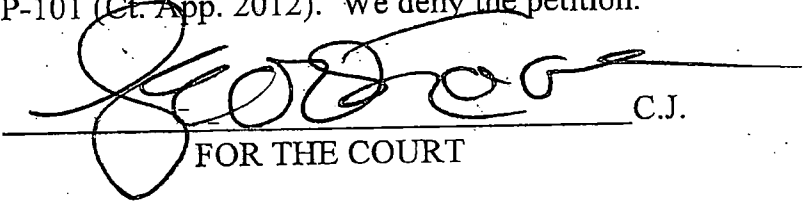
v.

Norman Lee Mitchell, Petitioner.

Appellate Case No. 2012-210591

ORDER

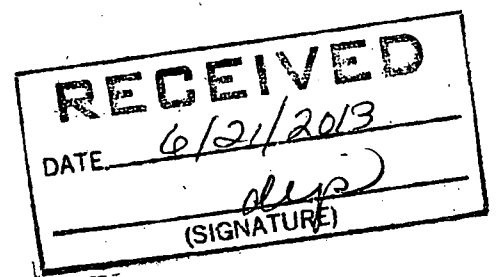
Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *State v. Mitchell*, Op. No. 2012-UP-101 (Ct. App. 2012). We deny the petition.


C.J.
FOR THE COURT

Columbia, South Carolina
June 20, 2013

cc:

The Honorable Jenny A. Kitchings
Deborah R.J. Shupe
Kathrine Haggard Hudgins





The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 21, 2013

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Mitchell, Norman Lee
Lower Court Case No. 2008GS4001238, 2008GS4001239
Appellate Case No. 2009-118766

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Deborah R.J. Shupe
Kathrine Haggard Hudgins

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF RichlandCounty

Full name and prison number (if any) of Applicant.

NORMAN Mitchell #293197

v.

State of South Carolina.

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEF2013 OCT 1 PM 1:36
JEREMY R. McNEAL
CLERK OF COURT
S.C. & G.S.RICHLAND COUNTY
FILEDINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional
2. Name and location of Court which imposed sentence Richland County
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-1239. Failure to stop for a blue light
 - (b) 2008-1238 CARJACKING
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) February 6 2009 Life without parole
 - (b) _____

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Court of Appeals
- ii. Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Court of Appeals - upheld and Affirmed
- ii. Supreme Court - Denied
- iii. _____
- (c) the date of each such result:
- i. Court of Appeals May 2010
- ii. Supreme Court - June 20th 2013
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) INAFFECTIVE Assistance of Counsel
- (b) DENIAL of Due process
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) WAS NEVER offered A plea And Also NO witnesses on my behalf
- (b) My ~~lawyers~~ NEVER objected to me being in handcuffs
- (c) My lawyers NEVER contacted Anyone who I ASKED

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Motion for New trial to Court of Appeals
- ii. Writ of Certiorari to Supreme Court
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. Court of Appeals South Carolina
- ii. Supreme Court South Carolina
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Court of Appeals Denied And Affirmed
- ii. Supreme Court Denied And Affirmed
- iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. UNKNOWN
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NO plea deal was offered or Arranged
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

i. Jim May - 1401 main st Cola, S.C 29201

ii. Brian Shealy - 1401 main st Cola, S.C 29201

iii. _____

- (b) the proceedings at which each such attorney represented you:

i. Jim May - Trial

ii. Brian Shealy - Trial

iii. _____

19. State clearly the relief you seek in filing this application:

New trial

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA

County of

Richland

Norman Mitchell

VERIFICATION

I, ✓, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Norman Mitchell

SWORN to and subscribed before me this 13
day of Sept, 2013.

Franklin

(L.S.)

Notary Public

My Commission Expires: 12-16-2015

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

NORMAN Mitchell

I, N, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Norm Mitchell
Applicant

SWORN or affirmed to and subscribed before me this
13 day of Sept, 2013.

J. A. Rankin
Notary Public

My Commission Expires: 12-16-2019

RICHMOND COUNTY
FILED
2013 OCT -1 PM 1:36
JEANETTE E. MORRIS
C.C.P. & C.S.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Norman Mitchell, #293197,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2013-CP-40-5967

RETURN

Respondent, making its Return to the Application for post-conviction relief filed October 1, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during 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. 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. Applicant filed post-trial motions, which were heard and denied by Judge Manning on March 3, 2009.

Applicant 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.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, and Applicant's trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his Application, Applicant alleges that he is being held in custody for the following allegations of ineffective assistance of counsel:

1. Was never offered a plea and also no witnesses on my behalf.
2. My lawyers never objected to me being in handcuffs.
3. My lawyer never contacted anyone who I asked.

Any claims not specifically enumerated in the application or amendments filed by counsel of record will be opposed by Respondent at an evidentiary hearing, and Respondent will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

Applicant alleges ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests a hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the Application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, Respondent requests that a hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN RATIGAN
Senior Assistant Deputy Attorney General

MEGANE E. HARRIGAN
Assistant Attorney General

By: Megane E. Harrigan
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Feb. 27, 2014.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2013-CP-40-5967
	)	
NORMAN MITCHELL, #293197	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kristy G. Goldberg, Esquire
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 301
Columbia, South Carolina 29201

DATED this 27th day of February, 2014.


 Kelly Oppenheimer, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE # 2013-CP-40-5967

Norman Mitchell,)

vs.)

State of South Carolina,)

Respondent.)

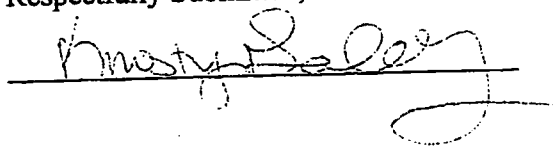
MOTION FOR PAYMENT OF FUNDS
AND AUTHORIZATION OF SERVICES

RICHLAND COUNTY
FILED
2014 AUG - 7 PM 4:31
JEANNETTE W. McBRIDE
C.C.P. & G.S.

The Applicant, by and through his undersigned counsel, requests the Court to order the payment of State funds on behalf of the Applicant and hereby states as follows:

1. The Applicant has filed a non-frivolous post-conviction relief action. The Court has appointed Kristy G. Goldberg, Esquire, to represent the Applicant in this matter. The Applicant is currently serving a life without parole sentence in the Department of Corrections for the offense of Carjacking, along with a concurrent three year sentence for failure to stop for a blue light.
2. Applicant was convicted of these charges after a jury trial. In preparation of the post-conviction relief matter Applicant's counsel has consulted with his original trial counsel, James May, about this case. Trial counsel has stated that he believes that he should have retained an expert in eyewitness testimony to challenge the identification at trial, and that if he had done so the trial outcome would probably have been different.
3. In order to prove prejudice as to the Applicant's claims a formal consultation by someone trained in the field of eyewitness testimony reliability will be necessary. Applicant will provide a copy of any report issued by the evaluator to opposing counsel prior to the evidentiary hearing in this matter.
4. Counsel has consulted with the Attorney General's office who has requested a hearing on this motion.
5. Counsel for the Applicant requests the Court to authorize the Commission on Indigent Defense to provide funding for this service. Applicant's counsel will provide information as to the estimated amount necessary and the proposed individual who will be retained at the motion hearing or earlier.

Respectfully Submitted,



Kristy G. Goldberg
Attorney for Applicant

Columbia, South Carolina
This 8th Day of August, 2014.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT
CASE # 2013-CP-40-5967

Norman Mitchell)
vs.) ORDER FOR PAYMENT OF FUNDS
State of South Carolina,) AND AUTHORIZATION OF SERVICES
Respondent.)

RICHLAND COUNTY
FILED
2014 SEP 24 PM 3:50
JEANNETTE W. MCQUISTON
C.C.P. & G.S.

This matter came before me pursuant to §17-3-50 of the 1976 S.C. Code of Laws, as amended, through a Motion outlining the facts and circumstances of this case. A hearing on this matter was held on September 3, 2014 wherein counsel for the Applicant stated that trial counsel informed her that he believes he should have retained an expert in eyewitness testimony for consultation.

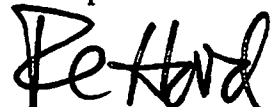
Applicant Mitchell is currently serving a life without parole sentence in the Department of Corrections for the offense of Carjacking. It appears that Mr. Mitchell's trial involved a single victim eyewitness who did not previously know the Applicant prior to the incident. The trial transcript reflects that the physical description she provided at trial did not match the physical description of the Applicant in his booking photo. As a result, this court deems it reasonable and necessary to grant Counsel the ability to consult with an eyewitness identification expert to assist in determining if trial counsel should have retained such an expert in his representation of the Applicant.

It appears, and I so find, that that payment in excess of the standard rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services to be provided are reasonably and necessarily incurred.

IT IS ORDERED that the Commission on Indigent Defense shall issue payment in an amount not to exceed One Thousand One Hundred Dollars (\$1,100) for the services of Dawn McQuiston, Ph.D.

IT IS FURTHER ORDERED that the Defendant may reapply for additional funding as necessary in areas for which funds have already been requested or in areas for which the defense has yet to request funding.

AND IT IS SO ORDERED.



Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina

This 22 day of Sept., 2014.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT
CASE # 2013-CP-40-5967

Norman Mitchell,)
vs.) SECOND ORDER
State of South Carolina,) FOR PAYMENT OF FUNDS
Respondent.) AND AUTHORIZATION OF SERVICES

This matter initially came before me pursuant to §17-3-50 of the 1976 S.C. Code of Laws, as amended, through a Motion outlining the facts and circumstances of this case. A hearing on this matter was held on September 3, 2014 wherein counsel for the Applicant stated that trial counsel informed her that he believes he should have retained an expert in eyewitness testimony for consultation.

Applicant Mitchell is currently serving a life without parole sentence in the Department of Corrections for the offense of Carjacking. It appears that Mr. Mitchell's trial involved a single victim eyewitness who did not previously know the Applicant prior to the incident. The trial transcript reflects that the physical description she provided at trial did not match the physical description of the Applicant in his booking photo. As a result, this court found it reasonable and necessary to grant Counsel the ability to consult with an eyewitness identification expert to assist in determining if trial counsel should have retained such an expert in his representation of the Applicant. Accordingly, this court found that payment in excess of the standard rates was necessary and authorized payment by the Office of Indigent Defense of an amount not to exceed One Thousand One Hundred Dollars (\$1,100) for the services of Dawn McQuiston, Phd.

Counsel for the Applicant has since informed this Court that Dr. McQuiston has reviewed the necessary records related to this case and believes she is able to provide an opinion and testimony favorable to the Applicant's case. Dr. McQuiston believes that the costs associated with the necessary time to draft a report, conduct additional research, travel and submit testimony would come to an approximate additional Three Thousand Five Hundred Dollars (\$3,500.)

It appears, and I so find, that the payment in excess of the standard rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit and prior approval is appropriate because the services to be provided are reasonably and necessarily incurred.

IT IS ORDERED that the Commission on Indigent Defense shall issue payment in an amount not to exceed Two Thousand Eight Hundred and Thirty Four Dollars (\$2,834) for the services of Dawn McQuiston, Ph.D. This is in addition to the One Thousand One Hundred

Dollars (\$1,100) already authorized, resulting in a total amount of Three Thousand Nine Hundred and Thirty Four Dollars approved (\$3,934.00)

IT IS ORDERED that the Applicant may reapply for additional funding as necessary in areas for which funds have already been requested or in areas for which the Applicant has not yet requested funding.

AND IT IS SO ORDERED.

Refford

Judge for the Fifth Circuit

Columbia, South Carolina
This 19 Day of Nov, 2014.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT
CASE # 2013-CP-40-5967

Norman Mitchell,)
) THIRD ORDER
) FOR PAYMENT OF FUNDS
vs.) AND AUTHORIZTION OF SERVICES
) State of South Carolina,)
) Respondent.)
_____)

Applicant Mitchell is currently serving a life without parole sentence in the Department of Corrections for the offense of Carjacking. It appears that Mr. Mitchell's trial involved a single victim eyewitness who did not previously know the Applicant prior to the incident. The trial transcript reflects that the physical description she provided at trial did not match the physical description of the Applicant in his booking photo.

Counsel for the Applicant initially filed a Motion with the Court pursuant to §17-3-50 of the 1976 S.C. Code of Laws, as amended, outlining the facts and circumstances of this case and requesting funding to consult an expert in eyewitness identifications. A hearing on this matter was held before the Honorable Robert Hood on September 3, 2014. The Court found it reasonable and necessary to grant Counsel the ability to consult with an eyewitness identification expert to assist in determining if trial counsel should have retained such an expert in his representation of the Applicant. The Court found that payment in excess of the standard rates was necessary and authorized payment by the Office of Indigent Defense of an amount not to exceed One Thousand One Hundred Dollars (\$1,100) for the services of Dawn McQuiston, Phd. An Order authorizing this funding was signed by Judge Hood on September 22, 2014.

Thereafter, Counsel for the Applicant informed the Court that Dr. McQuiston reviewed the necessary records related to this case and was able to provide an opinion and testimony favorable to the Applicant's case. Dr. McQuiston originally stated that the costs associated with the necessary time to draft a report, conduct additional research, travel and submit testimony would come to an approximate additional Three Thousand Five Hundred Dollars (\$3,500). Counsel requested approval of this amount. Instead, the Court authorized payment by the Office of Indigent Defense of an amount not to exceed Two Thousand Eight Hundred and Thirty Four Dollars (\$2,834) for the services of Dawn McQuiston, Ph.D. in addition to the One Thousand One Hundred Dollars (\$1,100) already authorized. This resulted in an order authoring a total amount of Three Thousand Nine Hundred and Thirty Four Dollars (\$3,934.00). A Second Order authorizing this funding was signed by Judge Hood on November 19, 2014.

On March 31, 2015 Dr. McQuiston submitted an invoice to counsel for her pre-trial services in a total amount of \$4,056.25. This amount was graciously reduced by Dr. McQuiston in accordance with the then existing orders authorizing a total amount of \$3,934.00. This invoice

was submitted to the Office of Indigent Defense with the Court Orders and the invoice has since been paid in full.

On July 14, 2015 Dr. McQuiston traveled to Columbia to testify in the Post-Conviction Relief evidentiary hearing, as was required for competent prosecution of the Applicant's claims. Thereafter she provided counsel with an additional invoice with a total amount due of \$3,587.50 for her time preparing for trial, testifying in trial, and traveling.

It appears, based on the testimony presented at the evidentiary hearing, that Dr. McQuiston's testimony was necessary and essential for the adequate presentation of the Applicant's case. Accordingly, I find that the payment in excess of the standard rates is necessary because the services were reasonably and necessarily incurred.

IT IS ORDERED that the Commission on Indigent Defense shall issue payment in an amount not to exceed Three Thousand Five Hundred and Eighty Seven Dollars and Fifty Cents (\$3,587.50.) This is over and above any previously approved funding.

AND IT IS SO ORDERED.

Judge for the Fifth Circuit

Columbia, South Carolina
This ____ Day of _____, 2015.

*Dawn McQuiston, Ph.D.
Legal Psychologist & Consultant*

152 Chandler Crest Ct., Greer SC 29651

Telephone: 602.617.5233

E-Mail: dawn.mcquiston@gmail.com

Tax ID # 287-64-4128

March 31, 2015

Kristy Grafton Goldberg
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 303
Columbia, SC 29201

RE: Norman Lee Mitchell v. State of South Carolina, No. 2013-CP-40-5967

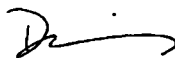
Dear Ms. Goldberg:

Here is my bill for pre-trial services in the Mitchell matter.

Date	Hours	Amount	Activity
10/03/14	4.50	\$1237.50	Review case file; correspondence with Ms. Goldberg
01/20/15	9.00	\$2475.00	Review materials; write report
03/23/15	.25	\$ 68.75	Conference call with Ms. Goldberg
03/29/15	1.00	\$ 275.00	Finalize report
Total		<u>\$4,056.25</u>	
Amount due		<u>\$3,934.00</u>	

Thank you for giving me the opportunity to participate in this matter.

Sincerely yours,



Dawn McQuiston

*Dawn McQuiston, Ph.D.
Legal Psychologist & Consultant*

152 Chandler Crest Ct., Greer SC 29651

Telephone: 602.617.5233

E-Mail: dawn.mcquiston@gmail.com

Tax ID # 287-64-4128

July 15, 2015

Kristy Grafton Goldberg
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 303
Columbia, SC 29201

RE: Norman Lee Mitchell v. State of South Carolina, No. 2013-CP-40-5967

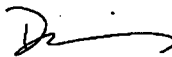
Dear Ms. Goldberg:

Here is my bill for trial services in the Mitchell matter.

Date	Hours	Amount	Activity
03/29/15	2.00	\$ 550.00	Prepare courtroom testimony
03/31/15	3.00	\$ 825.00	Preparation for court (review case, literature, testimony)
07/13/15	4.00	\$1100.00	Preparation for court (review case, literature, testimony)
07/14/15	1.50	\$ 412.50	In court
	4.00	\$ 700.00	Roundtrip travel from Greer, SC to Richland County Courthouse
<u>Total</u>		<u>\$3,587.50</u>	
<u>Amount due</u>		<u>\$3,587.50</u>	

Thank you for giving me the opportunity to participate in this matter.

Sincerely yours,



Dawn McQuiston

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

NORMAN MITCHELL)
SCDC # 293197,)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)
Defendant.)

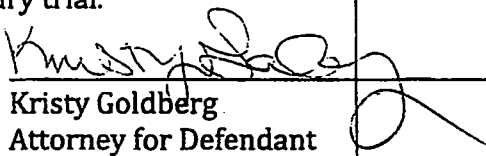
IN THE COURT OF COMMON PLEAS
2013-CP-40-5967

AMENDED APPLICATION
FOR POST CONVICTION RELIEF

2015 MAR 13 PM 3:44
CLERK OF COURT
COURT REPORTER
COURT CLERK

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows:

11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- a) Ineffective assistance of counsel - Trial counsel failed to present an expert testimony regarding eyewitness identification.
 - b) Ineffective assistance of counsel - Trial counsel failed to investigate and present additional witnesses and evidence.
 - c) Ineffective assistance of counsel - Trial counsel failed to object to the Applicant's restraint in handcuffs during the jury trial.


Kristy Goldberg
Attorney for Defendant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 301
Columbia, SC 29201
803-252-2299
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina
This 13th day of March, 2015

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

NORMAN MITCHELL)
SCDC # 293197,)

Applicant,)

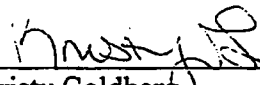
vs.)

STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE COURT OF COMMON PLEAS
2013-CP-40-5967

CERTIFICATE OF SERVICE

I certify that on this date I served the Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this application to the Office of the Attorney General via U.S. mail at Post Office Box 11549, Columbia, South Carolina 29211-1549.



Kristy Goldberg
Attorney for Defendant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 301
Columbia, SC 29201
803-252-2299
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 13th day of March 2015

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2013-CP-40-05967
	)	
	)	
	)	
Norman Mitchell	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina	)	)
<u>DEFENDANT</u>	)	July 14, 2015
		Columbia, SC

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JUDGE.

A P P E A R A N C E S:

KRISTY G. GOLDBERG, ESQ.
Attorney for the Applicant

J. CLAYTON MITCHELL, ASSISTANT ATTORNEY GENERAL
Attorney for the State

KESHIA REED
Official Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Brian Shealey				
Ms. Goldberg	6			
Mr. Mitchell		16		
Dr. Dawn McQuiston				
Ms. Goldberg	20		45	
Mr. Mitchell		38		
James May				
Mr. Mitchell	47		57	
Ms. Goldberg		53		58
Norman Mitchell				
Ms. Goldberg	59		67	
Mr. Mitchell		66		
Certificate of Reporter 79				

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
Applicant's 1	Jail Photo		12
Applicant's 2	Dr. McQuiston Curriculum Vitae		25
Applicant's 3	Dr. McQuiston Draft Report		25
Applicant's 4	Receipt for Filing Disability		65
Applicant's 5	Dr. McQuiston's Report		25

1 THE COURT: All right. Mr. Attorney General.

2 MR. MITCHELL: One second, Your Honor.

3 THE COURT: Take your time.

4 MR. MITCHELL: All right. Your Honor, may it
5 please the Court, this is Norman Mitchell vs. the State of
6 South Carolina case number 2013-CP-40-5967. Mr. Mitchell
7 was indicted in June of 2008 for carjacking and failure to
8 stop for a blue light. He was represented on those
9 charges by Mr. James May and Mr. Brian Shealey proceeded
10 to trial on February 4th through February 7th of 2009
11 before Judge Manning. He was convicted as indicted and
12 sentenced to life without the possibility of parole.

13 THE COURT: LWOP?

14 MR. MITCHELL: Yes, sir, it's an LWOP case. He
15 had two prior first degree burglaries. There's a
16 posttrial motion heard and that was heard in March of
17 2009. A direct appeal was taken and the South Carolina
18 Court of Appeals affirmed his conviction and unpublished
19 opinion. Remitter was issued June of 2013. This
20 application was filed October 1st of 2013. Mr. Mitchell
21 is represented by Ms. Goldberg. I believe she's filed an
22 amended application in this case.

23 THE COURT: That's what I'm looking for.

24 MR. MITCHELL: It's failure to present expert
25 testimony regarding eyewitness identification, failure to

1 investigate, present additional witnesses, evidence and
2 failure to object to applicant's restraints in handcuffs
3 during the jury trial. And I'll let Ms. Goldberg clarify
4 on those issues if she wishes to do so. And I'll turn it
5 over to her at this time.

6 THE COURT: Ms. Goldberg.

7 MS. GOLDBERG: Thank you, Your Honor. May it
8 please the Court, did you find a copy of that amended
9 application?

10 THE COURT: I'm still looking.

11 MS. GOLDBERG: I'll hand you mine.

12 THE COURT: Just wait a minute, no sense to give
13 me more paper than I need. No, I don't. I don't have the
14 amended application.

15 MS. GOLDBERG: Here you go, Your Honor.

16 THE COURT: Thank you.

17 MS. GOLDBERG: Your Honor, I believe that the
18 allegations on the amended application are relatively
19 obvious as to generally what the allegation itself is. So
20 unless, Your Honor, needs anything further at this time,
21 I'm going to go ahead and call my first witness.

22 THE COURT: Go ahead.

23 MS. GOLDBERG: At this time I would call Brian
24 Shealey.

25 THE COURT: Do you solemnly swear or affirm that

1 the testimony you're about to give in this case will be
2 the truth, the whole truth, and nothing but the truth so
3 help you God?

4 THE WITNESS: I do.

5 THE COURT: Please have a seat in the witness
6 box and state your full name for the record?

7 THE WITNESS: Brian Shealey.

8 WHEREUPON,

9 Brian Shealey,
10 after first having been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. GOLDBERG:

13 Q Mr. Shealey, where are you employed right now?

14 A I work at the Shealey law firm.

15 Q How long have you been an attorney?

16 A I was sworn in in 2008, so a little over seven years.

17 Q And what percentage of your work since that time has
18 been in criminal law?

19 A Exclusively. I do now some personal injury civil
20 cases, but primarily it's been criminal defense.

21 Q Do you know Mr. Norman Mitchell?

22 A I do from my time back when I assisted Mr. May and we
23 represented him.

24 Q When you and Mr. May represented Mr. Mitchell
25 where were you working?

1 A In this courthouse at the Richland County public
2 defender's office.

3 Q You were both employed there?

4 A Yes.

5 Q And you said you assisted Mr. May?

6 A I did. I was what we call second chair. I believe
7 Mr. May had gotten a case from another attorney, had been
8 reassigned and it was coming up for trial and got me
9 involved.

10 Q How soon before the trial did you become involved
11 with this case to the best of your memory?

12 A Somewhere between a month or two weeks before the
13 trial. I can't be certain. I know I visited Mr. Mitchell
14 at the jail and we prepped a lot obviously with him and I
15 was working with Mr. May, but it wasn't a whole lot before
16 trial.

17 Q Did you simply assist Mr. May in his direction or did
18 you work collaboratively with him?

19 A We worked collaboratively. It was Jim's case. He
20 was more familiar with it. He had it longer. It was his
21 case, but we collaborated it and -- as much as you can
22 with Mr. May, but, yeah, we collaborated.

23 Q Did you have certain witnesses, certain legal issues
24 that were your own assignment?

25 A Yes, divide up the witnesses. I recall I did the

1 Biggers hearing and Mr. May did some other items.

2 Q To assist the Court in understanding this case, can
3 you give us a general summary of facts of the incident he
4 was charged with?

5 A I can. This was an LWOP case stemming from a
6 carjacking allegation down in Five Points at the Time
7 Warner Cable, which is still there and at that business it
8 was an elderly lady Ms. Gillmore. The general allegation
9 was that somebody grabbed her, opened the car door while
10 she was waiting while her son was paying the bill and
11 stuck a gun in her face, and basically got her out of the
12 car pretty abruptly, drove away quickly in her car and
13 then that person was caught. That was the general
14 allegation that Mr. Mitchell was caught in the Mitchells'
15 car six to ten minutes after the carjacking, so that was
16 the case.

17 Q You testified that one of your responsibilities in
18 this case was the Biggers hearing?

19 A Yes.

20 Q Therefore the identification issue?

21 A That's correct.

22 Q What were some of the concerns and issues surrounding
23 that?

24 A Well, I mean, it was always kind of couched. Our
25 defense was it wasn't me. Mr. Mitchell had told us and I

1 think told everyone from day one that he didn't
2 essentially take her car, but that he was at the Greyhound
3 bus station and was approached by a guy in a car and it
4 was like a -- some people called it a crack rental or I
5 forget if it was drugs or money, but it was in exchange
6 for a ride. And his defense was, yeah, I was in that car,
7 but it wasn't me. So it was always kind of you got the
8 wrong guy. I know in the Biggers hearing it was a show-up
9 ID. And then at that time, you know, I been a lawyer six
10 to eight months. It was my first general sessions trial,
11 but I was researching that issue. And I think the case
12 law led me to believe that it was not a favorable
13 identification procedure. It was suggestive. I think the
14 testimony at the Biggers hearing was that Ms. Gillmore
15 was -- one she was listening to the commentary. She was
16 being treated for her injuries and a Columbia police
17 department officer was with her. And she was hearing this
18 chase. It all happen so quickly on the officer's radio.
19 They got him, they got him that kind of thing. And she
20 was brought up in a car to identify Mr. Mitchell in the
21 Gonzales Gardens apartment, which is where he was
22 apprehended I think after a foot chase. So it was that
23 kind of show-up ID where he's in handcuffs surrounded by
24 officers. We had concerns. I think I argued and I
25 reviewed the transcript from it regarding she being

1 confronted with a firearm. I think I argued that point.
2 I think the general consensus was I was arguing that it
3 was a suggestive ID and the fact that it was a show up.
4 And then you look at the other five factors in its
5 totality and I think we're concerned about a gun being in
6 her face as far as her attention to that kind of detail.
7 She couldn't describe the gun. She didn't describe
8 initially her assailant except for he was a black man.
9 There was no ---

10 THE COURT: Except for what?

11 A That he was a black man. There was not -- in her
12 statement that was it essentially. There was a black man
13 that took my car, force me out of the car at gun point and
14 then they brought me to him. They said they got him. And
15 Mr. Mitchell had been seen running from this Intrepid that
16 was being chased by the Columbia police department. The
17 concerns about that there was some testimony she was
18 bleeding from her ear. She fainted after this incident,
19 she was about 75. She just had back surgery and she
20 testified to being on pain medication when this thing
21 happened. She was essentially pretty fragile. And
22 there's just no description of her assailant other than
23 being black, but when she was questioned on that when she
24 got to the car, she said that she was 110 percent it was.
25 But I also do recall her saying that she was -- it smelled

1 funny, it smelled bad and she wanted to leave the show-up
2 procedure. And she was viewing it from inside the back of
3 a police car. And he was outside and they kind of did a
4 ride by essentially.

