

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Greenville County
The Honorable Letitia H. Verdin, Trial Judge
The Honorable Edward W. Miller, PCR Judge

Appellate Case No. 2020-000494

PATRICK DEAN LOWRANCE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Statement of Issue Presented

Did the PCR court err by ruling petitioner was not prejudiced by defense counsel's failure to request a Biggers hearing or otherwise object to Officer Cruell's in court identification of petitioner where the procedure for identification was unduly suggestive and the issue was found procedurally barred on direct appeal?

Respondent's Counterstatement of Issue Presented

Did the PCR court correctly find that Petitioner failed to prove any constitutional ineffectiveness regarding Officer Cruell's in-court identification of Petitioner when the absence of a law enforcement identification procedure and the independence of Cruell's actions as an eyewitness did not implicate Neil v. Biggers, 409 U.S. 188 (1972), and when, to the extent that Petitioner's defense attorneys did not object contemporaneously to the admission of the in-court identification, which left the issue unpreserved for direct appellate review, Petitioner has failed to prove the substantial likelihood of a different result on appeal had the issue been preserved because the identification was admissible?

STATEMENT OF THE CASE

Patrick Dean Lowrance (“Petitioner”) is presently confined in the South Carolina Department of Corrections. During its March of 2012 term, the Greenville County Grand Jury indicted Petitioner for two counts of attempted murder (2012-GS-23-1424; -1425), possession of a stolen motor vehicle (2012-GS-23-1426), possession of a weapon during the commission of a violent crime (2012-GS-23-1423), and failure to stop for blue lights (2012-GS-23-1423). Petitioner was represented by Brian P. Johnson, Esquire, and Assistant Solicitor Lucas C. Marchant of the Thirteenth Circuit Solicitor’s Office prosecuted the case. On October 8-11, 2012, Petitioner proceeded to a jury trial with the Honorable Steven H. John presiding. The jury found Petitioner guilty of possession of a stolen vehicle but did not reach a unanimous verdict as to the other offenses; Judge John declared a mistrial as to those. Judge John sentenced Petitioner to a suspended sentence of imprisonment for three years and one year of probation, gave credit for time served, and ordered that Petitioner undergo random drug and alcohol testing and complete some public service of maintain employment.

Johnson filed a timely notice of appeal. Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent defense represented Petitioner on appeal, arguing that Judge John erred in denying Johnson’s motion for a directed verdict as to possession of a stolen vehicle based upon the insufficiency of the evidence. The South Carolina Court of Appeals affirmed. State v. Lowrance, Op. No. 2014-UP-439 (S.C. Ct. App. filed December 3, 2014) (per curiam). The remittitur was issued on December 19, 2014.

On January 7, 2013, Petitioner was tried again before a jury for the offenses for which Judge John declared a mistrial. Johnson represented Petitioner again at the second trial, along with

John V. S. Crangle, Esquire, and the Honorable Letitia H. Verdin presided. That jury found Petitioner guilty as indicted and Judge Verdin sentenced Petitioner to concurrent terms of imprisonment for twenty-eight years for the two counts of attempted murder, five years for possession of a weapon during the commission of a violent crime, and three years for failure to stop for a blue light.

Johnson filed a timely notice of appeal. Then-Appellate Defender David S. Jones of the South Carolina Commission of Indigent Defense represented Petitioner on appeal, arguing that Judge Verdin erred in finding that a law enforcement officer's identification of Petitioner was of sufficient reliability so as to be presented to the jury. The Court of Appeals affirmed, finding that the issue had not been preserved for appellate review. State v. Lowrance, Op. No. 2017-UP-154 (S.C. Ct. App. filed April 12, 2017) (per curiam). The remittitur was issued on April 27, 2017.

Petitioner filed his application for post-conviction relief on April 23, 2018, claiming that he was entitled to post-conviction relief because: (1) his trial attorneys were constitutionally ineffective for failing to conduct an adequate investigation and to prepare for trial adequately; (2) his trial attorneys were constitutionally ineffective for failing to preserve issues for direct appellate review; (3) his trial attorneys were constitutionally ineffective for failing to conduct an independent investigation and to review evidence with Petitioner properly before trial; and (4) Jones was constitutionally ineffective for failing to raise meritorious issues on appeal. Respondent filed its return on September 11, 2019, requesting that an evidentiary hearing regarding the claims be held.

