STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County
Honorable G. Thomas Cooper, Circuit Court Judge

ALONDA B. DESAUSSURE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000137

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding trial counsel effective where he failed to request funding for and obtain an eyewitness identification expert despite the necessity of such expert testimony to Petitioner's defense and the inadequacy of trial counsel to effectively defend the case without professional assistance?

STATEMENT OF THE CASE

On April 4, 2011, the Charleston County grand jury indicted Petitioner Alonda Desaussure for one count of armed robbery and one count of assault and battery first degree. App. 513 – 516 (Indictments). The case was originally set for trial in March 2013; however, on the first day of trial Desaussure made a motion to relieve his public defender, Mary Ford, which was granted. He retained private attorney, Aaron Mayer, later that month. App. 395, l. 21 – 396, l. 8; App. 447, ll. 4-14.

On June 21, 2013, the State filed its notice of intention to seek life without parole for the armed robbery charge, based on Desaussure's prior convictions. App. 357, ll. 9-17.

On July 8-10, 2013, Desaussure appeared for trial before the Honorable Stephanie P. McDonald and a jury. Desaussure was represented by Aaron Mayer, and the state was represented by assistant solicitors Meg Haley and Spencer Compton. App. 1. The jury found Desaussure guilty of both offenses. App. 354, ll. 12-22. Judge McDonald sentenced him to the mandatory term of life without parole for armed robbery and the mandatory minimum of ten years for assault and battery, to be served concurrently. App. 358, l. 18 – 359, l. 6.

No direct appeal was filed.[1] App. 393, ll. 20-23.

On September 24, 2013, Desaussure filed an application for post-conviction relief ("PCR"). App. 362. The state filed its return on February 11, 2014. App. 384. On September 11, 2014, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Desaussure was represented by James Falk, and the state was represented by assistant attorney general Ashleigh Wilson. App. 390. The witnesses at the hearing included trial counsel Aaron

[1] Though the failure to file a notice of appeal from Desaussure's conviction and life sentence was not raised as an allegation of ineffective assistance of counsel in his application for post-conviction relief, it is certainly another noteworthy failure by trial counsel.

Mayer, Ninth Circuit Public Defender Ashley Pennington, former trial counsel Mary Ford, and eyewitness identification expert Lori Van Wallendael, Ph.D. App. 391 – 493. Desaussure did not testify. App. 491 – 492. The sole allegation was ineffective assistance of trial counsel for failing to request funding for and obtain an eyewitness identification expert.

On December 15, 2014, Judge Cooper issued an Order of Dismissal denying Desaussure's PCR application. App. 499.

On August 12, 2015, Desaussure filed a petition for writ of certiorari in this Court. The state filed its return on December 30, 2015. On October 20, 2016, this Court granted the petition for writ of certiorari and ordered further briefing.

This brief of petitioner follows.

STATEMENT OF FACTS

Introduction

Petitioner Desaussure was charged with armed robbery and first-degree assault and battery in connection with an incident at Gilroy's Pizza Pub (hereinafter "Gilroy's") in Charleston, South Carolina on Sunday, October 3, 2010. Daniel Cobiella was the only worker at Gilroy's that night and was in the kitchen cleaning when he heard someone enter the empty restaurant at approximately 9:00 p.m. App. 104, ll. 5-24. He heard movement of the tip jar, which contained seven dollars in cash and coins and credit card receipts. App. 105, ll. 2-6; App. 109, ll. 4-8. When he came out into the restaurant, Cobiella saw that only the receipts remained in the jar. He confronted the sole person inside the restaurant but the man denied taking anything. Cobiella got between the man and the door as he tried to leave, and followed him outside where they continued to argue. An altercation ensued and Cobiella's face was injured. App. 105, l. 7 – 106, l. 18. Whether the injury was the result of the use of a knife was disputed at trial. App. 312, l. 21 – 313, l. 17. The assailant rode away on his bicycle. Desaussure was stopped by police **three hours later** because the officer thought he fit the suspect's description. Stephen Silcott, a bystander during the earlier incident who did not stay to talk to authorities, road by where police had stopped Desaussure. Silcott claimed to recognize Desaussure as the assailant from Gilroy's and Desaussure was arrested. App. 200, l. 24 – 202, l. 25; App. 204, ll. 7-11. There was no physical evidence linking Desaussure to the crime.

Relevant Trial Testimony

Victim Daniel Cobiella – In-Court Identification Only

The trial judge heard testimony from Cobiella *in camera* and allowed him to make an in-court identification of Desaussure, even though he was never asked to make a pre-trial

identification and despite the highly suggestive nature of the courtroom. App. 80 – 100. At trial, Cobiella testified that he could only see the suspect's shoulder and side of his head when he was initially inside of Gilroy's. App. 108, ll. 5-15. When he came around the counter, he was approximately twenty-five feet from the suspect and continued to get closer as they argued and moved down the street outside of the restaurant. App. 109, ll. 12-23; App. 111, ll. 1-21. Though the restaurant was well-lit inside, it was dark outside at the time of the incident except for a street light. App. 113, l. 19 – 114, l. 1; App. 116, ll. 4-14. Cobiella saw two people outside of Gilroy's and asked them to call 911. App. 116, ll. 4-9. Cobiella did not see any weapon on the suspect and claimed to have been focused "on the individual" during the altercation. App. 110, ll. 6-13; App. 116, l. 15 – 117, l. 4; App. 131, ll. 2-3.

Cobiella met with an officer at the hospital and described the suspect as "a black male, approximately six-foot-three in height, age approximately 50 years old, salt and pepper, close beard, close hair." App. 115, l. 21 – 116, l. 3; App. 127, ll. 18-24; App. 130, ll. 14-17. He described the clothing as a "long navy or black top." App. 130, ll. 18-24. He did not recall what the suspect's bike looked like other than that it allegedly had a white bag on it.[2] App. 114, ll. 10-14. However, he agreed that there was no mention of a bag in his written statement. App. 131, ll. 4 – 132, l. 11. Cobiella made an in-court identification of Desaussure, who was sitting at the defense table, as his assailant. App. 109, l. 24 – 110, l. 5. He admitted that no pre-trial identification procedures were ever conducted. App. 133, l. 25 – 134, l. 2.

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[2] Trial counsel impeached the officers regarding whether a white plastic bag was actually mentioned to authorities prior to their stop of Desaussure. App. 165, l. 4 – 177, l. 24; App. 219, l. 9 – 221, l. 17; App. 224, l. 23 – 225, l. 25; App. 230, l. 3 – 233, l. 4; App. 257, l. 17 – 262, l. 10. A report prepared after the fact purportedly indicated that Adam Corbin mentioned a while plastic bag attached to the bike, though no such information was contained in Corbin's statement. App. 173, ll. 9-13; App. 215, l. 20 – 216, l. 12; App. 230, l. 3 – 233, l. 4. Corbin testified that he could not describe the suspect's bike because it was too far away. App. 140, ll. 8-13.