5 Q During the trial, you actually cross examined the
6 victim on pretrial and during the trial itself, correct?

7 A Yes, ma'am.

8 Q During the trial, did the victim make any statements
9 regarding Mr. Mitchell's appearance that were concerning
10 to you?

11 A Well, initially she was saying that she was 110
12 percent sure. It was him. I started questioning her on
13 that. She couldn't give any description about his
14 clothes, but -- I'm sorry you stating at the Biggers
15 hearing or actually in trial?

16 Q Either one.

17 A Yeah, she came out actually on direct examination
18 with Mr. Cathcart who was prosecuting. He kind of asked
19 her how did Mr. Mitchell look and she said, well, he looks
20 different. That day he had long kind unkept, ungroomed
21 hair. She said it looked like it needed a good shampoo.
22 And, yeah, it stood out because she never described her
23 physical appearance and we actually had been looking at
24 his mug shot from when he was arrested and he is about as
25 bald as he is now. As that stood out and I remember

1 asking her about it and she confirmed it, yes, it was
2 long. She called it long nappy hair.

3 Q Did you enter a copy of that booking photo into
4 evidence to combat that testimony?

5 A We did. We got that entered into evidence. We
6 called Captain Redmond, who at the time was a captain down
7 at the jail, and he was doing all their booking
8 procedures. And basically confirmed that that was his
9 appearance. It was unaltered from his arrest and that he
10 would have been bald just like the picture indicated when
11 he was brought in.

12 MS. GOLDBERG: Beg the Court's indulgence.

13 (WHEREUPON, a pause in the proceedings.)

14 BY MS. GOLDBERG:

15 Q Mr. Shealey, I'm handing you a copy of Plaintiff's
16 Exhibit Number 1. Can you tell me what that is?

17 A It would appear to be the booking image that he was
18 booked in on that day of this incident that we entered
19 into evidence at his trial.

20 MS. GOLDBERG: At this time I ask for this to be
21 admitted into evidence.

22 THE COURT: Any objection?

23 MR. MITCHELL: Without objection.

24 (WHEREUPON, Applicant Exhibit No. 1 was admitted
25 into evidence.)

1 BY MS. GOLDBERG:

2 Q Mr. Shealey, based on the testimony offered at trial,
3 was it your understanding that the encounter between the
4 victim and the defendant was brief?

5 A Very brief. She -- Ms. Gillmore said it happened so
6 quickly that he didn't -- he wanted her to get out of the
7 car, but he wouldn't let her get out. And he pushed her
8 out and then took off in that car so fast that the car
9 door was left open and knocked her over. So my
10 understanding was it was very quick.

11 Q Do you recall from meeting her what the race of the
12 victim was?

13 A She was white.

14 Q Mr. Mitchell was black?

15 A Yes.

16 Q You understood there to be a gun involved?

17 A Yes.

18 Q Was there ever any physical evidence offered at trial
19 tying Mr. Mitchell to the incident?

20 A No, this was not. The vehicle was recovered, but
21 there was no gun. So there was nothing linking any kind
22 of fingerprints or DNA from my recollection at all from
23 either the car, which was collected and there was no
24 weapon ever collected. This was in essence an ID case.

25 Q Other than the identification, there wasn't any other

1 evidence pointing to Mr. Mitchell?

2 A No -- well, I mean, he was running from the vehicle.
3 They -- I think the State brought in a witness to testify
4 that he was the guy running from the vehicle. I think law
5 enforcement they brought in some officers that chased him.
6 I don't recall if they gave a statement or not, but it
7 never was an admission statement. It was may be I was
8 running. I got pulled over and then I think he testified
9 at trial and his defense was essentially I was at the bus
10 station trying to get some place. And this guy approach
11 with an opportunity for a ride.

12 Q Do you recall if there was another reason for Mr.
13 Mitchell to have run from the car?

14 A I don't recall specifically. He may have had -- I
15 didn't review that part of the transcript, but it may have
16 been warrants or DUS or no license or something. I don't
17 know, but I don't really recall.

18 Q Did you ---

19 THE COURT: Ms. Goldberg, clarify this car
20 situation, what car you talking about? What is Mr.
21 Shealey talking about in other words. There was a car
22 that was owned by the victim?

23 MS. GOLDBERG: The victim's car was taken and
24 then ---

25 THE COURT: By somebody?

1 MS. GOLDBERG: By somebody. And then
2 approximately six minutes later the defendant -- it was
3 stopped and the defendant ran from that particular car.

4 THE COURT: Okay. Thank you.

5 BY MS. GOLDBERG:

6 Q Mr. Shealey, did you and Mr. May ---

7 THE COURT: By himself?

8 MS. GOLDBERG: By himself, yes, sir.

9 BY MS. GOLDBERG:

10 Q Did you and Mr. May retain an expert in witness
11 identification to testify at trial?

12 A No, we did not. Like I said, that was my first
13 general sessions trial. Mr. May had that case a couple
14 months prior. I'm not sure in 2009 if we had really
15 educated ourself enough on ID cases to actually do that.
16 I know we don't step forward into a courtroom now or I
17 don't on a ID case like this without an expert available
18 to consult with or potentially testify, but that I don't
19 recall a discussion about it or if we had one. I knew the
20 ID was an issue, but I just don't recall us ever
21 consulting.

22 Q So not only retained but to your recollection you
23 didn't even consult with one?

24 A I can't recall. I know we didn't have anybody that
25 came to court with us. Jim would have worked that case up

1 and he only had it briefly. And you'll have to ask him if
2 he4 talk to anybody, but I don't think he did. And we
3 certainly didn't have anybody that we would need in the
4 Biggers or to help us generally educate a jury at trial on
5 the big ID issues.

6 Q If you had this case now, would you have an
7 eyewitness expert ---

8 MR. MITCHELL: Objection, it's not relevant as
9 to this.

10 THE COURT: I'll sustain it.

11 MS. GOLDBERG: No further questions.

12 THE COURT: Mr. Mitchell.

13 CROSS-EXAMINATION

14 BY MR. MITCHELL:

15 Q Good afternoon, Mr. Shealey.

16 A Hello, good afternoon.

17 Q I'm going to try not to be redundant. So the Biggers
18 hearing your strategy -- well, your arguments were that
19 there's a single person show up lineup, right?

20 A It was a show up, yes.

21 Q And it was unduly suggestive and therefore should be
22 suppressed, correct?

23 A I argued that, yes, based on the law concerning show
24 ups. They're just favored, that's what I argued.

25 Q You also emphasized that the victim heard that he was

1 apprehended over the radio?

2 A Yeah, and that kind of flesh itself out in the
3 hearing or either in the testimony that she was actually
4 having this narrated for her, that they got the guy
5 because she was being interviewed by an officer and it was
6 on the radio. And like they were following the car and it
7 was kind of realtime happening.

8 Q So on your cross-examination of Ms. Gilmore, who's
9 the victim, you focused on a I guess a number of things.
10 So it would have been her description of Mr. Mitchell the
11 hair specifically, right?

12 A That kind of came out of left field the hair, yes.
13 Once Mr. Cathcart was directing her on that issue came up,
14 yes, I did focus on that and she confirmed the hair. He
15 looked different. She was basically saying it looks
16 different now. He had short hair in court kind of like he
17 does right now, but at the time it was long and unkept and
18 she described it as nappy and that's why that photograph
19 became a big issue.

20 Q Do you think that was a surprise to the State when
21 she said that he wasn't bald at the time?

22 A I don't know why it would have come out otherwise.

23 Q You also emphasized that she had back surgery
24 recently?

25 A Yes, she testified to that and that she was taking

1 pain medications at the time of the incident for her back.

2 Q Talked about her wearing glasses?

3 A Yeap, she says that she wears them and that she had
4 them on at the time.

5 Q So these are all things that you brought up on cross
6 and a little bit in the Biggers hearing as well, correct?

7 A Yes, sir.

8 Q And that was kind of a theory in the case too
9 misidentification her ID was not reliable, is that fair to
10 say?

11 A Right, I think it happen so fast, got in your face,
12 you're injured. I knew what his testimony was going to be
13 and he did testify to that effect that this guy approached
14 him trying to basically look for someone to take his car.
15 This whole thing happened like two blocks from the
16 incident location. It was all very compact from where he
17 was arrested in Gonzales Gardens from down in Five Points
18 where the incident occurred.

19 Q Were you aware of what issues were raised on direct
20 appeal?

21 A I have no clue.

22 Q You also -- correct me if I'm wrong here, did you
23 also cross-examine the victim's son when he testified?

24 A I could look through my transcript if you like, I
25 don't recall right now.

1 Q That's fine. The record will speak for itself on
2 that. At the directed verdict stage you also argue that
3 the ID was not reliable enough and that the directed
4 verdict should be entered is that part your recollection?

5 A Sure. Jim May had me do a lot of work in that case,
6 so I imagine I did the DV too.

7 Q As to the restraints issue, what is it your
8 general -- when you go to trial, are your clients normally
9 handcuffed?

10 A I think courthouse security typically upon request
11 will allow them to be off. I'm not sure at the time what
12 was going on if that was an issue or not. We standardly
13 request that shackles that are visible be removed, but I
14 don't recall if that was the case.

15 Q You recall if Mr. Mitchell was wearing leg irons?

16 A I do not recall.

17 Q In the trials that you've had during your defendant's
18 who are incarcerated they mostly -- they normally wear leg
19 shackles as well?

20 A I think we almost always -- we almost always request
21 that I do not. It's usually taken up outside the presence
22 of the jury and I think, you know, it's up to the
23 presiding judge some of them removed if securities okay
24 with it. Some will keep them on and then just have them
25 removed when they come and testify if they testify.

1 MR. MITCHELL: No further questions. Thank you,
2 Mr. Shealey.

3 THE COURT: Redirect?

4 MS. GOLDBERG: No more questions, Your Honor.

5 THE COURT: Just a factual matter, Judge Manning
6 heard the Biggers hearing and he allowed the in-court
7 identification.

8 THE WITNESS: Yes, Your Honor.

9 THE COURT: That's all I have.

10 (WHEREUPON, the witness leaves the witness
11 stand.)

12 THE COURT: Next witness.

13 MS. GOLDBERG: Your Honor, at this time I would
14 call Dr. Dawn McQuiston.

15 THE COURT: You solemnly swear or affirm the
16 testimony you're about to give in this hearing will be the
17 truth, the whole truth and nothing but the truth?

18 THE WITNESS: Yes, sir.

19 THE COURT: Have a seat in the witness box and
20 state your full name for the record.

21 THE WITNESS: It's Dawn McQuiston.

22 THE COURT: How do you spell your last name?

23 THE WITNESS: M-C-Q-U-I-S-T-O-N.

24 MS. GOLDBERG: Your Honor, before she testifies,
25 I'd be okay with Mr. Shealey being relieved.

1 THE COURT: That's fine with the Court. Go
2 ahead.

3 MS. GOLDBERG: Thank you, Your Honor.
4 WHEREUPON,

5 Dr. Dawn McQuiston,
6
7 after first having been duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MS. GOLDBERG:

10 Q All right, ma'am. What is your current occupation?

11 A I'm a psychology professor at Wofford College.

12 Q And how many years have you had that occupation?

13 A For 12 years, ten years at Arizona State University
14 and then the last two years at Wofford College.

15 Q What is your education and degree?

16 A I have a bachelor's degree in psychology. I have a
17 master's degree in experimental psychology and a PHD in
18 experimental psychology.

19 Q What does your faculty position at Wofford consist
20 of?

21 A Since, I'm a professor, I teach classes and I do
22 research.

23 Q What is your general area of expertise?

24 A My general area is legal psychology or psychology as
25 it applies to legal issues and I specialize in eyewitness

1 memory.

2 Q You currently teach and do research in that area?

3 A I do, yes.

4 Q Do you belong to any psychological organizations?

5 A I do. I belong to the American Psychology Law
6 Society, The Society for Applied Research and Memory and
7 Cognition and the Association for Psychological Science.

8 Q Do you present your research for professional
9 psychology ---

10 A I do.

11 Q Have you published any of your research and has it
12 been peer reviewed?

13 A I have and it has been, yes.

14 Q Do you conduct peer review of other scholars works?

15 A I do.

16 Q Have you been qualified as an expert in eyewitness
17 identification before?

18 A Yes, ma'am.

19 Q In what states?

20 A In Arizona, Washington, Tennessee, South Carolina and
21 North Carolina.

22 MS. GOLDBERG: Your Honor, at this time I have
23 premarked Plaintiff's Exhibit Number 2 that's the CV of
24 this witness which the defense has already seen.

25

1 (WHEREUPON, Applicant Exhibit No. 2 was marked
2 for identification only.)

3 BY MS. GOLDBERG:

4 Q Let me do this, ma'am, is this document your CV?

5 A Yes, ma'am.

6 MS. GOLDBERG: At this time I would offer this
7 witness as an expert in eyewitness testimony.

8 THE COURT: Any objection or voir dire?

9 MR. MITCHELL: No voir dire, no objection, Your
10 Honor.

11 THE COURT: Thank you. You may proceed.

12 MS. GOLDBERG: Your Honor, I'll hand this up for
13 the Court's convenience.

14 BY MS. GOLDBERG:

15 Q All right, ma'am, what documents have you reviewed in
16 preparation for this hearing?

17 A I reviewed the transcript of records State of South
18 Carolina vs. Norman Lee Mitchell. The private
19 investigator report dated August 11, 2008 and some other
20 documents, the incident report, investigative report,
21 investigators follow-up report, witness statements, and
22 photographs of Mr. Mitchell.

23 Q Did that include the victim's statement?

24 A It did, yes.

25 Q In reviewing those documents, do you believe that

1 your expertise and research on eyewitness testimony could
2 have aided the Court or the jury in weighing the
3 credibility or the evidence at trial?

4 A I do, yes.

5 Q Have you prepared a report in preparation for today's
6 hearing?

7 A Yes.

8 Q Beg the Court's indulgence. Going to hand you what's
9 premarked as Plaintiff's Exhibit Number 3 -- Applicant's
10 Exhibit Number 3. Is that a copy of your report?

11 A It's a copy of a draft of the report. I do have a
12 final copy.

13 Q You do have a final copy?

14 A I do.

15 MS. GOLDBERG: Can I exchange this for
16 Applicant's Exhibit Number 3.

17 COURT REPORTER: I'll do it as number five.

18 BY MS. GOLDBERG:

19 Q All right. This is Applicant's Exhibit Number 5. Is
20 this a copy of your report?

21 A Yes, ma'am.

22 MS. GOLDBERG: At this time I'm going to ask to
23 offer that report into evidence.

24 THE COURT: Counsel seen it?

25 MS. GOLDBERG: Yes.

1 MR. MITCHELL: Well, you know, I got a draft.
2 I'm not sure what's the different than the final.

3 MS. GOLDBERG: I don't think it's different.

4 MR. MITCHELL: No objection.

5 THE COURT: Without objection.

6 (WHEREUPON, Applicant's Exhibit No. 2, 3 and 5
7 was admitted into evidence.)

8 MS. GOLDBERG: Your Honor, I'll hand up a
9 courtesy copy of the exact same document and not marked as
10 draft.

11 BY MS. GOLDBERG:

12 Q Okay. What does this report generally seek to
13 explain?

14 A It explains some of the psychology factors underlying
15 issues that could have been relevant to the identification
16 made in this case.

17 Q Now, have you testified in criminal trials before?

18 A I have, yes.

19 Q In preparing to offer expert testimony in a criminal
20 trial, do you typically review the same documents you
21 reviewed in this case?

22 A Yes.

23 Q Is there anything different that you would have given
24 that every case is different, different documents exist.
25 Is there anything that you would be missing in this case

1 or not had available to you?

2 A No, ma'am.

3 Q Would any opinion that you have today be the same
4 opinion that you would have had had you been retained
5 prior to trial?

6 A Yes.

7 Q Because you would have reviewed the same documents
8 you reviewed for today?

9 A Right.

10 Q So based on that, I am going to ask you to testify as
11 you would have testified before the jury if you had been
12 called. Do you understand that?

13 A Yes.

14 Q Eyewitness testimony issues rely heavily on concepts
15 related to human ability and memory. Is there a generally
16 accepted theory about how memory works?

17 A There is and it was set forth back in the 60's by a
18 couple of psychologists Atkinson and Shipon (sic) and the
19 main principles of that argument or that theory are that
20 memory does not work like a videotape. Instead when we
21 process information, when we receive information, it has
22 to pass through a series of stages.

23 Q And what would be the first stage?

24 A So there are three stages and so the first stage is
25 what we call sensory memory. Sensory memory is memory

1 storage that only lasts for a matter of seconds. So when
2 we receive incoming information, it's what's in our minds
3 right at that moment and we very quickly select what will
4 -- what we will retain for further processing or what is
5 irrelevant.

6 Q And then what would the next stage be?

7 A Next stage is called short-term memory also temporary
8 memory lasts for about 30 seconds or so. And so with that
9 stage, it's again information that you're thinking about
10 right in that moment. And unless we rehearse information
11 over and over again, then it's lost. So again, it's very
12 -- it's a very quick process. You can think of this
13 stage. For example, if someone tells you their phone
14 number, you got to rehearse it over and over again or else
15 in a matter of seconds it's lost.

16 Q And then the final stage, the third stage?

17 A The final stage would be long-term memory and so
18 anything that makes it into long-term memory we should be
19 able to recall that information at any time.

20 Q Do people technically remember a mental photograph of
21 video of what they saw?

22 A No, they do not.

23 Q What would they be remembering if they saw a
24 photograph or video or incident happen?

25 A We think of memory as being reconstructive. Any time

1 we're recalling something, typically there are gaps in
2 what we remember and it happens to everybody. It's the
3 normal process of trying to recall something. And so
4 since there are typically gaps in what we remember, we
5 tend to fill in those gaps with information that may be is
6 accurate and maybe is not accurate. We fill in those gaps
7 with information from our own personal experiences or
8 perhaps what we might have expected to have happened or
9 expected to be there.

10 Q When we talk about eyewitness testimony, one of the
11 things that you look at is attention, perception, duration
12 of the event. Is that accurate?

13 A Yes.

14 Q What do scientist mean by the word attention?

15 A So attention is a cognitive mechanism that we used to
16 filter out irrelevant information while hanging on to
17 relevant information. Since, we know that attention
18 really is fairly limited.

19 Q And how does that affect memory?

20 A We can only later remember the things that we
21 attended to.

22 Q Under what circumstances would someone fail to attend
23 to an important thing?

24 A Sure. Since tension is limited we can't possibly
25 process every single thing that's happening at any given

1 moment. Also, if we don't know that we'll need that
2 information later on, we may not attend to it in a given
3 moment.

4 Q What do scientist mean by the term perception?

5 A Perception is simply another mechanism that we use to
6 filter out information or hang on to relevant information.

7 Q Are the things that happened influence the quality of
8 information perceived and accepted?

9 A Sure, yes.

10 Q Such as the amount time?

11 A That's right, how long an event takes the longer any
12 event is happening the more information there is. The
13 more information we will get and then the more likely we
14 will remember it later.

15 Q So conversely the shorter the period of time ---

16 A The less information we will get. Therefore, there's
17 less information to remember later.

18 Q Now, continuing on as to factors that usually come up
19 in eyewitness testimony, is there something called
20 cross-race effect?

21 A Yes, ma'am.

22 Q And what is that?

23 A The cross-race effect are also called the own race
24 bias. It's a term coined by psychologist -- something
25 that psychologist have been studying for decades. And the

1 bottom line is that what research shows is that people
2 have a more difficult time recognizing and identifying
3 faces that are of another race than of their own race or
4 ethnic group.

5 Q Is there scientific research that backs that theory
6 up?

7 A There is. Again, several decades worth of research
8 that came together in what scientist call meta-analysis,
9 which is essentially combining many many studies into one
10 overall study to look at overall findings. So there was a
11 meta-analysis published in 2001 that looked at what we
12 know or knew at that time overall about the cross-race
13 effect.

14 Q Do you know how many studies went into this
15 meta-analysis?

16 A There were almost 40 studies that went into that
17 meta-analysis using thousands of participants.

18 Q How are these studies that review cross-race effect
19 generally conducted?

20 A Sure. People are -- participants are exposed to some
21 sort of event and an assailant would be of the same race
22 or ethic group as the participant or of another race. So
23 it creates two separate groups and then the person's --
24 the participants memory for the event and for the person
25 their memory is tested.

1 Q How does the cross-race effect happen?

2 A There a lot of theories set forth by scientist who
3 study the cross-race effect, but the one that seems to
4 receive the most support scientifically is what is called
5 the contact hypothesis and simply put it is that the more
6 time that people spend around members of another group,
7 the less susceptible they are to this effect.

8 Q Has it been found with different racial groups?

9 A It has. This is a phenomena that's been found --
10 studied and found all over the world in this country and
11 Europe and many countries using many different groups?

12 Q Do eyewitness experts generally support this theory?

13 A They do, yes.

14 Q Based on your review of the documents here, do the
15 facts in this case involve a victim and a defendant of a
16 different races?

17 A From what I read, yes.

18 Q So this principal would have been relevant to present
19 to the jury?

20 A It would have been, yes.

21 Q Is there another phenomena called weapon focus?

22 A Yes. Weapon focus is a term coined by psychologist.
23 Psychologist have been studying this for years looking at
24 the effects of the presence of a weapon on a person's
25 ability to remember information later.

1 Q And what does that research generally find?

2 A It finds that when there is a weapon involved people
3 tend to remember details of the person's face less --
4 remember fewer details of the person's face and have a
5 more difficult time making an accurate identification of
6 that person.

7 Q Has this research been published?

8 A It has similar to the cross-race effect another
9 meta-analysis published in the early 1990's dozens of
10 studies, thousands of participants in this research on
11 weapon focus.

12 Q Now, when are those studies generally conducted?

13 A Those studies are done exposing participants again to
14 some sort of event in one scenario that would be a weapon
15 present in another scenario there wouldn't be a weapon
16 present. And then participants memory for the details are
17 tested later in those groups are compared.

18 Q What types of weapons?

19 A Lots of different weapons guns, knives anything sort
20 of threatening, syringes anything that might be perceived
21 as threatening to a participant.

22 Q Does it matter if the study has a realistic nature to
23 it?

24 A Sure. What research shows is that the more realistic
25 the study the bigger the effect you find here. The worse

1 people tend to do when there is a weapon present, the more
2 realistic these simulated events are.

3 Q Is this related to a heightened level of stress or
4 fear?

5 A Yes, the idea is that the presence of a weapon
6 certainly invokes a level of stress or fear arousal, yes.

7 Q How does stress generally impair a person's memory?

8 A In general, scientist find that people focus on their
9 stress response to the expense of encoding or processing
10 other information that's happening at the same time.

11 Q Is there research that supports that theory?

12 A There is dozens of studies going into another
13 meta-analysis that was published in the mid 2000's looking
14 at how people or people's ability to remember information
15 and details of a person's face under stressful conditions
16 versus a condition that isn't stressful.

17 Q Do eyewitness experts generally support conclusions
18 regarding weapon focus and stress?

19 A They do, yes.

20 Q That are generally accepted in the community?

21 A That's right.

22 Q Because there was an allegation in these facts that a
23 gun was present would this information have been relevant
24 to present to the jury or the judge during the trial?

25 A I believe so, yeah.

1 Q Now, have eyewitness researchers studied the
2 confidence witnesses expressed and may have any studies
3 related to that?

4 A Yes, a line of research among eyewitness researchers
5 has been looking at whether we can use a witnesses
6 confidence to reliably predict accuracy. Typically, a
7 witness will give a confidence statement in terms of how
8 confident they are that they made an accurate
9 identification.

10 Q What does that research generally find?

11 A So this research finds that confidence is not a
12 perfect of predictor accuracy. Witnesses can be very
13 confident but not be accurate.

14 Q Why might confidence and accuracy not be related?
15 Why is there not a correlation there?

16 A Sure. And I would say that -- it's not that there's
17 no correlation. It's a smaller relationship than you
18 would expect. Confidence what we have learned in looking
19 at research is that confidence can fluctuate. There are a
20 lot of things that can affect whether a person is
21 moderately confident or highly confident. Confidence is
22 malleable. It can change over time and so that's the
23 reason that there is not perfect or really strong
24 relationship between confidence and accuracy.

25 Q Do eyewitness experts generally support these

1 conclusions regarding the relationship between confidence
2 and accuracy?

3 A They do, yes.

4 Q Would this theory had also have been relevant given
5 the testimony and facts at issue in this jury trial?

6 A It would, yes.

7 Q To your recollection, the victim stated she was 110
8 percent sure of her identification. Would that testimony
9 by the victim have been persuasive to the jurors?

10 MR. MITCHELL: Objection, I don't think her
11 opinion toward the jurors is relevant.

12 THE COURT: I'll sustain it.

13 BY MS. GOLDBERG:

14 Q I'm going to go on to one-on-one procedures show-up
15 identifications. How is a show-up identification
16 different than a lineup?

17 A With a lineup because there's other members it
18 provides a line of procedure, provides some protection
19 against a witness who may not have a great memory for the
20 person who committed the crime.

21 Q From a psychological perspective are show ups as
22 equally as good -- equally as reliable as a lineup?

23 A They are not.

24 Q How are they different?

25 A Again, the idea is that when there's other lineup

1 members it can provide a fairer test of a witnesses
2 memory. You can think of this like similar to a multiple
3 choice test. If a witness has a great memory, they should
4 be able to pick out the correct answer in a multiple
5 choice test with a one-on-one procedure that part of it is
6 included. The idea is that a one-on-one procedure can be
7 suggestive to a witness. The witness then knows who law
8 enforcement think committed the crime in that moment.

9 Q Has there been empirical research examining how
10 one-on-one identifications compared to lineup procedures?

11 A There has been about a dozen studies went into a
12 meta-analysis published in the early 2000's looking at the
13 rate of false identifications made from a lineup -- a
14 lineup procedure versus a show-up procedure and what those
15 conclusions are. The conclusions show that with a lineup
16 procedure there are fewer false identifications made.