An evidentiary was held before Judge Miller at the Greenville County Courthouse on October 21, 2019. Petitioner was represented by R. Mills Ariail, Jr., Esquire, and the undersigned

represented Respondent. At the start of that hearing, Petitioner clarified for the record that he would move forward only upon the claims that his trial attorneys were constitutionally ineffective for: (1) failing to review discovery with Petitioner; (2) failing to move for a change of venue; (3) failing to object to Judge Verdin's instruction to the jury on the theory of accomplice liability; and (4) failing to preserve issues for direct appellate review. Judge Miller denied Petitioner's application with prejudice in an order of dismissal issued on February 14, 2020. In that order, Judge Miller found, among other things, that Petitioner failed to prove that a law enforcement officer's in-court identification of Petitioner was objectionable and that Petitioner failed to prove that, if Petitioner's attorney's had objected to the identification, thus preserving the issue for appellate review, there is a reasonable likelihood that the appellate courts would have reversed Petitioner's convictions.

Petitioner's appeal follows.

STATEMENT OF FACTS

Assistant Solicitor Marchant briefly described in his opening statement at Petitioner's second trial the events leading to the charges levied against Petitioner. On October 28, 2011, Officer Brittany Cruell of the Greenville City Police Department was checking license plates at the Comfort Inn parking lot on Laurens Road when she came across a 2005 GMC Yukon with the wrong tag, a tag that was registered to a Honda Accord. Suspicious the vehicle might be stolen, she radioed dispatch for backup. Officer Charles Lane responded to the hotel and, while Cruell and Lane were in the lobby speaking to management, the vehicle left the parking lot. The officers went to their respective patrol vehicles but Cruell was the first one out of the parking lot and began a solo pursuit. She followed the Yukon onto I-85 towards Atlanta and activated her blue lights during the chase, but terminated her pursuit after the car increased speed, attempted to evade her, and eventually exited the highway and ran a red light. App. 477-79.

Officer Taci Cobb was on patrol in the area and, several minutes after Cruell stopped pursuing the vehicle, Cobb located the Yukon at the Berkeley Point apartments. As Cobb stepped out of her car and attempted to call in the specific address, she was fired upon. Cobb charged towards the threat and returned fire before getting pinned in the stairwell. Following a second exchange of gunfire, Petitioner was struck in the left shoulder. Officer Lane arrived at the apartments just in time to hear the first exchange of gunfire. When Lane heard the second exchange, he reported to dispatch that shots had been fired and tried to assist. As Lane approached the breezeway, he was fired upon as well, so he backed out and tried to clear the building. Petitioner fled into the woods and was not located until later that evening when he was apprehended at a friend's house. The gun used to fire at Cobb and Lane was found with Petitioner. App. 479-81.

First Trial – Neil v. Biggers¹

Following jury selection at Petitioner’s first trial, Johnson advised Judge John that he wanted to make a pretrial challenge to Officer Cruell’s in-court identification of Petitioner. Johnson argued it would constitute a violation of Petitioner’s due process rights for the identification to be admitted based on the undue suggestiveness of the identification. Judge John said that they should probably conduct a Neil v. Biggers hearing. App. 58-59. The assistant solicitor then called Officer Cruell to the stand. She testified she was in the “wide open” lobby of the Comfort Inn and was able to view Petitioner for about five minutes as he walked past, only a few feet away. She described the lighting in the hotel as being the same as in the courtroom. Cruell did not have a conversation with Petitioner and said she just briefly paid attention to him; however, she noted he was the only other person in the lobby besides herself, Lane, and the hotel employees. She described Petitioner as a black male, about thirty years old, wearing a gray shirt, and she revised her estimate to say that she had observed Petitioner for only about one minute rather than five. Cruell testified that the following day, after Petitioner was arrested, she looked up a picture of him and recognized him as the same person she saw in the hotel the day before. She then made an in-court identification. App. 59-65. On cross-examination, Cruell was asked to review her incident report and read the description she gave of the man in the hotel. She had written: “A male walked by with longer hair. He looked to be about thirty-five or forty years old, but could have been younger of age, wearing a gray shirt.” App. 66-67.

