ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable G. Thomas Cooper, Circuit Court Judge

RECEIVED
MAR 27 2017
S.C. SUPREME COURT

NORMAN MITCHELL,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2016-000241

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED

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

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether there was any evidence to support the PCR judge's ruling under *Strickland* that trial counsel were deficient in failing to consult or retain an expert in eyewitness identification in light of the severity of the concerns surrounding the identification and its centrality to the case, and properly ruled that Respondent was prejudiced because had such an expert been called to testify at his trial, there is a reasonable probability that the result of the trial would have been different?

II. Whether the PCR court's grant of post-conviction relief should be affirmed pursuant to Rules 220(c) and 243(g), SCACR, because defense counsel violated Respondent's constitutional right to effective assistance of counsel where they failed to request reconsideration of the admissibility of the victim's show-up identification after the victim provided testimony at trial that her assailant had "long nappy hair" and the booking photograph of Respondent showed that he was bald on the day of the incident?

STATEMENT OF THE CASE

Indictment and Trial

On June 18, 2008, the Richland County Grand Jury returned indictments against Respondent Norman Mitchell for carjacking and failure to stop for a blue light. App. 680 – 683.

On February 4-6, 2009, Mitchell appeared for trial before the Honorable L. Casey Manning and a jury. Mitchell was represented by James H. May and Brian R. Shealey, Jr., and the state was represented by assistant solicitors Richard Cathcart and L. Eden Hendrick. App. 1. The jury returned verdicts of guilty on both charges. App. 427 – 428. Judge Manning sentenced Mitchell to three years for the traffic offense and the mandatory term of life imprisonment without parole pursuant to the recidivist statute on the carjacking offense. App. 432 – 435.

Following a hearing on March 3, 2009, Judge Manning denied Mitchell's written post-trial motions for a new trial. App. 438 – 446. The defense's notice of appeal from the carjacking conviction was timely served on March 4, 2009. App. 448.

Direct Appeal

Mitchell was represented on direct appeal by appellate defender Kathrine Hudgins. The final brief of appellant was filed on November 16, 2010, and raised the issue of whether the trial judge erred in denying the motion to suppress the show-up identification of Mitchell as unduly suggestive and unreliable and the resulting in-court identification as tainted by the prior suggestive procedure. App. 450 – 462. The state, represented by assistant attorney general Deborah Shupe, filed its final brief of respondent on November 18, 2010. App. 463 – 479.

The Court of Appeals affirmed Mitchell's conviction in an unpublished opinion filed on January 25, 2012. App. 480. Following denial of the petition for rehearing, Mitchell, through counsel, filed a petition for writ of certiorari to the Court of Appeals on June 1, 2012. App. 483

– 496. The state filed its return on July 2, 2012. App. 497 – 510. By Order filed June 20, 2013, this Court denied the petition for writ of certiorari. App. 511. The remittitur was sent on June 21, 2013. App. 512.

Post-Conviction Relief Application and Proceedings

On October 1, 2013, Mitchell filed his application for post-conviction relief ("PCR"). App. 513 – 519. The state filed its return on February 27, 2014. App. 520 – 524. Mitchell was represented at PCR by Kristy Goldberg, and the state was represented by assistant attorney general J. Clayton Mitchell. App. 536. On March 13, 2015, PCR counsel Goldberg filed an amended application for post-conviction relief. App. 534.

On July 14, 2015, an evidentiary hearing was held before the Honorable G. Thomas Cooper. App. 536. The following witnesses testified at the hearing: Norman Mitchell, Brian Shealey, James May, and Dr. Dawn McQuiston. App. 537. Following the hearing, the state submitted a proposed order of dismissal. App. 639 – 650. On December 23, 2015, Judge Cooper filed an Order granting post-conviction relief, ruling that trial counsel were deficient in failing to present testimony from an expert in eyewitness identification at Mitchell's trial. App. 649 – 667. The state filed a motion to reconsider on January 19, 2016, to which PCR counsel filed a response on January 22, 2016. App. 668 – 675; App. 676 – 678. By Order filed January 29, 2016, the PCR Court denied the motion to reconsider. App. 679.

The state filed its notice of appeal on February 9, 2016, and filed its petition for writ of certiorari on November 2, 2016. This return follows.