Bystander Adam Corbin – No Identification

Adam Corbin was standing outside of Gilroy's smoking a cigarette at the time of the incident. An African American man asked him and his friend from money. They did not give him anything but watched him go inside of Gilroy's. Through the window, Corbin saw the man take money from the tip jar that was on the counter. He then saw him come out of the restaurant followed by the clerk, who asked Corbin to call the police. Corbin observed the physical altercation between Cobiella and the suspect from approximately thirty to forty feet away but did not see any weapon. App. 135, l. 3-19; App. 137, l. 10 – 139, l. 5. He described the suspect as being six-foot two or three inches tall, with a scruffy beard, wearing jeans and a dark, long sleeved T-shirt with a stripe around the elbow, and approximately 25 to 30 years old. App. 139, l. 18 – 140, l. 7; App. 143, ll. 2-11; App. 145, ll. 1-6. Corbin could not describe the suspect's bike because "he was too far away." App. 140, ll. 8-13. No identification procedures were ever utilized with Corbin to identify a suspect. App. 140, ll. 14-19.

Stop of Desaussure Three Hours After Incident

Officer Jonathan Burns responded to the initial call at Gilroy's and unsuccessfully attempted to locate a suspect. Approximately **three hours later**, he saw Desaussure wearing jeans and walking on King Street with a bicycle with a plastic bag tied to the front.[3] Notably, Desaussure was wearing a **multicolored shirt** with a black **short-sleeved t-shirt** underneath. App. 156, l. 4 – 157, l. 6. Further, none of the other clothing subsequently found in Desaussure's possession matched the suspect description either. App. 306, ll. 1-18.

Burns "made contact" with Desaussure and immediately stopped his patrol car. App. 157, ll. 7-8. He said that his suspicions were raised because Desaussure immediately became

[3] See footnote 2, *supra*.

"defensive." Desaussure asked why the officer was stopping him and yelled that he had not done anything wrong. App. 157, ll. 8-11. When Burns asked Desaussure if he had any weapons, he responded that he had a large knife in his waistband. That further raised Burns' suspicion because he believed a knife was used in the altercation outside of Gilroy's. App. 157, ll. 7-19. However, Silcott, the sole witness who claimed to have seen the weapon, confirmed that the knife seized by Burns was **not the knife** allegedly used by the suspect to assault Cobiella. Further, DNA testing found no blood belonging to Desaussure or Cobiella on the knife. App. 208, ll. 2-14; App. 267, l. 2 – 268, l. 16 (stipulation regarding DNA); see also App. 336, ll. 4-9 (solicitor's closing argument).

Bystander Stephen Silcott –
Pretrial "Identification" and In-Court Identification

At approximately 12:30 a.m., while Burns was speaking with Desaussure, Stephen Silcott road by quickly on his bicycle and yelled out at Burns. App. 157, l. 19 – 158, l. 2; App. 160, l. 22 – 161, l. 7. Silcott said that he saw that "a couple police cars has pulled a man over." Though Burns and Silcott's accounts of the exchange varied, Silcott admitted that he yelled out "Okay, you got that piece of shit" or "fucking piece of shit." App. 200, l. 24 – 201, l. 14; App. 208, ll. 11-19; see App. 162, l. 5 – 164, l. 14 . Then, either spontaneously or in response to Burns' question whether he "recognize[d] this gentleman," Silcott said that Desaussure was "the man from Gilroy's that had, you know, been involved in a robbery earlier that evening." App. 201, ll. 14-18.; App. 201, ll. 19-21; App. 202, ll. 2-25. Silcott also "said a few choice words to the suspect." App. 202, ll. 6-7. Burns did not conduct any formal identification procedure with Silcott that night. App. 164, ll. 15-17.

Silcott was a cashier at a Five Guys restaurant, who was returning from his break when he observed "two gentlemen arguing over some money that had allegedly been stolen from

Gilroy's, and the victim was asking the suspect for the money back." App. 194, l. 13 – 195, l. 6. Silcott saw the two push and shove each other, until the other "pulled out a blade and swung his arms wildly and managed to connect with the face of the victim." App. 195, ll. 7-16. He was going to attempt to help the victim, but once he saw a knife he decided to return to Five Guys and not risk any danger to himself. App. 196, ll. 1-15; App. 198, l. 21 – 199, l. 1. Silcott had no interaction with police until later that night when he saw that police had stopped Desaussure. App. 201, l. 22-24; App. 207, ll. 1-21.

Silcott claimed to have been within three feet of the altercation and that it lasted approximately five minutes. App. 196, ll. 16-17l; App. 198, ll. 3-5. He noticed that the suspect had salt and pepper hair and was a tall and thin African American. **Silcott described the salt-and-pepper hair as the suspect's "strongest characteristic."** App. 198, ll. 6-9; App. 203, ll. 1-4. However, **once he saw the knife, Silcott became focused upon it**. He recalled that it was a common knife with a two and a half inch serrated blade and a thumb hole to unfold it. App. 199, l. 10 – 200, l. 9. He described the night as clear, the area as well lit, and his vision as unobstructed. App. 200, ll. 10-23. Silcott **claimed to be one hundred percent sure** that Desaussure was the assailant from Gilroy's. App. 204, ll. 7-11.

Silcott also made an in-court identification of Desaussure. App. 196, l. 18 – 197, l. 4. Though he failed to mention it to officers on the night of the incident, Silcott claimed that he also saw Desaussure while he was on his way to work at approximately 5:00 p.m. on the night of the incident. Their alleged interaction only lasted approximately five seconds, when the person asked Silcott for change outside of Pop's Pizza. App. 197, l. 5 – 198, l. 2; App. 202, ll. 20-25.

Failure to Utilize Any Other Identification Procedures

At approximately 12:30 p.m., Sergeant Kelly Stone responded to the area where Burns stopped Desaussure. Burns directed him to Silcott. App. 217, ll. 5-15. Stone said that no other line-ups or photo arrays were conducted because they "felt confident" that Silcott's identification "was the strongest ID." App. 217, l. 24 – 218, l. 4. Investigator Richard Burckhardt went to Gilroy's when the incident was initially reported, met with Cobiella at the hospital, and later responded to the area where Burns stopped Desaussure at approximately 12:45 p.m. He said that Cobiella gave "a pretty good description of the individual who had attacked him." App. 249, l. 18 – 252, l. 15. The description was of an African American male with salt-and-pepper hair, with some sort of facial hair, wearing dark striped cloths and in his forties. App. 254, l. 15 – 255, l. 7. Though there were **no unique identifiers** provided and **neither Desaussure's shirt nor any in his possession matched the description**, Burckhardt claimed that Desaussure "matched the same physical description pretty much head to toe that was offered to [him] by the victim." App. 157, ll. 1-6; App. 252, ll. 16-25; App. 306, ll. 1-18.

Defense's Theories and Presentation of Evidence

Defense's Opening Statement

In his opening statement, trial counsel Aaron Mayer repeated the refrain "science does not lie." App. 74, l. 12; App. 77, l. 1; App. 77, l. 23-24; App. 80, l. 12. He tried to focus the jury on the lack of fingerprints at the scene and the absence of the victim's DNA on the knife that Desaussure was carrying when he was stopped. App. 74, ll. 16 – 75, l. 19. Mayer told the jury that he would present evidence that Desaussure was really drinking beer with friends on the night of the incident. App. 77, ll. 6 – 78, l. 23. He said that Desaussure had left to buy another beer and a hotdog when the police stopped him. App. 78, 19 – 79, l. 4.

Trial counsel asked the jury to "carefully scrutinize" the credibility of the witness' identification. He suggested that Silcott may not have even scene the incident and noted that neither the victim nor the other witness had ever identified Desaussure in the two and a half years since the incident. App. 77, l. 25 – 78, l. 18. He further pointed to discrepancies between Desaussure and the description of the assailant, including the height, age and clothing. He also noted that bicycles are commonplace in the downtown Charleston area and that the witnesses failed to mention the distinguishing features of Desaussure's bicycle. Trial counsel told the jury that once they scrutinized the evidence, they would "see it wasn't my guy that did this crime." App. 79, l. 5 – 80, l. 13.

Denial of Request to Take Judicial Notice

On the morning of the third and last day of trial, defense counsel requested that the trial court take judicial notice pursuant to Rule 201, SCRE, and Rule 803(18), SCRE, of any one of a list of articles discussing eyewitness testimony and allow him to read them into the record. App. 242, l. 24 – App. 243, l. 20; App. 244, ll. 12-20; App. 245, ll. 18-23. Rule 201(b), SCRE, provides:

> Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Rule 803(18), SCRE, states:

> Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. This rule is in addition to any statutory provisions on this subject.

The solicitor opposed the request, arguing that defense counsel "could have called an expert witness to talk about eyewitness identification" but that this was not a proper subject for judicial notice. App. 244, l. 21 – 245, l. 9.

The trial judge found: "What Rule 803(18) [SCRE] talks about . . . are periodicals . . . established as a reliable authority by the testimony or admission of a witness or by other expert testimony or by judicial notice." App. 244, ll. 1-5. She found that the Rule was not applicable without "some kind of **expert witness** that says this is what we rely on." App. 243, l. 21 – 244, l. 11 (emphasis added). Further, she did not find that judicial notice was proper regarding a matter that experts continued to debate. App. 245, ll. 10-17. She accordingly denied defense counsel's request to take judicial notice of and allow the reading of the articles related to eyewitness identifications. App. 245, ll. 24-25.

Defense Witnesses

Trial counsel had trouble procuring the appearance of several witnesses, who were originally characterized as "alibi" witnesses. App. 4; App. 47 – 52; App. 59; App. 247. Only Roger Jenkins testified at the trial. Jenkins grew up in the same neighborhood with Desaussure. He could not recall whether he saw Desaussure in the year 2010, much less on the night of October 3, 2010. App. 284, l. 5 – 286, l. 21; App. 287, ll. 4-6. While Jenkins said that he "probably" *saw* Desaussure in 2010, he could not recall with any particularity where or when. App. 287, l. 13 – 294, l. 24.

Trial counsel failed to properly serve the subpoena for Patrick Rivers, such that the trial judge could not find Rivers in contempt or issue a bench warrant. App. 292, l. 5 – 294, l. 24. Judge McDonald asked Mayer whether he needed a continuance to try to procure Rivers and the basis for such a request. App. 294, l. 25 – 296, l. 5. Mayer responded:

> Your Honor, I spoke with Patrick Rivers when Ms. Eva Desaussure accompanied me to his house and was able to get him to open the door on that occasion, and at that time he told us that **he did not remember that specific day**, that he and Mr. Desaussure were -- **could have been hanging out in that general time period, which is basically the exact same thing that Mr. Jenkins had told me outside the court earlier.** Of course he says it a little bit different in court, but I don't think that we would need to wait and try to get Mr. Rivers. **I don't think that he's got -- that he's going to have the memory to say that on October 3, Mr. Desaussure was there.** At the very best case scenario would be that he would say, you know, **it's possible that we were hanging out that night, but he's not going to be able to say he specifically remembers.**

App. 296, ll. 6-21 (emphasis added). Mayer said that he thought that the witnesses would "kind of support any testimony that might have come from the defendant" but that Desaussure was no longer going to testify. App. 297, ll. 13-20. Judge McDonald agreed that there was no basis to grant a continuance and found that even if Rivers could be located, his testimony would not be relevant. App. 296, l. 22 – 297, l. 1; App. 298, l. 16 – 299, l. 2.

Mayer re-called officer Kelly Stone to hold up the various clothing items that Desaussure was wearing or had with him when he was stopped on the night of the incident. None of them included a dark long-sleeved shirt, much less one with stripes on the elbows. App. 305, l. 4 – 309, l. 12. The defense then rested. App. 310, l. 11. Mayer did not elicit any evidence of Desaussure's height, despite asking the trial judge how he would go about doing so. App. 303, l. 24 – 304, l. 8; App. 316, l. 24 – 317, l. 3.

Defense's Closing Argument

In trial counsel's wandering closing argument, he touched on both Cobiella and Silcott's identifications. He argued both that Cobiella could not have made any identification at time of the incident and that he could have if only the police had conducted one. Mayer said that the in-court identification was "unfair" and that Cobiella would have picked out anyone who generally matched the description and was sitting on at the defense table. App. 314, l. 22 – 317, l. 10.

Regarding Silcott, he argued that the description of an African-American male with salt-and-pepper hair riding a bicycle is "very common" in Charleston and pointed to inconsistencies between Desaussure and the description. App. 322, ll. 9-24; App. 325, l. 13 – 326, l. 20; App. 330, ll. 13-18. He further argued: "For a young white guy like Mr. Silcott who may or may not have a lot of African American friends, it's probably very difficult for him to make a cross racial identification with any accuracy." App. 322, l. 25 – 323, l. 3. He noted that Silcott admitted that he called Desaussure a "Fing piece of shit" but would not admit "what he really said that caused the officer to call him back," eluding to the use of a racial epithet. App. 323, ll. 4-20. Mayer also suggested that the police doctored their reports to include that there was a white plastic bag seen on the assailant's bicycle in order to strengthen their case against Desaussure. App. 323, l. 25 – 326, l. 11; App. 326, l. 21 – 327, l. 24; App. 328, l. 6 – 329, l. 3.

Mayer further argued that the state failed to prove the elements of the offense, though he never put it so plainly. He cited Cobiella's testimony that he did not see a knife and comparison of his injury to the type received from a boxing match. App. 317, l. 11 – 318, l. 1. That argument would make sense in light of the judge's charge of strong-arm robbery, but counsel later credited Silcott's detailed description of the assailant's knife. App. 321, ll. 12 – 322, l. 8; App. 329, l. 4 – 330, l. 7. At one point, trial counsel suggested the possibility that someone else snuck into Gilroy's and stole the change from the tip jar without Cobiella knowing, such that the black man he found inside the store later really was innocent of any theft. App. 318, l. 1 – 319, l. 14. Mayer then told the jury "[n]ow, I don't think that's what happened" and referenced Corbin's testimony that he saw the assailant take the money from the tip jar. App. 319, ll. 15-21.

In an attempt to "clean up" from Jenkins' testimony, Mayer said that Jenkins was "no kind of friend that I would ever want" and that he "expected differently." App. 320, ll. 17-18.

He "sincerely apologize[d]" for the problems he had with his witnesses. App. 320, l. 19 – 321, l. 4. Mayer constantly repeated the refrain from his opening statement – "science does not lie." App. 314, l. 19; App. 320, l. 16; App. 323, l. 22; App. 325, l. 12; App. 327, l. 25 – 328, l. 1; App. 332, l. 6. He argued that the DNA "shows it was not Mr. Desaussure." App. 321, ll. 5-11; App. 329, l. 4 – 330, l. 7; App. 331, ll. 17-18. Mayer concluded by reminding the jury that the burden was on the state to prove Desaussure's guilt and said: "I implore you to acquit him because the science doesn't fit. Find him not guilty, please." App. 332, ll. 1-8.

Jury Charge on Identification

The trial judge granted the defense's request to give an identification charge to the jury. App. 237, ll. 9-17; App. 300, l. 6 – 303, l. 10. The jury was charged:

> An issue in this case is the identification of the defendant as the person who committed the crimes charged. The State has the burden of identification beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant.
>
> Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of any identification witness in the same way as you would consider the believability of any other witness.
>
> **You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense or afterward. This will be affected by things such as how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past.**
>
> Once again, I instruct you that the burden of proof in the case relates to every element of the crime charged and that specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime.
>
> If after examining the testimony you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

App. 342, l. 23 – 343, l. 24 (emphasis added).

Evidentiary Hearing on Post-Conviction Relief

Former Counsel Ford

Mary Ford was the public defender assigned to represent Desaussure. App. 446, l. 18 – 447, l. 3. She was relieved as counsel on what would have been the first day of trial in March 2013. App. 447, ll. 4-9. Based on her review of the discovery, she believed that it was necessary to hire an eyewitness identification expert. She originally consulted with a Dr. Bingham. When he was unavailable for the trial date, she retained Dr. Brian Cutler. App. 447, l. 18 – 448, l. 3; App. 449, l. 5 – 450, l. 7; App. 455, l. 6-20. Ford retained the expert because, once the knife seized from him by police was ruled out as being involved in the incident, the only evidence against Desaussure was the identification. She cited potential problems with Silcott's identification and the circumstances surrounding it as matters that she thought an expert would be important to explain. App. 448, ll. 4-13.

When asked if she would have considered going to trial without an expert witness, Ford responded:

> I mean I think there was enough that the I.D. lacked so much in credibility that I could have easily attacked it on my own because a lot of other things didn't match up and I think I could have easily done that. But, considering that that one I.D. is all that the State had as far as evidence, **I do feel like an expert was necessary, yes.**

App. 451, l. 21 – 452, l. 2 (emphasis added). She further stated: I think that there was a lot for me to work with, but I don't -- if an expert, if it's possible to have an expert I don't see any reason not to have the expert. **To me this case screamed for an expert . . . . [A]s soon as I got the case that's the first thing I recognized.** App. 453, l. 23 – App. 454, l. 8 (emphasis added).

Trial Counsel Mayer

Trial counsel Aaron Mayer was retained by a friend of Desaussure and substituted as counsel in March 2013. App. 395, l. 21 – 396, l. 8; App. 447, ll. 10-14. Mayer is a solo practitioner in Charleston, South Carolina. He was admitted to the South Carolina bar in 2011, though he is also licensed in North Carolina and Florida. App. 395, ll. 6-20. **Desaussure's trial was the first jury trial in General Sessions court in which Mayer had ever participated.** His prior jury trial experience consisted only of serving as "second chair" to a prosecutor in an assault case in North Carolina while he was in law school. App. 397, l. 9 – 398, l. 6.

Mayer admitted that his competency to represent a criminal defendant had been questioned in the past by Judge Kristi Lea Harrington. Mayer had attempted to obtain an order for funds to obtain a DNA expert for his client, Bryant Loyal.[4] By the time Loyal's case was called for trial, Mayer had yet to obtain a ruling on the funding order. App. 398, l. 7 – 410, l. 3; App. 495 (Petition to Authorize Funds for Independent DNA Review). On May 29, 2013, Judge Harrington's filed an order relieving Mayer as Loyal's counsel and ordering him to pay the state's costs. She found: "Mr. Mayer does not possess the required legal knowledge, skill, thoroughness, and preparation required under our Rules of Professional Conduct" and was "unable to provide competent representation to the Defendant." App. 497 – 498 (Order to Pay State's Costs). Her ruling was based in part of Mayer's admission that he was not competent to handle the matter "as well as other comments and behaviors exhibited during the proceedings, [which] caused the Court considerable concern about Mr. Mayer's ability to represent the Defendant in this matter . . . ." App. 497 – 498.

[4] When asked if the motion for funding in Loyal's case was submitted *ex parte*, Mayer responded that he did not understand the question and that he did not know the answer to that question. However, Mayer said that he served the motion upon the solicitor, showing that he simply did not understand the meaning of the term "*ex parte*." App. 403, l. 7 – 404, l. 5.

With respect to Desaussure's case specifically, Mayer could not recall if he met with Desaussure before or after executing a contract and receiving the initial payment of five-hundred dollars from Desaussure's friend.[5] App. 396, ll. 4-6. The friend informed him that Desaussure's public defender was relieved on the first day of trial. He recalled that they were upset that the identification expert retained by the public defender was not there on the first day of trial, though Mayer explained to them that the expert's presence would likely have been unnecessary that day. Mayer claimed that he discussed with Desaussure's friend "the importance of having an expert witness to testify about the flaws and the problems associated with eyewitness identification in their first conversation." He said that he told both Desaussure and his friend that if they wanted a free expert, they needed to stay with the public defender's office and that they would be responsible for the cost of any expert that he retained. App. 396, l. 9 – 397, l. 3; App. 411, l. 4 – 415, l. 4. Mayer estimated that an expert would cost between one and three thousand dollars. App. 412, ll. 1-7.

Mayer never contacted public defender Ford, but understood from speaking with Desaussure's friend that she had intended to call an identification expert. App. 416, l. 25 – 417, l. 14; App. 450, ll. 20-22. He opined that the case "absolutely" called for an eyewitness identification expert. App. 420, ll. 4-6. However, **Mayer never contacted any potential identification expert or even found out who the public defender had intended to use**. App. 419, l. 18 – 420, l. 3. It was not until approximately one month before the trial that Mayer realized that Desaussure's family and friends were not going to have the funds for an expert witness. App. 412, l. 18 – 413, l. 16; App. 421, ll. 4-10. He did not seek funding for the expert from the court, based on his experience in Loyal's case. App. 415, l. 25 – 416, l. 8. He never

[5] According to Mayer, no additional payments toward his fee were made. App. 410, ll. 20-23.

told Desaussure that there was a possibility to get funds from the Commission on Indigent Defense to fund an expert either; in fact, he represented to him that the only way to get a free expert was to remain represented by the public defender's office. He did not conduct any further investigation into funding for an expert in Desaussure's case. App. 423, l. 23 – 424, l. 16.

When initially asked about his "strategy going into trial," Mayer discussed the presentation of an "alternate narrative" that Desaussure "had been with some people who, on a front porch, . . . shortly before the armed robbery occurred." App. 432, ll. 2-18. He intended to call Desaussure to testify and to present corroborating testimony from his friends. App. 432, l. 19 – 433, l. 1. However, Mayer also agreed with the assistant attorney general that, once they "made a decision to go forward at trial without the expert," it was his "strategy to chip away at the identification of these eyewitnesses." App. 434, ll. 7-13. He said that he conducted research regarding identifications, asked the trial court to take judicial notice of articles regarding identifications, and argued that the cross-racial nature of the identification may have affected its reliability. App. 429, l. 17 – 431, l. 6.