17 Q Do eyewitness experts generally support the
18 conclusion that show up on identifications are suggestive?

19 A They do, yes.

20 Q Are there guidelines to discuss how a show up should
21 be administered?

22 A There are guidelines that were published by the
23 department of justice, national institute of justice in
24 1999 distributed to law enforcement that discussed
25 recommendations for conducting a show-up procedure and a

1 lineup procedure.

2 Q What did the guidelines say about administering a
3 show up?

4 A Is that that procedure is inherently suggestive.

5 Q What would have been a better test of the witnesses
6 recollection in this case?

7 A To have place the photo on Mr. Mitchell's photo in a
8 lineup.

9 Q Why would that be more reliable?

10 A Because a line of procedure will offer some
11 protection against a witness who may not have a great
12 memory.

13 Q The initial description as stated in the trial
14 transcript provided by the victim regarding the assailant
15 was a black male. Does that initial description provide
16 any concerns regarding identification procedure used?

17 A There just wasn't much of a description there. I
18 think that would be the concern. I believe the only
19 descriptor given in that moment at that time was the
20 assailant was a black male.

21 Q Do you think that this theory -- these -- the fact
22 that psychologists routinely considers show-up
23 identifications to be inherently suggestive, do you think
24 that information would have been helpful to the jury
25 making their decision?

1 A I do, yes.

2 MS. GOLDBERG: No further questions at this
3 time.

4 THE COURT: Cross-examination.

5 MR. MITCHELL: Yes, sir.

6 CROSS-EXAMINATION

7 BY MR. MITCHELL:

8 Q Good afternoon, Dr. McQuiston.

9 A Good afternoon.

10 Q How are you doing today?

11 A Good, thank you.

12 Q You testified you been qualified in South Carolina
13 before; is that right?

14 A I have, yeah.

15 Q How many occasions is that?

16 A In South Carolina specifically?

17 Q Yes, ma'am.

18 A Probably five times.

19 Q Have you testified on a collateral review like this
20 case here or is it normally the trial level?

21 A Only at the trial, yes.

22 Q Not just in South Carolina? I mean, any other times
23 you testified has always been at the trial level?

24 A It's always been at the trial, on occasion pretrial
25 hearings, most trial.

1 Q How many times have you testified for the
2 prosecution?

3 A Zero.

4 Q Let me run through a bit of your report starting with
5 the exposure duration. So the more time you spend with
6 someone the more accurate your ID will be of them?

7 A That's the general idea, right.

8 Q Is that kind of coincide with refreshness like if I
9 saw you and I was asked to ID you within an hour as oppose
10 to a week later ---

11 A Right.

12 Q --- so that would be a -- more indicator of more
13 positive identification, correct?

14 A Right, we call that retention interval the time
15 between the event and the subsequent event, right, the
16 shorter that amount of time the better someone's memory
17 would be sure.

18 Q You recall in this case that the time between
19 identification was around I think no more than 15 minutes?

20 A The time between the crime and the ---

21 Q Crime and the identification?

22 A Right.

23 Q To the weapon focus, where was the gun pointed at the
24 victim?

25 A I believe it was pointed at her head.

1 Q I believe it was pointed to part of her ear, so she
2 testified that the gun was put to the side of her head and
3 that she was looking right at Mr. Mitchell that would play
4 into the accuracy of her ID whether she's looking at the
5 gun or whether she's looking at the assailant; is that
6 right?

7 A I believe it plays into it sure, yes.

8 Q So as far as the stress goes the more fear someone
9 feels the less accurate the identification is generally;
10 is that right?

11 A In general that's what can happen sure.

12 Q You mentioned how the studies goes and how the
13 studies go on meta-analysis. How do they test weapons
14 with an gun? Are there mock robberies with knives and
15 guns?

16 A There have been, yes.

17 Q So that's ---

18 A Right.

19 Q They would have a mock robbery where you try to
20 identify the person ---

21 A Right.

22 Q --- who is trying to rob you?

23 A Right.

24 Q That's interesting. Now, if people are more engaged,
25 they'll be more tentative to what's going on. They would

1 have a more likelihood of being able to recall or make a
2 positive identification; is that correct?

3 A What do you mean by engaged?

4 Q Kind of bored or not engaged with what's going on in
5 your surroundings. So if you were more engaged, you'd
6 have a likelihood of a positive identification; is that
7 right?

8 A Right.

9 Q You didn't have an opportunity to interview the
10 victim or anything like that?

11 A No, sir.

12 Q Were you aware that she was a retired registered
13 nurse?

14 A I read that, yes.

15 Q And she was likely trained to evaluate people's
16 symptoms and use to working in a stressful environment.
17 Could that play a role in people's perceptions of these
18 identifications?

19 A I don't know about that.

20 Q It could?

21 A It could, sure.

22 Q Kind of getting into the confidence, but if a witness
23 was able to recall specific facts of her surroundings and
24 of this alleged assailant, that would make her testimony
25 more reliable in your opinion; isn't that right?

1 A Right.

2 Q Because the witness couldn't give any details at all
3 either you would say, well, her testimony is not going to
4 be very reliable?

5 A Right.

6 Q So confidence really doesn't swing both ways like if
7 you're not confident in the identification, but it's
8 likely that it's not an accurate identification?

9 A It's probably not likely in that scenario.

10 Q So it really doesn't swing both ways. You say I am
11 very confident doesn't correlate that it's going to be
12 accurate, but it does correlate you say I'm not confident
13 that it be inaccurate?

14 A I'm not sure I fully understand the point.

15 Q Just generally how confidence goes that the more
16 confident just doesn't correlate to the accuracy of the
17 ID, correct?

18 A I wouldn't say it doesn't correlate, but it doesn't
19 strongly correlate.

20 Q Correlate strongly as you would suspect I think is
21 what you said?

22 A Exactly.

23 Q What other factors play into a analysis of someone's
24 -- the accuracy of someone's identification, other factors
25 that you did detail as you did the other ones?

1 A Sure. There could be a host of issues -- you in
2 general?

3 Q Just general, yes, ma'am.

4 A It could be anything in terms of post-event
5 information. The way the witness is interviewed. The way
6 a lineup procedure is conducted, whether the lineup is
7 conducted blind or not, so the investigator knows who the
8 suspect is or not, co-witness information discussing
9 details with a co-witness that can effect identification
10 accuracy. There's many things that psychologist study
11 when it comes to eyewitness ID.

12 Q What you discussed in your report and what you
13 thought most relevant to this case?

14 A That's right.

15 Q Now, is most of your research concentrated on just
16 facial composition or does it encompass clothing
17 descriptions or ---

18 A I say most of the research in this area focuses on
19 how well people can recognize someone's face.

20 Q So it's kind of the lineup what they're saying and
21 you've shown six different faces and that's kind of how a
22 lot of this research is done, right?

23 A That's right.

24 Q So if someone could confirm saying that the clothing
25 you said I was wearing that would make the identification

1 more accurate?

2 A Right.

3 Q A chance of it being more accurate?

4 A Right.

5 Q You talked about this a little bit I think -- I think
6 you talked about it on direct distance would play a role,
7 how close the assailant gets to you, correct?

8 A Yes.

9 Q But time of day, the lighting things of that nature.

10 A Uh-huh.

11 Q It's kind of common sense things?

12 A Yes.

13 Q If it start, it would be harder to pick this man out
14 after, correct?

15 A Right.

16 Q What about capacity of the witness' capacity to
17 perceive or take in what's going on, that would be
18 something that could play into the identification?

19 A What do you mean by capacity.

20 Q I guess, like if the witness was intoxicated or was
21 taking pain relievers or anything like that?

22 A Sure, yes.

23 Q I think I'm about finish. I guess, the conclusion
24 that you've kind of come to in this case is that you can't
25 make a conclusion, of course, one way or the other whether

1 it was accurate, but your testimony would have -- your
2 testimony you would have tried to help the jury bring out
3 certain things to think about and certain factors to
4 consider when considering the reliability to the witnesses
5 ID; is that right?

6 A Exactly.

7 MR. MITCHELL: No further questions. Thank you.

8 THE COURT: Redirect.

9 MS. GOLDBERG: Just briefly, Your Honor, to omit
10 any confusion.

11 REDIRECT EXAMINATION

12 BY MS. GOLDBERG:

13 Q Doctor, you didn't testify that the more accurate a
14 person believe themselves to be the more likely they were to
15 be inaccurate; is that right?

16 A Right.

17 Q It's just that it doesn't necessarily have any
18 correlation at all. Is that more of the accurate
19 statement?

20 A What I would say is that we have learned through
21 research that a person's level of confidence is not a
22 perfect predictor of whether they are accurate or not. It
23 can be a predictor. Sometimes it's a predictor and
24 sometimes not, which is why I say it's not a perfect
25 predictor.

1 MS. GOLDBERG: Nothing further, Your Honor.

2 THE COURT: Anything further?

3 MR. MITCHELL: Nothing further, Your Honor.

4 THE COURT: All right. You may come down,
5 ma'am. Thank you very much.

6 (WHEREUPON, the witness leaves the witness
7 stand.)

8 THE COURT: This witness be excused?

9 MS. GOLDBERG: Yes, Your Honor.

10 MR. MITCHELL: Yes, Your Honor. Your Honor, can
11 we call Mr. May out of order?

12 THE COURT: Who's calling him?

13 MR. MITCHELL: I would be calling him.

14 MS. GOLDBERG: And I have no objection. I know
15 Mr. May needs to leave.

16 THE COURT: Mr. May, just got here.

17 MR. MAY: I'm sorry, Your Honor. I've been in a
18 Sovereign Citizen hearing for the last five and half
19 hours.

20 THE COURT: Well, we use to always have this
21 argument which court has precedence.

22 MR. MAY: Yours, of course.

23 THE COURT: That's because you're here.

24 MR. MAY: Absolutely.

25 THE COURT: Call Mr. May.

1 MR. MITCHELL: All right. They State calls Mr.
2 James May.

3 THE COURT: You solemnly swear or affirm the
4 testimony you about to give in this hearing will be the
5 truth, the whole and nothing but the truth so help you
6 God?

7 THE WITNESS: Yes, Your Honor.

8 THE COURT: Have a seat in the witness box and
9 state your full name for the record.

10 THE WITNESS: My full name is James Hunter May.
11 WHEREUPON,

12 James May,
13 after first having been duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. MITCHELL:

16 Q Okay. Good afternoon, Mr. May.

17 A Good afternoon.

18 Q Thank you being here with us here today. Now, if you
19 could describe your background where you currently
20 employed and where you previously...

21 A Sure. My background is my undergraduate and graduate
22 degree from Vanderbilt University. I have a law degree
23 from the University of South Carolina. After graduating
24 from the University of South Carolina law school, I was a
25 public defender for five years, last three and a half

1 years I'm an Assistant United States attorney.

2 Q And you recall being -- becoming involved in
3 Mr. Mitchell's case?

4 A Yes, sir, I was appointed by Doug Strickland, who was
5 the chief public defender to represent Mr. Norman
6 Mitchell, when his previous counsel left the office that
7 was Caroline Gripp.

8 Q And your case was assign to you and Mr. Shealey
9 was -- how did Mr. Shealey become involved?

10 A I need somebody to try a case with and I always had
11 very good luck with the Shealey brother's.

12 Q We been over the facts of the case pretty detail so
13 far, so I won't go through that with you. But did you and
14 Mr. Shealey go through your strategy on keeping the
15 victim's identification out of -- out from before the jury
16 suppress that identification?

17 A Well, sure, I mean, the initial thing was we wanted
18 to try to suppress under Neil vs. Biggers. The huge
19 hurdle and Norman knew the big hurdle was the amount of
20 time that elapsed from the time that the victim was armed
21 robbed until Mr. Mitchell was caught fleeing from the
22 vehicle, that was just -- it was just a huge hurdle and
23 under the factors of Biggers, that was the one least that
24 Judge Manning rested his decision on. We tempted -- we
25 thought we had a valid argument. He was the guy in

1 handcuffs without a shirt on in February under the hood of
2 a car with a bunch of police surrounding him. I mean, it
3 was suggestive. There's no way you can say it wasn't.
4 However, the fact that it weighed ultimately in policing
5 the judge's mind was the amount of time from the incident
6 from observing him initially 'till the time she was able
7 to identify him.

8 Q So as you understand the law, show up lineup is
9 suggestive on its face almost?

10 A I mean, a single show up lineup has to be suggestive.
11 You have one person handcuffed and you have a bunch of
12 people surrounding them, that's suggestive. Now, is it
13 overly suggestive, Judge Manning found that it was not.
14 So we attempted to in pretrial matters to exclude that
15 identification when we didn't -- we had to reformulate a
16 strategy, which was -- we knew it was going to come in
17 under any type of analysis in the Neil v. Biggers. Then
18 we had to figure out what's the best way to attack it as
19 Mr. Mitchell was facing life without parole.

20 Q So where did you go from there just attacking a
21 witness on the cross-examination?

22 A Well, sure as well as getting Mr. Mitchell's story
23 out there. Mr. Mitchell testified that it was a crack
24 rental and that he was in possession of the car, but it
25 was because he had purchased it or rented it for crack.

1 It's a plausible argument. It's a plausible story because
2 there are crack rentals in Columbia, South Carolina. As
3 often times when people of meager means are able to
4 procure cars, but that was Mr. Mitchell's story as to how
5 he was in possession of the car.

6 Q The way the facts kind of came out the incident took
7 place at the Time Warner Cable Five Points, right?

8 A That's right.

9 Q Mr. Mitchell's testimony was that he rented the
10 vehicle from someone at a bus station, which was a block
11 away?

12 A That's right. And then the car was seen by Columbia
13 police department going down -- there's a road that
14 parallels Harden. It's in between Harden and the railroad
15 tracks right there. I do not know the name of the road,
16 but that's where the car was first seen high speed chase
17 pursued. I ended up having and Mr. Mitchell was then
18 apprehended in Gonzales Gardens apartments fleeing from
19 the police.

20 Q You discussed the timeline. What was the timeline
21 from incident to arrest?

22 A Pretty quick.

23 Q Let me go back to cross-examination of Ms. Gilmore.
24 I know Mr. Shealey handled this, but ---

25 A He did. He did a great job.

1 Q And we went through everything that he attempted to
2 bring out on that, but I think where you all really
3 focused on was her description of the assailant's hair; is
4 that right?

5 A Absolutely. She said -- I think the correct quote
6 was long-nappy hair was her identification. And Norman
7 had a shiny head in his arrest picture later that day, so
8 we were able to juxtapose her identification with what
9 Norman really look like. The State countered well he must
10 have had a stocking cap on was their only explanation.

11 Q Do you think that caught the State off guard when the
12 witness said that he had longer hair?

13 A Absolutely.

14 Q Do you recall moving for a directed verdict in this
15 case?

16 A It was my practice to always move for a direct
17 verdict. However, I have no independent memory of doing
18 it.

19 Q Would it surprise you that you argued the ID as a
20 ground for granting of directed verdict?

21 A No, it would not.

22 Q You did closing argument in this case; is that right?

23 A I did.

24 Q How did you plan to go about arguing Mr. Mitchell's
25 case to the jury?

1 A We had adopted her identification. The person who
2 robbed this poor-old lady had long-nappy hair. We
3 attempted to show how the argument of Richard Cathcart was
4 absurd that it must have been a stocking cap. I think I
5 actually did the vast majority of my closing in a stocking
6 cap. Pointed out the difference between the one thing
7 that you can know the difference between me and Richard
8 Cathcart we're both 6'3 white males, but he has no hair
9 and I have hair. That was -- it was the best thing we
10 had. The worse thing we had was that he was caught in the
11 car I mean generously to say minutes afterwards. I hate
12 that for Norman it was a life without parole case.

13 Q There's an allegation Mr. Mitchell making regarding
14 whether he was in handcuffs during the trial?

15 A He was in leg irons.

16 Q Just in leg irons?

17 A It was not handcuffs. He was -- I think the case is
18 Missouri v. Deck is what we argued. He was in leg irons
19 and he as oppose to any other witness was on the stand
20 when the jury came in. And the jury was excused before he
21 left the stand to try to minimize the judge's thought was
22 to minimize. However, there was definitely noticeable
23 difference that Norman Mitchell was the only person who
24 didn't walk to the stand. He was the only person who
25 didn't put his hand on the Bible to swear like that. They

1 brought the Bible up to him and he swore like this. There
2 was no -- at least in my opinion I was his attorney, but I
3 thought there was a noticeable difference in the way he
4 proceeded to he stand and they way anybody else did.

5 MR. MITCHELL: No further questions. Answer
6 anything Ms. Goldberg has for you.

7 THE COURT: Ms. Goldberg.

8 MS. GOLDBERG: Thank you, Your Honor. May it
9 please the Court.

10 CROSS-EXAMINATION

11 BY MS. GOLDBERG:

12 Q I'll start with the handcuffs since you were just
13 talking about that.

14 A Yes, ma'am.

15 Q So do I understand correctly that you were testifying
16 that he did have them on while he testified?

17 A I do not believe he had handcuffs on at any time when
18 the jury was present. He had leg irons on. I do not
19 believe -- I don't believe I've ever tried a case where
20 the person was in handcuffs at any time the jury was
21 present before a determination was made as far as guilt or
22 innocence.

23 Q So to your knowledge the jury didn't see him in
24 handcuffs at any time?

25 A I don't know when they would have.

1 Q To your knowledge were they able view the leg irons
2 at any time?

3 A I don't have any knowledge one way or the other.

4 Q Fair enough. How long did you represent Mr. Mitchell
5 before the trial was called?

6 A One month.

7 Q Who was his attorney before that?

8 A Caroline Gripp.

9 Q In during that one month preparation for this trial,
10 did you consult or retain an eyewitness expert?

11 A I did not.

12 Q Did Ms. Gripp ever consult or retain an eyewitness
13 expert?

14 A She did not.

15 Q Is there any particular reason why not?

16 A I can answer for myself.

17 Q Of course, answer for yourself.

18 A I didn't have any idea about eyewitness expert at the
19 time.

20 Q You didn't know they existed?

21 A I think it was sometime later that year. I think the
22 trial was February of 2009. I think some time later that
23 year we started looking at how to attack an arm robbery
24 that occurred at a post office and we started looking at
25 experts. I'm not saying I didn't know about them, but it

1 was not something that was in my -- it was not an error of
2 my quiver that early in my career.

3 Q From the testimony offered at trial ---

4 A Ms. Goldberg ---

5 Q Go ahead.

6 A Had I done it now if I'm a defense attorney, of
7 course, I would have ---

8 MR. MITCHELL: Objection speculation.

9 MS. GOLDBERG: Your Honor, that's actually not
10 speculation.

11 THE COURT: Well, I've excluded it before, so
12 what I do now is not relevant.

13 BY MS. GOLDBERG:

14 Q The testimony at trial that was offered was that
15 police got behind the car the defendant was driving about
16 six minutes after the 9-1-1 call; is that accurate?

17 A I think it was less.

18 Q Less than that?

19 A I think it was less. I think that that was on
20 cross-examination. I think Mr. Shealey was able to go
21 with a timeline that six minutes was that -- however, I do
22 not believe that it was accurate. I think that it was
23 less. I think it was less.

24 Q Despite the proximation in time to where police were
25 behind the defendant in a car, your testimony was that the

1 defendant testified to a plausible explanation as to how
2 he got into the car?

3 A Yes.

4 MS. GOLDBERG: Beg the Court's indulgence.

5 (WHEREUPON, a pause in the proceedings.)

6 BY MS. GOLDBERG:

7 Q I'm going to hand you what's marked as Applicant's
8 Exhibit Number 4. I don't know that I can introduce it
9 through this witness because we're calling them out of
10 order, so I'm asking for a little leniency here. Mr. May,
11 do you recognize that document at all?

12 A It looks familiar. However, I can -- I mean, I can
13 read what it is.

14 Q You agree that it may have come out of your file?

15 A I would agree with that.

16 Q You don't remember it or recall why it's relevant
17 anyway?

18 A I mean, I know that he said he was living with his
19 aunt or cousin in Charleston and he had come up for the
20 Super Bowl.

21 Q That was part of his testimony?

22 A That was part of his testimony at trial, yes.

23 Q Did you enter this document into evidence during
24 trial?

25 A I have no idea.

1 Q Fair enough.

2 MS. GOLDBERG: And I will enter this exhibit
3 through the next witness as he can more properly
4 authenticate it. No further questions.

5 THE COURT: Thank you very much.

6 MR. MITCHELL: Very briefly.

7 REDIRECT EXAMINATION

8 BY MR. MITCHELL:

9 Q So the timing is what really hurt Mr. Mitchell's case
10 the most, do you agree with that?

11 A Absolutely.

12 Q It was just such a short period of time, but it was
13 plausible but let's not say likely this all could happen
14 that way?

15 A That was what Mr. Mitchell's testimony was -- that's
16 what his story was to me in the time I represented him. I
17 believe he testified to. However, again the hurdle was
18 time.

19 Q In fact, you testified you think the theory of the
20 case changed a bit when the witness -- when the victim
21 testified about the hair you think that changed the
22 strategy a bit?

23 A Absolutely. We had to embrace it. That's the best
24 piece of evidence that we had is that she identified the
25 person who robbed her as having long-nappy hair. And

1 again Norman did not have a hair on his head the day that
2 he was arrested.

3 MR. MITCHELL: Thank you no further questions.

4 MS. GOLDBERG: Your Honor, if I could just have
5 a brief recross just on that last issue?

6 THE COURT: Go ahead.

7 RECROSS-EXAMINATION

8 BY MS. GOLDBERG:

9 Q Mr. May, you said that theory of the case changed
10 when the testimony regarding Mr. Mitchell's hair came out?

11 A The theory on the case was always that it was a crack
12 rental.

13 Q What -- was that the first time that information
14 regarding his hair had ever been said before?

15 A Yeah.

16 Q It was not said in pretrial?

17 A No.

18 Q Did -- when this new information came out during the
19 actual trial, did you and Mr. Shealey ask Judge Manning to
20 reconsider his ruling on the Biggers issue?

21 A We did not.

22 Q Did you ask for a mistrial?

23 A We did not.

24 MS. GOLDBERG: No further questions.

25 THE COURT: All right, sir, you may come down.

1 Thank you very much, Mr. May.

2 (WHEREUPON, the witness leaves the witness
3 stand.)

4 MS. GOLDBERG: No objection to this witness
5 being excused. Your Honor, at this time I would call
6 Norman Mitchell as a witness.

7 THE COURT: Come around. Do you solemnly swear
8 or affirm the testimony you about to give in this case to
9 be the truth, the whole truth and nothing but the truth so
10 help you God?

11 THE WITNESS: Yes, sir.

12 THE COURT: Have a seat in the witness box and
13 state your full name for the record.

14 THE WITNESS: Norman Mitchell.

15 WHEREUPON,

16 Norman Mitchell,
17 after first having been duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MS. GOLDBERG:

20 Q Mr. Mitchell, where are you housed?

21 A I'm currently housed at Lee Correction.

22 Q And what sentence are you serving?

23 A Life without parole.

24 Q You had a jury trial?

25 A Yes, ma'am.

1 Q How many attorneys did you have representing you
2 during this case? Let's say from the time you were
3 arrested through the trial how many attorneys did you
4 have?

5 A Three.

6 Q Who were they?

7 A First it was Caroline Gripp, and then I had
8 Mr. Shealey and Mr. May.

9 Q When did Mr. May get involved with your case?

10 A I would say it's like right at the before I started
11 trial.

12 Q Did you stay in jail the entire time your charges
13 were pending?

14 A Yes, ma'am.

15 Q Did your lawyers meet with you to prepare for trial?

16 A Yes, ma'am.

17 Q They came to the jail and met with you?

18 A Yes, ma'am.

19 Q Did you review your discovery documents with them?
20 Incident reports, police reports things like that?

21 A Yes, ma'am.

22 Q Did they ever mention the idea of hiring an
23 eyewitness testimony expert in your case?

24 A No, ma'am.

25 Q Did you know that such a thing existed?

1 A No, ma'am.

2 Q Is it your allegation today that an expert in
3 eyewitness identification should have been retained in
4 this case?

5 A Yes, ma'am, after many sleepless nights to read a
6 bunch of cases, yes, ma'am.

7 Q I'm sorry I just didn't hear that.

8 A I said many sleepless nights reading a bunch of
9 cases, yes, ma'am.

10 Q Is there any particular reason why you think it would
11 -- it was especially relevant in your case?

12 A Yes, ma'am, because it would have proven that I
13 didn't do this.

14 Q You've always maintained your innocence?

15 A Yes, ma'am.

16 Q You also always admitted that you were driving the
17 car at some point in time, correct?

18 A Yes, ma'am.

19 Q The facts of this case involved a gun used in the
20 carjacking; is that right?

21 A From what they say.

22 Q Was there a gun ever found in the car?

23 A No, ma'am.

24 Q And explain to me -- there was testimony in the trial
25 that we haven't talked about today regarding a duffel bag.

1 Can you tell me what happened with a duffel bag or what
2 the testimony was?

3 A The testimony was the bags that I was carrying from
4 Charleston when I got a bus ticket. I had a overnight bag
5 and she said -- they said the bag was found in the car.

6 THE COURT: Sir, I got to hear you. You got to
7 speak up.

8 A Bag was found in the car with items that I had
9 purchased to bring overnight for the Super Bowl party.

10 Q Your duffel bag was found in the car?

11 A Yes, ma'am.

12 Q Was there any other allegation that the person who
13 did this crime had a duffel bag with them when they did
14 it?

15 A It wasn't a duffel bag that was mine. I had bags
16 in -- a bag in the car, yes, ma'am.

17 Q Right. Is there any evidence or witnesses that you
18 asked your lawyer to present during trial that they did
19 not present?

20 A Yes, I was trying -- I mention to Mr. May about my
21 bus ticket and about locating a family member that I was
22 living with in Charleston that couldn't be located.

23 Q Do you know if he was able to determine evidence
24 about the bus ticket?

25 A No, ma'am.

1 Q You don't know or he couldn't?

2 A I was never sure.

3 Q Any other witnesses?

4 A The guy who was scheduled to pick me up from the
5 Greyhound bus station.

6 Q That individual is now deceased; is that right?

7 A Yes, ma'am.

8 Q Let me hand you Applicant's Exhibit Number 4. Can
9 you tell me what that document is?

10 A This is my social security replica that I got from
11 the social security office in Charleston, South Carolina
12 on January 23rd 2008.

13 Q Is that something that you believe should have been
14 admitted as evidence at trial?

15 A Yes, ma'am, because it clearly shows my address and
16 where I was living at.

17 Q And what purpose do you think that would have served
18 or what good that would have done?

19 A At that time had they have retrieved this, then they
20 could have retrieved -- they probably could have went back
21 and retrieved the bus ticket from the Greyhound bus ticket
22 during the dates and time.

23 Q Do you think that the jury could have -- that that
24 document would have helped the jury in making their
25 decision in any way?