After hearing arguments, Judge John found that he did not have enough information to rule on the suggestiveness of the procedure and asked Johnson to put Cruell back on the stand. Under

¹ Neil v. Biggers, 409 U.S. 188 (1972).

further cross-examination by Petitioner and questioning from Judge John, Cruell explained that when she came in for her shift the day after the incident someone at the station told her that Petitioner had been arrested. Of her own accord, she looked up the photographs of Petitioner from the detention center database and identified him as the man from the Comfort Inn. Cruell testified that nobody told her the person who was arrested was the same person she saw at the hotel; however, when she saw the photograph she “immediately recognized him.” Judge John recited the relevant factors from Neil v. Biggers and ruled: “I do find in this, taking all of those factors and the facts described, that I will allow the in-court identification of [Petitioner] by the witness.” Ultimately, the jury was sworn and the case proceeded to trial. App. 67-74. Following brief preliminary instructions from the court and opening statements, Officer Cruell was called to testify in the State’s case-in-chief. She described seeing Petitioner in the hotel lobby and then identifying him from the photograph following his arrest, and she then made an in-court identification before the jury. Johnson did not object to or otherwise challenge this testimony in any way. App. 84-99.

Second Trial - Pretrial Matters

On January 7, 2013, Judge Verdin commenced proceedings in Petitioner’s retrial. The assistant solicitor noted there were several pretrial matters that could be handled right away. He announced that the parties were agreeable to adopting Judge John’s pretrial rulings from the previous trial, including the ruling “with respect to . . . the Biggers hearing.” The assistant solicitor asked Johnson if he had stated things accurately and Johnson replied: “As I understand it, res judicata applies.” Judge Verdin stated: “I think I am bound by [Judge John’s] prior rulings unless there’s something materially different about this trial. All right.” App. 406-07. Johnson did not object to or otherwise challenge Judge Verdin’s ruling that she was somehow bound the

evidentiary rulings from the first trial, even though there had been a mistrial. Johnson did say that he was attempting to renew or seeking to preserve challenges or objections that had been raised in the first trial. The parties proceeded to jury qualification, jury selection, opening statements, and the presentation of evidence at the second trial.

Second Trial – Testimony of Officer Brittany Cruell

Officer Cruell was the first witness to take the stand. She described the events of October 28, 2011, explaining that she was working patrol and checking license plates on vehicles in a Comfort Inn parking lot when she came across a 2005 silver GMC Yukon that had the wrong tag. She tried to check the vehicle identification number (VIN) in the windshield, but was unable to do so because the VIN was covered by an air freshener. Concerned that the vehicle might be stolen, Cruell called Officer Lane to meet her and help with further investigation. They went inside to ask the hotel clerk if he or she knew who was driving the vehicle or had a record of a person who had registered the tag in question. Using a series of photographs, Cruell described the layout of the hotel and parking lot. She testified that while talking to the hotel clerk she noticed a black male walk by her. Cruell said she “just barely noticed him,” but knows he had a gray shirt on at the time. She testified he “looked to be older, maybe about 40,” but said could have been younger, and commented that she did not pay a lot of attention to him. Cruell testified she thought his hair was longer and could have been pulled back. She said the inside of the hotel had florescent lighting like the courtroom, and that she “looked at him in the face.” App. 486-98.

Cruell went on to describe her pursuit of the Yukon after it left the hotel, as well as her subsequent response to the scene of the shootout involving Cobb and Lane. App. 498-510. She then testified in regard to reporting to roll call the following day when she learned that Petitioner

had been arrested. Cruell testified she went to the computer in her patrol car and checked the records database for photographs of Petitioner. She said she “immediately recognized him as the same male that had walked by myself and Officer Lane the day before in Comfort Inn.” App. 510. Cruell testified that no one told her to look at the database before she looked at the photographs and repeated her comment that she “immediately recognized [Petitioner] as the same male that was at the Comfort Inn.” Cruell then made an in-court identification of Petitioner. App. 510-24. Both the out-of-court and in-court identifications were made without objection from the defense.

Second Trial - Other Evidence

After Officer Cruell finished testifying, the assistant solicitor presented testimony from Arva Irby, the employee working at Comfort Inn on the morning of the incident who alerted Officers Cruell and Lane when the Yukon was leaving the parking lot. App. 524-30. The assistant solicitor then elicited testimony from Officers Cobb and Lane, the two officers who were the victims of the attempted murder charges. Cobb responded to a “BOLO”² call from Cruell in regard to the vehicle that fled from the Comfort Inn. Cobb located a vehicle that looked like a match at a nearby apartment complex and confirmed the license tag number with Cruell. Cobb got out of her car and began walking up the sidewalk toward the apartment building when she saw a muzzle flash and heard at least two gunshots. She saw a person standing on the stairwell and was able to tell it was a black male because she briefly saw his face from the muzzle flash. Cobb drew her service weapon, began returning fire, and took cover. She exchanged shots with the gunman in two distinct bursts, but did not return fire the third time she heard him shooting. At some point, Cobb was

² “Be on the look-out.”

joined by Officer Lane but could not tell if he had fired his weapon. Cobb did not see anyone leave the building after the shooting stopped. App. 531-55.

Officer Lane responded to Cruell's initial request for assistance at the Comfort Inn. He first looked at the GMC Yukon in the parking lot and noticed the air freshener covering the VIN as well as a radar detector on the dashboard. Lane then went inside with Cruell where he heard a hotel employee say the person who drives that car had just walked out. He noticed a male driver as the vehicle drove away and, after telling Cruell the direction that vehicle was going, got in his own patrol car and attempted to join her in pursuit. Shortly after terminating the chase, Lane responded to a call about a suspicious person in the same general area where they lost track of the vehicle. He drove through nearby apartment complexes and discovered Cobb's car parked in front of an apartment building near the GMC Yukon he had seen at the Comfort Inn. It had the same air freshener, same radar detector, and same vehicle tag. After he got out of his car, Lane heard two exchanges of gunfire between Cobb and the shooter, drew his weapon, and began calling for Cobb. Lane did not fire his weapon because he did not know if Cobb might be in his line of fire. He saw a silhouette of the person shooting at Cobb, but never saw a face or anything specific about that person. App. 555-75.

During the subsequent investigation the police found a duffle bag in the apartment complex breezeway which held a wallet containing Petitioner's health card, social security card, and pawn shop ticket. They then went to the Comfort Inn and searched a room that had been registered to "Dean Lowrance." There, the police found a backpack containing Petitioner's driver's license. The police tracked down Petitioner and arrested him at a friend's house, where they discovered a

firearm and a sweatshirt stained with what appeared to be blood. Petitioner was suffering from a gunshot wound and was taken to the hospital. App. 653-88.

The police processed the GMC Yukon for fingerprints and DNA. They also processed the gun and sweatshirt, as well as bullet casings and droplets of blood found at the scene, and a box of ammunition found in the vehicle. A qualified fingerprint expert was able to identify Petitioner's fingerprints on the box of ammunition and several places on the exterior of the vehicle. A qualified expert in forensic DNA analysis was able to identify Petitioner as the major DNA contributor on the gun found at the place of Petitioner's arrest, and as the source of the blood on the sweatshirt and the ground where the shootout took place. A qualified expert in firearms identification was able to match numerous shell casings as having been fired by either Cobb's service weapon, or the gun discovered after Petitioner's arrest. App. 703-38, 758-75, 792-95, 797-809, 816-27, 864-97, 906-07, 912-36.

Norman Pearson testified he and Petitioner were like cousins and had grown up together, and that on the morning of the incident he received a phone call from Petitioner. Petitioner told Pearson that he needed a ride because he had run from the police and had been shot. Pearson testified he saw Petitioner with the magazine from the gun the day before the incident. App. 776-89. William Brockman testified that he and Petitioner are neighborhood acquaintances and that, on the day of the incident, he picked up Petitioner from the side of the road to give him a ride. Petitioner was wearing a black hoodie and had a bullet hole in his shoulder. App. 828-49.

Motion for a Directed Verdict

After the State rested, Johnson moved for a directed verdict on all charges. The following exchange then occurred between Johnson and Judge Verdin.

Johnson: And I'd like to renew any and all prior objections, Your Honor. I think I should say this. A lot of things in the previous trial that I didn't say anything in this trial because I understand res judicata applied.

Judge Verdin: Yes, sir.

Johnson: Therefore, Your Honor, I'd like to preserve any objections there as well.

Judge Verdin: They are so preserved. Your objections are noted for the record and reiterated for the record and denied.

App. 937-39. After hearing from the assistant solicitor in response, Judge Verdin then denied the motion for a directed verdict. App. 939-41.

Defense's Case, Closing Arguments, Jury Charge, and Verdict

Petitioner testified in his own defense. He admitted to sometimes driving the Yukon but claimed the vehicle belonged to his friend "Meat." Petitioner also admitted to being in the car with Norman Pearson but claimed that he did not know there was a gun in the car. He testified he stayed at the Comfort Inn the night before the incident with Meat and "Tee" but denied walking through the lobby of the hotel before they left in the Yukon. Petitioner claimed he and Tee left through the side door and that Meat must have walked through the lobby. He described Meat as being about 6'2 with long hair. He claimed Meat was driving when they left the Comfort Inn and that he argued with Meat about stopping the car when the police were in pursuit. Petitioner admitted he was present during the shootout, but provided an explanation for each piece of forensic evidence presented by the State and maintained that he did not do anything wrong. App. 941-1011. After the Johnson rested the defense's case, the assistant solicitor advised Judge Verdin that the State would have no reply. The jury was excused and, after a brief discussion of the proposed jury charges, Judge Verdin asked: "Oh, and you renew all your previous motions and your motion for

directed verdict as well?” Johnson replied: “I guess I should do that.” Judge Verdin said: “Okay. They are noted for the record and preserved. I respectfully deny. Thank you.” App. 1011-15.

Next, the parties made closing arguments. Johnson began his argument by attacking the Office Cruell’s identification of Petitioner. He argued that Cruell was merely aiming to please her fellow officers by claiming the person arrested was the person she saw in the lobby of the Comfort Inn. App. 1020-37. In his response, the assistant solicitor made a detailed argument laying out the mountain of incriminating evidence connecting Petitioner to the crimes. Though he briefly mentioned Cruell’s identification of Petitioner, the assistant solicitor admitted that the description in her incident report did not precisely match Petitioner’s actual appearance. App. 1037-65.

Thereafter, Judge Verdin charged the jury on the applicable law including the burden of proof, the presumption of innocence, the roles of the judge and jury, reasonable doubt, direct and circumstantial evidence, credibility of witnesses, expert witnesses, criminal intent, accomplice liability, mere presence, and the elements of the charged crimes. No particular charge was given in regard to identification evidence. Johnson did not take exception to or object to the jury charges. App. 1065-83.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court correctly found that Petitioner failed to prove any constitutional ineffectiveness regarding Officer Cruell's in-court identification of Petitioner because the absence of a law enforcement identification procedure and the independence of Cruell's actions as an eyewitness do not implicate Neil v. Biggers, 409 U.S. 188 (1972). However, to the extent that Petitioner's defense attorneys did not object contemporaneously to the admission of the in-court identification, which left the issue unpreserved for direct appellate review, Petitioner has failed to prove the substantial likelihood of a different result on appeal had the issue been preserved because the identification was admissible

Petitioner argues that the PCR court erred in finding that Petitioner failed to prove that Johnson and Crangle were constitutionally ineffective for not preserving the issue of Office Cruell's in-court identification of Petitioner for appellate review because Officer Cruell's identification was tainted by police conduct and was unreliable, and that Petitioner's convictions would have been reversed had the issue been preserved for review. Petitioner's argument fails because Officer Cruell's identification did not implicate Neil v. Biggers was not the result of a law enforcement identification procedure and, even if the issue had been preserved for appellate review, it would not have been resolved in Petitioner's favor because the identification was admissible under a Neil v. Biggers analysis.

As an initial matter, the trial court was not required to hold a pre-trial Neil v. Biggers hearing. When evidence of an eyewitness identification is introduced during a criminal trial, a defendant may be deprived of due process of law if that identification was the product of unnecessarily suggestive circumstances arranged by government officials, such as law enforcement officers, and a very substantial likelihood of irreparable mistaken identification exists as a result of those suggestive circumstances. Neil v. Biggers, at 197-198; see Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (recognizing that "a due process check on the admission of eyewitness identification" is applicable "when the police have arranged suggestive circumstances

leading the witness to identify a particular person as the perpetrator of a crime”). A “preliminary judicial inquiry is required once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness’s prior knowledge of the accused.” State v. Liverman, 398 S.C. 130, 140-41, 727 S.E.2d 422, 427 (2012) (citing Perry, at 244-45). Such a hearing was not required in this case, however, because there was no state action involved in Officer Cruell’s identification of Petitioner. While Office Cruell was clearly a member of law enforcement, her employment status alone does not implicate Neil v. Biggers. The record established that Officer Cruell, an eyewitness, looked up the photograph of Petitioner of her own accord after she heard that Petitioner had been arrested from another officer. App. 1224. Cruell looked at Petitioner’s photograph in a database internal to the police department that showed recent photographs taken at the detention center. App. 69. Cruell testified that no other person showed her the photograph of Petitioner; she wanted to compare Petitioner’s photograph to the individual she remembered seeing in the hotel lobby before the high-speed chase began. App. 1224. Cruell was not a detective, but was a patrol officer. App. 84. Cruell testified that no one else instructed her or asked her to view Petitioner’s photograph. App. 70-72. The purpose of a Neil v. Biggers hearing is to weed out in-court identifications of defendants that are tainted by some undue government involvement. In this case, Officer Cruell’s viewing of Petitioner’s photograph was not directed or caused by law enforcement actors. Instead, Officer Cruell acted of her own accord as an eyewitness. Her viewing of the photograph was not done in her capacity as a law enforcement officer but as a fact witness. This set of facts is admittedly unusual when considered in the context of witness identifications of defendants, but this factual situation is not the kind to which Neil v. Biggers applies as there was no law enforcement identification procedure.

Consider this hypothetical: if a gunman enters a police station and fires off some shots at officers inside, surely some officer inside would witness the incident and would thereafter be a fact witness to the shooting. If that officer learned that the gunman had been arrested and then later looked at the booking photograph of the newly arrested gunman, no government suggestibility issue would be implicated there, either. In both the hypothetical and the case on appeal, what would matter for purposes of a Neil v. Biggers hearing would be whether some person acting in a law enforcement or government capacity asked, directed, or caused the witnessing officer to view the photograph of the gunman, not whether the witness was employed as a law enforcement officer. Officer Cruell viewed Petitioner's photograph of her own accord and testified at trial as a fact witness; Neil v. Biggers is not implicated by Officer Cruell's job title alone. Even though the trial court conducted a Neil v. Biggers hearing, such was not required because this case did not involve a law enforcement procedure that could have tainted the identification.

Even if Johnson had objected contemporaneously to Officer Cruell's in-court identification of Petitioner, thus preserving the issue for appellate review, Petitioner would not have been successful on appeal. The PCR court correctly found that Officer Cruell's in-court examination of Petitioner was proper. App. 1225. An out-of-court identification of a defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. State v. Liverman, at 138, 727 S.E.2d at 425; State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (S.C. Ct. App. 2013). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). Trial courts

employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from “unnecessarily suggestive” police procedures. Biggers, 409 U.S. at 198-99; Liverman, 398 S.C. at 138, 727 S.E.2d at 426; Traylor, 360 S.C. at 81, 600 S.E.2d at 526. If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. Id. at 557-58, 745 S.E.2d at 139. The defendant bears the burden of proving the identification procedure was impermissibly suggestive. Id. at 561, 745 S.E.2d at 141 (“Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.”).

In considering whether Officer Cruell’s in-court identification of Petitioner was the product of suggestive police procedures, the PCR court took note that Cruell was herself a law enforcement officer who looked up the photograph of Petitioner of her own accord. App. 1224. Cruell testified that no other person showed her the photograph of Petitioner; she wanted to compare Petitioner’s photograph to the individual she remembered seeing in the hotel lobby before the high-speed chase began. App. 1224. The PCR court compared Cruell’s seeing the photograph of Petitioner to the circumstances in Dukes, in which the Court of Appeals found that a witness’s identification of Dukes was not the product of an unduly suggestive police procedure because the witness saw the photograph of Dukes on a law enforcement officer’s desk after the officer got up from the table to get a “photo book” to show to the witness. 404 S.C. at 562-66, 745 S.E.2d at 138-42. The PCR

court determined that there was no suggestive police procedure involved in Cruell's identification of Petitioner because, as in *Dukes*, there was no "intentional act," nor "any deliberate act," on the part of the police in causing Cruell to see the photograph. App. 1224-25. The PCR court rightly could have come to no other conclusion because a procedure *cannot be suggestive* where it was not "made under suggestive circumstances arranged by law enforcement." Liverman, 398 S.C. at 134, 727 S.E.2d at 423 (emphasis added).

If a reviewing court finds that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 426. Significantly, identification evidence may still be admissible if the State can prove by clear and convincing evidence the identification is reliable notwithstanding the suggestiveness of the identification procedure employed. State v. Govan, 372 S.C. 552, 559, 643 S.E.2d 92, 95-96 (S.C. Ct. App. 2007); see State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (S.C. Ct. App. 2003) ("Reliability is the linchpin in determining the admissibility of identification testimony."). The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007); State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (S.C. Ct. App. 2011). When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. State v. Turner,

373 S.C. 121, 127, 644 S.E.2d 693, 697 (2007); Singleton, at 13-14, 716 S.E.2d at 335-36. Upon examining those factors, a court ordinarily should admit identification evidence and allow the jury to determine its worth “if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances[.]” Perry, 565 U.S. at 232; see Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983) (instructing the exclusion of evidence is a “drastic sanction” and should be “limited to identification testimony which is manifestly suspect”).

Though it was not required to do so because it found that there was not a suggestive police procedure, the PCR court also found that Office Cruell’s out-of-court identification of Petitioner was reliable under the totality of the circumstances. App. 1225. As the PCR court noted: Cruell testified that she was able to observe Petitioner in a well-lit hotel lobby for about a minute and recognized Petitioner “immediately” when she saw the photograph of him; Cruell was probably in a heightened state of awareness when Petitioner passed her in the hotel lobby because she was investigating a possible vehicle theft; Cruell gave a description of the man who passed her in the lobby that was partially accurate and, although she believed the man had been about forty years of age, allowed that the man may have been younger; and Cruell’s identification of Petitioner took place only one day after she had seen him in the hotel lobby. App. 1225. Under these circumstances, there was no substantial likelihood that Cruell misidentified Petitioner. As such, Petitioner received the best defense against Cruell’s identification that he was entitled to when counsel thoroughly cross-examined Cruell in front of the jury about the reliability of her identification. App. 517-24; Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (explaining that, since the Supreme Court was unable to say that there was a very substantial likelihood of irreparable misidentification under all the circumstances, the evidence of the identification was for the jury to

weigh, for the Court was “content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.”).

Finally, even if the in-court identification was improperly admitted, an appellate court would have found that the error in its admission was harmless. The PCR court found that Petitioner failed to prove that, even if the jury had not heard Officer Cruell identify Petitioner as the perpetrator that she saw in the lobby, there is a reasonable likelihood that the outcome of trial would have been any different. App. 1225-26. The PCR court’s finding was correct because the evidence against Petitioner was overwhelming. Felder v. State, 427 S.C. 518, 528-59, 832 S.E.2d 591, 596 (2019) (citing Smalls, at 192, 810 S.E.2d at 845 (“For the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . it must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard cannot possibly be met.”)). By his own admission during trial, Petitioner was at the Comfort Inn before the police chase began, was in the Yukon during the chase, and was at the apartment complex where the shootout happened. App. 1225-26. Law enforcement officers found much evidence linking Petitioner to the crimes: Petitioner’s wallet and social security card were recovered from the scene of the shooting; Petitioner’s driver’s license was in the room for “Dean Lowrance” at the hotel; Petitioner had been gunshot when police arrested him after the shooting; Petitioner’s fingerprints were on a box of cartridges inside the Yukon; Petitioner’s DNA was on the handgun used to shoot at the officers; and Petitioner’s blood was found at the scene of the shooting and on the sweatshirt that he had

been wearing at the time of the shooting. App. 126. The proverbial camel's back would have been broken thoroughly even without the straw of Cruell's identification of Petitioner.

CONCLUSION

Petitioner has failed to prove that trial counsel was constitutionally ineffective for not preserving the issue of a law enforcement officer's in-court identification of Petitioner. The officer's identification did not necessitate a Neil v. Biggers hearing, but was nevertheless admissible even under that analysis. Petitioner has failed to prove that the issue would have been a successful one on appeal had it been preserved and that there is a reasonable probability that the jury would have reached another verdict had it not heard the in-court identification. The PCR court was correct to deny Petitioner's application for post-conviction relief and this Court should deny the petition for a writ of certiorari.

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