On cross-examination, Mayer said that Desaussure's decisions were "pretty informed" but "there were certainly times when . . . [he] felt like [Desaussure] was following what [he] was saying better than at some other times." App. 423, ll. 5-10. Mayer asked Desaussure's friend if he had been evaluated "or if he was all there." She told Mayer that the public defender had had Desaussure evaluated and that "he did fine." App. 423, ll. 11-15.

Mayer also admitted that his "alternate narrative" theory was weak. He clarified that Desaussure was alone at the time of the robbery and that his friends, had they been willing to testify, would have merely "corroborate[d] the fact that he [Desaussure] was on this front porch sometime in the hour or so before this armed robbery occurred." App. 435, l. 13 – 438, l. 14.

Trial counsel said that he did not know that Desaussure was eligible for a mandatory sentence of life without parole ("LWOP") when he accepted the case and found out when he received discovery and reviewed the criminal record. However, Mayer then said that he "really realized that [Desaussure] was eligible for that [LWOP]" during a meeting the solicitor to discuss a plea offer. Mayer said that "[the solicitor's] eyes got bright and she said, '[O]h he's eligible for LWOP . . . . I'm going to LWOP him. I'm going to serve LWOP notice in ten days if he doesn't take this plea.'" App. 417, l. 15 – 418, l. 10. At Desaussure's sentencing, Mayer said:

> Your Honor, I have explained the life without parole provision in the statute and how that works, and my understanding, how that should function in reality for him, being 50 years old now, he's looking at potentially — he might have an option or something, age 70 or something.[6]

App. 358, ll. 6-13.

Circuit Public Defender Pennington

Ashley Pennington, the Ninth Circuit Public Defender, testified that though it was not a frequent occurrence, he has known of cases where private attorneys sought funds from the Commission on Indigent Defense to pay for an expert witness. App. 442, l. 21 – 443, l. 18. When private attorneys contact him about it, he has told them that there is precedent for it that he believes the Commission has been responsive to providing funding when the Circuit Court has found that there was a due process need for an expert witness. App. 444, ll. 7-20.

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[6] Trial counsel appears to have been referencing the remote possibility of parole under S.C. CODE ANN. § 24-21-715, which provides for the release of a "geriatric" inmate upon a petition filed by the Director of the Department of Corrections and approved by the full parole board. "Geriatric" is defined as "an inmate who is seventy years of age or older *and* suffers from chronic infirmity, illness, or disease related to aging, which has progressed so *the inmate is incapacitated* as determined by a licensed physician to the extent that the inmate does not pose a public safety risk." S.C. Code Ann. § 24-21-715(A)(2) (emphasis added).

Eyewitness Identification Expert Dr. Wallendael

Dr. Lori Van Wallendael, Ph.D., testified at the PCR hearing as an expert in eyewitness identification. App. 457, l. 11 – 461, l. 6. Dr. Wallendael is an associate professor and associate chair of the psychology department at the University of North Carolina at Charlotte. App. 457, ll. 20-24. She had been qualified as an expert in South Carolina approximately six to eight times in the past and written eight published materials specific to eyewitness and earwitness reliability. While she has only testified as a defense expert, Dr. Wallendael has also worked with the Charlotte-Mecklenburg police department to develop better identification practices. App. 459, l. 3 – 462, l. 20.

After reviewing Desaussure's case, she testified that there were "definitely" reliability concerns regarding the eyewitness identifications in his case. App. 462, l. 21 – 463, l. 5. Had she been called as an expert witness in Desaussure's case, Dr. Wallendael would have discussed how memory works, the difficulties of cross-racial identification, possible weapons focus effect, and what kinds of best practice procedures could and should have been followed. She would have also advised defense counsel regarding matters to inquire about on cross-examination of the witnesses and officers. App. 469, l. 21 – 471, l. 2.

Dr. Wallendael characterized Silcott's identification as more concerning than an inherently suggestive "show up" procedure because it lacked any controls. There was no cautionary instruction given to Silcott, which are very important in identification procedures. App. 463, l. 7 – 464, l. 7. Dr. Wallendael rejected the notion that the spontaneity of Silcott's identification lessened its suggestiveness. App. 478, ll. 3-18 Additionally, the identification was cross-racial, calling into questions its reliability and often resulting in overconfidence by the witness. App. 464, ll. 8-13. The distance and lighting factors may have also impeded the

witness' opportunity to form an accurate memory, which often amounts to only a glance by the time the person realizes that what they are witnessing might be a crime. App. 464, ll. 14-17; App. 467, ll. 2-16.

Additionally, Dr. Wallendael discussed the weapon focus effect, whereby a victim or witness is less likely to remember other details about an event because their attention was on the weapon. She noted that Silcott's detailed description of the knife indicated that he was focused upon it. App. 465, l. 21 – 467, l. 1. Dr. Wallendael was particularly struck, "almost stunned," that no additional identification procedures were ever done with the victim or other potential witnesses. App. 464, ll. 18-23. She also testified regarding the correlation between false convictions and eyewitness identifications. App. 467, l. 17 – 468, l. 7.

Dr. Wallendael's main area of study is regarding juror reaction to eyewitness testimony. Jurors tend to be very persuaded by eyewitnesses due to the compelling narrative that they usually tell and the lack of any reason to question their honesty. Jurors believe in their own memories, making them reluctant to question the accuracy of a witness' memory. App. 468, ll. 8--23. Jurors also rely heavily on witness confidence. In Desaussure's case, Silcott claimed to have seen him earlier that same evening, increasing his confidence but potentially decreasing the reliability of his identification. App. 469, ll. 2-20; App. 474, ll. 1-5. In speaking with attorneys after cases in which she testified, Dr. Wallendael has learned that jurors often cite her testimony as important in their decision to acquit the defendant. App. 471, ll. 3-23.

The PCR court read portions of Silcott's trial testimony to Dr. Wallendael and asked her if that was a "fair or reasonably good identification in [her] opinion," to which she responded that there were points in favor of a possibly accurate identification but there were also "red flags." App. 480, l. 2 – 484, l. 3. She then described the problems and inconsistencies with

Silcott's testimony that she would have pointed out to the jury. App. 484, l. 4 – 486, l. 15. Moreover, she opined that **a jury needs to be provided with some explanation of the factors and research regarding identifications in order to be persuaded.** Mere cross-examination and argument by a defense attorney would not be effective, which is why expert testimony on the subject of eyewitness identification is so valuable. App. 487, l. 3 – 489, l. 18.

Order of Dismissal

In its Order of Dismissal denying Desaussure's PCR application, the PCR judge found that Desaussure failed to prove ineffective assistance of trial counsel. In ruling that trial counsel was not deficient, the PCR judge found that he "articulated a valid strategy basis for his decision to proceed to trial without the aid of an eyewitness identification expert to testify for the defense." App. 506. He further found that while retained counsel could have applied to the Commission on Indigent Defense for funding for the expert, counsel's decision not to do so was "reasonable under professional norms." App. 509. The PCR judge ruled that Desaussure also failed to prove any prejudice, finding that (1) the nature of the expert testimony presented did not suggest a reasonable probability that the testimony would have affected the outcome of the trial "since the testimony include[ed] conclusions that were favorable to both Applicant and the State;" (2) the jury was given an identification instruction that highlighted potential factors affecting the accuracy of eyewitness identification; and (3) there was no testimony or evidence presented to show that a request for funding for the expert from the Commission on Indigent Defense would have been granted. App. 510 – 511. Thus, the PCR court found that Desaussure was not entitled to relief.