1 A Yes, ma'am.

2 Q How?

3 A They said I was homeless. They said -- Mr. Cathcart
4 said I was living homeless and I didn't have anywhere to
5 live and I fabricated the story about ever living in
6 Charleston never lived in Charleston at all.

7 Q So it would help to show that the Solicitor was wrong
8 when he said you were lying?

9 A Yes, ma'am.

10 MS. GOLDBERG: At this time I would ask to enter
11 Applicant's Exhibit Number 4 into evidence. I have showed
12 opposing counsel.

13 THE COURT: Any objection?

14 MR. MITCHELL: Your Honor, I think it's hearsay
15 and I don't think it's authenticated. It's a document
16 from the social security office I believe.

17 BY MS. GOLDBERG:

18 Q Let me ask you another question. Mr. Mitchell,
19 that's a letter from the social security office, who's it
20 address to?

21 A Norman Coward Mitchell, Jr., 1921 Marshan Street
22 North Charleston, South Carolina.

23 Q Did you receive it in the mail?

24 A Yes, ma'am.

25 Q And is the purpose of the jury having seen that

1 document just to verify your address?

2 A Yes, ma'am.

3 MS. GOLDBERG: I ask that it be offered into
4 evidence?

5 THE COURT: Objection is overruled. Go ahead.

6 MS. GOLDBERG: Thank you, Your Honor.

7 (WHEREUPON, Applicant Exhibit No. 4 was admitted
8 into evidence.)

9 BY MS. GOLDBERG:

10 Q Mr. Mitchell, I think you told me that you believe
11 the jury was able to see you in handcuffs during the
12 trial?

13 A Yes, ma'am.

14 Q Tell me about that?

15 A I had on leg irons and every time I get a little
16 static or something, they tell me to slid my feet up
17 under, keep telling me to slide my feet up under the jury
18 box. And it was very very uncomfortable so I kept moving
19 around, kept moving around couldn't never just sit
20 straight. When they came in, I was told to sit still.
21 And then when they leave out, then I can leave.

22 Q You believe the jury saw the leg irons?

23 A Yes, ma'am.

24 Q Why do you think that?

25 A I have a nervous problem, so I can't really just sit

1 straight and erect like everybody else, so I move around
2 when I talk and like he said my voice echos out.

3 MS. GOLDBERG: No further questions.

4 THE COURT: Cross-examination.

5 MR. MITCHELL: One second.

6 (WHEREUPON, a pause in proceedings.)

7 CROSS-EXAMINATION

8 BY MR. MITCHELL:

9 Q Good afternoon, Mr. Mitchell.

10 A Good afternoon.

11 Q All right. So you're -- what you testified to at
12 trial was that you were approached by a man at the
13 Greyhound station and you exchange crack for a rental car?

14 A Gas money \$20, I gave him \$20. Yes, sir.

15 Q You gave him money for the car to be able to rent to,
16 right?

17 A Yes, sir.

18 Q And you testified his name was John?

19 A Yes, sir.

20 Q He did not testify at trial, right?

21 A No, sir.

22 Q So you testified you took a bus from Charleston to
23 Columbia to work for a Super Bowl party that was being
24 held in Columbia, right?

25 A Yes, sir.

1 Q This incident took place on a Friday; is that right?

2 A Yes, sir.

3 Q And the Super Bowl would have been two days later?

4 A Yes, sir.

5 Q Now, when the police pulled up behind you when you
6 were driving the victim's car, you fled; is that right?

7 A Yes, sir.

8 Q Okay. You testified something about having a warrant
9 or something out for your arrest and that's why you fled?

10 A Yes, sir, actually just out of fear.

11 Q Just out of fear?

12 A Yes, sir.

13 Q We hadn't talk about this yet, but the victim's son
14 cell phone was recovered; is that right? Mr. William
15 Gilmore cell phone.

16 A Yeah, I believe so I outside of the car.

17 Q Right. And the car that was when you were driving
18 the car was -- the cell phone was dropped when you were
19 fleeing; is that right?

20 A Yes, sir.

21 MR. MITCHELL: No further questions. Thank you,
22 Mr. Mitchell.

23 THE COURT: Redirect.

24 MS. GOLDBERG: Briefly.

25 REDIRECT EXAMINATION

1 BY MS. GOLDBERG:

2 Q Mr. Mitchell, this individual that you rented the car
3 from at the bus station, you didn't know him previously,
4 right?

5 A No, ma'am.

6 Q You didn't know his name?

7 A Not like knowing seeing him, just seen him around,
8 like I just seen him around.

9 Q You didn't have any name or contact information to
10 call him at a trial, correct?

11 A No, ma'am, actually no investigator came to see me
12 since I been locked up to ask me any questions or
13 anything.

14 MS. GOLDBERG: Nothing further.

15 THE COURT: All right, sir. You may come down.
16 Thank you very much.

17 (WHEREUPON, the witness leaves the witness
18 stand.)

19 THE COURT: Next witness.

20 MR. MITCHELL: No further witnesses from the
21 State, Your Honor.

22 MS. GOLDBERG: Or the applicant.

23 THE COURT: Anything further from anybody either
24 party wish to...

25 MS. GOLDBERG: No, I will submit some brief

1 argument.

2 THE COURT: Go ahead.

3 MS. GOLDBERG: Your Honor, I'll go through the
4 amended application just kind of address those in reverse
5 order because I think makes the most sense. The third
6 allegation presented was the fact that counsel failed to
7 object when the jury saw the defendant in handcuffs. I'll
8 stand on the testimony regarding that. Mr. Mitchell had
9 testified that the jury did see him in leg irons. Trial
10 counsel said he didn't believe they did. I'll just rest
11 on that testimony.

12 As far as the next allegation that was that
13 trial counsel failed to investigate, present witnesses or
14 evidence on his behalf. The only evidence that is
15 available to present in this hearing that goes to that
16 allegation is that letter from the social security
17 administration. Mr. Mitchell claims that that would have
18 been relevant because as he said he did testify in trial
19 that he lived in Charleston and that he was coming up to
20 Columbia. And he was correct in his testimony during the
21 trial Richard Cathcart made several accusation allegation
22 that Mr. Mitchell was in fact homeless, lived in that
23 area. And in particular, I think he may have even use the
24 phrase homeless village. And it would have just gone to
25 corroborate Mr. Mitchell's testimony versus the State's

1 theory of the case.

2 But finally I think what I'll spend the most
3 time on is that first allegation, which is that trial
4 counsel should have consulted and retained an expert in
5 eyewitness testimony. Your Honor, there's only two pieces
6 of evidence in the entire trial that tied Mr. Mitchell to
7 this crime. One was the fact that he fled from the car --
8 was observed to have fled from the car and two was the
9 identification of the victim.

10 THE COURT: Cathcart argued that flight?

11 MS. GOLDBERG: He did.

12 THE COURT: He did?

13 MS. GOLDBERG: He did.

14 THE COURT: And the judge didn't instruct on it?

15 MS. GOLDBERG: No, Your Honor, that's not an
16 issue for here, but those were the only pieces of evidence
17 that tied Mr. Mitchell to the crime. Mr.

18 Mitchell presented testimony which even Mr. May said was
19 plausible that, you know, regardless of what Mr.

20 May thinks happened, the testimony in the transcript was
21 that law enforcement was behind this car six minutes after
22 9-1-1, which means more than six minutes after the
23 incident happened. This happened at the Time Warner Cable
24 building in Five Points kind of across the street from the
25 grocery store closer to the Cook Out and Chick-Fil-A over

1 on that end of Five Points. And he was first seen by law
2 enforcement on the side street of where the Greyhound bus
3 station was. I would submit that you could walk that
4 distance in less than six minutes.

5 THE COURT: A chase ensued to Gonzales Gardens?

6 MS. GOLDBERG: After law enforcement got behind,
7 yes.

8 THE COURT: And they got behind the victim's
9 vehicle?

10 MS. GOLDBERG: Correct. And it was the victim's
11 vehicle tag and everything matched. I guess, my point in
12 saying that is that that was circumstantial evidence and
13 that there was an alternative theory of events presented
14 by Mr. Mitchell. So the only remaining evidence would
15 have been if the jury wasn't sure how to come down on
16 that, the only remaining evidence was the eyewitness
17 identification.

18 In this case, I think that our expert that we
19 offered today was extremely credible, neither attorney
20 provided a reasonable strategic reason for not having even
21 consulted an eyewitness testimony. They basically just
22 testified that they weren't aware of that kind of witness
23 at the time. Didn't know it was something that they could
24 use to play.

25 Our expert was able to provide relevant

1 background information on all the major factors that are
2 considered in Biggers. I would submit the appeal in this
3 case addressed Judge Manning's denial of the Biggers, so I
4 can't ---

5 THE COURT: The appeal did?

6 MS. GOLDBERG: The appeal did, so I can't
7 raise -- I can't argue that his judicial determination
8 based on what was presented was incorrect because that was
9 done on appeal. What I can argue is that this expert
10 witness should have been presented in the Biggers hearing
11 and that would have changed his decision.

12 THE COURT: Could have changed?

13 MS. GOLDBERG: Could have change or in the jury
14 trial itself and I think that that information she would
15 have been able to provide the jury regarding the science,
16 the background would have been extremely persuasive in
17 this particular case.

18 It is clear by all accounts factually that the
19 interaction between the assailant and the victim was a
20 very short duration, that there was cross races involved,
21 that a gun was used. It is clear factually that the
22 victim never described the assailant as anything other
23 than a black man until the day of trial, never gave a
24 height, a weight, a clothing description, any other
25 particular significant features. And further once the

1 trial started after the Biggers decision had already been
2 ruled on, then she provided information that was factually
3 incorrect. She said the assailant had long hair and
4 defense counsel very smartly introduced the booking photo
5 showing that he actually didn't have hair at the time.

6 I think that the eyewitness identification
7 provided was extremely weak. If the jury had known that
8 just because someone says they're a 100 percent positive,
9 doesn't mean they're right. That maybe there's a
10 correlation there maybe there's not, that would have had a
11 big impact. If the jury had known about cross-race effect
12 about the duration issues, that I believe should have had
13 a huge effect. And then even more so than all that, the
14 manner of the suggestive lineup here. The victim heard
15 over the police radio we got them. He's running from the
16 car.

17 THE COURT: She testified to that?

18 MS. GOLDBERG: I'm sorry.

19 THE COURT: Did she testify to that?

20 MS. GOLDBERG: She did testify that she was able
21 -- she did hear that. And I believe verbatim heard them
22 say we got the guy or we got him. They drove her directly
23 to the scene and he was the only individual in handcuffs
24 that was a black male at the scene. It was an extremely
25 weak identification. And I think it's easy for a jury of

1 average citizens to believe a victim or a witness when
2 they say I am 100 percent positive, but that's why this
3 expert testimony is necessary because they don't know that
4 doesn't always mean that they positive. They don't know
5 that there's these other factors out there that could
6 influence the way human memory works. For those reasons,
7 I do think that there is a substantial likelihood that had
8 this evidence been offered in pretrial or trial, then
9 there would have been a different outcome in this case.

10 THE COURT: Mr. Mitchell.

11 MR. MITCHELL: Your Honor, I'll start with the
12 handcuffs issues. Note that that was a concern that Judge
13 Manning had as well and that Mr. May brought up to Judge
14 Manning saying to make sure you keep your feet there, so
15 they can't see the shackles. And Mr. May's testimony I
16 think is persuasive on that that he doesn't believe the
17 jury saw a little differently when he testified, but
18 that's the way security works. I don't believe any
19 prejudice was presented on that, any evidence of
20 prejudice.

21 As to the investigative or failure to admit any
22 evidence specifically that social security, Your Honor, I
23 think that's not really relevant to the issue of whether
24 he's guilty or not. I think it's not really exculpatory,
25 which kind of -- it re-enforces a bit of his story that he

1 says he lives in Charleston, which is not quite relevant.
2 I mean, that's what the State kind of took the position
3 that he is living in Columbia, but his story that he
4 testified to was that he took a bus from Charleston to
5 Columbia. I don't think that's really -- I don't think
6 there's really much there on that.

7 I think with the eyewitness expert I note South
8 Carolina Supreme Court case Ranzin v. State counselors
9 failure to procure an expert witness does not render
10 representation sufficient or counsel vigorously
11 cross-examines the State's witnesses and attacks the
12 accuracy of that evidence. And that's exactly what
13 happened here. I mean, they challenge that identification
14 on all fronts. It was the Biggers hearing. It was on
15 cross-examination. It was directed verdict. It was
16 argued to the jury. It was argued in opening a bit. The
17 ID is the issue and that was thoroughly brought before the
18 jury.

19 As Mr. May said, we kind of adopted her ID after
20 she said wait it's a guy with big hair not a bald guy.
21 And I think that caught the State by surprise and I think
22 that's where it would not be reasonable to call eyewitness
23 expert if you're going to adopt her identification saying,
24 yeah, the guy probably did have an afro whatever longer
25 hair. Mr. Mitchell does not -- and here is a photo

1 showing that he was bald the day he was arrested.

2 You know, we got into a little bit into the
3 suggestiveness or how unduly suggestive the lineup was.
4 The Court of Appeals deal with that. They agreed that it
5 was not unduly suggestive obviously of show up lineup it's
6 suggestive on its face usually, but, you know, they dealt
7 with that, been ruled upon at this point. And I think
8 what the expert witness testified to today was that a lot
9 these factors go both ways. But, I mean, it's kind of,
10 you know, it can be this, but it can also be this. It can
11 be, you know, how close you were or it can be, you know,
12 some other factors taking into account like she was a
13 nurse. She was kind of trained to be aware of certain
14 things maybe use to a stressful environment things like
15 that, but I think what we got to look at is whether it was
16 reasonable at the time, whether it was a reasonable
17 strategy at the time. I think it absolutely was to say we
18 can attack this witness on all fronts on this
19 identification. She's an older lady that went through all
20 that, her age, her glasses. She had back surgery a month
21 before. She had an 13-hour surgery. They bring all this
22 out. Mr. Shealey handled that part.

23 In closing, all this is argued as well. You
24 know, her identification cannot be trusted due to these
25 things that are wrong especially the hair. They picked up

1 on that and really ran with that and that kind of became
2 more so a theory of the case than anything at least on the
3 ID part. The theory is always that Mr. Mitchell was up
4 here and then rented a car, which he was able to present
5 in his testimony, but I think the timing is what really
6 kills this whole thing. And I think it's -- he was -- the
7 police show up very quickly to the Time Warner building.
8 They put out a call to be on the look out for this
9 vehicle. Within 90 seconds of that, an officer said that
10 he is behind the vehicle. So this is a very very short
11 amount of time.

12 THE COURT: Testimony to that effect?

13 MR. MITCHELL: There is testimony to that
14 effect. Ninety seconds is repeated over and over by the
15 State through the trial, within ninety seconds be on the
16 look out call that vehicle was identified, high speed
17 chase like we talked about. Mr. Mitchell jumps out of
18 car. I argue fleeing was evidence of guilt. And one
19 thing we did not talk about a whole lot, but I think is
20 pretty important is that he had the victim's son cell
21 phone that was found in the car in his hands while he was
22 running. And he tried to ditch it out tried to hide it
23 and was able to get rid of it. Then the police ended up
24 recovering that and that was issued at trial as well. I
25 think for those reasons we ask that you find that the

1 Applicant failed his burden of proving efficiency and
2 prejudice. And I think there is a bit of overwhelming
3 evidence. It's just because of the timing, it's so short.
4 The entire from when the incident happened to after the
5 identification was done everyone says it was under 15
6 minutes. It's a very very quick amount of time. Thank
7 you, Your Honor.

8 THE COURT: All right. Thank you very much,
9 counsel. Proposed orders in 30 days.

10 MS. GOLDBERG: Thank you, Your Honor.

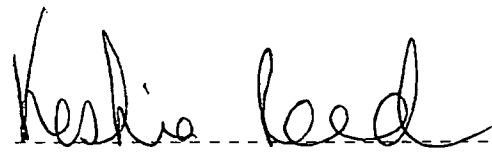
11 END OF REQUESTED TRANSCRIPT
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public
in and for the State of South Carolina At Large, do hereby
certify that the above-entitled cause was heard as
hereinafter set out; that I was authorized to and did
transcribe the said proceedings; and that the foregoing
and annexed paged, numbered 1 through 79, inclusive,
constitute a true and accurate transcription of my
stenographic report of the said cause taken during the
said hearing. In the Court of Common Pleas for Richland
County, South Carolina, on the 14th day of July, 2015.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto. In witness
whereof, I have hereunto affixed my signature this 29th
day of February 2011.


Keshia Reed, Court Reporter

[Home](#) [Support](#) [Contact Us](#)

[General Information](#)
[Administration](#)

[Employment](#) 2/4/2009 3:53:37 PM

[Inmate Accounts](#)

[Mission Statement](#)

[Religious Services](#)

[Inmate Visitation](#)

[Set as Home Page](#)

[Visit Richland County](#)

[Offender Information](#)

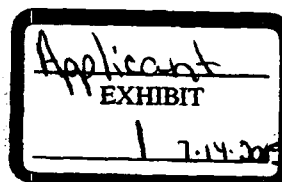
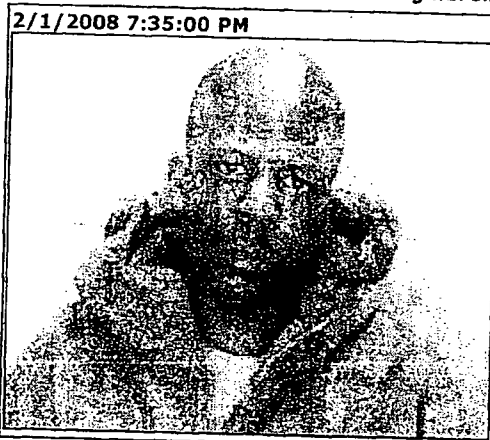
[Public Access](#)

[Secure Access](#)

[Link Details](#)

Click on an image to view it in it's original size

[Return to Offender Information](#)



DAWN E. MCQUISTON, Ph.D.
Curriculum Vitae

CONTACT INFORMATION

Wofford College
Department of Psychology
429 North Church Street
Spartanburg, SC 29303-3663

602-617-5233
dawn.mcquiston@gmail.com
dawnmcquiston.wix.com/legalpsy

EDUCATION

- Ph.D. (2003) Experimental Psychology, University of Texas at El Paso
Specialization: Legal Psychology
- M.A. (1999) Experimental Psychology, University of Texas at El Paso
Specialization: Legal Psychology
- B.S. (1995) Psychology (Minor in Sociology), Eastern New Mexico University

ACADEMIC POSITIONS

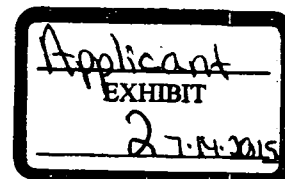
- 2013 – present Associate Professor of Psychology (Visiting Appointment)
Department of Psychology
Wofford College
- 2009 – 2013 Associate Professor of Psychology (With Tenure)
School of Social and Behavioral Sciences
Arizona State University
- 2003 – 2009 Assistant Professor of Psychology
School of Social and Behavioral Sciences
Arizona State University

ADMINISTRATIVE EXPERIENCE

- 2012 – 2013 & Director, Master of Science in Psychology Program
2009 – 2010 New College of Interdisciplinary Arts & Sciences
Arizona State University

RESEARCH/ACADEMIC AFFILIATIONS

- 2011 – 2013 Research Associate, Arizona Justice Project
Sandra Day O'Connor College of Law, Arizona State University
- 2005 – 2009 Affiliate Assistant Professor
Department of Criminal Justice and Criminology, Arizona State University



- 2004 Visiting Research Scholar, Face Perception Laboratory
University of Stirling, Scotland
- 2001 Visiting Research Scholar, Centre for Forensic Psychology
University of Portsmouth, England

PUBLICATIONS, BOOK CHAPTERS & ARTICLES

- Vallano, J., Lawson, K. & McQuiston, D. (in preparation). *Examining psychological versus physical injury schemas in civil litigation.*
- McQuiston, D. & Jules, S. (in preparation). *Jurors' beliefs about defendant guilt based on recanted confession and DNA evidence.*
- Arthurs, S. & McQuiston, D. (under review). How the expression of DNA evidence affects jurors' interpretation of probabilistic fingerprint evidence. *Behavioral Sciences and the Law.*
- Topp, L., McQuiston, D. & Malpass, R. (in press). Facial composites and the misinformation effect: How composites distort memory. *Legal and Criminological Psychology.*
- Jules, S. & McQuiston, D. (2013). Speech style and occupational status affect assessments of eyewitness testimony. *Journal of Applied Social Psychology, 43*(4), 741-748.
- McQuiston, D. & Saks, M. J. (2009). The testimony of forensic identification science: What expert witnesses say and what factfinders hear. *Law and Human Behavior, 33*, 436-453.
- Malpass, R. S., Tredoux, C. G., & McQuiston, D. (2009). Response to R. C. L. Lindsay et al.'s 'Sequential Lineup Presentation: Patterns and Policy'. *Legal and Criminological Psychology, 14*(1), 25-30. (Part of *Hot Topics Debate*)
- Malpass, R. S., Tredoux, C. G., & McQuiston, D. (2009). Public policy and sequential lineups. *Legal and Criminological Psychology, 14*(1), 1-12. (Part of *Hot Topics Debate*)
- Malpass, R. S., Tredoux, C. G., Schreiber Compo, N., McQuiston, D., MacLin, O. H., Zimmerman, L. A., & Topp, L. D. (2008). Study space analysis for policy development. *Applied Cognitive Psychology, 22*, 789-801. (Special Issue: *Basic and Applied Issues in Eyewitness Research: A Münsterberg Centennial Retrospective*)
- McQuiston, D., Douglass, A. B., & Burkhardt, S. (2008). Evaluations of facial composite evidence depends on the presence of other case factors. *Legal and Criminological Psychology, 13*(2), 279-298.
- McQuiston, D. & Saks, M. J. (2008). Communicating opinion evidence in the forensic identification sciences: Accuracy and impact. *Hastings Law Journal, 59*(5), 1159-1189.
- McQuiston, D. & Topp, L. (2008). Externalizing visual images: Examining the accuracy of physical descriptions vs. facial composites as a function of the own-race bias. *Experimental Psychology, 55*(3), 195-202.
- Frowd, C. D., McQuiston, D., Anandaciva, S., Ireland, C. E., & Hancock, P. J. B. (2007). An evaluation of U.S. systems for facial composite production. *Ergonomics, 50*(12), 1987-1998.

- Malpass, R. S., Tredoux, C., & McQuiston, D. (2007). Lineup construction and measuring lineup fairness. In R. Lindsay, D. Ross, D. Read, & M. Toglia (Eds.), *Handbook of Eyewitness Psychology, Vol. 2* (pp. 155-178). Mahwah: Lawrence Erlbaum.
- McQuiston, D. (2006). How do jurors evaluate facial composite evidence? *The Legal Investigator*, 4-5.
- Douglass, A. B. & McQuiston, D. (2006). Post-identification feedback: Exploring the effects of sequential photospreads and eyewitness' awareness of the identification task. *Applied Cognitive Psychology*, 20(8), 991-1007.
- McQuiston, D., Malpass, R. S., & Tredoux, C. (2006). Sequential vs. simultaneous lineups: A review of methods, data and theory. *Psychology, Public Policy and Law*, 12(2), 137-169.
- McQuiston, D., Topp, L. D., & Malpass, R. S. (2006). Use of facial composite systems in U.S. law enforcement agencies. *Psychology, Crime, and Law*, 12(5), 505-517.
- Sporer, S. L., McQuiston, D., & Ibabe, I. (2006). Eyewitness metamemory. In E. Garrido, C. Herrero, & J. Masip (Eds.), *Handbook of Psychology and Law* (pp. 223-268). Madrid: Pearson Education.
- McQuiston, D. (2005). Facial composites as evidence in court: How much weight do they have? *The Defender*, 8-9.
- Frowd, C. D., McQuiston, D., Kirkland, I., & Hancock, P. J. B. (2005). The process of facial composite production. In A. Czerederecka, T. Jaskiewicz-Obydzinska, R. Roesch, & J. Wojcikiewicz (Eds.), *Forensic Psychology and Law* (pp. 140-152). Krakow: Institute of Forensic Research Publishers.
- Frowd, C. D., Carson, D., Ness, H., McQuiston, D., Richardson, J., Baldwin, H. & Hancock, P. (2005). Contemporary composite techniques: The impact of a forensically-relevant target delay. *Legal and Criminological Psychology*, 10(1), 63-81.
- McQuiston, D. (2004). On collecting eyewitness evidence: The pitfalls of facial composite construction. *The Legal Investigator*, 14-17.
- McQuiston, D. (2004). "I'll never forget that face!": The (mis)use of facial composite production in criminal investigation. *The Defender*, 9-10.
- Bradfield, A. & McQuiston, D. E. (2004). When does evidence of eyewitness confidence inflation affect judgments in a criminal trial? *Law and Human Behavior*, 28(4), 369-387.
- Wogalter, M. S., Malpass, R. S., & McQuiston, D. E. (2004). A national survey of U.S. police on preparation and conduct of identification lineups. *Psychology, Crime, & Law*, 10(1), 69-82.
- McQuiston, D. E. & Malpass, R. S. (2002). Validity of the mockwitness paradigm: Testing the assumptions. *Law and Human Behavior*, 26(4), 439-453.
- Corey, D., Malpass, R. S. & McQuiston, D. E. (1999). Parallelism in eyewitness and mock witness identifications. *Applied Cognitive Psychology*, 13, S41-S58. (Special Issue: Measuring Lineup Fairness)

PEER-REVIEWED CONFERENCE PRESENTATIONS

- McQuiston, D., Gough, T., Hill, R., Holland, M., & Lehmuller, C. (2014, April). *Jurors' judgments about recanted confessions*. Paper presented at the 10th Annual South Carolina Upstate Research Symposium, Spartanburg, SC.
- Burd, K. A. & McQuiston, D. (2014, March). *The effects of facility animals in the courtroom on juror decision-making*. Poster presented at the annual American Psychology-Law Society conference, New Orleans, LA.
- Shaffer, S., Havener, S., McQuiston, D., & Sperling, C. (2013, March). *Analysis of interrogations and confessions in alleged shaken baby syndrome cases*. Paper presented at the meetings of the American Psychology-Law Society, Portland, OR.
- Burd, K. & McQuiston, D. (2013, February). *Judges' evaluation of evidence when considering post-conviction relief*. Paper presented at the 65th Annual Meeting of the American Academy of Forensic Sciences, Washington, D.C.
- McQuiston, D., Morris, E., & Graffious, D. (2013, January). *Jurors and new media: Implications for courtroom decisions*. Poster presented at the 14th Annual Meeting of the Society for Personality and Social Psychology. New Orleans, LA.
- Burd, K., McQuiston, D., & Arthurs, S. (2013, January). *Evidence ranking affects jurors' judgments about DNA and eyewitness evidence*. Poster presented at the 14th Annual Meeting of the Society for Personality and Social Psychology. New Orleans, LA.
- Findley, K., Sperling, S., & McQuiston, D., Shaffer, S., & Havener, S. (2012, October). *What role should confessions play in the diagnosis of abusive head trauma?* Paper presented at the Twelfth International Conference on Shaken Baby Syndrome/Abusive Head Trauma, Boston, MA.
- Perez, L. & McQuiston, D. (2012, April). *How jurors judge the reliability of eyewitness versus DNA evidence in a criminal trial*. Paper presented the meetings of the Western Psychological Association, San Francisco, CA.
- Arthurs, S. & McQuiston, D. (2012, April). *How the expression of DNA evidence affects jurors' interpretation of probabilistic fingerprint evidence*. Paper presented at the meetings of the Western Psychological Association, San Francisco, CA.
- Sporer, S., Davids, M., Kaminski, K. & McQuiston, D. (2012, March). *Re-reading brings your memory back: The end of verbal overshadowing?* Paper presented at the meetings of the American Psychology-Law Society, San Juan, Puerto Rico.
- Jules, S. J. & McQuiston, D. (2011, March). *Speech style and occupational status affect assessments of eyewitness testimony*. Poster presented at the meetings of the American Psychology-Law Society, Miami, FL.
- McQuiston, D. (2010, August). *Jurors' judgments about forensic identification science*. Paper presented in the *Experimental Psychology in the Courtroom* Symposium at the meetings of the American Psychological Association, San Diego, CA.

- McQuiston, D. (2010, March). *Forensic science in the courts: The National Academy of Sciences report and beyond*. Symposium presented at the meetings of the American Psychology-Law Society, Vancouver, Canada.
- Lovis-McMahon, D., Tingen, I., & McQuiston, D. (2010, March). *Jurors' interpretation of DNA and confession evidence through a third verdict option*. Paper presented in the *Forensic science in the courts: The National Academy of Sciences report and beyond* Symposium at the meetings of the American Psychology-Law Society, Vancouver, Canada.
- Jin, H. & McQuiston, D. (2010, March). *It was your fault! How jurors blame assault victims in the sex industry*. Poster presented at the meeting of the American Psychology-Law Society, Vancouver, Canada.
- McQuiston, D., Jules, S., Douglass, A., & Garcia, J. (2010, March). *Can an emotional courtroom audience enhance jurors' evaluation of evidence strength?* Poster presented at the meetings of the American Psychology-Law Society, Vancouver, Canada.
- McQuiston, D., Jules, S., Lowman, T., & Roethel, C. (2009, April). *The impact of audience in the courtroom on mock jurors' judgments*. Poster presented at the meetings of the Western Psychological Association, Portland, OR.
- McQuiston, D., Anderson, H., Bartholomew, M., & Valenti, R. (2009, March). *Jurors' beliefs about recanted confessions*. Paper presented at the meetings of the American Psychology-Law Society, San Antonio, TX.
- Sporer, S., Davids, M., & McQuiston, D. (2009, March). *The verbal facilitation effect: Person descriptions as a means to improve identification performance*. Paper presented at the meetings of the American Psychology-Law Society, San Antonio, TX.
- Papp, K., McQuiston, D., & Jin, H. (2009, March). *Assessing the persuasiveness of DNA evidence in the courtroom*. Poster presented at the meetings of the American Psychology-Law Society, San Antonio, TX.
- McQuiston, D., Papp, K., & Saks, M. (2008, March). *Jurors' assessment of the scientific limitations of forensic identification science*. Paper presented at the meetings of the American Psychology-Law Society, Jacksonville, FL.
- Malpass, R. S., Tredoux, C. G., Schreiber, N., McQuiston, D., MacLin, O. H., Zimmerman, L. A., & Topp, L. D. (2008, March). *Study space analysis: A new method for describing and evaluating research literatures*. Paper presented at the meetings of the American Psychology-Law Society, Jacksonville, FL.
- McQuiston, D., Saks, M. J., Papp, K. & Buttrum, K. (2007, July). *Factfinders' interpretation of scientific data: Subjective estimates vs. objective probabilities*. Poster presented at the meetings of the Society for Research in Memory and Cognition, Lewiston, ME.
- Malpass, R. S., Tredoux, C. G., & McQuiston, D. (2007, March). *The past gives cues to the future of eyewitness identification research*. Presented in R. Malpass (Chair), Programmatic ideas for the second century of eyewitness identification research. Symposium presented at the 'Off The Witness Stand: Using Psychology in the Practice of Justice' Conference, John Jay College of Criminal Justice, New York, NY.

- McQuiston, D., Horgan, A., Erickson, G., Saks, M., & Montgomery, D. (2006, March). *Forensic expert testimony: How presentation affects jurors' evaluations of the evidence*. Presented in S. Sommers (Chair), Extra-legal factors influencing juror decision-making. Symposium presented at the meetings of the American Psychology-Law Society, St. Petersburg, FL.
- Burkhardt, S., McQuiston, D., Bradfield, A., Bartholomew, M., & Kyrimis, D. (2006, March). *Evaluation of facial composite evidence depends on the presence of other case evidence*. Paper presented at the meetings of the American Psychology-Law Society, St. Petersburg, FL.
- Malpass, R.S., Tredoux, C.G., McQuiston, D.E., Zimmerman, L.A. & MacLin, O.H. (2006, March). *A re-examination of sequential lineup superiority*. Paper presented at the meetings of the American Psychology-Law Society, St. Petersburg, FL.
- Topp, L.D., McQuiston, D., & Malpass, R.S. (2006, March). *Examining the effects of facial composite production and repeated viewing on identification accuracy*. Paper presented at the meetings of the American Psychology-Law Society Conference, St. Petersburg, FL.
- Schweitzer, N., Connolly, B., Erickson, G., Horgan, A., Shaaban, N., McQuiston, D., and Saks, M. (2005, November). *The cognitive science of forensic expert testimony*. Poster presented at the Sackler Colloquium of the National Academy of Sciences, Washington, DC.
- Erickson, G., McQuiston, D., Horgan, A., & Burkhardt, S. (2005, April). *Do eyewitness' age influence perceptions of their incorrect testimony?* Poster presented at the meetings of the Rocky Mountain Psychological Association, Phoenix, AZ.
- Bradfield, A., McQuiston, D., Horgan, A., & Erickson, G. (2005, March). *Sequential photospread presentation and post-identification feedback*. Poster presented at the meetings of the American Psychology-Law Society, La Jolla, CA.
- McQuiston, D., Kirkland, I., Frowd, C., & Hancock, P. (2005, March). *On improving facial composite accuracy: Exploring interview type and procedural strategies*. Poster presented at the meetings of the American Psychology-Law Society, La Jolla, CA.
- Topp, L., McQuiston, D., & Malpass, R. (2005, March). *Eyewitness' perception of the composite construction task and their ability to identify the culprit*. Poster presented at the meetings of the American Psychology-Law Society, La Jolla, CA.
- Frowd, C., McQuiston, D., Ness, H., & Hancock, P. (2004, July). *The process of facial composite production*. Paper presented at the meetings of the European Association of Psychology and Law, Krakow, Poland.
- Kirkland, I., Horgan, A., Erickson, G. & McQuiston, D. (2004, April). *The utility of competing technologies in facial composite production*. Poster presented at the meetings of the Western Psychological Association, Phoenix, AZ.
- McQuiston, D. E. & Topp, L. D. (2004, March). *Cross-race face recall: Assessing perceptual expertise in a description and facial composite task*. Paper presented at the meetings of the American Psychology-Law Society, Scottsdale, AZ.

- McQuiston, D. E. & Bradfield, A. L. (2004, March). *The perceived reliability of facial composite evidence*. Poster presented at the meetings of the American Psychology-Law Society, Scottsdale, AZ.
- McQuiston, D. E. & Tredoux, C. G. (2003, July). *Face composite production by eyewitnesses: New technologies and developments*. Symposium presented at the meetings of the Society for Applied Research in Memory and Cognition, Aberdeen, Scotland.
- McQuiston, D. E. & Malpass, R. S. (2003, July). *Investigating the own-race bias in composite production*. In D. McQuiston & C. Tredoux (Chairs), *Face composite production by eyewitnesses: New technologies and developments*. Symposium presented at the meetings of the Society for Applied Research in Memory and Cognition, Aberdeen, Scotland.
- Topp, L., McQuiston, D. E., & Malpass, R. S. (2003, July). *Exploring composite production and its subsequent effects on eyewitness memory*. Poster presented at the meetings of the European-American Psychology-Law/American Psychology-Law Society, Edinburgh, Scotland.
- Malpass, R. S., MacLin, O. H., Zimmerman, L. A., Tredoux, C. G., & McQuiston, D. E. (2003, July). *A study space analysis for policy development: Application to simultaneous vs. sequential lineups*. In R. Malpass (Chair), *Simultaneous or sequential lineups? New data, new perspectives, new looks at old questions, and a study space based policy analysis*. Symposium presented at the meetings of the European-American Psychology-Law/American Psychology-Law Society, Edinburgh, Scotland.
- McQuiston, D. E., Gaitens, K. E., Zimmerman, L. A., & Malpass, R. S. (2002, October). *Examining the mockwitness technique for evaluating sequential lineups*. Poster presented at the National Conference on Science and the Law, Miami, FL.
- Malpass, R. S., McQuiston, D. E., MacLin, O. H., Zimmerman, L. A. & Gaitens, K. E. (2002, October). *The use of quantitative techniques for the evaluation of eyewitness identification lineups: Application to actual cases*. Poster presented at the National Conference on Science and the Law, Miami, FL.
- Zimmerman, L. A., Gaitens, K. E., McQuiston, D. E., MacLin, O. H. & Malpass, R. S. (2002, October). *Differences in simultaneous and sequential lineups: How multiple lineup variables affect eyewitness identification*. Poster presented at the National Conference on Science and the Law, Miami, FL.
- Bradfield, A. L. & McQuiston, D. E. (2002, March). *Confidence inflation in eyewitnesses: Do changes in confidence over time affect evaluations of the eyewitness or the defendant?* Poster presented at the meetings of the American Psychology-Law Society, Austin, TX.
- Gaitens, K., Zimmerman, L., McQuiston, D. E., & Malpass, R. S. (2002, March). *Structural bias in eyewitness lineups: When does the suspect stand out?* Poster presented at the meetings of the American Psychology-Law Society, Austin, TX.
- Wilhelmy, R., McQuiston, D. E., & Bull, R. (2002, March). *The effects of rehearsal on eyewitness identification accuracy in young children*. Paper presented at the meetings of the American Psychology-Law Society, Austin, TX.
- MacLin, O. H., McQuiston, D. E., Kroeger, B., & Malpass, R. S. (2001, June). *A fair comparison of laboratory administered simultaneous and sequential lineups*. Paper presented at the meetings of the Society for Applied Research in Memory and Cognition, Kingston, Ontario, Canada.

- Malpass, R. S., MacLin, O. H., McQuiston, D.E., & Kroeger, B. (2001, June). *Lineup evaluation: Notes from the field*. Paper presented at the meetings of the Society for Applied Research in Memory and Cognition, Kingston, Ontario, Canada.
- McQuiston, D. E. & Malpass, R. S. (2001, June). *Eyewitness identifications in criminal cases: An archival study*. Paper presented at the meetings of the Society for Applied Research in Memory and Cognition, Kingston, Ontario, Canada.
- McQuiston, D. E., Malpass, R. S., Kroeger, B., & MacLin, O. H. (2001, June). *The effects of verbal information and lineup instructions on mockwitness' ability to detect structural bias in lineups*. Paper presented at the meetings of the Society for Applied Research in Memory and Cognition, Kingston, Ontario, Canada.
- McQuiston, D. E. & Malpass, R. S. (2001, May). *Eyewitness identifications in criminal cases: A view from the field*. Poster presented at the meetings of the Western Psychological Association, Maui, HI.
- McQuiston, D. E., Salinas, R., Villegas, E., Garcia, G., & Malpass, R. S. (2001, May). *Utility of the sequential lineup procedure: Exploring generalizability issues*. Poster presented at the meetings of the Western Psychological Association, Maui, HI.
- Herrera, V., McQuiston, D. E., MacLin, O. H., & Malpass, R. S. (2000, April). *Examining the cross race effect using ambiguous race faces*. Poster presented at the meetings of the Western Psychological Association, Portland, OR.
- Holguin, S., McQuiston, D. E., MacLin, O. H., & Malpass, R. S. (2000, April). *Racial classification of racially ambiguous faces*. Poster presented at the meetings of the Western Psychological Association, Portland, OR.
- MacLin, O. H., Malpass, R. S., Honaker, S., & McQuiston, D. E. (2000, March). *Another attempt to understand the cross-race effect*. In J. C. Brigham (Chair), What do we know about the own-race bias" in face recognition? Symposium conducted at the meetings of the American Psychology-Law Society, New Orleans, LA.
- McQuiston, D. E., & Malpass, R. S. (2000, March). *Use of facial composite systems in U.S. law enforcement agencies*. Poster presented at the meetings of the American Psychology-Law Society, New Orleans, LA.
- McQuiston, D. E. & Malpass, R. S. (1999, July). *Estimation of lineup bias from mock witness identifications*. Paper presented at the meetings of the Society for Applied Research in Memory and Cognition, Boulder, CO.
- Corey, D., Malpass, R. S., & McQuiston, D. E. (1998, March). *An examination of procedures in eyewitness and mock witness identification*. Paper presented at the meetings of the Academy of Criminal Justice Science, Albuquerque, NM.
- Malpass, R. S., Corey, D., Parada, M., Chavez, J., Bowles, S., & McQuiston, D. E. (1998, March). *Reliability of face recognition: Take two*. Paper presented at the meetings of the American Psychology-Law Society, Redondo Beach, CA.

INVITED LECTURES, TALKS, WORKSHOPS & COLLOQUIA

- McQuiston, D. (2014, September). *Applying the science of eyewitness identification in the courtroom*. Invited presentation for the annual South Carolina Public Defender Association Conference, Myrtle Beach, SC.
- McQuiston, D. (2014, May). *How jurors and judges think about forensic identification evidence*. Invited colloquium, Department of Psychology, University of South Carolina, Columbia, SC.
- McQuiston, D. (2013, November). *Psychology in the courtroom: Implications for factfinders' decision making*. Invited colloquium, Department of Psychology, University of North Carolina at Asheville, Asheville, NC.
- McQuiston, D. (2013, November). *Memory and eyewitness identification*. Invited presentation for the North Carolina Bar Association, Greensboro, NC.
- McQuiston, D. (2013, November). *The psychology of jury decision making*. Invited colloquium, Department of Psychology, Wofford College, Spartanburg, SC.
- McQuiston, D. (2013, September). *Jury decision making*. Invited presentation for the annual South Carolina Public Defender Association Conference, Myrtle Beach, SC.
- McQuiston, D. (2013, April). *Psychology and the law: Applying psychological science to courtroom decision making and expert testimony*. Invited presentation at the Forensic Expert Witness Association annual conference, Scottsdale, AZ.
- McQuiston, D. (2012, November). *Eyewitness evidence*. Invited lecture, Post-conviction clinic, Sandra Day O'Connor College of Law, Arizona State University, Tempe, AZ.
- McQuiston, D. (2012, May). *Eyewitness evidence*. Invited workshop at the Forensic Science Training for Capital Defense Attorneys, sponsored by the National Clearinghouse for Science, Technology and the Law, Las Vegas, NV.
- McQuiston, D. (2012, March). *12 Angry Men: What witnesses say and jurors hear*. Invited presentation at the Literature and the Law Conference, Maricopa County Bar Association, Phoenix, AZ.
- McQuiston, D. (2011, October). *Eyewitness evidence*. Invited lecture, Post-conviction clinic, Sandra Day O'Connor College of Law, Arizona State University, Tempe, AZ.
- McQuiston, D. (2011, October). *How jurors judge forensic science evidence*. Invited presentation at the International Association for Identification Conference, Tucson, AZ.
- McQuiston, D. (2011, September). *The use of statistics in jury decision making research*. Invited colloquium, Department of Psychology, Bates College, ME.
- McQuiston, D. (2011, September). *Forensic science in the courtroom*. Invited colloquium for the Forensic Science Program at Pennsylvania State University, State College, PA.
- McQuiston, D. (2011, April). *Eyewitness identification and the courtroom*. Invited lecture, Post-conviction clinic, Sandra Day O'Connor College of Law, Arizona State University, Tempe, AZ.

- McQuiston, D. (2010, March). *Jurors' Judgments About Forensic Identification Evidence: How NIJ Supports Research on Improving the Use of Forensic Science in the Courts*. Invited presentation at the American Psychology-Law Society Conference, Vancouver, BC.
- McQuiston, D. (2010, March). *Eyewitness and forensic evidence in the courts*. Invited lecture, Post-conviction clinic, Sandra Day O'Connor College of Law, Arizona State University, Tempe, AZ.
- McQuiston, D. (2010, January). *Communicating forensic identification science in the courtroom*. Invited colloquium for the Department of Psychology at Florida International University, Miami, FL.
- McQuiston, D. (2009, October). *Eyewitness and forensic evidence in the courts*. Invited lecture, Post-conviction clinic, Sandra Day O'Connor College of Law, Arizona State University, Tempe, AZ.
- McQuiston, D. (2009, March). *Eyewitness identification, forensic science, and wrongful conviction*. Post-conviction clinic, Sandra Day O'Connor College of Law, Arizona State University, Tempe, AZ.
- McQuiston, D. (2008, March). *Communicating forensic science to factfinders*. Presented at the 'Faces of Forensics: Identification and Behavior' Conference, University of California, Hastings College of the Law, San Francisco, CA.
- McQuiston, D. (2007, June). *Applying the science of eyewitness identification in the courtroom*. Presented at the 5th Annual Arizona Public Defender Association Conference, Tempe, AZ.
- McQuiston, D. (2006, June). *Recent research on the reliability of eyewitness identification*. Presented at the 4th Annual Arizona Public Defender Association Conference, Tempe, AZ.
- Saks, M. & McQuiston, D. (2006, June). *Forensic Science*. Invited presentation, Arizona Judicial Conference, Tucson, AZ.
- McQuiston, D. E. (2000, October). *Eyewitness identifications in real crimes: An archival study*. Invited colloquium for the Department of Psychology at the University of Texas at El Paso, El Paso, TX.
- McQuiston, D. E. (1999, February). *Application of the mock witness paradigm using sequentially presented lineups*. Invited colloquium for the Department of Psychology Psychology-Law Group at the University of Texas at El Paso, El Paso, TX.

EXTERNALLY FUNDED RESEARCH GRANTS

- Jurors Judgments About Forensic Identification Evidence* (PI: Dawn McQuiston, Co-PI: Jonathan Koehler). National Institute of Justice. \$496,450. 2009-2013.
- Filtering Expert Testimony Elements* (PI: Dawn McQuiston, Co-PI: Michael Saks), awarded by the Project on Scientific Knowledge and Public Policy. \$24,842. 2006-2008.

INTERNALLY FUNDED RESEARCH GRANTS

- Factfinders' Use of Forensic Science Expert Testimony* (Co-PI: Michael Saks), awarded by the Multi-Disciplinary Grants-In-Aid Program. \$28,941. 2007-2008.

Awarded by the Scholarship, Research & Creative Activities Grant Program:

Jurors' Assessment of the Limitations of Forensic Identification Science. \$5,000. 2008.

Jury Deliberation as a Mechanism for Increasing Comprehension of Expert Evidence. \$5,000. 2007.

Factfinders' Understanding of Scientific Evidence. \$5,500. 2006.

Evaluating Juror Perceptions of the Reliability of Facial Composite Evidence. \$5,500. 2005.

Examining the Own-Race Bias in Facial Composite Production. \$5,500. 2004.

MASTERS THESES SUPERVISED

Courtroom Technology in the 21st Century. Shannon Havener.

An Exploratory Analysis Of Interrogation and Confession In Alleged Cases of Shaken Baby Syndrome. Sarah Shaffer.

The Impact of Social Media on Jurors' Behavior During Trial. Erin Morris.

Exploring the Bias of Facility Dogs in the Courtroom. Kayla Burd.

How the Expression of DNA Evidence Affects Jurors' Interpretation of Probabilistic Fingerprint Evidence. Shavonne Arthurs.

UNDERGRADUATE HONORS THESES SUPERVISED

Jurors Judgments About Recanted Confessions. Tara Gough, Ross Hill, Meghan Holland & Chuck Lehmuller.

From Standard Protocol to Virtual Autopsies: The Advancement of Forensic Pathology. Jesse Fitzgerald.

Evaluation of DNA vs. Eyewitness Evidence in the Courtroom. Lindsay Perez.

Google Mistrials: Implications of Social and Information Media in the Jury Box. Jessica Garcia.

Juror Bias in the Evaluation of Sex Workers as Victims in Court. Helen Jin.

The Effect of Speech Style and Occupational Status on an Eyewitness's Credibility. Sean Jules.

Assessing the Persuasiveness of DNA Evidence in the Courtroom. Kristina Papp.

Jurors' Beliefs About Recanted Confessions. Haley Anderson.

Justice: Blind to Science? Julie Lohne.

The Impact of Deliberations on Mock Jurors' Understanding of Statistical Evidence. Deanna Kyrimis.

Varying Temporal Distances between Inconsistent Sources of Information: Increasing Effective Memory Monitoring by Varying Retention Interval Placement. Jeffrey Foster.

Forensic Expert Testimony: How Target and Frame Affect Mock-Jurors' Decisions. Allyson Horgan.

Evaluation of Facial Composite Evidence Depends on the Presence of Other Evidentiary Factors.

Samantha Burkhardt.

Mock-Jurors' Evaluations of Forensic Experts: Assessing the "Hired Gun" Effect. Gina Erickson.

AD HOC REVIEWING

Journal Reviewing: *Applied Cognitive Psychology*; *Journal of Experimental Social Psychology*; *Journal of Experimental Psychology: Applied*; *Justice Quarterly*; *Law and Human Behavior*; *Psychological Science*; *Psychology, Crime & Law*; *Women & Criminal Justice*; *Visual Cognition*; *Behavioral Science and the Law*

Textbook Reviewing: *Prentice Hall*, *Sage Publications*

Grant Proposal Reviewing: *National Science Foundation Law and Social Science Division*

MEDIA:

Radio Interview: KTAR Radio, Phoenix, AZ (June, 2005)

Newspaper Interviews: *New York Times* (May, 2012), *Chicago Daily Herald* (April, 2007), *Associated Press* (June, 2005; August, 2004), *East Valley Tribune*, Phoenix, AZ (June, 2005; April, 2005)

Magazine Interviews: *O (Oprah) Magazine* (December, 2003)

Video Interviews: Walter Cronkite School of Journalism & Mass Communication, Arizona State University (May, 2013)

AWARDS AND DISTINCTIONS

Faculty Achievement Award, Office of Student Engagement, Arizona State University (2007)

Outstanding Commitment to Students Award, Arizona State University (2005)

Award for Outstanding Research, University of Texas at El Paso (2001)

COURSES TAUGHT

Undergraduate Level:

Introduction to Psychology / Psychological Science

Experimental Psychology (Lab Instructor)

Introduction to Statistics

Advanced Statistics/Multivariate Analysis

Applied Statistics for Psychology

Social Psychology

Psychology and Law

Psychology of Jury Decision Making

Supervised Research

Individualized Instruction

Undergraduate Honors Thesis

Graduate Level:

Psychology of Jury Decision Making

Graduate Student Research

Graduate Thesis

SERVICE

Professional:

Member, Undergraduate Paper Award Committee, American Psychology-Law Society (2014-2017)

Member, Dissertation Awards Committee, American Psychology-Law Society (2012-2014)

Member, Grant Proposal Review Committee, American Psychology-Law Society Grant-In-Aid Program (2012)

Member, Mentorship Committee, American Psychology-Law Society (2009-2012)

Speaker, Post-conviction clinic, Sandra Day O'Connor College of Law, Arizona State University (2009-2013)

Session Chair, Conference on Empirical Legal Studies, Los Angeles, CA (2009)

Panel Moderator, Forensic Science in the 21st Century Conference, Arizona State University (2009)

Session Chair, American Psychology-Law Society Conference, San Antonio, TX (2009)

Conference Submission Reviewer, American Psychology-Law Society (2004-2011)

Conference Host Committee, Rocky Mountain Psychological Association (2005)

Symposium Co-Chair, Society for Research in Memory and Cognition conference (2003)

Community:

Invited speaker, Arizona Public Defender Association Conference, Tempe, AZ (2006, 2007)
Invited speaker, Arizona Judicial Conference, Tucson, AZ (2006)
Co-Developer, Facial Composite Production Training Course, El Paso Police Department (2006)
Invited speaker, Psychology Advisement Workshop, Glendale Community College (2005)

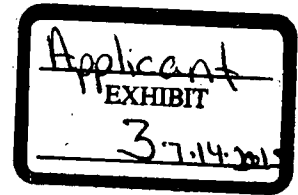
University (Arizona State University):

Member, Graduate School Preparation Committee (2013)
Member, New College Undergraduate Inquiry and Research Experiences Grant Review Committee (2012-present)
Member, Psychology & Law Concentration Planning Committee (2012)
Member, Probationary Peer Review Committee (2012)
Member, Promotion & Tenure Review Committee (2012)
Invited Panelist, *Insider Tips on the Graduate Admissions Process*, Hosted by Psi Chi (2012)
Member, Committee on Forensics Concentration Area (2010-present)
Director, Master of Science Degree in Psychology Program (2009-2010)
Consultant, Sun Devil Mock Trial Team (2009-present)
Chair, SBS Division Research Committee (2008-2009)
Faculty Co-Advisor, Students Taking Action for Animal Rights (2008-present)
Member, SBS Division Planning Committee, Master of Science Degree in Psychology (2008-2009)
Member, SBS Division Faculty Search Committee (2008-2009)
Member, SBS Division Research Committee (2006-2008)
NCIAS Web Committee (2006-2008)
Psychology Program Subject Pool Coordinator (2006-2007)
Invited speaker, *The Real CSI* (2006)
Faculty advisor, Animal Welfare Association of ASU's West Campus (2005-present)
NCIAS Standards Committee (2004-2006)
SBS Division Faculty Search Committee (2004-2005)
Invited panelist, Social and Behavioral Sciences Professions (2004)
Faculty mentor, TRiO Program (2003-2009)
Invited panelist, Graduate Studies Discussion Panel (2003)

PROFESSIONAL AFFILIATIONS

Association for Psychological Science
American Psychology-Law Society
Society for Empirical Legal Studies

Dawn McQuiston, Ph.D.
Legal Psychologist & Consultant
152 Chandler Crest Ct., Greer SC, 29651
602-617-5233 * dawn.mcquiston@gmail.com



Date: January 21, 2015

To: Kristy Gafton Goldberg
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 301
Columbia, SC 29201

From: Dawn McQuiston, Ph.D.

RE: Norman Lee Mitchell v. State of South Carolina, No. 2013-CP-40-5967
Post-Conviction Relief Action

Based on my review of *State of South Carolina v. Norman Lee Mitchell*, I have identified several significant issues that could have been presented by trial counsel via an eyewitness expert during the jury trial in challenging the eyewitness identification made of Norman Mitchell. Each of these concerns diminishes the potential reliability of Nola Gilmore's identification of Mitchell.

Materials Reviewed:

1. Transcript of Record, *State of South Carolina v. Norman Lee Mitchell* dated February 4, 5, and 6, 2009 (No. 2008-GS-40-1238, 1239)
2. Private Investigator Report dated August 11, 2008
3. Discovery Documents (including Incident Report, Investigative Report, Investigator's Follow-up Report, Witness Statements, and Photographs of Norman Mitchell)

Conclusions:

1. Several psychological factors shown to detrimentally affect the reliability of eyewitness identifications are implicated by the facts surrounding Nola Gilmore's identification of Norman Mitchell.

In reviewing the Private Investigator Report provided by Information Services LLC (dated 08/11/08) and the jury trial transcript (dated 02/04/09-02/06/09), the following pertinent facts were noted: Nola Gilmore waited in the car's passenger seat for her son as he paid a bill inside Time Warner on the afternoon of 02/01/08. While waiting for her son to return, a Black male abruptly opened the driver's side door, brandished a handgun, put it to the side of her head, and threatened that Gilmore exit the car or she would be shot. She struggled with exiting the vehicle quickly due to back problems; the assailant drove away anyway, knocking her to the ground with the passenger side door. While providing a statement to the police she overheard via police radio that a suspect was being chased and was then caught. She was taken nearby to view the suspect in police custody; she made a positive identification of the suspect from a one-on-one identification procedure within 10 minutes of the crime. Based on these facts, the following items challenge the reliability of Nola Gilmore's identification.

Exposure Duration. The amount of time a witness has to view an assailant during the crime is related to the likelihood of making an accurate identification. Research shows that the shorter the duration, the less likely a witness will later be able to make an accurate identification (e.g., Shapiro & Penrod, 1986). *The confrontation between Nola Gilmore and the assailant was quite brief.*

Weapon Focus. When a weapon is visible the ability to identify and to describe the face of an assailant is decreased. A meta-analysis by Steblay (1992) reviewed 19 tests of the effect of weapon focus on identification accuracy, and reviewed 10 tests of the effect of weapon focus on feature accuracy. Results show a small but consistent effect for the presence of a weapon that leads to reduced identification accuracy and reduced accuracy of the description of an assailant. The effect is stronger in situations which simulate a real-life event for participants, and in which a threatening weapon is visible. Not surprisingly, such eyewitnesses are often able to recall discreet details about the appearance of the weapon but fewer details about an assailant. *Nola Gilmore indicated that the assailant pulled a gun, pointed it at her head, and threatened to shoot her. The only physical description she gave immediately following the crime was "Black male".*

Stress, Fear and Arousal. A witness's attention may be impaired or distracted if he or she focuses on the psychological stress or fear accompanying a traumatic event. Under highly stressful or physiologically arousing conditions, the ability to identify and describe the face of an assailant is decreased. A meta-analysis by Deffenbacher, Bornstein, Penrod, and McGorty (2004) reviewed 27 tests of the effect of stress on eyewitness identification, and reviewed 36 tests of the effect of stress on eyewitness recall of crime details. Their results show a reliable effect of heightened stress that leads to both reduced identification accuracy and reduced recall accuracy. The effects found in this research are stronger in situations which more closely resemble a real life event for participants. *The confrontation between the assailant and Nola Gilmore was presumably a very frightening and threatening one.*

Own-Race Bias. People are generally not as accurate in recognizing and identifying members of another, less familiar ethnic group versus identifying members of their own ethnic group. This phenomenon is known as the own-race bias or cross-race effect. A meta-analysis by Meissner and Brigham (2001), reviewing 39 studies, shows a reliable effect demonstrating reduced identification accuracy under cross-ethnic/racial conditions among a variety of ethnic groups around the world. *With reference to this case, Nola Gilmore is White and Norman Mitchell is Black.*

Attention, Perceptual Salience and Encoding. The salience of the assailant in a witness's perceptual field (i.e., how much information is available and how much competing information there is) and the conditions (e.g., environmental) under which the person is viewed can affect the number of details and information about that person that is encoded and processed into memory. Only the information that is attended to and, thus, encoded at the scene will be processed in memory and stored for later retrieval. The less information encoded, the less information that is available for later retrieval (e.g., Narby, Cutler, & Penrod, 1996). *Given the nature of the confrontation as described by Nola Gilmore – including its brief duration, level of stress evoked, presence of a weapon, physical struggle, and cross-racial situation – there was sufficient competing information to conclude that Nola Gilmore's attention to the specific details of the assailant's face was diminished. This is consistent with the fact that the only description Gilmore gave of the assailant immediately following the crime was "Black male".*

Taken together, these well-established psychological principles provide significant reason to challenge the reliability of Nola Gilmore's identification of Norman Mitchell.

2. A one-on-one identification procedure is inherently suggestive.

While giving her statement to a police officer at the crime scene, Nola Gilmore indicated she heard another officer say via the police radio, "I've got him, I've got him...I'm on his bumper, give me backup", after which an officer took Gilmore to the location of the suspect a few minutes away. These statements arguably suggested to Gilmore that the police suspect was, in fact, the assailant prior to the identification procedure ever taking place. Within 10 minutes of the crime being committed, Nola Gilmore positively identified Norman Mitchell (who was handcuffed) from a one-on-one procedure.

One-on-one identification procedures, also known as showups, are perceived to be inherently suggestive, as the presentation of one suspect to a witness presumes that the individual administering the showup has suspicion of the suspect's guilt. This inherent suggestiveness additionally lies in the fact that the administrator of the showup is aware that the person is the suspect, which increases the likelihood that the administrator may transmit verbal or non-verbal cues that bias the witness's selection of the suspect as the perpetrator (Philips, McAuliff, Kovera, & Cutler, 1999). The showup procedure generally underperforms when compared to the presentation of a police lineup by producing more identifications of innocent suspects; showups can be particularly problematic when the suspect looks very similar to the perpetrator (Steblay, Dysart, Fulero, & Lindsay, 2003). According to Kassir, Tubbs, Hosch, and Memon (2001), 65% of surveyed eyewitness experts believed that showups increase the likelihood of misidentification when compared to other lineup techniques.

The best practice eyewitness identification procedures outlined by the National Institute of Justice Guidelines (Technical Working Group on Eyewitness Evidence, 1999) indicate that the use of a one-on-one procedure with eyewitnesses is inherently suggestive. As echoed in the 2014 National Academy of Sciences Report on eyewitness identification, the courts also consider showups to be highly suggestive.

Given the suggestive and potentially unreliable nature of a one-on-one procedure, the circumstances surrounding Nola Gilmore's identification do not provide conclusive information regarding the actual identity of the assailant. A better test of this witness's recollection would have been to place the suspect's picture in a lineup immediately after obtaining the witness's description of the assailant.

3. Great eyewitness confidence provides no proof of eyewitness accuracy.

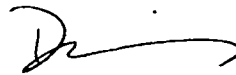
Nola Gilmore's identification of Mitchell from the one-on-one procedure was made with a great deal of confidence. According to Gilmore, immediately following her identification of Mitchell an officer asked whether she was 100% sure to which Gilmore replied, "I'm 110% sure". During the jury trial, she asserted three times that she was "110 percent sure" she identified the correct person following the crime.

Confidence is a useful tool in an investigation but is an imperfect indicator of eyewitness accuracy – great confidence provides no proof of accuracy (see National Academy of Sciences, 2014 for a review). In their meta-analysis, Sporer, Penrod, Read and Cutler (1995) find a moderate relationship between confidence and accuracy. The relationship between eyewitness confidence and accuracy is complex; the strength of this relationship varies across circumstances and as a function of many factors. In optimal viewing conditions, there is some evidence for the diagnosticity of confidence as an indicator of accuracy. But in most real-world circumstances that involve sub-optimal witnessing conditions (e.g., when a witness's degree of attention is compromised or the duration of the encounter is brief), confidence can be an imprecise indicator of accuracy, and, in some cases, an unreliable indicator of accuracy.

Further, the malleable nature of confidence means that factors occurring after the identification (e.g., hearing investigator feedback, learning details about the crime from a co-witness) can inflate eyewitness confidence while not affecting identification accuracy (see Douglass & Pavletic, 2012). Even the simple passage of time and the subsequent rehearsal of the person identified can erroneously inflate eyewitness confidence, as the witness is essentially reinforcing the notion that the identified individual is indeed the person originally viewed during the crime. An in-court identification made with high confidence is highly persuasive to jurors despite its inability to strongly indicate accuracy (Brewer & Burke, 2002). The majority of eyewitness experts surveyed (87%) believe that an eyewitness's confidence is not a reliable predictor of accuracy (Kassin, Tubb, Hosch & Memon, 2001). Indeed, actual cases of eyewitness misidentification often come from witnesses who were highly confident but in fact incorrect in their identification.

The research literature and many cases of wrongful conviction provide sufficient evidence that eyewitness confidence is not necessarily a strong and reliable predictor of eyewitness accuracy. Nola Gilmore's in-court statements that she was "110 percent sure" the suspect she positively identified from the one-on-one procedure was in fact the assailant is not proof that her identification was accurate, yet is highly persuasive to jurors. It is important to consider the possibility that Gilmore's confidence in her identification was bolstered by the information she overheard on the police radio just prior to her identification procedure.

In summary, several well-established psychological principles involving attention, perception, encoding, memory, recognition, and recall confirm that there were significant reasons to question the reliability of Nola Gilmore's identification of Norman Mitchell. A more reliable identification procedure (a blind simultaneous or sequential lineup) should have been implemented to provide a fairer test of Gilmore's memory of the assailant, particularly considering the nondescript physical details of the assailant she provided following the crime. Gilmore's sense of confidence that she identified the correct person from the one-on-one procedure was arguably artificially inflated by suggestions she overheard from police that they had detained the actual assailant – a level of confidence that was then asserted by her numerous times to the jury at trial. Given all of the facts and circumstances surrounding Gilmore's experience and identification, it would have been advantageous for defense counsel to have sought the expertise of an eyewitness expert to assist in challenging the reliability of the identification at trial.



Dawn McQuiston, Ph.D.

SOCIAL SECURITY ADMINISTRATION
IMPORTANT INFORMATION

SOCIAL SECURITY
1463 TOBIAS GADSON BLV
CHARLESTON, SC 29407

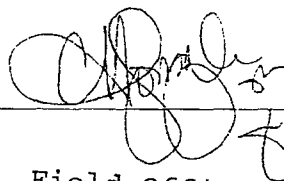
DATE: January 23, 2008

NORMAN CARROLL MITCHELL JR
1921 MARSON ST
N CHARLESTON, SC 29406

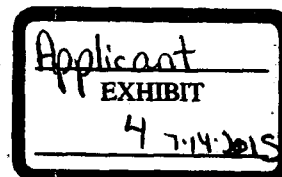
This is a receipt to show that you applied for a Social Security card on January 23, 2008. You should have your card in about 2 weeks. Any documents you have submitted are being returned to you with this receipt.

If you do not receive your Social Security card within 2 weeks, please let us know. You may call, write or visit any Social Security office. If you visit an office, please bring this receipt with you. To protect your privacy, we will not disclose a social security number over the telephone.

SSA is required by law to limit replacement SSN cards to three per year and ten per lifetime. Do not carry your SSN card with you. Keep it in a safe location, not in your wallet.



Field Office Manager



NUMI
1

DTE:01/23/08

SSN:

XC:

UNIT:CHG

PG:001

SOCIAL SECURITY ADMINISTRATION
SOCIAL SECURITY NUMBER VERIFICATION

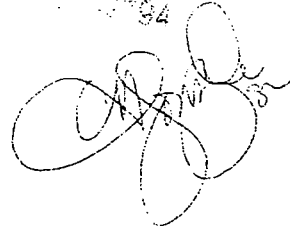
OUR RECORDS INDICATE THAT SOCIAL SECURITY NUMBER
ASSIGNED TO NORMAN , CARROLL , MITCHELL , JR .

IS

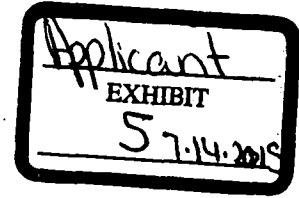
YOUR SOCIAL SECURITY CARD IS THE OFFICIAL VERIFICATION OF YOUR SOCIAL SECURITY
NUMBER. THIS PRINTOUT DOES NOT VERIFY YOUR RIGHT TO WORK IN THE UNITED STATES.

PROTECT YOUR SOCIAL SECURITY NUMBER FROM FRAUD AND IDENTITY THEFT. BE CAREFUL
WHO YOU SHARE YOUR NUMBER WITH.

SOCIAL SECURITY ADMINISTRATION
1-800-795-6880
CHANGES
1-2-94



Dawn McQuiston, Ph.D.
Legal Psychologist & Consultant
152 Chandler Crest Ct., Greer SC, 29651
602-617-5233 * dawn.mcquiston@gmail.com



Date: April 1, 2015

To: Kristy Gafton Goldberg
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 301
Columbia, SC 29201

From: Dawn McQuiston, Ph.D.

RE: Norman Lee Mitchell v. State of South Carolina, No. 2013-CP-40-5967
Post-Conviction Relief Action

Based on my review of *State of South Carolina v. Norman Lee Mitchell*, I have identified several significant issues that could have been presented by trial counsel via an eyewitness expert during the jury trial in challenging the eyewitness identification made of Norman Mitchell. Each of these concerns diminishes the potential reliability of Nola Gilmore's identification of Mitchell.

Materials Reviewed:

1. Transcript of Record, *State of South Carolina v. Norman Lee Mitchell* dated February 4, 5, and 6, 2009 (No. 2008-GS-40-1238, 1239)
2. Private Investigator Report dated August 11, 2008
3. Discovery Documents (including Incident Report, Investigative Report, Investigator's Follow-up Report, Witness Statements, and Photographs of Norman Mitchell)

Conclusions:

1. Several psychological factors shown to detrimentally affect the reliability of eyewitness identifications are implicated by the facts surrounding Nola Gilmore's identification of Norman Mitchell.

In reviewing the Private Investigator Report provided by Information Services LLC (dated 08/11/08) and the jury trial transcript (dated 02/04/09-02/06/09), the following pertinent facts were noted: Nola Gilmore waited in the car's passenger seat for her son as he paid a bill inside Time Warner on the afternoon of 02/01/08. While waiting for her son to return, a Black male abruptly opened the driver's side door, brandished a handgun, put it to the side of her head, and threatened that Gilmore exit the car or she would be shot. She struggled with exiting the vehicle quickly due to back problems; the assailant drove away anyway, knocking her to the ground with the passenger side door. While providing a statement to the police she overheard via police radio that a suspect was being chased and was then caught. She was taken nearby to view the suspect in police custody; she made a positive identification of the suspect from a one-on-one identification procedure within 10 minutes of the crime. Based on these facts, the following items challenge the reliability of Nola Gilmore's identification.

Exposure Duration. The amount of time a witness has to view an assailant during the crime is related to the likelihood of making an accurate identification. Research shows that the shorter the duration, the less likely a witness will later be able to make an accurate identification (e.g., Shapiro & Penrod, 1986). *The confrontation between Nola Gilmore and the assailant was quite brief.*

Weapon Focus. When a weapon is visible the ability to identify and to describe the face of an assailant is decreased. A meta-analysis by Steblay (1992), reviewing 19 studies, shows a small but consistent effect for the presence of a weapon that leads to reduced identification accuracy and reduced accuracy of the description of an assailant. The effect is stronger in situations which simulate a real-life event for participants, and in which a threatening weapon is visible. Not surprisingly, such eyewitnesses are often able to recall discreet details about the appearance of the weapon but fewer details about an assailant. *Nola Gilmore indicated that the assailant pulled a gun, pointed it at her head, and threatened to shoot her. The only physical description she gave immediately following the crime was "Black male".*

Stress, Fear and Arousal. A witness's attention may be impaired or distracted if he or she focuses on the psychological stress or fear accompanying a traumatic event. Under highly stressful or physiologically arousing conditions, the ability to identify and describe the face of an assailant is decreased. A meta-analysis by Deffenbacher, Bornstein, Penrod, and McGorty (2004) reviewed 27 tests of the effect of stress on eyewitness identification, and reviewed 5 tests of the effect of stress on eyewitness recall of crime details. Their results show a reliable effect of heightened stress that leads to both reduced identification accuracy and reduced recall accuracy. The effects found in this research are stronger in situations which more closely resemble a real life event for participants. *The confrontation between the assailant and Nola Gilmore was presumably a very frightening and threatening one.*

Own-Race Bias. People are generally not as accurate in recognizing and identifying members of another, less familiar ethnic group versus identifying members of their own ethnic group. This phenomenon is known as the own-race bias or cross-race effect. A meta-analysis by Meissner and Brigham (2001), reviewing 39 studies, shows a reliable effect demonstrating reduced identification accuracy under cross-ethnic/racial conditions among a variety of ethnic groups around the world. *With reference to this case, Nola Gilmore is White and Norman Mitchell is Black.*

Attention, Perceptual Salience and Encoding. The salience of the suspect/culprit in a witness's perceptual field (how much information is available *and how much competing information there is*) and the conditions (e.g., environmental) under which the person is viewed can affect the number of details and information about that person that is encoded and processed into memory. Only the information that is attended to and, thus, encoded at the scene will be processed in memory and stored for later retrieval. The less information encoded, the less information that is available for later retrieval (e.g., Narby, Cutler, & Penrod, 1996). *Given the nature of the confrontation as described by Nola Gilmore – including its brief duration, level of stress evoked, presence of a weapon, physical struggle, and cross-racial situation – there was sufficient competing information to conclude that Nola Gilmore's attention to the specific details of the assailant's face was diminished. This is consistent with the fact that the only description Gilmore gave of the assailant immediately following the crime was "Black male".*

Taken together, these well-established psychological principles provide significant reason to challenge the reliability of Nola Gilmore's identification of Norman Mitchell.

2. A one-on-one identification procedure is inherently suggestive.

While giving her statement to a police officer at the crime scene, Nola Gilmore indicated she heard another officer say via the police radio, "I've got him, I've got him...I'm on his bumper, give me backup", after which an officer took Gilmore to the location of the suspect a few minutes away. These statements arguably suggested to Gilmore that the police suspect was, in fact, the assailant prior to the identification procedure ever taking place. Within 10 minutes of the crime being committed, Nola Gilmore positively identified Norman Mitchell (who was handcuffed) from a one-on-one procedure.

One-on-one identification procedures, also known as showups, are perceived to be inherently suggestive, as the presentation of one suspect to a witness presumes that the individual administering the showup has suspicion of the suspect's guilt. This inherent suggestiveness additionally lies in the fact that the administrator of the showup is aware that the person is the suspect, which increases the likelihood that the administrator may transmit verbal or non-verbal cues that bias the witness's selection of the suspect as the perpetrator (Philips, McAuliff, Kovera, & Cutler, 1999). Research indicates that the showup procedure generally underperforms when compared to the presentation of a police lineup by producing more identifications of innocent suspects (Dysart & Lindsay, 2013). Even more, showups are particularly problematic when the suspect looks similar to the perpetrator (Stebly, Dysart, Fulero, & Lindsay, 2003). According to Kassin, Tubb, Hosch, and Memon (2001), 65% of surveyed eyewitness experts believed that showups increase the likelihood of misidentification when compared to other lineup techniques.

The best practice eyewitness identification procedures outlined by the National Institute of Justice Guidelines (Technical Working Group on Eyewitness Evidence, 1999) indicate that the use of a one-on-one procedure with eyewitnesses is inherently suggestive. As echoed in the 2014 National Academy of Sciences Report on eyewitness identification, the courts also consider showups to be highly suggestive.

Given the suggestive and potentially unreliable nature of a one-on-one procedure, the circumstances surrounding Nola Gilmore's identification do not provide conclusive information regarding the actual identity of the assailant. A better test of this witness's recollection would have been to place the suspect's picture in a lineup immediately after obtaining the witness's description of the assailant.

3. Great eyewitness confidence provides no proof of eyewitness accuracy.

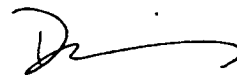
Nola Gilmore's identification of Mitchell from the one-on-one procedure was made with a great deal of confidence. According to Gilmore, immediately following her identification of Mitchell an officer asked whether she was 100% sure to which Gilmore replied, "I'm 110% sure". During the jury trial, she asserted three times that she was "110 percent sure" she identified the correct person following the crime.

Confidence is a useful tool in an investigation but is an imperfect indicator of eyewitness accuracy – great confidence provides no proof of accuracy (see National Academy of Sciences, 2014 for a review). In their meta-analysis, Sporer, Penrod, Read and Cutler (1995) find a moderate relationship between confidence and accuracy. The relationship between eyewitness confidence and accuracy is complex; the strength of this relationship varies across circumstances and as a function of many factors. In optimal viewing conditions, there is some evidence for the diagnosticity of confidence as an indicator of accuracy. But in most real-world circumstances that involve sub-optimal witnessing conditions (e.g., when a witness's degree of attention is compromised or the duration of the encounter is brief), confidence can be an imprecise indicator of accuracy, and, in some cases, an unreliable indicator of accuracy.

Further, the malleable nature of confidence means that factors occurring after the identification (e.g., hearing investigator feedback, learning details about the crime from a co-witness) can inflate eyewitness confidence while not affecting identification accuracy (see Douglass & Pavletic, 2012). Even the simple passage of time and the subsequent rehearsal of the person identified can erroneously inflate eyewitness confidence, as the witness is essentially reinforcing the notion that the identified individual is indeed the person originally viewed during the crime. An in-court identification made with high confidence is highly persuasive to jurors despite its inability to strongly indicate accuracy (Brewer & Burke, 2002). The majority of eyewitness experts surveyed (87%) believe that an eyewitness's confidence is not a reliable predictor of accuracy (Kassin, Tubb, Hosch & Memon, 2001). Indeed, actual cases of eyewitness misidentification often come from witnesses who were highly confident but in fact incorrect in their identification.

The research literature and many cases of wrongful conviction provide sufficient evidence that eyewitness confidence is not a strong and reliable predictor of accuracy in an identification. Nola Gilmore's in-court statements that she was "110 percent sure" the suspect she positively identified from the one-on-one procedure was in fact the assailant is not proof that her identification was accurate, yet is highly persuasive to jurors. It is important to consider the possibility that Gilmore's confidence in her identification was bolstered by the information she overheard on the police radio just prior to her identification procedure.

In summary, several well-established psychological principles involving attention, perception, encoding, memory, recognition, and recall confirm that there were significant reasons to question the reliability of Nola Gilmore's identification of Norman Mitchell. A more reliable identification procedure (a blind simultaneous or sequential lineup) should have been implemented to provide a fairer test of Gilmore's memory of the assailant, particularly considering the nondescript physical details of the assailant she provided following the crime. Gilmore's sense of confidence that she identified the correct person from the one-on-one procedure was arguably artificially inflated by suggestions she overheard from police that they had detained the assailant – a level of confidence that was then asserted by her numerous times to the jury at trial. Given all of the facts and circumstances surrounding Gilmore's experience and identification, it would have been advantageous for defense counsel to have sought the expertise of an eyewitness expert to assist in challenging the reliability of the identification at trial.



Dawn McQuiston, Ph.D.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Norman Mitchell, #293197,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2013-CP-40-05967

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 1, 2013. Respondent file a Return on March 7, 2014, requesting an evidentiary hearing be convened. Kristy G. Goldberg, Esquire, was appointed by the Richland County Clerk of Court. An amended application was filed on March 13, 2015. An evidentiary hearing was held on July 14, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Goldberg. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's trial counsel, James H. May, Esquire, and Brian R. Shealey, Jr., Esquire, and Dr. Dawn McQuiston. The Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, the trial transcript, and the appellate records.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during 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 Counsel May and Counsel Shealey. 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.

Applicant 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.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Trial counsel was ineffective in:
 - a. Failing to present expert testimony regarding eyewitness identification;
 - b. Failing to investigate and present additional evidence; and
 - c. Failing to object to Applicant's shackles allegedly being visible to the jury.

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcripts, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible.

Ineffective Assistance of Trial Counsel

Failing to present expert testimony regarding eyewitness identification

First, Applicant alleges Counsel were ineffective in failing to present an eyewitness identification expert. Specifically, Applicant argues that if the jury had been presented with this testimony then it is likely that the result of the trial would have been different.

Testimony

Counsel Shealey testified and the record reflects that he handled the Neil v. Biggers¹ hearing. He testified that the victim, Nola Gilmore (Gilmore), was carjacked and that a few minutes later she identified Applicant as the assailant through a show-up identification. He testified he thoroughly researched this legal issue and framed his argument to detail the Biggers factors. He testified that he pointed out through cross examination that Gilmore was unable to give a detailed description, was bleeding from her ear, and had recently had back surgery. Gilmore testified that contrary to her previous statement that the assailant had long, unkempt hair. Counsel Shealey explained that her testimony changed their strategy somewhat because Applicant was bald in his mugshot taken the day of the incident. That was the reason given for entering Applicant's booking photo into evidence. Counsel Shealey also testified that they moved for a directed verdict on the grounds that the identification was not reliable. When asked whether he consider retaining an eyewitness expert, Counsel Shealey responded that he may not have been as educated on the issue as he is now.

Counsel May testified that they argued to Judge Manning that the show-up identification was inherently suggestive in hopes of having it suppressed. He testified that he believed it would

¹ 409 U.S. 188 (1972).

be admitted over objection. He explained that they would then attack Gilmore's identification of Applicant while arguing that a man with long and unkempt hair was responsible.

Applicant testified that he always admitted to driving Gilmore's car. He testified a gun was never found and that he rented Gilmore's car from a man at the bus station which was near where the carjacking took place.

Dr. Dawn McQuiston was called by Applicant to testify as she would if she had been retained to testify at trial. She was qualified as an expert in eyewitness identification. She testified consistently with the report that was entered into evidence. She noted that the following would have had an effect on Gilmore's reliability: exposure duration, weapon focus, stress, fear and arousal, own-race bias, attention, perceptual salience and encoding. She expounded upon those topics and how each would affect Gilmore's reliability. She concluded that "well-established psychological principles provide significant reason to challenge the reliability of Nola Gilmore's identification of Norman Mitchell."

She further testified that a one-on-one identification procedure is inherently suggestive. She also noted that eyewitness confidence provides no proof of eyewitness accuracy. She discussed the fact that many courts find testimony more credible and compelling if it is attested to with confidence. Confidence is an imperfect indication of eyewitness accuracy according to Dr. McQuiston.

Analysis

This Court finds Applicant has failed to meet his burden. Counsel's failure to procure expert witnesses does not render their representation deficient when counsel vigorously cross-examines the State's witnesses and attacked the accuracy of the evidence. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). See also Frasier v. State, 306 S.C. 158, 160-61, 410

S.E.2d 572, 573 (1991). This Court finds Counsel May and Counsel Shealey's testimony to be credible. Applicant's testimony is not credible. While Dr. McQuiston offered an interesting and thorough analysis of the case, Counsel cannot be held to be deficient when they followed a valid and competent strategy in handling the identification issues. Counsel both testified that the strategy changed in their handling of the case when Gilmore testified that the assailant had long, unkempt hair. This was contrary to her description given at the scene. Counsel May testified that they wanted to adopt her identification and argue to the jury that Applicant was not involved with the carjacking. This Court will not second guess Counsel's strategy to attack Gilmore's testimony identification Applicant. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court further finds Counsel vigorously challenged the eyewitness identification without the use of an expert witness. Counsel aptly argued that the identification should be suppressed in the pre-trial Biggers hearing. Counsel adequately cross examined Gilmore on the factors affecting the accuracy of her identification. This included questions regarding the gun, her age, her back surgery, her medications, her glasses, and of course the fact that she said the assailant had long and unkempt hair. The show-up identification issue was raised on appeal by appellate counsel as well.

This Court finds Applicant has failed to show that there is a reasonable probability that the result of Applicant's trial would have been different had Counsel presented an eyewitness identification expert at trial. Dr. McQuiston presented testimony that was helpful to both Applicant and the State. Specifically, Dr. McQuiston testified there were factors that tended to

increase the reliability of Gilmore's identification, like the amount of time between the incident and the identification. The fact that there is substantial evidence of Applicant's guilt precludes this Court from finding any prejudice. Applicant was apprehended less than fifteen (15) minutes after the carjacking took place. Applicant was driving Gilmore's car and was in possession of her son's cell phone which witnesses testified he discarded while fleeing on foot from police. This allegation is denied and dismissed with prejudice.

Failing to investigate and present additional evidence

Next, Applicant alleges Counsel were ineffective in failing to present additional evidence. Specifically Applicant argues Counsel should have admitted a letter from the Social Security Administration showing an address in North Charleston. Applicant asserts this would have combated the State's argument that Applicant was homeless at the time the crimes were committed.

This Court denies this allegation. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). Whether or not Applicant was homeless is not an issue that would weigh upon his culpability in the crimes. Counsel May testified that he did not recall his rationale for not admitting the document. In any case, Applicant cannot show that this document would have changed the result of the trial. This allegation is dismissed with prejudice.

Failing to object to Applicant's shackles allegedly being visible to the jury

Finally, Applicant alleges Counsel were ineffective in failing to object to Applicant's shackles allegedly being visible to the jury. The Court has examined the trial record and notes

that Counsel May brought the issue to Judge Manning's attention before Applicant gave his testimony. (Trial Tr. p. 314, lines 6-12). Counsel May testified that he was cognizant of Applicant's restraints during the trial, especially when Applicant was testifying. He recalled that Applicant's hand restraints were removed and that he was seated in the witness box before the jury entered the room to ensure the restraints were not visible to the jury.

Applicant relies on Deck v. Missouri, 544 U.S. 622 (2005) in support of his allegation. Deck held that a criminal defendant has a right to remain free of physical restraints that are visible to the jury absent a trial court determination that they are justified by a state interest specific to a particular trial. This Court finds Applicant's testimony not credible on the issue. Applicant's testimony is self-serving and unsupported by any evidence before the Court. Applicant has failed to present any probative evidence that his shackles were ever visible to the jury. This Court finds Applicant failed to meet his burden.

Applicant has also failed to show how he was prejudiced in any manner. In Humbert v. State, 345 S.C. 332 (2001), the supreme court faced the issue of whether the PCR court erred in finding no prejudice where the applicant was wearing a jail uniform and shackles during his trial. The court held that there was not a reasonable probability that the outcome of the trial would have been different had he not been dressed in a jail uniform. Humbert v. State, 345 S.C. at 338. See Byers v. Basinger, 610 F.3d 980, 989 n.6 (7th Cir. 2010) (finding that even if a defendant proceeds to a jury trial while wearing ankle restraints, he must still prove his appearance affected the outcome of his trial); Whitman v. Bartow, 434 F.3d 968, 971-72 (7th Cir. 2006) (finding any error in having the defendant proceed to a jury trial while wearing a prison jumpsuit was harmless because the State presented overwhelming evidence of the defendant's guilt); see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991)

(concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Applicant has failed to prove any prejudice. This allegation is denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this _____ day of _____, 2015.

G. THOMAS COOPER, JR.
Presiding Judge

_____, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Norman Mitchell, #318173,
Applicant,

Case No. 2013-CP-40-5967

v.

**ORDER GRANTING
POST-CONVICTION RELIEF**

State of South Carolina,
Respondent.

RICHLAND COUNTY
FILED
2015 DEC 23 AM 4:55
JEANETTE W. BRIDE
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed October 21, 2013. Respondent made its return on or about February 27, 2014. An evidentiary hearing into the matter was convened on July 14, 2015 at the Richland County Courthouse. Applicant was present at the hearing and was represented by Kristy G. Goldberg, Esq. while Respondent was represented by Clay Mitchell, Esq. of the Office of the Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the June 2008 term of the Richland County Grand Jury for Carjacking (2008-GS-40-1239) and Failure to stop for a Blue Light (2008-GS-40-1230). On February 4-7, 2009 Applicant proceeded to a jury trial before the Honorable L. Casey Manning. During trial he was represented by James H. May, Esq. and Brian R. Shealey, Esq. At the conclusion of trial the Applicant was convicted as indicted and Judge Manning sentenced him to life without parole pursuant to S.C. Code Ann. § 17-25-45. Applicant filed post-trial motions, which were heard and denied by Judge Manning on March 3, 2009.

Applicant filed a notice of appeal and was represented by Appellate Defender Katherine Hudgins. Following briefing, the South Carolina Court of Appeals affirmed the 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.

Applicant filed his initial Application for post-conviction relief on October 31, 2013. Counsel for Applicant filed a Second Amended Application on or about March 31, 2015. In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

- a) Ineffective assistance of counsel – Trial counsel failed to present an expert testimony regarding eyewitness identification.
- b) Ineffective assistance of counsel – Trial counsel failed to investigate and present additional witnesses and evidence.
- c) Ineffective assistance of counsel – Trial counsel failed to object to the Applicant's restraint in handcuffs during the jury trial.

SUMMARY OF TESTIMONY AT EVIDENTARY HEARING

Brian Shealey, Esq.

At the PCR hearing, Applicant called Brian Shealey, Esq. as his first witness. Mr. Shealey testified that he currently works at the Shealey Law Firm, but at the time of this trial he worked at the Richland County Public Defender's office with James May. He testified that he served as a "second seat" and assisted James May in defending Mr. Mitchell in the jury trial. Mr. Shealey provided a brief factual recitation of the facts of the underlying criminal offense which was accurate to the testimony contained within the trial transcript. Of special significance, Mr. Shealey explained that a carjacking of a 75 year old white woman occurred in the parking lot

of the Time Warner Cable building on Harden Street in Columbia's Five Points area. A short time thereafter Mr. Mitchell was seen in and running from the stolen car. The only evidence presented that Mr. Mitchell committed this crime was the identification testimony from the victim and testimony that he was in and around the stolen car. There were no other eyewitnesses to the crime and there was no physical evidence found in the car tying Mr. Mitchell to the crime. Mr. Shealey also added that, despite the fact that the stolen car was found a very short time¹ after the carjacking, the gun that was allegedly used in the carjacking was not found in or around the car.

Mr. Shealey testified that he was given the responsibility to handle the identification issue and the Neil v. Biggers hearing. He testified that the identification was a major concern and a major part of their trial defense. The initial issue that caused concern was that discovery documents showed that the victim only described her assailant as a "black man" without ever providing any more descriptive terms. Secondly, the defendant was identified by the victim using a "show up" identification procedure whereupon he was the only black man in handcuffs presented to the victim. Further, the victim admittedly heard the police scanners during the police chase and heard the police say that they saw him in the vehicle and they caught that man.

Mr. Shealey testified that their concerns regarding the identification increased during trial when the victim testified that Mr. Mitchell looked different sitting at the defense table than he did the day of the crime. She testified that on the day of the crime he had longer hair that looked like it needed a good wash. The defense team responded by entering a booking photo of Mr. Mitchell from the day of the incident into evidence. See, Applicant's exhibit 1. This photo shows that Mr. Mitchell was bald on the day of the incident.

¹ In closing arguments the Solicitor summarized that the panic button call from Time Warner Cable was initiated at 12:45 pm and a police officer called in stating they were behind the stolen car at 12:52. (See, Trial Transcript pages 409 through 411). Therefore, the State's version of the evidence was that approximately seven minutes elapsed between when the emergency call went out and when the car was being followed by police.

G7 23

Mr. Shealey testified that an expert in eyewitness identification was not used in the jury trial and was not consulted. He stated that he never suggested retaining an expert because this was his first jury trial and at the time he was not aware of all of the potential issues surrounding eyewitness testimony.

Dawn McQuiston, Ph.D.

The Applicant called Dr. Dawn McQuiston as a witness in the evidentiary hearing. Dr. McQuiston is a Psychology professor at Wofford College in Spartanburg who has an area of expertise in Psychology and the Law with an emphasis in eyewitness identification. Dr. McQuiston has been qualified as an expert in eyewitness identification and testified in criminal jury trials in Arizona, Washington, North Carolina, Tennessee, and approximately five times in South Carolina. She was admitted as an expert in eyewitness identification testimony without objection by the State. See, Applicant's exhibit 2 – curriculum vitae of Dawn McQuiston, Ph.D.

Dr. McQuiston testified that she reviewed the trial transcript, private investigator's report, incident report, investigator reports, and witness and victim statements related to Mr. Mitchell's criminal case in preparation for this hearing. She testified that these were the same type of documents she would have reviewed if she had been retained to testify in the jury trial. Based upon her review of these documents she drafted a report outlining several significant issues that could have been presented by trial counsel by an expert during the jury trial and described the scientific principles underlying each issue. See, Applicant's exhibit 3 – Report of Dr. McQuiston.

Dr. McQuiston provided thorough testimony regarding how memory works and addressed several factors that have significance in the study of memory. She then addressed five specific areas of memory research that apply to the facts at issue in Mr. Mitchell's case and

62 4

explained what information could have been presented to the jury to assist them in their determination regarding the reliability of the identification.

First, Dr. McQuiston testified that scientists have found that memory is typically poorer for events of shorter duration as compared to events of longer duration. Accordingly, the people tend to have a better memory of incidents that last longer. Second, Dr. McQuiston testified that scientific evidence supports a phenomenon called cross-race effect, or own race bias, which shows that people have a tendency to be better at recognizing and identifying faces of their own race. Next, Dr. McQuiston provided testimony regarding a phenomenon called weapon focus, which occurs when a weapon is shown during the commission of a crime. Research has shown that the weapon can draw attention to itself and away from other aspects of the scene, including the person who is holding the weapon. The research provides that the presence of a weapon often reduces the quality of the description people give of a perpetrator and the likelihood of making an accurate identification because they often remember fewer details of the perpetrator's face. This phenomenon is related to findings which have also shown that heightened stress can affect eyewitness identification because a witness will often focus on the stress or fear they experience rather than the details at the scene.

Dr. McQuiston also discussed research regarding the confidence witnesses express when they make identifications. She explained that research has found that confidence is not an accurate predictor of accuracy and there is a smaller correlation between confidence of accuracy and actual accuracy than the average person might expect.

Finally, Dr. McQuiston discussed the research regarding one-on-one identification procedures. She explained that, from a psychological perspective, one-on-one identification procedures provide a higher risk of false identification. She added that the U.S. Department of Justice has even published guidelines stating that one-on-one procedures are inherently

suggestive. She testified that, to ensure reliability, police should have placed the suspect's photograph in an array or lineup with other photographs immediately after obtaining the witness's description of the assailant.

Norman Mitchell

Mr. Mitchell testified that he is currently incarcerated at Lee Correctional serving a life without parole sentence as result of these convictions. He stated that he was arrested on February 1, 2008 and remained in jail until his trial February 4, 2009. He was represented during the majority of this time by Carolyn Gripp with the Richland County Public Defender's Office, but approximately one month before trial James May became his attorney. He believes that Mr. May was as prepared as he could be for trial given this time constraint.

Mr. Mitchell testified that he had leg restraints on while he testified before the jury. He stated that the Judge cautioned him to not let the jury see the restraints, but that he couldn't sit comfortably in the chair and had to move around quite a bit. For this reason he believes the jury probably saw him in the leg irons and it probably affected their decision in his case.

Mr. Mitchell also testified that he mentioned several witnesses to his lawyer that he wanted presented in his jury trial. Mr. Mitchell admits that those witnesses could not be located at the time and are not available now. Additionally, Mr. Mitchell stated that there was a letter from the Social Security Administration on January 23, 2008 addressed to the Applicant at 1921 Marson Street in North Charleston that counsel should have admitted into evidence during trial. See, Applicant's exhibit 4. Applicant testified that this letter would have corroborated his testimony that he lived in Charleston and took the bus to Columbia that day to visit friends for Super Bowl weekend, and more importantly, it would have combatted the Solicitor's multiple accusations that Mr. Mitchell was homeless and living in the "homeless area" nearby the Time Warner Cable building.

James May

Mr. May testified that he currently works as an Assistant United States Attorney, but previously worked at the Richland County Public Defender's Office for five years. It was during this time that he represented Mr. Mitchell on his criminal charges. Mr. May testified that attorney Carolyn Gripp initially represented Mr. Mitchell but when she left the office the case was transferred to him. This was approximately one month before trial.

Mr. May testified that their initial defense was to try and suppress the identification of Mr. Mitchell by the victim. However, their biggest problem in doing this was the close proximity of time between when the incident occurred, when Mr. Mitchell was apprehended, and when the victim identified Mr. Mitchell at the show-up identification. Mr. May believed that the show up identification was suggestive, but unfortunately Judge Manning ruled that it was not overly suggestive and therefore admissible.

Mr. May stated that Mr. Mitchell testified at trial that he received the car through a "crack rental" from another person at the Greyhound Station, which is about a block away from the Time Warner Cable Building. Mr. May testified that this was a "plausible story."

Mr. May said that a major concern for the defense occurred during the direct testimony of the victim when she stated that the assailant had long nappy hair at the time of the incident. Upon cross-examination Mr. May acknowledged that the victim never said this prior to trial or in the pretrial hearing, but he did not request the Judge to reconsider his ruling on the Neil v. Biggers issue and did not request a mistrial.

Mr. May testified that he never consulted or retained an expert in eyewitness identification in preparation for this trial, and to his knowledge one had never been consulted by the attorney before him. When asked why, he stated that he was a new attorney at the time of

G 7

this trial and he did not even realize that eyewitness experts existed at the time. Therefore, he never considered it as an option.

Mr. May testified that he ensured that Mr. Mitchell was not in handcuffs when he testified. He believed the jury could not see his leg irons. Mr. May also testified that he recognized the letter from the Social Security Administration but did not remember why it would have been significant and therefore did not know why he would or would not have admitted it as evidence in trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1985).

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC: Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 286 S.E.2d 624 (1989).

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

FAILURE TO PRESENT EXPERT TESTIMONY

Applicant has asserted that trial counsel failed to present an expert in eyewitness identification during his jury trial. Generally speaking, the Applicant must show a reasonable probability that, but for failure to call the witness, the result would have been different. Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008).

In Lorenzen, the PCR judge found that trial counsel was ineffective for failing to call an expert witness in multiple areas. The Supreme Court found that this was inappropriate because Lorenzen did not offer favorable expert witness testimony during the PCR hearing. "Aside from his testimony and trial counsel's testimony, Lorenzen did not offer any other witnesses to testify on his behalf at the PCR hearing. Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided his defense." *Id.* at 530, 776., citing Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005). This is not analogous to the case at bar where Dr. Dawn McQuiston was called and presented credible testimony regarding specific areas of eyewitness identification research that could have assisted the jury in their analysis of the testimony and deliberation of the issues.

The Supreme Court in Lorenzen also found that "counsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the

GA 9

State's witnesses and attacked the accuracy of the evidence." *Id.* at 531, 777, citing Frasier v. State², 306 S.C.158, 410 S.E.2d 572 (1991). After a complete review of the trial transcript, the testimony presented at the evidentiary hearing, and the arguments made by counsel, this Court finds that the identification concerns in this case are so severe and central to the heart of the conviction in this matter that vigorous cross-examination of the victim alone was not sufficient to challenge the accuracy of the identification in such a matter to ensure a just result.

The identification testimony from the victim was extremely important in this trial, as there was no other eyewitness to the crime and no physical evidence tying Mr. Mitchell to the crime³. During the Neil v. Biggers hearing pre-trial evidence was presented that the victim initially described the assailant as a "black male." *See*, trial transcript page 51. The victim testified that shortly after the incident they brought her to Gonzalez Gardens to "see who it was and it was definitely him" and she was 100% positive. *See*, trial transcript page 83. During

² In Frazier, the petitioner asserted that trial counsel was deficient in failing to retain an expert to challenge DNA evidence. This assertion was denied because "trial counsel vigorously cross-examined the state's DNA experts and attacked the accuracy of the evidence." *Id.* at 160, 573. The Court explained "[W]e cannot say that his performance was unreasonable under prevailing professional norms." *Id.* Applicant argues that this case is factually very different from the one at bar because the DNA evidence only linked the co-defendant to the crime and did not implicate the petitioner. Additionally, in Frazier, there was witness testimony that the defendant had admitted committing the crime.

³ The State emphasizes the importance of the testimony that Mr. Mitchell was seen in and fleeing from the stolen car. However, this was readily admitted by Mr. Mitchell. *See*, Trial transcript pages 322-326. He testified that he came into possession of the car when he was approached by a man at the Greyhound Bus Station on Gervais Street who offered to let him borrow the car for \$20. *Id.* He then dropped this man off at a house close to the Bus Station and shortly after a police car was behind him. *Id.* While the credibility of this testimony may have been an issue in trial, a detailed review of the transcript shows that: 1) the gun allegedly used in the incident was not found in the car or on the defendant, and 2) two duffle bags not belonging to the victim were found in the car. *See*, trial transcript pages 170, 209, 216, and 224. The victim stated that she did not see her assailant carrying anything other than a gun at the time of the carjacking. *See*, trial transcript page 181. Therefore, it is probable that the car did make a stop somewhere between the time that the incident occurred and when law enforcement spotted the vehicle, and accordingly, it is possible that the jury may have considered his conjunction with Mr. Mitchell's testimony that he obtained the car after the incident.

cross-examination she added that, generally, she heard about the police chase on the officer's radio and heard that they caught him. *See*, trial transcript page 85. The victim admitted that in her statement to police after the identification she still only described her assailant as a "black man." *See*, trial transcript page 93. When prompted for additional details about his appearance, including hair, height and clothes she did not provide any other details. *See*, trial transcript 94-94. She also could not describe the gun. *See*, trial transcript page 96.

During this pre-trial hearing the victim stated that she knew she was going to Gonzalez Gardens "to identify the gentlemen because they told me he was—they had him ..." *See*, trial transcript page 96. They brought the suspect to her window and he was the only person handcuffed at the scene. *See*, trial transcript page 97.

Defense counsel also raised several ancillary concerns with the victim's identification during the per-trial hearing. Specifically it was addressed that she was 75 years old, a diabetic, and had undergone back surgery one month before for which she prescribed pain medication although she denied having taken any medication that day. *See*, trial transcript pages 86-88. The Defense also brought out that the victim wears prescription glasses. *See*, trial transcript pages 88-89. It was also elicited that after the incident the victim felt faint and was bleeding from the ear where she was hit with the gun. *See*, trial transcript page 92.

Mr. Mitchell testified in the pre-trial hearing that police removed him from the back of a patrol car for the show-up identification. *See*, trial transcript page 100. At the time he was the only handcuffed black male, he was not wearing a shirt (in February), and he had four or five police officers around him. *See*, trial transcript page 102. Mr. Mitchell testified that he thought he heard the police on the radio say that the victim was initially not sure if he was the correct suspect or not. *See*, trial transcript page 102.

After argument by the State and Defense counsel, the Honorable Judge Manning ruled on the Biggers motion as follows:

"Looking at the prong where the witness's opportunity to view the perpetrator at the time of the crime, she was in the passenger seat when some gentleman opened up the driver's side door. She was looking at him the whole time. He sticks a gun in her left ear. She's looking at him the whole time. She wouldn't get out of the car soon enough. He walks around in front of the vehicle, comes and opens the door. She testified that she had an opportunity to observe the perpetrator at the time. So her - she had an ample opportunity to view the perpetrator at the time of the crime. Her degree of attention that she's testified was specific and direct. A little bit weak maybe, the accuracy of the witness's prior description. But the level of certainty she demonstrated at the confrontation was high and the length of time between the crime and the confrontation was very little. So, considering the totality of the circumstances, especially in view of the light of the Defendant's testimony, in camera, I find and conclude that the ID was proper. I'm going to allow it." See, trial transcript page 119.

When the victim testified in front of the jury she again admitted that her original description of her assailant was simply a "black male." See, trial transcript page 227. The victim then proceeded to testify about the incident with substantially more specific details than she had provided before. The victim testified that while she was with police at the incident location she heard the police talking on the radios and heard "there goes that Intrepid now, says it's a flying," "I've got him, I've got him," and "I'm on his bumper." See, trial transcript page 166 and 173. After this the police took the victim to Gonzalez Gardens, about which she said "I never heard of it or seen or know anything about it but I smelled it." See, trial transcript pages 167. She testified that she "was trying to get out of there fast because it was making me sick, the smell." See, trial transcript page 183. Then the police officer "that had pursuit of him, she brought him out." See, trial transcript pages 183. The victim agreed that he was "the only one" she saw in handcuffs. See, trial transcript page 184. The victim asked the police to bring him closer to the car and then she said she was 110% sure it was him. See, trial transcript pages 184. Again, she admitted that her statement, written after this identification, only described her assailant as a "black man."

See, trial transcript page 178. At no time was a photo line-up provided to the victim to see if she could identify the defendant specifically.

When asked in trial if the individual at the defense table looks exactly as he looked the day of the incident, the victim stated "he has changed his looks some...he looks like he's put on maybe a little weight...his hair is differently...he doesn't have as much hair as he did." *Id.* at 169. She added that he had "less hair" at trial than he did before. *Id.* at 169. She later elaborated that his hair "was longer than what I have and it was gummy looking...like it needed a good shampoo...it was nappy like...(and) uncombed." *Id.* at 181. In response to this testimony, defense counsel later entered into evidence the booking photo of the defendant from the day of the incident to show that the defendant was bald on the day of the incident. See, trial transcript page 254.

At no time during this testimony did defense counsel raise an objection to the new testimony or ask Judge Manning to reconsider his ruling on the Biggers motion in light of this new information, nor did they request a mistrial. During their Directed Verdict argument defense counsel argued "we don't believe they've met the substantial circumstantial evidence as the only witness to the carjacking clearly identified the man who carjacked her as having long nappy hair, looked like it hadn't been combed. The Defendant, through the evidence that was introduced has - is bald." See, trial transcript page 295. The Judge denied the defense's request for a directed verdict. Trial counsel did not specifically renew their objection to the identification under Neil v. Biggers and technically did not ask the Judge to reconsider the admissibility of the identification. Despite the fact that it may have not been properly preserved, the Appellate Court reviewed the trial court's decision in unpublished opinion 2012-UP-010. In this opinion the Court held:

GC 13

"Here, the circuit court did not err in admitting the victim's initial show-up identification and subsequent in-court identification. Although the single-person show-up procedure used in the instant case has been disfavored as suggestive, the circuit court properly found the victim's identification was sufficiently reliable pursuant to the Biggers factors. The victim was able to view Mitchell's face very closely during the carjacking, which took place outside during the day. In addition, the victim demonstrated a high degree of certainty that Mitchell was perpetrator, and both witnesses to her initial identification of Mitchell testified she demonstrated no hesitation or doubt. Finally, she identified Mitchell within minutes after the crime. Accordingly, Mitchell's carjacking conviction is affirmed."

This court finds that the credible testimony presented by Dr. Dawn McQuiston would have aided the jury, circuit court, and appellate court in reaching their conclusions in this matter. This court finds that, had this testimony been presented during the jury trial, there is a reasonable probability that the result of Mr. Mitchell's case would have been different.

Dr. McQuiston provided a comprehensive but understandable explanation regarding how memory works. She also explained several scientific principles or phenomena that are especially relevant in this case. First, she explained that memory of a short event is usually not as accurate as memory of a longer event. She explained that the less time you have to perceive an event, the less information you take in, and therefore your memory for the event will be poorer. It is undisputed that the carjacking in this case was a relatively quick occurrence.

McQuiston also explained the Cross-Race Effect, which is a phenomenon supported by scientific research that shows a tendency for people to be better at recognizing or identifying faces of their own race. Again, it is undisputed that the victim in this matter was a white female, while the assailant was a black male. McQuiston testified that this principle would have been relevant to present to the court and the jury to assist in making their decisions.

McQuiston also explained a phenomenon called weapon focus, where research has found that the presence of a weapon often reduces the quality of the description people give of a perpetrator and reduces the likelihood of making an accurate identification. This can happen for

two reasons. First, a weapon shown during a crime can draw attention to itself and away from other aspects of the scene, such as the person who is holding the weapon. Secondly, events that create stress or fear can cause a person to focus on the stress or fear they experience more so than their surroundings. Again, it is undisputed that the allegations involve a gun pointed at or near the victim's face and left ear and that the gun made contact with her ear.

Next, McQuiston provided testimony that confidence is not an accurate predictor of accuracy. This is especially important because the circuit court and the appellate court noted the victim's confidence level as a major factor in their decisions, inferring that they believed that the confidence level of the victim did in fact correlate to accuracy. It is likely that the jury also took the victim's testimony regarding her confidence level the same way and assumed this meant that her identification was more reliable. Dr. McQuiston testified that a person's sense of confidence can fluctuate and be influence by other things, like post identification-feedback or other cues. This court is especially concerned that the victim's recitation of what she overheard on the police scanners may have affected her confidence level. For this reason this Court believes that testimony on this subject would have been extremely beneficial for the jury and court to consider.

Finally, McQuiston testified that show-up identifications are considered to be inherently suggestive by the psychology community and even the U.S. Department of Justice. McQuiston could have explained to the jury the problems with show-up identifications in general and why they are not a good test of a witness's memory, and in fact, carry a higher risk that people make false identifications. This court is aware of the inherent suggestibility of a show-up identification, but coupling that with the information the victim heard on the police scanner, it appears even more likely that this was an overly suggestive procedure for identification. It is likely that the average juror does not have any background knowledge about research regarding

G2-15

show-up identification versus line-up identifications, and this Court believes that this testimony would have been especially beneficial to the jury in making their decisions.

In Legare v. State, 333 S.C. 275, 509 S.E.2d 472 (1999) the PCR court found that counsel failed to call an expert witness in the field of identification. However, the Supreme Court found that the lower court erred regarding this issue because counsel was able to articulate very clear reasons for not calling the expert, specifically stating that the expert was unpersuasive, belligerent and arrogant. In the case at bar, counsel did not specifically articulate a specific reason or trial strategy behind not consulting with or retaining an expert in this matter. In contrast, both counsel stated that they were not aware of eyewitness identification experts at this point in their professional career and they did know about the importance this testimony could have had in their case.

Given the extreme concerns regarding the identification evidence offered at trial, and given the fact that no reasonable legal strategy was asserted for not consulting or retaining an expert witness in this matter, this Court finds that counsel was ineffective for failing to call an expert witness in this case. Considering the credible testimony of Dr. McQuiston offered in the evidentiary hearing, this court finds that there is a reasonable probability that, but for counsel's failure to call her as a witness in trial, the result of the trial would have been different. Accordingly this court finds that granting post-conviction relief to the Applicant is appropriate in this matter.

FAIULRE TO PRESENT EVIDENCE

Applicant has asserted that trial counsel failed to investigate and present additional witnesses and evidence. The only evidence related to this allegation offered during the evidentiary hearing was a letter from the Social Security Administration on January 23, 2008 addressed to the Applicant at 1921 Marson Street in North Charleston. See, Applicant's exhibit 4.

Applicant testified that this document should have been presented during the jury trial to corroborate his testimony that he was living in Charleston in January and February of 2008 and he was not a homeless resident of Columbia, as alleged by the State. Applicant believes that this corroboration would have assisted in convincing the jury that he was telling the truth and the State was not.

James May testified that he recognized the document but did not recall why it may or may not have been significant. He could not remember why he did not introduce the document into evidence.

This Court has reviewed the exhibit presented and considered the testimony of the Applicant and trial counsel in conjunction with the trial transcript. Even assuming that failure to introduce this document may have been deficient performance by counsel, failure to produce this document did not prejudice the applicant such that the result of the proceeding would probably have been different if the exhibit had been entered at trial. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. While the issue was mentioned several times in trial, the residence of the Applicant was not a key factor in the jury's determination of guilt or innocence in this trial. Accordingly, this allegation of the Applicant's petition is denied.

FAILURE TO OBJECT TO APPLICANT'S RESTRAINT IN HANDCUFFS

Applicant testified in the hearing that he was wearing leg restraints while he was on the witness stand testifying before the jury. He stated that he was uncomfortable and moved around a lot and he is confident that the jury would have seen the leg restraints during this time.

James May testified that he was very cognizant of concerns in juries seeing restraints, and accordingly he ensured that the Court remove his hand restraints and have Mr. Mitchell seated in the witness box before the jury entered the room so they would not see his leg restraints. He believed that the jury did not see Mr. Mitchell's restraints. Further, this Court notes that on page

314 of the Trial Transcript Mr. May engaged in a discussion with the trial Judge attempting to ensure that the jury did not see Mr. Mitchell's feet or leg restraints. Judge Manning stated "If somehow they inadvertently see them, I'll give them a charge, you've got to disregard and can't hold it against him, whatever." See, Trial Transcript, page 314, lines 10-12. Throughout the remainder of the trial neither Mr. Mitchell nor Mr. May ever informed the court of any concern that the jury did in fact see the leg restraints and therefore no charge was given.

The Applicant has not provided any credible evidence that the jury was able to see his leg restraints during his trial. Alternatively, the testimony of Mr. May and trial transcript provide credible evidence that efforts were made to avoid the jury's view of any leg restraints. Accordingly, this allegation of the Applicant is denied.

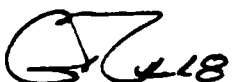
ALL OTHER ALLEGATIONS

As to any and all allegations that may have been raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

CONCLUSION

Based on all of the foregoing, this Court finds and concludes that the Applicant has established constitutional deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be granted and his criminal charges remanded to General Sessions Court.

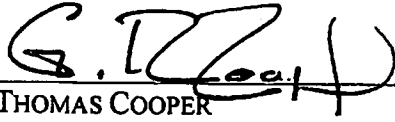
This Court notes that the Respondent must file and serve a notice of appeal within third days from the receipt by counsel of written notice of entry of judgement to secure the appropriate appellate review. *See*, Rule 203, SCACR.

 18

IT IS THEREFORE ORDERED:

1. That this post-conviction relief matter is granted and the Applicant's criminal charges shall be remanded to General Sessions Court.

AND IT IS SO ORDERED this 23 day of December, 2015.



G. THOMAS COOPER
PRESIDING JUDGE
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Norman Mitchell, #293197,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2013-CP-40-05967

MOTION TO RECONSIDER

Respondent, pursuant to Rules 59(a) and (e), Rule 52(b) SCRCP, would respectfully show unto this Court:

I.

This matter came before the Court by way of an Application for Post-Conviction Relief filed February 25, 2014. The Court convened an evidentiary hearing into the matter on July 7, 2015, at the Richland County Courthouse. Applicant was present at the hearing and represented by Kristy G. Goldberg, Esquire. By order filed December 29, 2014, the Court granted relief on one of three grounds raised in the Application. Respondent received a copy of this order on January 6, 2015.

II.

Respondent respectfully asks this Court to reconsider its judgment granting Applicant post-conviction relief. In the order granting relief, the Court found trial counsel ineffective for failing to retain and call an eyewitness identification expert. The Court further found that the result of the proceeding likely would have been different had the expert testimony been presented. However, the Court may have overlooked certain law, testimony from Counsel, and portions of the transcript where Counsel's defense strategy was clear. The Court may have also

discounted the evidence presented by the State at trial which affirmatively proved Applicant's guilt.

First, the Court did not apply the appropriate standard in conducting its analysis. The longstanding standard as to whether counsel is ineffective for failing to retain and present an expert at trial, as initially noted in the 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 Court erroneously disregards 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." (Order, p. 10). The Court did not provide any legal authority to support this new rule. The new standard adopted by the Court requires that Counsel call an eyewitness identification expert in nearly every imaginable case where identification is at issue. The 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 that Counsel cannot be ineffective if he or she vigorously cross examines and otherwise challenges the evidence is the proper standard for determining whether Counsel was deficient. This Court did not apply the correct standard.

When applying the correct standard, the Court should find that Counsel was not ineffective because Counsel vigorously challenged the victim, Nola Gilmore's, testimony and the

eyewitness identification without the use of an expert witness. Counsel aptly argued that the identification should be suppressed in the pre-trial Biggers hearing. (Trial Tr. p. 110, line 11 – p. 117, line 5; p. 119, lines 4-24). Counsel aggressively cross examined Gilmore on the factors affecting the accuracy of her identification. Counsel Shealey questioned Gilmore on her age, subtly suggesting that she may not be as attentive or observant as a younger person. (Trial Tr. p. 86, lines 8-10; p. 173, line 31 – p. 174, line 1). Gilmore also provided details surrounding her recent back surgery and the medications she was prescribed at the time of the incident. (Trial Tr. 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. (Trial Tr. p. 88, line 4 – p. 89, line 10; p. 177, lines 5-14). Counsel Shealey questioned Gilmore about feeling faint and how she almost passed out according to her son, William Gilmore, who also testified at trial. (Trial Tr. p. 90, line 24 – p. 92, lines 8; p. 182, line 23 – p. 183, line 11). Most important to our analysis, Counsel Shealey emphasized on cross examination Gilmore's testimony that Applicant's hair was long, nappy, and looked like it "needed a good shampoo." (Trial Tr. p. 181, lines 2-14). Respondent submits that Gilmore was vigorously cross examined, and her identification was challenged throughout the trial.

Gilmore 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. Gilmore's testimony that the assailant had long unkempt hair was a critical point in the trial. In response, Counsel introduced a booking photo of Applicant 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 Gilmore's credibility and reliability in identifying Applicant as the assailant. Counsel May also argued these points in his

closing argument. He highlighted Gilmore's testimony that Applicant's hair was long and unkempt when the booking photo proved that he was bald the day the crime took place. (Trial Tr. p. 396, line 7 – p. 397, lines 8). He also argued that Gilmore's identification was not accurate because she is a seventy-four (74) year old woman who just experienced a traumatic event. (Trial Tr. p. 402, lines 22-25). Counsel May also argued the identification was mistaken because Gilmore had an obstructed view of him (Trial Tr. p. 402, line 21 – p. 403, line 21). Respondent asks this Court to reconsider its ruling while applying the applicable law and considering that Gilmore's identification had been substantially impeached and challenged by Counsel.

Respondent also asks the Court to examine its reasoning for granting relief on a number of grounds. The Court found Counsel failed to articulate a reasonable trial strategy in not calling an eyewitness expert. Counsel need not provide a strategic reason for not calling an expert when the State's evidence is adequately challenged through cross examination and argument. See Fraiser, Dempsey, and Lorenzen. The testimony and record are clear that Counsel's strategy in handling the identification issue was to impeach Gilmore's testimony and to challenge the admissibility of the identification.¹ The Court found Counsel were ineffective despite this strategy. Respondent asks the Court to reconsider its ruling.

In support of its ruling for relief, the Court found Counsel failed to renew their objection made pursuant to Biggers after Gilmore testified. (Order, p. 13). The Court found that "Trial counsel . . . technically did not ask the Judge to reconsider the admissibility of the identification." (Order, p. 13). In fact, Counsel did renew all objections numerous times throughout the trial. (Trial Tr. 378, lines 10-16). Notably, Counsel moved for a directed verdict

¹ Respondent submits that both Counsel Shealey and Counsel May testified as to their strategy in defending their case. If this Court disagrees, it is clear from the record that their strategy was to discount Gilmore's identification. See Wood v. Allen, 558 U.S. 290, 301-02, 130 S. Ct. 841, 849-50 (2010) (holding that a strategic decision does not have to be articulated by counsel on the record and that it can be read from the record).

on the grounds that Gilmore's identification was not reliable. (Trial Tr. 295, line 13 – p. 296, line 12). Counsel May also specifically renewed his objection pursuant to Biggers during the post-trial hearing. (Post Trial Tr. p. 3, line 19 – p. 4, line 10). The Court's reasoning is flawed as the Court may have overlooked these objections and Judge Manning's ruling denying the objections.

The Court also found that Counsel did not preserve the identification issue for appeal. (Order, p. 13). This finding is contrary to the South Carolina Court of Appeals' opinion which found Counsel's challenge of the show-up identification preserved for review. Respondent submits that the Court overlooked the appellate decision. The court of appeals issued an unpublished opinion affirming Judge Manning's decision overruling Counsel's objection to Gilmore's identification. This ruling is law of the case and this Court should amend its ruling to reflect that the 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).

III.

Finally, the Court failed to adequately address the prejudice prong of Strickland. The Court's finding that the result of the trial would have been different but for Counsel's failure to call an eyewitness expert is not supported by the record and evidence before the Court.

Notably, the Court disregarded the ample evidence supporting the jury's verdict even excluding the identification evidence. The Court notes that Applicant was apprehended after fleeing in the victim's car and while in possession of the victim's cell phone but fails to address how this ample evidence could be overcome by an eyewitness identification expert. The Court makes a finding that Applicant's version of events is plausible, even likely. The statement that Applicant's version of events is probable is not a valid ruling as it essentially overrules the jury's

finding of fact. Specifically, Applicant was seen driving the victim's car approximately seven (7) minutes after the authorities were notified. (Trial Tr. p. 50, lines 13-15; p. 53, lines 1-7). Law enforcement attempted to stop the vehicle, but Applicant attempted to flee². (Trial Tr. p. 198, line 12 – p. 201, line 6). After a brief car chase, Applicant jumped out of the vehicle on foot and tried to run away from officers. Applicant was seen discarding a cell phone which was later affirmatively identified as the victim's son's phone. (Trial Tr. 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 Gilmore identified Applicant was around ten (10) minutes. (Trial Tr. p. 54, lines 12-17). There is overwhelming evidence of Applicant's guilt that this Court has overlooked.

Accordingly, Respondent respectfully asks this Court to reconsider its judgment.

IV.

WHEREFORE, Respondent respectfully requests a hearing be held on this motion and that the Court amend the final judgment to reflect a finding that trial counsel was not ineffective and that Applicant was not prejudiced in any manner.

(signatures on following page)

² "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).

Respectfully submitted,

ALAN WILSON
Attorney General

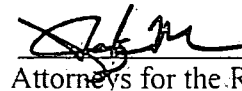
JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:



Attorneys for the Respondents

Jan. 19, 2016 Columbia, South Carolina

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2013-CP-40-05967

AFFIDAVIT OF SERVICE BY MAIL

VS

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Reconsider** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kristy G. Goldberg, Esquire
1720 Main Street, Suite 303
Columbia, SC 29201

DATED this 19th day of January, 2016.


Jenna C. Brown, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
)
NORMAN MITCHELL)
SCDC # 293197,)
)
Applicant,)
)
vs.)
)
)
STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2013-CP-40-05967

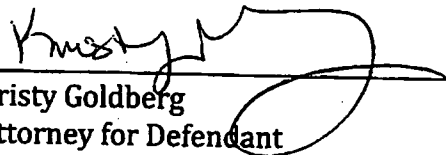
APPLICANT'S RESPONSE TO STATE'S
MOTION TO RECONSIDER

This matter comes before the Court by way of an Application for post-conviction relief (PCR) filed February 25, 2014. An evidentiary hearing was held on July 7, 2015 at the Richland County Courthouse. By order filed December 29, 2015, the Court granted relief on one of three grounds raised in the Application. It appears the final order was received by the Respondent on January 6, 2016.

The Respondent has filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP. Counsel for the Applicant received this Motion on January 21, 2016. The Applicant would hereby ask that this Court respectfully deny the Respondent's motion based upon the following:

1. The State has not alleged any substantial new factual or legal argument that was not originally argued by the State during the evidentiary hearing or in their proposed order to the Court;
2. The Court's ruling in the initial Order is sound.

Based on the foregoing, the Applicant would ask that this Court deny the State's motion to Reconsider.


Kristy Goldberg
Attorney for Defendant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina
This 21st day of January, 2016

STATE OF SOUTH CAROLINA,
Defendant,

CERTIFICATE OF SERVICE

678

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Norman Mitchell, #293197

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2013-CP-40-05967

**ORDER DENYING STATE'S
MOTION TO RECONSIDER**

JEANETTE W. MCBRIDE
C.C.P. & G.S.

2016 JAN 29 PM 4:16

RICHLAND COUNTY
FILED

This matter comes before the Court by way of State's Motion to Reconsider pursuant to Rule 59(e), SCRCP. Specifically, the State asks this Court to reconsider its Order Granting Applicant's Post Conviction Relief and Remanding the Case for Sentencing filed December 23, 2015.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered. In addition, the Court was not served with a copy of the State's Motion to Alter or Amend the Judgment filed January 19, 2016, as is required under Rule 59(g) of the South Carolina Rules of Civil Procedure.

Accordingly, this Court hereby **DENIES** Plaintiff's Motion under Rule 59(e), SCRCP, to Reconsider this Court's Order filed December 23, 2015. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
January ~~28~~ 2016


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

SCANNED

679

WITNESSES

(S) INV. W. Pegram - CPD

DOCKET NO. 2008-GS-40-1238

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JUNE TERM 2008

67

ARREST WARRANT NUMBER
K-332565

THE STATE
VS.

Norman Lee Mitchell

After being fully advised as to my legal rights, I hereby waive present and future rights to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
C.C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

Defendant

Witness:

C.C.C. PLS. AND G.S.

680

TRUE BILL

ACTION OF GRAND JURY

Handwritten: *Norman Lee Mitchell*
Person of Grand Jury
ite: JUN 19 2008

VERDICT

Indictment for
CARJACKING

SC Code: 16-3-1075(B)(2)
CDK Code: 2600
Class: UNC/FELONY

Person of Petit Jury
te:

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF RICHLAND)

At a Court of General Sessions, convened on **June 18, 2008**, the Grand Jurors of Richland County present upon their oath:

CARJACKING

That Norman Lee Mitchell did in Richland County on or about February 1, 2008, take or attempt to take, a motor vehicle from the victim, Nola Gilmore, by force and violence or by intimidation, while the person, Nola Gilmore, was operating the vehicle, or while the person was in the vehicle, to wit: a 1994 Dodge Intrepid. All in violation of SC Code Section 16-3-1075(B)(2).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



WARREN B. GIESE, SOLICITOR

WITNESSES

1(s) G. R. Sanders - CPD

DOCKET NO. 2008-GS-40-1239

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JUNE TERM 2008

67

ARREST WARRANT NUMBER

K-332567

THE STATE

VS.

Norman Lee Mitchell

ACTION OF GRAND JURY

TRUE BILL

Richard Sanders

oreperson of Grand Jury
ate: JUN 20 2008

VERDICT

Indictment for

TRAFFIC/FAIL TO STOP FOR BLUE
LIGHT

SC Code: 56-5-750(b)(1)

CDR Code: 065

Class MIS-A

oreperson of Petit Jury
ate:

After being fully advised as to my legal rights, I hereby waive present and future rights to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

CERTIFIED TRUE COPY
OF ORIGINAL FILED
C.C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

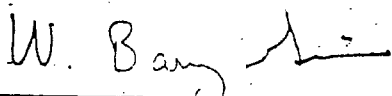
INDICTMENT

At a Court of General Sessions, convened on June 18, 2008, the Grand Jurors of Richland County present upon their oath:

TRAFFIC/FAIL TO STOP FOR BLUE LIGHT

That Norman Lee Mitchell did in Richland County on or about February 1, 2008, unlawfully fail to stop while driving a motor vehicle on a road, street or highway of the state for a law enforcement vehicle after being signaled so to by a duly constituted and acting law enforcement officer, with a blue light and/or siren, all in violation of §56-5-750, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


WARREN B. GIESE, SOLICITOR

ARREST WARRANT

K- 332565

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

 THE STATE
against

NORMAN LEE MITCHELL

Address: NO PERM

COLUMBIA SC 29202

Phone: _____ SSN: _____

Sex: M Race: B Height: 5 2 Weight: 140

DL State: _____ DL#: _____

Agency ORI#: SC24200100

Prosecuting Agency: CITY OF COLUMBIA

Prosecuting Officer: PEGRAM INV W/T GARNETT

Offense: CARJACKING

Code/Ordinance Sec: 16-3-1075 Offense Code: MAC

 This Warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☒ Municipality of
 COLUMBIA

 The accused
 is to be arrested and brought before me to be
 dealt with according to law.

Signature of Judge _____ (L.S.)

Date: _____

RETURN

 A copy of this arrest warrant was delivered to
 defendant Norman Lee Mitchell
 on 02/01/2008

Signature of Constable/Law Enforcement Officer _____

 RETURN WARRANT TO:
 CITY OF COLUMBIA
 MUNICIPAL COURT
 P.O. BOX 644
 COLUMBIA SC 29202

 STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
 COLUMBIA

 Personally appeared before me the affiant
 being duly sworn deposes and says that defendant
 did within this county and state on 02/01/2008

 State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of COLUMBIA
 in the following particulars:

DESCRIPTION OF OFFENSE: CARJACKING

 I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

THE DEF DID ON 02/01/08 AT 1240 HRS WHILE AT 1030 HARDEN ST CITY C
 COLA SC, RICHLAND CITY. ENTER THE DRIVER'S SIDE DOOR OF A PARKED 19
 DODGE INTREPID OCCUPIED BY VICTIM NOLA GILMORE. THE SUSPECT PLACED
 OBJECT TO SIDE OF THE VICTIM'S NECK AND TOLD HER THAT HE WOULD SHC
 HER IF SHE DID NOT EXIT THE VEHICLE. THE VICTIM GOT OUT OF THE VEH
 & THE DEF DROVE AWAY WITH HER CAR. APPROX 10 MINS LATER CPT. SANDER
 OBSERVED THE DEF DRIVING THE STOLEN VEH. AFTER A BRIEF CHASE THE D
 WAS APPREHENDED. THE VICTIM ARRIVED AT THE DEF'S LOCATION AND
 POSITIVELY IDENTIFIED THE DEF. AS THE PERSON THAT CARJACKED HER.

Signature of Affiant

 Signature of Affiant Norman Lee Mitchell
 Affiant's Address 10 JUSTICE SQUARE
COLUMBIA, SC

Affiant's Telephone

5453525

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

 It appearing from the above affidavit that there are reasonable grounds to believe that
 on 02/01/2008 defendant NORMAN LEE MITCHELL
 did violate the criminal laws of the State of South Carolina (or ordinance of COLUMBIA) as set forth below:

 County/ ☒ Municipality of COLUMBIA
 DESCRIPTION OF OFFENSE: CARJACKING

16-3-1075

CARJACKING

 Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
 defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
 the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 02/01/2008
 Signature of Affiant Norman Lee Mitchell
 (L.S.)

Judge's Address

CITY OF COLUMBIA, SC

MUNICIPAL COURT, P.O. BOX 644

COLUMBIA SC 29202

Judge's Telephone

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL

AFFIDAVIT

INV W PEGRAM

NORMAN LEE MITCHELL

02/01/2008

violate the criminal laws of th

COLUMBIA

16-3-1075

ARREST WARRANT

K-332567 K-332567

STATE OF SOUTH CAROLINA

County/ ☒ Municipality of COLUMBIA

THE STATE

against

NORMAN LEE MITCHELL

Address: NO PERM

COLUMBIA SC 29202

Phone: SSN:

Sex: M Race: E Height: 5'00" Weight: 140

DL State: DL#:

Agency ORI#: SC0400100

Prosecuting Agency: CITY OF COLUMBIA

Prosecuting Officer: SANDERS G R

Offense: FAIL STOP BLUE LIGHT/SIRE

Code/Ordinance Sec: 56-5-750

Offense Code: FSC

This Warrant is CERTIFIED FOR SERVICE in the

County/ ☐ Municipality of

COLUMBIA

The accused

s to be arrested and brought before me to be

dealt with according to law.

Signature of Judge

(L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to defendant

on 2/2/08 by Lee Mitchell

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

CITY OF COLUMBIA

MUNICIPAL COURT

P.O. BOX 644

COLUMBIA, SC 29202

ORIGINAL

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of COLUMBIA

Personally appeared before me the

being duly sworn deposes and says that

did within this county and state on

State of South Carolina (or ordinance of

in the following particulars:

DESCRIPTION OF OFFENSE:

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

ON 02/01/08 IN THE CITY OF COLA. SC THE AFFIANT ATTEMPTED TO INITIATE A TRAFFIC STOP ON A BLUE DODGE INTREPID TAG 301TCY. AFFIANT INITIATED BLUE LIGHTS & SIREN AT THE AREA OF HAMPTON ST AND GREEN ST. DEF DID CONTINUE TO DRIVE APPROX. TWO MILES THROUGHOUT THE CITY UNTIL DEF STOPPED THE VEHICLE AT HAMPTON ST AND HEIDT ST. DEF LEAD AFFIANT ON FOOT CHASE AND WAS CAPTURED AND POSITIVELY IDENTIFIED.

Signature of Affiant

STATE OF SOUTH CAROLINA

County/ ☒ Municipality of COLUMBIA

Signature of Affiant

STATE OF SOUTH CAROLINA

County/ ☒ Municipality of COLUMBIA

Signature of Affiant

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on 02/01/2008 defendant NORMAN LEE MITCHELL

did violate the criminal laws of the State of South Carolina (or ordinance of

County/ ☒ Municipality of COLUMBIA) as set forth below:

DESCRIPTION OF OFFENSE: FAIL STOP BLUE LIGHT/SIRE 56-5-750

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 02/01/2008

Signature of Affiant

Signature of Issuing Judge

Judge's Name: J. L. COLDER

Judge's Title: JUDGE

Judge's Address: CITY OF COLUMBIA, SC

MUNICIPAL COURT, P.O. BOX 644, 29202

Judge's Telephone

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

AFFIDAVIT

County/ ☒ Municipality of COLUMBIA

Personally appeared before me the

being duly sworn deposes and says that

did within this county and state on

State of South Carolina (or ordinance of

in the following particulars:

DESCRIPTION OF OFFENSE:

FAIL STOP BLUE LIGHT/SIRE 56-5-750

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

ON 02/01/08 IN THE CITY OF COLA. SC THE AFFIANT ATTEMPTED TO INITIATE A TRAFFIC STOP ON A BLUE DODGE INTREPID TAG 301TCY. AFFIANT INITIATED BLUE LIGHTS & SIREN AT THE AREA OF HAMPTON ST AND GREEN ST. DEF DID CONTINUE TO DRIVE APPROX. TWO MILES THROUGHOUT THE CITY UNTIL DEF STOPPED THE VEHICLE AT HAMPTON ST AND HEIDT ST. DEF LEAD AFFIANT ON FOOT CHASE AND WAS CAPTURED AND POSITIVELY IDENTIFIED.

Form Approved by
S.C. Attorney General
Jan 21, 2008
SC041616

STATE OF SOUTH CAROLINA

COUNTY OF
STATERichland
VS.Norman Lee MitchellAKA: _____
Race: Black Sex: Male Age: _____
DOB: _____ SS#: _____
Address: _____
City, State, Zip _____
DL# _____ SID# _____

IN THE COURT OF GENERAL SESSIONS

2008

INDICTMENT/CASE#:

- GS - 40 - 1238AW#: K332565Date of Offense: 2-1-08S.C. Code §: 16-3-1075(B)(2)CDR Code #: 2 / 6 / 0 / 0☐ CASE RESTORED

SENTENCE SHEET

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Carjackingin violation of § 16-3-1075(B)(2) of the S.C. Code of Laws, bearing CDR Code # 2 / 6 / 0 / 0☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

J. E. L. L. L.
Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of Life (without parole) days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of
\$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years
and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which
are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 1239☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____
§14-1-206 (Assessments 107.5%) \$ _____
§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____
§14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____
§56-5-2995 (DUI Assessment) \$12 \$ _____
§35.13 (Public Def/Prob) \$500 \$ _____
§73.3, 1B TP (Law Enforce. Funding) \$25 \$ _____
§33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____
§50-21-114(BUI Breath Test Fee) \$50 \$ _____
§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
3% to County (if paid in installments) \$ _____
TOTAL \$ _____

PTUP _____

days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.00 TP
Requires \$500 be paid to Clerk during probation.CERTIFIED TRUE COPY
OF ORIGINAL FILED

PRESIDING JUDGE

Judge Code: _____

Sentence Date: _____

Court Reporter: JoachClerk of Court/Deputy Clerk Joach

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

VS.

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

2008 INDICTMENT/CASE#: 1239
- GS - 40 -

AW#:

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE SHEET

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

in violation of §

of the S.C. Code of Laws, bearing CDR Code #

☐ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS (CSC
w/minor 1st or Lewd Act)☐ \$17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 3 days/months/years or ☐ under the Youthful Offender Act not to exceed 3 years and/or to pay a fine of \$ 500.00; provided that upon the service of 1238 days/months/years and/or payment of \$ 1238; plus costs and assessments as applicable*; the balance is suspended with probation for 1238 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

Jeanette McBride

Clerk of Court/ Deputy Clerk

Court Reporter: Goach

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning\$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation

PRESIDING JUDGE

Judge Code:

Sentence Date: