

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County

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

S.C. SUPREME COURT

Appellate Case No.: 2015-000137

ALONDA DESAUSSURE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PETITIONER’S ISSUE PRESENTED1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS4

STANDARD OF REVIEW12

ARGUMENT14

 I. There is evidence of probative value to support the PCR court’s finding trial counsel was not ineffective for failing to request funding for and obtain an eyewitness identification expert where trial counsel’s valid trial strategy did not require the use of such an expert, trial counsel vigorously cross-examined the State’s witnesses about their identification of Petitioner, and the use of such an expert would not have had any impact on the outcome of Petitioner’s case14

 A. The PCR court correctly found trial counsel was not deficient where he did not request funding for and obtain an eyewitness identification expert because he made the strategic decision to proceed without an expert and vigorously cross-examined the State’s witnesses concerning the identification14

 B. The PCR court correctly found Petitioner failed to prove he was prejudiced because Petitioner failed to show a motion to obtain funds would have been granted and Dr. Wallendael’s testimony would not have changed the outcome of the case.....17

CONCLUSION.....21

TABLE OF AUTHORITIES

Cases

| | |
|--|--------|
| <i>Butler v. State</i> , 286 S.C. 441, 334 S.E.2d 813 (1985)..... | 12 |
| <i>Caprood v. State</i> , 338 S.C. 103, 525 S.E.2d 514 (2000)..... | 12 |
| <i>Cherry v. State</i> , 300 S.C. 115, 386 S.E.2d 624 (1989)..... | 12, 13 |
| <i>Drayton v. Evatt</i> , 312 S.C. 4, 430 S.E.2d 517 (1993)..... | 16 |
| <i>Frasier v. State</i> , 306 S.C. 158, 410 S.E.2d 572 (1991)..... | 15 |
| <i>Harrington v. Richter</i> , 562 U.S. 86 (2011) | 15 |
| <i>Lorenzen v. State</i> , 376 S.C. 521, 657 S.E.2d 771 (2008)..... | 15 |
| <i>Menne v. Keowee Key Prop. Owners' Ass'n, Inc.</i> , 368 S.C. 557, 629 S.E.2d 690 (Ct. App. 2006) | 16 |
| <i>Moore v. State</i> , 399 S.C. 641, 732 S.E.2d 871 (2012) | 12 |
| <i>Neil v. Biggers</i> , 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) | 5 |
| <i>Roseboro v. State</i> , 317 S.C. 292, 454 S.E.2d 312 (1996)..... | 15 |
| <i>Sheppard v. State</i> , 357 S.C. 646, 594 S.E.2d 462 (2004)..... | 12 |
| <i>Stokes v. State</i> , 308 S.C. 546, 419 S.E.2d 778 (1992)..... | 15 |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984)..... | 12, 13 |
| <i>Suber v. State</i> , 371 S.C. 554, 640 S.E.2d 884 (2007)..... | 12 |
| <i>Underwood v. State</i> , 309 S.C. 560, 425 S.E.2d 20 (1992)..... | 15 |
| <i>Whitehead v. State</i> , 308 S.C. 119, 417 S.E.2d 529 (1992)..... | 15 |

Statutes

| | |
|---------------------------------|---|
| S.C. Code Ann. § 17-25-45 | 2 |
|---------------------------------|---|

RESPONDENT'S ISSUE PRESENTED

Is there evidence of probative value to support the PCR court's finding trial counsel was not ineffective for failing to request funding for and obtain an eyewitness expert where trial counsel's valid trial strategy did not require the use of such an expert, trial counsel vigorously cross-examined the State's witnesses about their identification of Petitioner, and the use of such an expert would not have had any impact on the outcome of Petitioner's case?

STATEMENT OF THE CASE

Petitioner Alonda Desaussure is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. Petitioner was indicted at the April 2011 term of the Charleston County Grand Jury for first degree assault and battery (2011-GS-10-2048) and armed robbery (2011-GS-10-2047). He was represented by Aaron Mayer, Esquire.

On July 8-10, 2013, Petitioner proceeded to a jury trial before the Honorable Stephanie P. McDonald. On July 10, 2013 the jury convicted Petitioner as indicted. Judge McDonald sentenced Petitioner to ten years for assault and battery and life without parole for armed robbery pursuant to S.C. Code Ann. § 17-25-45 based on Petitioner's prior convictions.¹ The sentences are to be served concurrently. Petitioner did not appeal his convictions or sentences.

On September 24, 2013, Petitioner filed an application for post-conviction relief. Respondent made its Return, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on September 11, 2014, in Charleston County before the Honorable G. Thomas Cooper, Jr. James Falk, Esquire, represented Petitioner at the hearing. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented the State. Petitioner proceeded solely on the allegation of ineffective assistance of counsel for counsel's failure to request funding for and obtain an eyewitness identification expert to testify at trial. Petitioner's trial counsel testified at the hearing. Also testifying were Dr. Lori Van Wallendael; Mary Ford, Esquire; Ashley Pennington, Esquire; and Aaron Mayer, Esquire. By an Order of Dismissal signed December 11, 2014 and filed December 15, 2014, the PCR court denied and dismissed Petitioner's application with prejudice.

¹ Petitioner was previously convicted of assault with intent to commit criminal sexual conduct in the first degree, making his current armed robbery conviction his second "most serious" conviction.

Petitioner filed a timely notice of appeal. On August 12, 2015, Petitioner filed a petition for writ of certiorari in this Court. Respondent filed its return on December 30, 2015. On October 20, 2016, this Court granted the petition for writ of certiorari and ordered further briefing. Petitioner's brief was submitted February 7, 2017. This Brief of Respondent follows.

STATEMENT OF FACTS

Petitioner 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. At trial, the victim Daniel Cobiella testified he was the only employee at Gilroy's at the time of the incident. Cobiella was cleaning the grill and heard the restaurant's tip jar rattling. App. 104, l. 19 – 105, l. 4. He came from behind the counter and noticed that the tip jar had been emptied of its cash, and that Petitioner was the only other person in the restaurant at the time. App. 105, ll. 7-18. Cobiella confronted Petitioner and demanded he return the money. Cobiella then moved into a position between Petitioner and the restaurant door as an argument ensued. App. 105, ll. 15-25. The argument continued outside and Petitioner "starting swinging" at Cobiella and eventually struck Cobiella over his eye. App. 106, ll. 2-9. Cobiella walked back inside Gilroy's and used a rag to stop the bleeding on his face. App. 106, ll. 16-18. Cobiella saw Petitioner ride off on a bicycle. App. 88, l. 16. Hours later, Officer Jonathan Burns stopped Petitioner on the sidewalk because he matched the description that he had been given. App. 156, ll. 18-25. One minute after Officer Burns stopped Petitioner, Mr. Stephen Silcott, an eyewitness to the altercation, approached Officer Burns and identified Petitioner as the assailant from Gilroy's. App. 157, ll. 24-25.

Relevant Trial Testimony

Victim Daniel Cobiella

Petitioner's trial counsel, Aaron Mayer, (hereinafter "Counsel") made a pretrial motion to suppress any in-court identification of Petitioner from Cobiella, arguing Cobiella never made any previous identification of Petitioner. After Cobiella testified at an in-camera hearing, the trial judge held an in-court identification would be allowed because any restrictions based on *Neil v.*

*Biggers*² would only apply to out-of-court identifications. However the trial judge held that even if it were to look at the *Biggers* factors, “four of the five factors are solidly satisfied: the opportunity for the witness to view the accused, the degree of attention, which was clearly acute and direct, the accuracy of the description I’m impressed by, and the witness certainly expressed a great level of certainty regarding his identification.” App. 97, l. 23 – 98, l. 4.

During Petitioner’s trial, Cobiella testified when he initially saw Petitioner while he was behind the grill, Petitioner’s shoulder and side of his head were visible. App. 108, ll. 7-18. He testified that when he came around the oven, he was approximately twenty-five feet away from Petitioner, then approached Petitioner and came within two feet of him as they argued. App. 109, ll. 12-23. Cobiella testified he “was very focused on [Petitioner]” during the altercation because he knew the argument could become physical and “was paying attention to [Petitioner] the whole time” as they went outside the restaurant. App. 111, ll. 1-9. Cobiella testified he maintained a two-foot distance between Petitioner and himself as the two walked outside Gilroy’s. App. 111, 12-16.

Cobiella described Gilroy’s as “well lit...clear, no smoke...nothing to take away from my view of the individual who attacked me.” App. 116, ll. 12-14. He described the environment outside Gilroy’s that night as “clear” with a street light outside. App. 114, l. 1; 116, l. 8. Cobiella testified once he came up to the counter, he had a “clear view of [Petitioner] until the end of the altercation.” App. 117, ll. 1-4.

Cobiella was taken to a hospital for his injuries and gave a description of Petitioner to the police. He described Petitioner as “a black male, approximately six-foot-three in height, age, approximately 50 years old, salt and pepper, close beard, close hair.” App. 116, ll. 1-3. During his direct examination, Cobiella identified Petitioner as the individual who robbed Gilroy’s and

² 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

assaulted him. App. 88, ll. 7-12.

Bystander Adam Corbin

Adam Corbin testified he was outside Gilroy's the night of the incident, saw Petitioner take money from the tip jar, saw Petitioner and Cobiella come out of Gilroy's, and called 911 when Cobiella asked him. App. 135, 15-19. He stated that he was on 911 when Petitioner struck Cobiella and did not see Petitioner with a weapon. App. 138, l. 20 – 139, l. 3. He described Petitioner to the police as being six-foot, two inches or six-foot, three inches tall, with a beard, long sleeved black t-shirt. App. 139, ll. 18-25. Corbin was never asked by police to identify Petitioner in this case. App. 140, ll. 14-16.

Eyewitness Stephen Silcott

After the incident, Officer Jonathan Burns stopped Petitioner based on the description he had been given. App. 156, ll. 18-25. Officer Burns believed Petitioner matched the description other than the fact that Petitioner was wearing a different shirt. App. 157, ll. 4-6. Officer Burns' suspicion was raised when Petitioner became defensive before Officer Burns spoke to him and because Petitioner admitted to having a knife on him. App. 157, ll. 7-15. One minute after Officer Burns stopped Petitioner, Stephen Silcott approached Officer Burns yelling, "Good job. You got him. That's the guy from Gilroy's." App. 157, ll. 24-25. Officer Burns testified he did not initiate contact with Silcott and did not reveal Petitioner's identity to him. App. 163, ll. 16-25.

Silcott testified he was working across the street from Gilroy's when the incident took place. App. 194, ll. 13-25. Silcott was on the street returning from a break when he saw Petitioner and Cobiella arguing over the stolen money. App. 195, ll. 2-16. He got within three feet of Petitioner and Cobiella and saw Petitioner pull out a knife and cut Cobiella in the face.

App. 196, ll. 8-17. Silcott identified Petitioner in court as the assailant. App. 197, l. 1. Silcott testified he was certain he had seen Petitioner three other times that night, including an interaction where Petitioner asked Silcott for change five minutes before Petitioner's altercation with Cobiella. App. 197, ll. 7-25. Silcott described the environment during the altercation as a clear night with well-lit streets and stated he was able to view the altercation with no one blocking his view. App. 200, ll. 10-23. Silcott testified he was riding his bike home from work later that evening and saw police cars pull over a man on a well-lit corner and recognized the man as Petitioner. App. 201, ll. 2-11. Silcott yelled to the officer and the officer asked if he recognized Petitioner. App. 201, ll. 12-18. Silcott told the officer that Petitioner was the man who robbed Gilroy's earlier that evening, stating Petitioner was "undoubtedly the man who held the knife and...cut the victim's face earlier." App. 201, ll. 19-21; 202, ll. 12-15.

Silcott testified he recognized Petitioner even though he was wearing a different shirt than before. App. 209, ll. 15-18. He testified Petitioner's hair was very distinguishable and found it odd that Petitioner changed into a bright neon shirt. App. 210, ll. 12-18. Silcott testified Petitioner was a tall, thin African American man and his salt and pepper hair was his strongest characteristic. App. 203, ll. 3-4. Silcott testified Officer Burns did not make a suggestive comment to him before or after his identification and that no one else had influenced his identification. App. 203, ll. 15-24.

PCR Hearing

Petitioner proceeded to a hearing on his PCR application, where he alleged Counsel should have obtained an eyewitness identification expert. App. 394, 1-2.

Counsel Mayer's Testimony

Counsel testified Petitioner was represented by the public defender's office before he

hired Counsel. He testified he discussed with Petitioner the possibility of having an expert testify about the flaws and problems associated with eyewitness identification. App. 396, l. 20 – 397, l. 2. Counsel testified had worked on a previous case where he made a motion to authorize funds for a DNA expert but was unsuccessful. App. 402, l. 5 – 403, l. 12. He testified he explained to Petitioner that if he wanted an expert witness then Petitioner would have to pay for it. App. 411, ll. 22-25. He testified Petitioner’s family always indicated that they would come up with the money for an expert leading up to trial but failed to do so. App. 412, ll. 10-23.

Counsel testified he did not ask Indigent Defense for funding in Petitioner’s case because of his previous experience where the Chief Administrative Judge told him that she had never seen private counsel get authorization to have an expert paid for by the State. App. 416, ll. 5-17. Counsel testified an eyewitness expert would be helpful in Petitioner’s case, and after he realized that Petitioner was unable to pay for an expert, researched the issue extensively. App. 422, ll. 1-25. He testified he researched the unreliability of eyewitness identifications including length of time to view the person, stress, cross-racial bias, lighting, and other factors that can cast doubt upon identifications. App. 422, ll. 2-12. Counsel testified he found related articles concerning eyewitness identifications but the trial judge would not take judicial notice of such articles. App. 430, ll. 1-5. Counsel testified he moved to preclude in-court identification of the Applicant at trial and asked the Court to charge the jury on identification. App. 430, ll. 6-18. Counsel testified he also recalled arguing to the jury the fact that the victim never identified the Applicant prior to trial and the possibility that cross-racial identification affected the accuracy of the eyewitness identifications. App. 430, l. 19 – 431, l. 5. Counsel further testified his strategy was to present the alternative narrative that Petitioner was in a different part of town at the time of the robbery. App. 432, ll. 2-8.

Public Defender Mary Ford's Testimony

Petitioner's previous trial counsel, Mary Ford, testified at the PCR hearing she retained an eyewitness identification expert witness for Petitioner's trial. App. 447, ll. 23-25. She testified she talked to her witness about a month prior to trial. App. 450, ll. 1-3. However, Ms. Ford testified she could have taken Petitioner's case to trial without an eyewitness expert because the eyewitness identification in Petitioner's case lacked so much credibility that she could have easily attacked it on her own. App. 451, ll. 19-25.

Doctor Lori Van Wallendael's Testimony

Dr. Lori Van Wallendael was present and called to testify for Petitioner. Dr. Wallendael testified she is an associate professor and chair of psychology at the University of North Carolina at Charlotte. She testified she has previously been qualified as a forensic psychology expert. App. 457, l. 20 – 458, l. 4.

She testified she reviewed the initial police reports on Petitioner's case, statements of witnesses, and sections of the trial transcript regarding the identifications of the witnesses. App. 459, ll. 18-22. Dr. Wallendael testified she had concerns about the reliability of the eyewitness identifications in Petitioner's case because of the informal, uncontrolled environment whereby Silcott identified Petitioner to the police. App. 463, ll. 7-19. She further testified she was surprised that no additional identification procedures were done by the police. App. 464, ll. 18-23.

Dr. Wallendael testified she was concerned with the cross-racial identification because her research showed that cross-racial identifications can be difficult for witnesses and affect their confidence level. App. 464, ll. 8-13. She testified the distance and lighting factors that could have impeded the witness's ability to view the perpetrator. App. 464, ll. 14-17. Dr. Wallendael

also testified when a weapon is visible, the witness's attention is drawn to the weapon and the witness's ability to remember details is decreased. App. 465, l. 24 – 466, l. 10. Dr. Wallendael testified the witness's ability to view and length of time to view an incident contribute to the accuracy of an identification. App. 467, ll. 2-16. She testified the more time one has to study a person, the more likely they are to recall a person accurately. App. 467, ll. 2-8. She also testified seeing a perpetrator more than once in a short period of time could increase the accuracy of an eyewitness' identification. App. 469, ll. 5-14.

Dr. Wallendael testified if Counsel had asked for her help in this case, she would have told him to focus on examining the police officers who were present when Silcott identified Petitioner and whether they had the opportunity to control the situation. App. 470, ll. 1-7. She testified she would have explained to the jury at trial how our memories work, the effect of weapons, cross-racial identification, and best practice procedures for identifications. App. 470, l. 18 – 471, l. 2. Dr. Wallendael testified whether an identification is accurate or not is beyond the point of her opinion and a question for the jury. App. 483, ll. 9-17.

Dr. Wallendael also testified there were other factors present in this case which would increase the accuracy of the eyewitness identifications in this case. She testified seeing a person for a longer period of time and more frequently would increase the accuracy of an identification. App. 473, l. 21 – 474, l. 5. She testified distinguishing features that make the suspect unique or stand out increase the accuracy of an identification. App. 474, l. 14 – 475, l. 6. She testified the cross-racial effect can be decreased by an increased exposure to the suspect. App. 475, ll. 7-16. Dr. Wallendael also testified regarding the weapons focus effect and noted that Silcott mentioned seeing Petitioner with a weapon, but only saw this weapon at the end of the argument after some time had passed. App. 475, l. 22 – 476, l. 7. She testified the sooner an identification is made, the

more likely it is accurate. App. 476, ll. 8-16. Dr. Wallendael also testified a well-lit area is better for an accurate identification than a busy street which could be distracting. App. 477, ll. 6-20. Dr. Wallendael concluded there were points in favor of a possible accurate identification in the Applicant's case, along with red flags which gave her concern. App. 484, ll. 1-3.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether “**any** evidence of probative value” exists to sustain the post-conviction relief court's findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. *Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove “counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, at 689. An applicant must overcome this presumption in order to receive relief. *Cherry*, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective

assistance of counsel, and both prongs must be established by an applicant to receive relief. *Strickland*, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, citing *Strickland*, at 688. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

- I. **There is evidence of probative value to support the PCR court's finding trial counsel was not ineffective for failing to request funding for and obtain an eyewitness identification expert where trial counsel's valid trial strategy did not require the use of such an expert, trial counsel vigorously cross-examined the State's witnesses about their identification of Petitioner, and the use of such an expert would not have had any impact on the outcome of Petitioner's case.**

The PCR court correctly found that Counsel was not ineffective for failing to request funding to obtain an eyewitness identification expert. The PCR court found that Counsel's actions were not deficient because Counsel articulated a valid strategy that did not require the use of an expert and because he vigorously cross-examined the State's witnesses about their identification of Petitioner. The PCR court found that Petitioner was not prejudiced by Counsel's actions because there was no evidence that a motion to obtain funds would have been granted and Dr. Wallendael's testimony would not have changed the outcome of the case as she provided testimony concerning factors that would have increased the accuracy the eyewitness identification.

- A. **The PCR court correctly found trial counsel was not deficient where he did not request funding for and obtain an eyewitness identification expert because he made the strategic decision to proceed without an expert and vigorously cross-examined the State's witnesses concerning the identification.**

This Court should uphold the PCR court's finding that Counsel was not ineffective for failing to request funding to obtain an expert witness. Counsel's actions were not deficient as he developed a trial strategy that did not require the need for an eyewitness expert. Counsel was well-versed in the law and factors that affect eyewitness identification and vigorously cross-examined the State's witnesses concerning the accuracy of their eyewitness identification of Petitioner.

The PCR court correctly found that Counsel's actions were not deficient as it found he

provided a valid strategic basis for proceeding without an expert witness. App. 506. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Although Counsel stated he did not ask for funding based on a prior experience where a circuit judge told him that she had never seen private counsel get authorization to have an expert paid for by the State, the record shows Counsel was well-versed in eyewitness identification reliability factors. *Harrington v. Richter*, 562 U.S. 86 (2011) ("Counsel is entitled to balance limited resources in accord with effective trial tactics and strategies"). Petitioner's prior trial counsel testified she could have easily attacked the eyewitness identification on her own without the use of an expert. App. 452, ll. 19-25. The PCR court did not give any weight to Counsel's reasoning that he did not request funding because he was unsuccessful in doing so in the past and it found that he vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence. *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). *See also Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (holding counsel was not deficient for failing to procure an expert witness to challenge the DNA evidence presented at trial when trial counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence).

Counsel testified he decided to proceed without an expert once it became clear Petitioner was not going to provide funding to hire an expert. In anticipation of trial, Counsel became well-versed in factors that can affect eyewitness identification including legal and scientific research.

pp. 422, ll. 1-25. Counsel made a pretrial motion to exclude in-court identifications by any State witness who had not identified Petitioner prior to trial on the basis that such identifications would be inherently suggestive. App. 54, l. 19 - 55, l. 8. He argued there were many factors that would make an identification prejudicial, including the two and a half year lapse in time from the incident to the trial, the high stress situation, and the witness's brief view of the incident. App. 94, l. 24 - 97, l. 14. Despite Counsel's preparation for this pre-trial hearing, the trial court ruled the identifications would be admissible at trial.

The PCR court found that Counsel provided credible testimony. This Court must give great deference to the PCR judge's determinations of witness credibility. See *Drayton v. Evatt*, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

Counsel was clearly prepared for trial and knowledgeable in the area of eyewitness identification reliability, as evidenced by his vigorous cross-examination of Cobiella regarding the accuracy of his identification. Counsel elicited testimony from Cobiella about the fact that he had poor vision at the time of the incident (App. 129, l. 21 - 130, l. 6), the fact that his description of the clothing of the assailant was vague (App. 130, ll. 18-25), the fact that Cobiella never saw a weapon when while he was attacked (App. 131, ll. 2-3), the fact that he never mentioned a white plastic bag in his description of the assailant's bike (App. 132, ll. 3-12), and the fact that he was never asked to identify Petitioner prior to trial (App. 133, l. 24-134, l. 2). Counsel also vigorously cross-examined Silcott concerning the factors that could lead to a

misidentification of Petitioner. He challenged Silcott's cross-racial identification based solely on Petitioner's hair color. App. 209, ll. 5-18. Counsel even elicited testimony from Silcott that the knife found on Petitioner was not the same knife that Silcott had seen during the altercation. App. 208, ll. 2-10.

Counsel also attacked Silcott's eyewitness identification in his opening statement and closing argument, arguing in closing that Silcott's cross-racial identification was unreliable because Silcott was simply seeing what he pictured in his head. App. 322, l. 25 – 323, l. 20. Counsel also asked the trial court to take judicial notice of scientific articles that explain eyewitness identification but was unsuccessful. App. 242, l. 24 – 245, l. 25.

Given Counsel's thorough research and preparation concerning eyewitness identification, his vigorous cross-examination of the State's witnesses that highlighted the State's shortcomings, and his overall argument to the jury, the PCR court correctly found that Counsel was not deficient for employing an alternative means of challenging the State's eyewitness identification evidence. The PCR court noted Ms. Ford's testimony that she could have easily challenged the State's eyewitness identification evidence without an expert witness and found that Counsel's effective trial tactics were reasonable under professional norms. App. 509. Accordingly, the PCR court's ruling that Counsel's actions were not deficient is supported by probative evidence and should be upheld.

B. The PCR court correctly found Petitioner failed to prove he was prejudiced because Petitioner failed to show a motion to obtain funds would have been granted and Dr. Wallendael's testimony would not have changed the outcome of the case.

The PCR court correctly found Petitioner failed to prove that he was prejudiced by Counsel's failure to obtain an expert witness, finding that he failed to show that the outcome would have otherwise been different. App. 509. There is no evidence that a motion to obtain

funds would have been granted and Dr. Wallendael's testimony would not have changed the outcome of the case as she provided testimony concerning factors that would have increased the accuracy the eyewitness identification

The PCR court correctly found that Petitioner failed to prove prejudice where Dr. Wallendael's expert testimony at the PCR hearing would not have changed the outcome of Petitioner's trial. App. 510. Dr. Wallendael summarized her testimony by concluding there were red flags in Petitioner's case that would cause concern, but also points in Petitioner's case **in favor of an accurate identification** by Cobiella and Silcott. App. 484, ll. 1-3. The PCR court noted Dr. Wallendael's testimony regarding her concerns in Petitioner's case, but found no prejudice resulted where Dr. Wallendael also provided expert testimony of factors in Petitioner's case that would increase the accuracy of an eyewitness identification. Dr. Wallendael mentioned the weapons focus but noted that Silcott only saw this weapon at the end of the argument after some time had passed. App. 475, l. 22 – 476, l. 7. She testified the frequency by which someone sees a person would increase the accuracy of the identification, and Silcott testified that he had seen Petitioner three times that night. App. 197, ll. 7-25; App. 473, l. 21 – 474, l. 5. Dr. Wallendael also testified an identification is more likely to be accurate if given the same day as the witness's encounter, which supports Silcott's accuracy of identifying Petitioner three hours after the incident. App. 476, ll. 8-16. Although Counsel and Dr. Wallendael stressed the importance of the cross-racial effect, Dr. Wallendael also testified this cross-racial effect can be decreased by an increased exposure to the suspect, which would support a more accurate identification by Silcott. App. 475, ll. 7-16. Dr. Wallendael also testified a well-lit area is better for an accurate identification than a busy street which could be distracting, which would support Silcott's accuracy as he stated he witnessed the altercation on a well-lit street in close range and

saw Petitioner with police on a well-lit street at close range. App. 200, ll. 10-23; App. 201, ll. 2-11; App. 477, ll. 6-20. The PCR court correctly found that Dr. Wallendael's expert testimony that highlighted the many factors that **would increase the likelihood of an accurate eyewitness identification** would not have changed the outcome of Petitioner's trial. Because the PCR court's ruling was based on probative evidence, the order denying post-conviction relief should be affirmed.

The PCR court correctly found Petitioner was not prejudiced as Counsel elicited testimony that highlighted the same eyewitness identification concerns that Dr. Wallendael shared. Counsel cross-examined Silcott on his cross-racial identification and the description he gave to police and elicited testimony from Officer Burns on the situation surrounding Silcott's identification. The PCR court also correctly found Petitioner was not prejudiced because Counsel requested an eyewitness identification jury instruction requested by Counsel highlighted many potential factors that affect eyewitness accuracy. App. 510. The charge given reads as follows:

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.

App. 343, ll. 4-16. The PCR correctly found Petitioner failed to prove prejudice where the jury charge reiterated many factors that Dr. Wallendael testified to at the PCR hearing regarding the reliability of eyewitness identification. App. 511.

There is no evidence before this Court to suggest that a motion to obtain funds would have been granted. There is nothing in the record before this Court to establish that Petitioner

was indigent at the time of trial as he retained Counsel privately. Counsel testified that he had no concerns about Petitioner's family's ability to pay him and did not have concerns about their ability to pay for an expert until they told him right before trial that they would not be able to pay for one. App. 412, ll. 10-23. The PCR court properly declined to speculate as to whether Counsel's motion for funding would have been granted and whether Petitioner's case fell into the category of rare cases where a private attorney successfully obtains funds from Indigent Defense. App. 511.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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August 11, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 11 2017

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Appellate Case No. 2015-000137

ALONDA DESAUSSURE,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Laura R. Baer, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 11th day of August, 2017



CAROLINE COLLINS
LEGAL ASSISTANT