ARGUMENT

I. There was evidence to support the PCR judge's ruling under *Strickland* that trial counsel were deficient in failing to consult or retain an expert in eyewitness identification in light of the severity of the concerns surrounding the identification and its centrality to the case, and properly ruled that Respondent was prejudiced because had such an expert been called to testify at his trial, there is a reasonable probability that the result of the trial would have been different.

Introduction

The PCR judge properly applied the Strickland[1] standard to Respondent Mitchell's allegation of ineffective assistance of counsel at his trial for carjacking and granted his application for post-conviction relief. Contrary to the state's assertion, there is no special standard for deficiency related to the failure to call an expert witness. Rather, under Strickland, the applicant had the burden of proving by a preponderance of the evidence (1) that counsels' representation was deficient, which is measured by an objective standard of reasonableness; and (2) that 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. 466 U.S. at 687-88, 694; Rule 71.1(e), SCRCivP. 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." This Court has recognized the reliability and admissibility of expert testimony in the area of eyewitness identifications for over twenty-five years. See State v. Whaley, 305 S.C. 138, 141, 406 S.E.2d 369, 371 (1991).

Here, trial counsel both agreed that the victim's identification of the carjacker was one of the main points of contention at trial. App. 543, l. 17 – 544, l. 8; App. 548, ll. 18-24; App. 583, l. 17 – 585, l. 5; see also App. 176, ll. 14-15. However, neither of them consulted an expert in

[1] Strickland v. Washington, 466 U.S. 668 (1984).

eyewitness identification. App. 550, l. 10 – 551, l. 5; App. 589, l. 9-14. They offered no valid strategic reason for failing to consult and call an eyewitness identification expert, instead conceding that they were early in their professional careers and were unaware that such an area of expertise existed. App. 544, ll.9-11; App. 550, l. 10 – 551, l. 5; App. 589, l. 15 – 590, l. 2.

Though the defense challenged the identification's admissibility at the Biggers[2] hearing and reliability through cross-examination and argument, the PCR judge found that under the particular facts of this case, the expert testimony would have aided the trial judge, jury, and appellate court in evaluating the suggestivity and reliability of the identification. App. 658. As such, the PCR judge found that the cross-examination and argument in this case were no substitute for trial counsel's failure to consult or retain an identification expert. App. 657 – 664. These findings must be afforded great deference and certiorari should be denied.

Standard of Review on Appeal

Upon appellate review, this Court gives great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also "gives great deference to a PCR court's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). It is well settled that "[i]n reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, this Court "will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of

[2] Neil v. Biggers, 409 U.S. 188 (1972).

the PCR court when it is controlled by an error of law." Council v. State, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2008).

Relevant Facts

Respondent's Trial

Nola Gilmore was waiting in the passenger's seat of her car on February 1, 2008, in the Time Warner Cable ("TWC") parking lot in the Five Points area of Columbia, South Carolina. A black man opened the driver's side door of the car, put a gun to her ear, and then came around to the passenger's side to force her out of the car. He sped off before Ms. Gilmore could shut the door, causing the door to hit her in the back. Ms. Gilmore repeatedly said that she got a "clear" look at her assailant. App. 77, l. 19 – 81, l. 25; App. 86, l. 5 – 95, l. 21; App. 159, l. 20 – 165, l. 16. Her son, William Gilmore, was waiting in line to pay his cable bill when he looked out of the window and saw Ms. Gilmore standing there and asking someone to call the police. When he realized that he had left his cellular telephone in the car, Mr. Gilmore used the courtesy telephone on the wall in the TWC office to call 911. App. 64, l. 11 – 65, l. 8; App. 82, ll. 1-17; App. 165, l. 18 – 166, l. 12; App. .

Officer Cashna Calloway arrived approximately three minutes after being dispatched for a possible armed robbery. She went inside of the TWC building to meet with the Gilmores and put out a be-on-the-lookout ("BOLO") with a description of the car and the assailant – **a black male.** Less than ninety-seconds after that, officer Ginger Sanders said the he was behind the car, either on Laurens Street or Heidt Street. It was undisputed at trial that Mitchell was driving the stolen car when Sanders attempted to initiate a traffic stop. Mitchell ran and hid from the officer and dropped Ms. Gilmore's son's cell phone as he ran. App. 49, l. 19 – 51, l. 24; App. 137, l. 17 – 142, l. 6; App. 196, l. 4 – 204, l. 20.

Mitchell explained to the court and jury that he had arrived in Columbia for Super Bowl weekend and rented the car from a man named John at the Greyhound bus station on Gervais Street for twenty dollars. Mitchell described John as a dark-complexioned black man with an afro, approximately 5'7" tall. Mitchell said that he had no part in the carjacking and was unaware that the car was stolen. He ran from police because he knew that he would be arrested for driving without a license. App. 316, ll. 1-5; App. 318, 21 – 327, l.14; App. 331, l 12 – 345, l. 22. The bus station was a mere block or two from the TWC building. The road where Rogers claimed to have first seen Mitchell was also in close proximity to the bus station and to the road where Mitchell said he dropped John off. App. 206, ll. 1-24. Notably, officers never recovered a gun from Mitchell, from inside the car, or from the path in which he ran. App. 209, ll. 15-16; App. 215, l. 8 – 216, l. 18. A duffel bag and other items belonging to Mitchell were found in the car, though there was no testimony that the assailant was carrying any luggage. App. 170, ll. 16-24; App. 181, ll. 15-25; App. 221, l. 1 – 223, l. 10; App. 320, l. 15 – 321, l. 3; App. 340, ll. 19-23.

Ms. Gilmore was an elderly woman, who identified Mitchell as her assailant during an inherently suggestive show-up identification procedure and after overhearing officers say that he was found in her car over the police radios. App. 85, l. 5 – 86, l. 3; App. 166, l. 16 – 167, l. 6; App. 183, ll. 12-20. In fact, Ms. Gilmore testified that she knew that she was being taken from the TWC building "to identify the gentleman because they told me he was -- they had him." App. 96, ll. 6-11. Mitchell was handcuffed and standing outside of a police cruiser, with "quite a few" officers and police cars in the area. App. 53, l. 10 – 54, l. 11; App. 56, l. 17 – 60, l. 22; App. 75, l. 1 – 76, l. 18; App. 96, l. 22 – 97, l. 12; App. 184, ll. 10-13. The show-up was

conducted at Gonzales Gardens.[3] Ms. Gilmore said: "I never heard of [Gonzales Gardens] or seen or know anything about it but I smelled it." App. 167, ll. 13-25. She admitted that she wanted to "get out of there fast" because the dirty smell was making her sick. She said that her son told her to hurry so they could get out there. App. 183, l. 21 – 184, l. 5. At trial, Ms. Gilmore claimed to have recognized Mitchell by his hair, which she described as "gummy" and "nappy" and said "needed a good wash." App. 180, l. 23 – 181, l. 14; see also App. 169, ll. 9-21. Trial counsel presented Mitchell's booking photo, which revealed that he was bald on the day of the incident. App. 299, l. 8 – 300, l. 23; App. 615. In response, the solicitor admitted evidence that Mitchell had a black and red knit stocking cap in his possession when arrested, which they argued Ms. Gilmore may have mistaken for long hair. App. 291, l. 10 – 293, l. 2; App. 303, l. 13 – 304, l. 22; App. 411, ll. 6-15.

Evidentiary Hearing on Respondent's PCR Application

The PCR court heard testimony from co-trial counsel Brian Shealey and Jim May, Dr. Dawn McQuiston, and Mitchell. As his attorneys confirmed, Mitchell testified that they never discussed the use of an eyewitness identification expert. App. 595, l. 22 – 596, l. 9. As he has throughout the proceedings, Mitchell admitted to driving the car but maintained his innocence as to the carjacking. App. 596, l. 14 – 597, l. 16.

Attorney Shealey testified that he acting as second chair and assisted James May in defending Mitchell at trial. Shealey noted that the only evidence presented that Mitchell committed this crime was the identification testimony from the victim and testimony that he was in and around the stolen car. Shealey was responsible for handling the identification, including

[3] Gonzales Gardens is a public housing complex in Columbia consisting of thirty apartment buildings. State v. Gray, 408 S.C. 601, 604, 759 S.E.2d 160, 162 (Ct. App. 2014).

the Biggers hearing. Shealey noted a variety of "red flags" related to the show-up identification. He testified that their concerns increased during trial when the victim testified that Mitchell looked different sitting at the defense table than he did the day of the crime because he had long hair then. 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. App. 542, l. 5 – 551, l. 5.

Dr. Dawn McQuiston, Ph.D., was qualified at the PCR hearing as an expert in eyewitness testimony. App. 558, ll. 6-10. Dr. McQuiston generated a report outlining the areas in which an expert in eyewitness identification would have aided trial counsel, the trial court, and the jury. App. 629 – 632. She also provided testimony regarding how memory works and various specific areas where scientific research on eyewitness identifications were relevant to the facts of Mitchell's case. Dr. McQuiston related 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. She also testified about the "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. App. 561, l. 10 – 566, l. 20.

Next, Dr. McQuiston described research regarding "weapons focus," which has shown that a weapon can draw attention to itself and away from other aspects of the scene, including the person who is holding the weapon. 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. Relatedly, 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. App. 566, l. 21 – 568, l. 25.

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, which would include the show-up procedure used in this case. 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. App. 569, l. 1 – 573, l. 1.

Attorney May admitted that he never consulted or retained an expert in eyewitness identification in Mitchell's case. When asked why, he stated that he was a new attorney at the time of this trial and he did not even realize that eyewitness experts existed at the time. Therefore, he never considered it as an option. App. 589, l. 9 – 590, l. 2. May also admitted that he did not ask the trial judge to reconsider his ruling on the admissibility of the out-of-court identification once the new evidence of Ms. Gilmore's description of the assailant's hair came out during her trial testimony, which further cut against its reliability. App. 593, ll. 9-23.

Order Granting Post-Conviction Relief

In the Order granting post-conviction relief, the PCR court properly explained the Strickland standard as the law applicable to Mitchell's allegations of ineffective assistance of

counsel. App. 656 – 657. The Court distinguished other cases where the failure to consult or retain an expert witness was not deficient and ruled:

> 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.

App. 657 – 658. The court found that 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 Mitchell to the crime. App. 658. While the court recognized the existence of some circumstantial evidence, it found the defense theory plausible such that Dr. McQuiston's testimony would have aided the jury, circuit court, and appellate court in reaching their conclusions in this matter. App. 658 – 662. The court noted the limited knowledge of law jurors regarding many of the factors discussed by Dr. McQuiston. App. 662 – 664. The court recognized the failure by either trial counsel to articulate a valid reason for failing to consult an expert. Rather, each cited a lack of awareness about that area of expertise at that point of their professional careers. App. 664.

The PCR judge ruled: "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." App. 664. "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." App. 664. "Accordingly this court finds that granting post-conviction relief to the Applicant is appropriate in this matter." App. 664.

Discussion

A. The PCR judge properly applied the *Strickland* test in determining that the trial counsel were deficient in failing to consider and failing to call an expert in eyewitness identification at Respondent's trial.

Counsel's performance under the first prong of the Strickland test is judged under the standard of "reasonableness under prevailing professional norms." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 688)). This Court has stated previously that 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. Id. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

"When counsel articulates a **valid** reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). "The validity of counsel's strategy is reviewed under "an objective standard of reasonableness." Id.; Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (ruling that professed strategy of focusing on the state's burden of proof rather than requesting alibi charge "invalid under an objective standard of reasonableness"). However, "[t]he 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").

As an initial matter, trial counsel in the present case failed to articulate any strategic reason for failing to consult with and retain an identification expert. As discussed *supra*, while the shroud of trial strategy will often save trial counsel from a finding of deficiency, such is not the case when – as in this case – no strategy is articulated. Petitioner focuses upon counsels' general trial strategy regarding the challenge of the identification through a Biggers hearing and cross-examination, as would be expected from even novice attorneys. See Cert Pet., pp. 9 -12. **The proper focus is upon whether trial counsel articulated a valid trial strategy for failing to consult or retain an eyewitness identification expert.** The testimony at the PCR hearing supports the PCR court's finding that no such strategy was expressed by either of Mitchell's trial attorneys. Attorney Shealy said: "Like I said, that was my first general sessions trial. Mr. May had that case a couple months prior. I'm not sure in 2009 if we had really educated oursel[ves] enough on ID cases to actually do that." App. 550, ll. 12-15. Attorney May said: "I didn't have any idea about eyewitness expert at the time." App. 589, ll. 18-19. He further said: "I think some time later that year we started looking at bow to attack an arm robbery that occurred at a post office and we started looking at experts. I'm not saying I didn't know about them, but it was not something that was in my -- it was not an [arrow] of my quiver that early in my career." App. 589, l. 22 – 590, l. 2.

Petitioner conflates challenges to the identification with challenges to Ms. Gilmore's independent recollection of her assailant's appearance. Cert. Pet. p. 11. The PCR judge found that Dr. McQuiston's testimony would have aided both the trial court and the jury, implying that

the trial judge may have reconsidered his *Biggers* ruling if aided by the expert. As will be discussed more fully in Issue II, trial counsel should have requested that the trial judge reconsider his ruling on the admissibility of the show-up identification after Ms. Gilmore said her assailant had long hair, in contrast to Mitchell, who was bald on the day of the incident. Even so, exclusion of the out-of-court identification would not preclude Ms. Gilmore's testimony regarding her independent recollection of her assailant's appearance. Thus, with or without the identification, trial counsel could have pointed to the obvious inconsistency between her in-court description of the assailant and Mitchell. Were the identification admitted despite expert testimony at the *Biggers* hearing, Dr. McQuiston's testimony would help explain why Ms. Gilmore could be so certain of her identification of Mitchell – because she was influenced by the radio transmissions she overheard and the suggestive nature of the show-up. Thus, Ms. Gilmore's mid-trial recollection of her assailant's hair did not obviate the need for an identification expert or inject any strategy into the failure to consult an eyewitness identification expert prior to trial.

In an attempt to manufacture an error of law by the PCR court, Petitioner asserts that the PCR court "disregarded the applicable case law and adopted a new standard" "unsupported by any authority." Cert. Pet., p. 6. Petitioner suggests that "the longstanding standard as to whether counsel was ineffective for failing to retain and present an expert at trial . . . is that counsel is *not* ineffective when he vigorously cross-examines the State's witnesses and attacks the accuracy of the evidence." See Cert. Pet., p. 6 (emphasis in original). This is not an accurate interpretation of Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991), or Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008). The proper standard for accessing whether trial counsel's representation was deficient, which was applied in this case, is the Strickland standard.

In Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991), the applicant alleged that his trial attorney was deficient in failing to procure an expert to challenge the DNA evidence that linked his co-defendant to the sexual assault of the victim. The DNA analysis did not implicate Frasier himself. 306 S.C. at 159-60, 410 S.E.2d at 573. Further, though he claimed he was forced at gunpoint, there was evidence that Frasier admitted to having intercourse with the victim. Id. A witness also testified that they had overheard Frasier and his co-defendant planning the crime and later bragging that it worked. Id. In affirming the PCR court's denial of relief, this Court simply wrote: "The record reveals that trial counsel vigorously cross-examined the state's DNA experts and attacked the accuracy of the evidence. We cannot say that his performance was unreasonable under prevailing professional norms." Id. at 160-61, 410 S.E.2d at 573. Contrary to Petitioner's assertion, this case specific ruling did not establish that an attorney can never be found deficient "when he vigorously cross-examines the State's witnesses and attacks the accuracy of the evidence." Cert. Pet. pp. 6, 8.

In Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008), the applicant 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. Jordan's testimony." This Court again found 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." 376 S.C. at 525-26, 657 S.E.2d at 774. Unlike Mitchell, who presented testimony from Dr. Dawn McQuiston, Lorenzen failed to present any expert testimony

at his PCR hearing, making his allegation that such experts would have aided his defense merely speculative. Id. at 530, 657 S.E.2d at 776-77.

With respect to the sufficiency of cross-examination, it is significant that the solicitors in Lorenzen 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. 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.

The lesson from both cases is not that cross-examination is a *per se* shield from a finding of deficiency. Instead, the PCR court must examine the extent and purpose of the cross-examination in contrast to the expert testimony presented at the PCR hearing. Here, unlike Lorenzen, the state did not call any expert witness that trial counsel could ask about how memory works, the impact of an event's duration on memory, "own race bias," weapons focus, the lack of correlation between accuracy and confidence, or proper identification procedures. While *some* facts related to the concepts about which Dr. McQuiston testified were elicited through the lay witnesses at trial, that fell short of what was required in this case, where the identification was so central to the state's case and highly suspect. The case lacked the expert testimony *necessary* to explain the significance of the testimony elicited on cross-examination to the jury.

While Petitioner suggests that the PCR court's decision requires that defense counsel always retain an expert to challenge an identification, the court's ruling has no such implication.

Rather, the PCR court wrote: "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 [manner] to ensure a just result." App. 658 (emphasis added). The PCR court then engaged in a lengthy analysis of the testimony presented at the trial and the testimony of the identification expert presented at the PCR hearing, noting how her testimony would have aided the trial court in its evaluation of the admissibility of the identification and aided jurors who would be unfamiliar with many of the concepts she explained. App. 658 - 664. Thus, the PCR court engaged in exactly the fact based inquiry required under Strickland and properly distinguished the facts of the present case from those of Frasier and Lorenzen.

Petitioner presents several additional "concerns" with what it improperly deems the PCR court's "new standard." Cert. Pet. pp. 7-8. Far from injecting the court into the attorney-client relationship, as Petitioner suggests, the PCR court's ruling in this case effectuated the constitutional requirement that trial counsel render effective assistance of counsel - which can require consultation and retention of an expert witness. Requiring that defense counsel make a reasonable investigation on behalf of his or her client does not shift the burden of proof to the defense. Further, to the extent that a strategic decision is made not to consult or retain an expert, that strategy may well save the attorney from a deficiency finding, so long as the strategy is valid and reasonable. Petitioner's additional "concern" about the defendant's loss of last closing argument is moot in light of this Court's recent holding in State v. Beaty, No. 2015-000718, 2016 WL 7474479, at *2–3 (S.C. Dec. 29, 2016), *cross-petitions for r'hrg pending* (holding that

in a criminal trial where the party with the "middle" argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter). Moreover, it is notable that in the present case, the defendant testified such that none of the "concerns" presented by Petitioner are applicable to these facts.

In sum, contrary to Petitioner's assertion, the PCR court's finding that counsel's other efforts to attack the identification were insufficient to overcome their failure to consult and retain an expert in that area was precisely the fact-specific application of the Strickland standard that he was required to conduct. Trial counsel's admission that their failure to call an expert was a product of ignorance rather than strategy provides them no protection from a finding of deficiency. Thus, the PCR court committed no error in finding that counsel were deficient and the court's finding was supported by ample evidence in the record.

B. The PCR judge properly found that there was a reasonable probability that the result of the trial would have been different had an eyewitness identification expert been called at Respondent's trial.

The evidence against Mitchell was circumstantial. Admittedly, even without the out-of-court identification testimony, there was sufficient evidence to overcome the directed verdict motion. However, that is *not* the standard for proving deficiency on post-conviction relief. Rather, Mitchell was only required to prove by a preponderance of the evidence that there was a reasonable probability that the result of trial would have been different but for trial counsels' deficiency. Petitioner focuses upon the evidence taken in the light most favorable to the state, neglecting the plausible explanation of events asserted by Mitchell. Under the limited analysis that Petitioner asserts should have been conducted, no applicant could be successful on post-conviction relief because of the original jury's finding of guilt. See Cert Pet., p. 12.

To show prejudice, a defendant must demonstrate there is a reasonable probability the result of the trial would have been different absent trial counsel's deficient performance. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 183, 480 S.E.2d 733, 735 (1997). No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt. Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

Here, there was a reasonable likelihood that the expert's testimony would have influenced that trial judge's decision to admit the show-up identification at all. Her testimony directly contradicted several of the reliability factors that the trial judge cited in support of his decision to admit the identification. Specifically, Judge Manning noted that the victim was "looking at him the whole time," "had an opportunity to observe the perpetrator," and that her degree of attention was "specific and direct." App. 119, ll. 4-16. He also found that 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." App. 119, ll. 17-20. While he found the accuracy of her prior description "a little bit weak," he determined under the totality of the circumstances to admit the testimony on the show-up identification. App. 119, ll. 16-24. Expert testimony at the Biggers hearing may well have swayed the judge to weigh these factors differently and exclude the out-of-court identification altogether.

Even with the identification admitted, this case presented a quintessential jury question, the resolution of which rested upon whether they believed in Ms. Gilmore's identification of Mitchell as her assailant such the evidence cannot be found overwhelming. In Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010), this Court held that there was "no valid claim of

overwhelming evidence of Smith's guilt" because of the "great deal of conflicting testimony from virtually every State and defense witness who testified at trial." In State v. Stokes, 339 S.C. 154, 162, 528 S.E.2d 430, 434 (Ct. App. 2000), the Court of Appeals found no overwhelming evidence of guilt where the evidence presented "two diametrically opposed versions of the events, either one of which is plausible."

Here, there was no dispute that a carjacking occurred such that the sole question for the jury was the identity of the assailant. The state's witness provided inconsistent testimony regarding where and when Mitchell was first seen in the car, and Mitchell provided a plausible scenario that he rented the car from the true assailant at the Grey Hound bus station just blocks away from the carjacking. It is further notable that the jury in this case was given no charge on identification, which even if given would have been only a general charge noting a few of the relevant factors to be considered. See State v. Green, 412 S.C. 65, 78, 770 S.E.2d 424, 431 (Ct. App. 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). Thus, the only proper avenue to inform the jury about the *how* to weight the various factors and educate them on matters like own race bias and weapons focus was through an expert.

In sum, the failure to call the expert in eyewitness identification prejudiced Mitchell because there is a reasonable likelihood that it would have affected the admissibility of the out-of-court identification, or at the very least, influenced the juror's consideration of the identification testimony. Further, the circumstantial evidence against Mitchell was not overwhelming.

II. The PCR court's grant of post-conviction relief should be affirmed pursuant to Rules 220(c) and 243(g), SCACR, because defense counsel violated Respondent's constitutional right to effective assistance of counsel where they failed to request reconsideration of the admissibility of the victim's show-up identification after the victim provided testimony at trial that her assailant had "long nappy hair" and the booking photograph of Respondent showed that he was bald on the day of the incident.

While the PCR court did not rule on this allegation, pursuant to Rule 220(c), SCACR, "an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723-24 (2000); Rule 243(g), SCACR ("The return may rephrase the questions, offer additional sustaining grounds, and present a concise counter-statement."). "[W]hen the lower court rules in one party's favor, it is not necessary for that party to return to the court and ask for a ruling on remaining issues and arguments in order to preserve those arguments for use in an appeal." I'On, LLC, 338 S.C. at 423, 526 S.E.2d at 725.

Here, though discussed in the order granting post-conviction relief, the PCR court did not specifically rule that trial counsel were ineffective in failing to ask the trial judge to reconsider his ruling on the admissibility of the out-of-court identification when Ms. Gilmore testified during trial that her assailant had long hair – a fact not mentioned in any of the discovery materials or during the original Biggers hearing. App. 661. Trail counsel May admitted at the PCR hearing that no such request for reconsideration was made. App. 593, ll. 9-23.

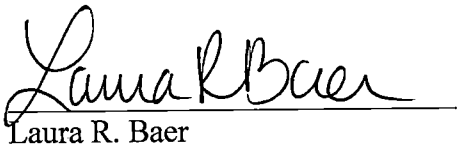
Following the Biggers hearing, the trial judge's finding that the accuracy of the victim's prior description – a black male – was "a little bit weak." App. 119, ll. 16-24. In light of her trial testimony that the assailant was a black man with long hair, her description lost even more weight in contrast to Mitchell's bald headed booking photo. At trial, the solicitor attempted to challenge the obvious inconsistency between that testimony and Mitchell's bald head by suggesting that Ms. Gilmore may have mistaken a black and red knit cap for long, unkempt hair.

Even if that explanation were accepted, it would call into question the accuracy of her other "memories" regarding her assailant. In combination with the information leaked to Ms. Gilmore before the already inherently suggestive show-up procedure, there is a reasonable likelihood that the trial judge would have changed his ruling had trial counsel requested that it be reconsidered.

To be clear, Respondent is not suggesting that the failure to ask for reconsideration precluded appellate review of the original Biggers ruling admitting the out-of-court identification. Rather, it was a missed opportunity by trial counsel to persuade the trial judge to change his ruling in light of the additional evidence produced at trial. The failure to raise the additional evidence in support of a exclusion of the identification limited the focus of appellate review to only the evidence considered at the Biggers hearing. Further, trial counsel's motion for directed verdict was no substitute for reconsideration of the admissibility ruling. See App. 295, l. 13 – 296, l. 12. The directed verdict stage is concerned only with the existence of evidence not its weight. State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 477 (2004). In this case, even without the out-of-court identification, there was sufficient circumstantial evidence to present the case to the jury. A request to reconsider the admissibility of the identification, however, would have necessitated a mistrial and allowed Mitchell's guilt or innocence to be weighed utilizing only competent evidence.

CONCLUSION

Based upon the foregoing, Respondent Norman Mitchell respectfully requests that this Court deny the petition for writ of certiorari.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable G. Thomas Cooper, Circuit Court Judge

NORMAN MITCHELL,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Clay Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Norman Mitchell, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 23rd day of March, 2017.

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 23rd day of March, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.