ARGUMENT

The PCR court erred in finding trial counsel effective where he failed to request funding for and obtain an eyewitness identification expert despite the necessity of such expert testimony to Petitioner's defense and the inadequacy of trial counsel to effectively defend the case without professional assistance.

Introduction

The State's sole evidence consisted of the out-of-court and in-court identifications of Desaussure by Silcott and the in-court identification and by the victim, Cobiella. There was no physical evidence that connected Desaussure to the crimes. Desaussure retained Aaron Mayer, an inexperienced, private attorney, in March 2013, just months before his trial. App. 395, l. 6 – 398, l. 6; App. 447, ll. 10-14. Regardless of the amount paid, he was entitled to effective assistance of counsel under the Sixth and Fourteenth Amendments. U.S. CONST., amend. VI and XIV; Strickland v. Washington, 466 U.S. 668 (1984). Mayer understood the importance of an eyewitness identification expert and that Desaussure was indigent, having previously qualified for representation by the public defender's office. App. 410, ll. 13-19; App. 420, ll. 4-6. He nonetheless accepted the case and claimed not to have realized until approximately one month before trial that Desaussure's friends and family could not afford the fee for an expert. App. 412, l. 18 – 413, l. 16; App. 421, ll. 4-10. On June 21, 2013, the solicitor served a notice of intent to seek life without parole. App. 357, ll. 9-17. Mayer failed to inform Desaussure that there was any other means to obtain funding for an expert and proceeded to trial on July 8, 2013, without an expert witness. App. 423, l. 23 – 424, l. 16.

The PCR judge's Order in this case is replete with errors. App. 499 – 512. Contrary to the court's findings, trial counsel offered no valid strategic reason for his failure to call an expert witness in Desaussure's case. It was rather a product of circumstance – Desaussure could not afford to pay for the expert and Mayer did not know how to obtain funding for an expert. See

App. 506 – 507. Further, far from reasonable "alternatives," the methods that Mayer employed to challenge the identifications at trial were either utter failures or grossly inadequate. See App. 509. The trial judge denied Mayer's request to exclude the in-court identifications and to take judicial of articles related to eyewitness identifications. His cross-examination and argument could not address the myriad of matters that Dr. Wallendael testified about at the PCR hearing, including how memory works, weapons focus effect, the effect of the passage of time on recall, problems with cross-racial identifications, the lack of correlation between accuracy and confidence, and proper identification procedures. See App. 507 – 509.

Regarding prejudice, the PCR court erred in finding that there was not a reasonable probability that the expert testimony would have affected the trial's outcome "since the testimony including conclusions that were favorable to both the Applicant and the State." App. 510. Though a few factors weighed in favor of a possibly accurate identification, Dr. Wallendael detailed several problems with Silcott's identification. They included weapons focus illustrated by his detailed description of the knife, increased stress due to his proximity to the altercation, the likely overestimation of the time spent observing the altercation, and the lack of correlation between confidence and accuracy. App. 480, l. 3 – 489, l. 18. Contrary to the PCR court's finding, the standard jury charge on identification was no substitute for the expert testimony on a host of other matters. See App. 510 – 511. Lastly, the PCR court erred in requiring Desaussure prove that an expert funding request would have been granted. See App. 511. Desaussure presented testimony from the Circuit Public Defender that such funding had been granted in the past where there was a due process concern. It is also significant that Desaussure had qualified as indigent, his public defender had secured expert funding, and that the eyewitness testimony was the cornerstone of the state's case without which he could not have been convicted.

Right to Effective Assistance of Counsel and Standard of Review

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRCP). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

While this Court gives great deference to a PCR judge's findings of fact, Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), "[a] PCR judge's findings will **not** be upheld if such findings are not supported by probative evidence." Horton v. State, 306 S.C. 252, 255, 411

S.E.2d 223, 225 (1991) (emphasis added); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992). Further, the Court will review questions of law *de novo,* and reverse the decision of the PCR court when it is controlled by an error of law." Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

Trial Counsel was Deficient

In Williams v. Martin, 618 F.2d 1021, 1025 (4th Cir. 1980), the Fourth Circuit Court of Appeals recognized that "an effective defense sometimes requires the assistance of an expert witness." The Williams court cited its earlier decision in Jacobs v. United States, 350 F.2d 571 (4th Cir. 1965), in which it "recognized that the obligation of the government to provide an indigent defendant with the assistance of an expert was firmly based on the equal protection clause." 618 F.2d at 1025. Such an obligation arises "when a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance." Id.

This Court has recognized the reliability and admissibility of eyewitness identification testimony for over two decades. State v. Whaley, 305 S.C. 138, 141, 406 S.E.2d 369, 371 (1991). The Whaley Court ruled that it would constitute an abuse of discretion for a trial judge to preclude such expert testimony "where . . . the main issue is the identity of the perpetrator, the sole evidence of identity is eyewitness identification, and the identification is not substantially corroborated by evidence giving it independent reliability." 305 S.C. at 143, 406 S.E.2d at 372; see also State v. Frazier, 357 S.C. 161, 165, 592 S.E.2d 621, 623 (2004).

In denying relief, the PCR court found that trial counsel's failure to call an expert witness on eyewitness identification was a valid "trial strategy." Contrary to the PCR court's finding, trial counsel did not make any "strategic decision" not to call an expert witness and did not a

make a "decision" not to apply for expert funding. See App. 506 and 509. Once Mayer learned that Desaussure could not afford an expert witness, he did not think that he could obtain funding through the Commission on Indigent Defense because he had tried to do so unsuccessfully in a prior case. App. 415, l. 25 – 416, l. 8. Notably, trial counsel's prior efforts included conducting research on Westlaw and emailing a former Commission employee, who never responded. This apparently left trial counsel "stymied" such that he never thought to contact the Commission itself or another practitioner. App. 408, l. 11 – 409, l. 9.

Further, trial counsel never articulated that his failure to call an identification expert was a strategic decision. Rather, when asked about his trial strategy, Mayer said that it was to present an alternate narrative using Desaussure's testimony regarding what he was doing that day and at the time of the incident and the testimony of witnesses who could "corroborate" what Desaussure was doing in the time leading up to the incident. App. 432, l. 2 – 433, l. 1; App. 435, l. 13 – 436, l. 10. Ultimately, that "strategy" fell apart at trial because the "corroborating" witnesses had no specific recollection of the date in question. App. 283, l. 18 – 299, l. 11. It was the assistant attorney general who asked Mayer: "And also you talked -- you testified that you after you and Mr. Desaussure made a decision to go forward at trial without the expert, eyewitness expert that it was your strategy to chip away at the identification of these eyewitnesses. Would you not consider that a part of your trial strategy?" App. 434, ll. 7-12; see also App. 421, l. 1 – 423, l. 1. Mayer responded: "Yes." App. 434, l. 13. Even Mayer's affirmative response to the state's question did not indicate any "strategic decision" not to call an identification expert. Rather, Mayer's testimony made clear that his failure was a product of Desaussure's inability to fund such an expert. App. 411, l. 4 – 416, l. 17; App. 420, l. 4 – 421, l. 10; App. 425, l. 8 – 426, l. 19.

While the shroud of "trial strategy" will often save an attorney's conduct from being found ineffective, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Further, even an articulated strategy must pass the test of objective reasonableness. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[S]trategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation." McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (internal quotations omitted) (reversing PCR court's denial of relief where trial counsel's two-fold error in calling an expert witness whose testimony was known to have previously been used to bolster the State's case and neglecting to elicit favorable testimony from other experts when such testimony was known to exist and readily available, were a product of inadequate preparation for trial rather than a valid trial strategy).

"The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledge[s] there was **no** trial strategy in mind . . . ." Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (emphasis in original) (reversing PCR court's denial of relief where trial counsel responded "none" after asked if he had a strategy in failing to object to the hearsay and the bolstering testimony); see also Stone v. State, 294 S.C. 286, 287–88, 363 S.E.2d 903, 904 (1988) (reversing PCR court's denial of relief where trial attorney testified that requesting a self-defense charge "did not cross his mind", "preclud[ing] a finding that his failure to request the instruction was an informed tactical decision").

In Roseboro v. State, 317 S.C. 292, 293-94, 454 S.E.2d 312, 313 (1995), trial counsel testified at the PCR hearing that he intentionally failed to request an alibi charge "because he felt

the alibi testimony 'did not come off too well in front of the jury.'" He claimed that it was his "tactical decision" to focus on the state's failure to meet its burden of proof rather than emphasize the alibi testimony by requesting an alibi charge. Id. at 294, 454 S.E.2d at 313. The PCR court found counsel's trial strategy credible and denied petitioner relief. Id. This Court found that trial counsel's professed strategy was "invalid under an objective standard of reasonableness" and reversed the PCR court. Id. An alibi charge would not have placed any burden on the defendant, but rather emphasized the State's burden to prove that the defendant was present and participated in the crime. Id. This Court found that an alibi charge was especially crucial in Roseboro's case because of the entirely circumstantial evidence and the solicitor's argument that the defense failed to prove alibi. Id.

Similar to Roseboro, there was no "downside" to calling an expert witness to necessitate a strategic decision by counsel in Desaussure's case. An expert in eyewitness identification would have only helped Desaussure. Such testimony was especially crucial in light of the lack of physical evidence or surveillance footage to place Desaussure at the scene, making the identifications were the crux of the state's entire case. Rather, Mayer's failure to call an expert witness was purely the product of his own lack of diligence and inexperience. There was no real strategic decision made not to call an eyewitness identification expert. Trial counsel testified that the case "absolutely" called for such a witness in light of the state's reliance on eyewitness identifications and lack of any other evidence to connect Desaussure to the crime. App. 420, ll. 4-25. Yet, Mayer never actually contacted any potential experts to discuss Desaussure's case or found out which expert the public defender had intended to use. App. 419, ll. 18 – 420, l. 3.

Instead of making *any effort* to obtain funding for an expert through the Commission on Indigent Defense, which he did not advise Desaussure was even an option, trial counsel devised

an inferior contingency plan to address the eyewitness testimony. Mayer's "plan" included an **unsuccessful** preliminary motion to preclude the in-court identifications, an **unsuccessful** request that the trial court take judicial notice of and allow him to read periodicals or scholarly articles into the record, cross-examination, and argument. The PCR court erroneously characterized this as merely an "alternative" means of challenging the evidence and found that Mayer employed "effective trial tactics and adequate cross-examination." App. 507 – 509; see Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (upholding finding of ineffectiveness where trial counsel failed to retain an independent gunshot residue expert and instead relied upon advice from the former supervisor of the State's expert).

Not surprisingly, Mayer's motion *in limine* and request for judicial notice were both denied. Both the solicitor and trial judge recognized the need for an expert witness in order to introduce matters related to eyewitness identification research. App. 244, l. 21 – 245, l. 9; App. 243, l. 21 – 244, l. 11. Trial counsel's belief that the trial judge would actually allow him to read into the record an article from Scientific American or the New York Times regarding identification was itself substantial evidence of his incompetence. App. 88, l. 23 – 100, l. 5; App. 242, l. 24 – 245, l. 25. The PCR court's reference to these **failed** attempts as "alternative method[s]" to challenge the evidence is nonsensical. See App. 507 – 509.

Mayer's attempts at cross-examination and argument related to identifications were likewise inadequate. App. 118 – 134 (cross and recross examinations of Cobiella); App. 205 – 209 (cross-examination of Silcott). This was in part because certain relevant considerations simply could not be presented without the aid of an expert witness, including how memory works, weapons focus effect, the effect of the passage of time on recall, problems with cross-

racial identifications, the lack of correlation between accuracy and confidence, and proper identification procedures. App. 487, l. 3 – 489, l. 18.

The PCR court cited Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) for this Court's holding that "counsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence." However, Lorenzen is readily distinguishable from the present case. Lorenzen alleged that his trial attorney should have consulted with and called an expert to: "(1) examine him in order to prove that he was not a pedophile; (2) discuss the lack of physical evidence of sexual abuse; (3) delve into the psychological issues of the victim; and (4) challenge Dr. Jorda's testimony." 376 S.C. at 525-26, 657 S.E.2d at 774. It is notable that, unlike Desaussure who presented testimony from Dr. Wallendael, Lorenzen failed to submit any evidence other than his own testimony and that of his trial attorney at the PCR hearing. Id. at 530, 657 S.E.2d at 776. As such, it was "merely speculative that these allegedly favorable expert witnesses would have aided in his defense." Id. at 530, 657 S.E.2d at 777.

Further, with respect to the sufficiency of cross-examination it is significant that, in Lorenzen, the state had presented testimony from two physicians who conducted physical examinations on the victim and testimony from Dr. Kay Jordan who specialized in child sexual abuse and provided counseling to the victim. Id. at 524-25, 657 S.E.2d at 773-74. The physical exams did not reveal any physical evidence of sexual assault, but both doctors testified that that the absence of such evidence did not necessarily negate the victim's allegations of sexual abuse. Id. Dr. Jordan testified that the victim exhibited symptoms of sexual abuse and was diagnosed with post-traumatic stress disorder. Id. at 525, 657 S.E.2d at 774. Thus, Lorenzen's trial counsel had three expert witnesses whom she could question regarding "the lack of physical

evidence of sexual abuse" and "the psychological issues of the victim." See 376 S.C. at 525-26, 657 S.E.2d at 774. She was also able to "challenge Dr. Jordan's testimony" through objections and cross-examination, as she apparently did "vigorously." Id. at 525-26, 531, 657 S.E.2d at 774, 777.

Here, the state did not call any expert witness that trial counsel could ask about how memory works, the impact of weapons focus or the cross-racial nature of an identification on its reliability, the effect of the passage of time on recall, the correlation between accuracy and confidence, or proper identification procedures. While certainly trial counsel elicited *some* testimony from the lay witness regarding their proximity, observations, and stress level, the case lacked the expert testimony *necessary* to explain the significance of those facts to the jury. For example, law enforcement contended that no further identification procedures were necessary because the "identification" by Silcott was "the strongest ID." App. 162, l. 5 – 164, l. 16; App. 189, l. 22- 190, l. 9; App. 217, l. 24 – 218, l. 4; App. 221, l. 18 – 224, l. 6; App. 262, ll. 11-14. Additionally, Silcott testified that the officer did not say anything to him before or after he made his "identification" and that no one influenced him. App. 203, ll. 5-24. Dr. Wallendael explained that the uncontrolled nature of Silcott's "identification," which had no cautionary instructions, functioned worse than an inherently suggestive show-up procedure. App. 463, l. 7 – 464, l. 7; see also App. 470, ll. 1-11. She said that the spontaneity of the "identification" did not alleviate the danger of suggestion, which was likely a misconception held by the jury just as it was by the assistant attorney general. App. 478, ll. 7-18; App. 485, l. 15 – 486, l. 15. Dr. Wallendael was also struck that no additional identification procedures were ever done with the victim or any other potential witnesses. App. 464, ll. 18-23.

Thus, the PCR court erred in finding that Mayer's failure to call an eyewitness identification expert was not deficient. There is no probative evidence to support the findings that the failure to use an expert was "strategic" or that trial counsel employed adequate "alternative" methods of attacking the identifications without the support of an expert witness.

Petitioner was Prejudiced by Counsel's Deficiency

The PCR court further erred in ruling that Desaussure did not meet his burden of showing prejudice. The court's ruling was premised upon its findings that (1) there was no reasonable probability that the eyewitness identification expert's testimony would have affected the outcome of the Desaussure's trial because her testimony included conclusions that were favorable to both the defense and the state; (2) the jury was given an identification charge; and (3) there was no proof that an expert funding request would have been granted. App. 509 – 511.

The testimony of Dr. Lori Van Wallendael, Ph.D., at the PCR hearing confirmed the need for and value of an identification expert at Desaussure's trial. App. 510. Even trial counsel himself admitted that an identification expert was "absolutely" called for in this case. App. 420, ll. 4-6. Nonetheless, the PCR court found that the expert's testimony presented did not suggest a reasonable probability that it would have affected the outcome of the trial because portions of it were favorable to the state. App. 510. Of course, given the consideration of the totality of the circumstances surrounding identifications, it is hardly surprising that there were some elements of the out-of-court identification that pointed to its reliability. Even so, the majority of Dr. Wallendael's testimony centered on the additional elements and research surrounding identifications that cast doubt on the identification and would have aided in the jury's evaluation of the identification. Those included "the difficulties of cross-racial identifications, the possible effect of a weapon, and the kinds of best practice procedures that could have been followed or

should have been followed in regard to the identifications in the case or the lack of identifications" and "the actual relationship between confidence and accuracy." App. 470, l. 16 – 471, l. 2; App. 484, l. – 486, l. 15. Further, it is notable that had the expert testimony been offered at Desaussure's trial, it would have been an abuse of discretion for the trial court not to admit the expert testimony in light of the centrality of the eyewitness testimony to the state's case and lack of any other corroborating evidence. See State v. Whaley, 305 S.C. 138, 141, 406 S.E.2d 369, 371 (1991); State v. Frazier, 357 S.C. 161, 165, 592 S.E.2d 621, 623 (2004).

The general charge on identification did not lessen the prejudice from the failure to call an expert either. The value of a jury charge without any underlying expert testimony regarding how to value and weigh the identifications is marginal at best. While certainly the identification instruction was proper based on trial counsel's attempts to draw out the infirmities in the identifications, it was no replacement for expert testimony. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006) ("If there is any evidence to support a jury charge, the trial judge should grant the requested charge."). Dr. Van Wallendael discussed a jury's inability to fully appreciate the complexities of eyewitness identifications solely through cross-examination and argument. App. 488, l. 9 – 489, l. 18.

Notably, the jury charge given here was the standard identification instruction. It merely told that the jury that it could consider the witness' opportunity to observe the offender at the time of the offense or afterward, which can be affected by time, distance, lighting, and prior interactions. It provided no instruction on cross-racial identification or weapons focus and listed only a few factors that affect a witness' opportunity to observe an offender. App. 342, l. 23 – 343, l. 24. A more specific jury charge on matters related to eyewitness identification research would not have been proper, as it would have constituted a charge on the facts. See State v.

Green, 412 S.C. 65, 78, 770 S.E.2d 424, 431 (Ct. App. 2015), cert. denied (Sept. 3, 2015) (finding some of the requested charges, including the requested charge on cross-racial identification, "would have been improper instructions into matters of fact or comments on the weight of the evidence")); State v. Robinson, 274 S.C. 198, 203, 262 S.E.2d 729, 731 (1980) (declining to adopt *Telfaire* charge because "Article V of the South Carolina Constitution prohibits judges from charging juries in respect to matters of fact"). Thus, the only proper avenue to inform the jury about the research related to eyewitness identifications was through an expert. Desaussure's case, which undisputedly hinged on the identification testimony, required an expert to explain the various factors and research related to eyewitness identifications.

Lastly, the PCR court's requirement that Desaussure present testimony or evidence to show that a request for funding for the expert from the Commission on Indigent Defense would have been granted placed an undue burden on the applicant. App. 511. It is unclear from the Order of Dismissal what sort of testimony or evidence would have satisfied the PCR court. Desaussure could not possibly be expected to call a judge to testify regarding whether they would have granted the request for funds had it been properly filed and argued. He did present testimony from Ashley Pennington, the Ninth Circuit Public Defender, that such funds have been provided for indigent clients represented by private attorneys in the past. App. 442, l. 21 – 443, l. 18; App. 444, ll. 7-20. Desaussure also presented evidence regarding the need for an expert witness in his case through the testimony of both his prior public defender, trial counsel, and an eyewitness identification expert. Further, even the Order of Dismissal states that "retained counsel could have chosen to request funding." App. 509. The creation of an impossible hurdle that Desaussure prove that such a request would have been granted was error.

In summary, Desaussure's trial counsel was deficient in failing to request funding for and obtain an eyewitness identification expert despite the necessity of such expert testimony to Petitioner's defense and the inadequacy of trial counsel to adequately defend the case without professional assistance. The PCR court erred in finding that trial counsel possessed any valid strategic reason for failing to call an expert witness, when the testimony was clear that counsel would have called such an expert had the funds been available. Further, trial counsel's secondary "efforts" regarding the identifications were far from "effective trial tactics and adequate cross-examination" as found by the PCR court.

This deficient conduct was not saved by the barebones jury instruction on identification. Additionally, the PCR court's finding that Dr. Wallendael's testimony was somehow lacking because she admitted that there were some factors regarding the identifications that were favorable to the State was erroneous. The expert was clear about the detailed testimony that she could and would have provided at trial and the value that such testimony would have brought to Desaussure. Further, the court's finding that Desaussure failed to prove that a request for funding for an expert would have been granted goes beyond the Strickland standard. Here, there was a total failure by trial counsel to even mention that such a funding request was possible. Based on the foregoing, trial counsel rendered ineffective assistance of counsel and Desaussure is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Petitioner Alonda Desaussure respectfully requests that this Court reverse his convictions and grant him a new trial.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of February, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Honorable G. Thomas Cooper, Circuit Court Judge

ALONDA DESAUSSURE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000137

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Alonda Desaussure, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 7th day of February, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of February, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .