STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Aiken County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2018-001674

JOHN UPSON,

Respondent,

vs.

THE STATE,

Petitioner.

BRIEF OF PETITIONER

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Did the post-conviction relief judge reversibly err by finding—in a legally-erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own?

A. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing either to seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or to challenge the admission of that evidence during trial when—just as the post-conviction relief judge found in his order incorrectly granting relief—the victim made the identification without the involvement of any suggestive circumstances created by law enforcement, which necessarily meant defense counsel could not have been deficient for failing to challenge the identification evidence through a pre-trial hearing request or a trial objection since there were no valid legal grounds supporting such a request or objection?

B. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to cross-examine Alston in some unspecified manner about testimony indicating Upson had a "lazy eye" when defense counsel thoroughly attacked Alston's identification of Upson as the robber in an appropriate and reasonable manner throughout the trial and when no prejudice could have resulted from defense counsel's failure to question Alston about her "lazy eye" testimony in light of the fact the jurors had a full opportunity to view Upson's eyes throughout the trial, which enabled them to make their own determinations regarding the reliability of Alston's testimony even without any additional questioning?

C. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own when the evidence the post-conviction relief judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding?

STATEMENT OF THE CASE

In December of 2013, Respondent John Upson was arrested following an investigation into an armed robbery that had occurred a few days earlier. In January of 2014, the Aiken County Grand Jury indicted Upson for one count of armed robbery and two counts of kidnapping. On April 15, 2014, a jury trial was commenced in the Aiken County Court of General Sessions with the Honorable Donald B. Hocker, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Upson as indicted. Following the verdict, the trial judge sentenced Upson to concurrent terms of imprisonment of twenty years for each of the three convictions. Upson then timely filed and perfected an appeal.

On appeal, the Court of Appeals unanimously affirmed Upson's convictions in an unpublished opinion. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). Thereafter, on June 17, 2016, remittitur was issued.

Subsequent to the issuance of the remittitur, Upson timely filed an application for post-conviction relief, and, in response, the State filed a return requesting an evidentiary hearing. On May 5, 2018, an evidentiary hearing was conducted in the Aiken County Court of Common Pleas with the Honorable R. Scott Sprouse, circuit court judge, presiding. At the conclusion of the hearing, the post-conviction relief judge took the matter under advisement. Thereafter, through an order filed on July 23, 2018, and an amended order filed on August 10, 2018, the post-conviction relief judge granted Upson's post-conviction relief application. The State then timely filed a motion to alter or amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and the post-conviction relief judge summarily denied the State's motion through an order filed on August 29, 2018. Following that, the State timely initiated an appeal of the post-conviction relief judge's decision.

On appeal, the State filed a petition for a writ of certiorari in the Supreme Court, and the Supreme Court transferred the matter to the Court of Appeals. Following the transfer of the case, the Court of Appeals granted the State's petition on November 12, 2021.

STATEMENT OF FACTS

Summary of Upson's Crimes and the Evidence Discovered During the Ensuing Investigation

At around 10:00 p.m. on the night of November 27, 2013, Scott Hall was taking the trash outside to the dumpster behind the Captain D's restaurant he worked at in Aiken, South Carolina, when two men dressed in black clothing with bandanas partially covering their faces rapidly approached him, put a gun to his head, and forced him back into the restaurant. (App'x pp. 54-55; pp. 57-58; pp. 78-80; p. 89; p. 96). Once inside, the gunman ordered Hall to take him to the front of the restaurant where the safe was located while the other robber remained at the rear of the restaurant with Jameshia Alston, another of the restaurant's employees. (App'x pp. 52-54; p. 80). Terrified, Hall complied with the gunman's commands and led him to Devin Johnson, the restaurant's manager. (App'x p. 101). The gunman then ordered Hall to get onto the floor and directed Johnson to give him the restaurant's cash. (App'x p. 81). After that, the robbers forced Hall, Johnson, and Alston into a freezer at the back of the restaurant before rapidly absconding from the scene. (App'x p. 54; pp. 59-60; p. 66; p. 81; pp. 85-86; p. 91; p. 95).

Once the robbers were gone, Alston and the others left the freezer, and Johnson called 911 to report what had occurred. (App'x pp. 60-61; pp. 91-92). Shortly after that, officers from the Aiken Department of Public Safety responded to the scene and spoke with the restaurant's employees, who recounted the harrowing ordeal and provided general descriptions of the partially-masked robbers. (App'x p. 61; p. 68; p. 71; p. 76; p. 80; pp. 86-87; p. 92; p. 96; p. 100). Furthermore, Alston reported she recognized the robber who watched over her during the incident as a customer who had come into the restaurant a few days earlier and spoken with William Keels, another of the restaurant's employees. (App'x pp. 56-57; p. 61; p. 110; p. 112). However, Alston indicated she did not know the man's name at that time. (App'x p. 61).

At the conclusion of the investigation at the scene, Alston went home and independently began searching for the robber she recognized using the internet. (App'x pp. 56-57; p. 72; pp. 116-117). During the search, she examined Keels's Facebook page and, while looking through his list of friends on that website, instantly recognized one of Keels's friends as the robber upon seeing his picture. (App'x pp. 56-57; p. 65; pp. 73-74). Based on that, she was able to determine the robber was Upson, and she quickly alerted Detective Billy Royster of her discovery. (App'x p. 61; pp. 73-74; p. 102).

In response, Detective Royster arrested Upson in connection to the incident. (App'x pp. 102-103; p. 105; pp. 271-272). Upson was then indicted for armed robbery along with several counts of kidnapping, and he proceeded forward to trial. (App'x p. 6; pp. 273-278).

Relevant Details from Upson's Trial

During the course of trial, Alston testified for the prosecution and recounted the details of the terrifying robbery. (App'x pp. 52-77). Alston further identified Upson in the courtroom as one of the robbers, and she explained how she was initially able to identify him as one of the people involved. (App'x pp. 55-57; p. 61; pp. 65-66; pp. 72-75). Then, during defense counsel's cross-examination, Alston acknowledged she was frightened when she viewed the robber, conceded she only saw a partial view of the robber's face, and revealed she was shown a list of names as some point by the police. (App'x p. 75). However, she specifically confirmed she did not have Upson's name at the time she identified him through her independent research. (App'x p. 74). Thereafter, on redirect examination, the solicitor questioned Alston about her recognition of Upson's eyes as the robber's eyes, and she explained: "He has a lazy eye. It's kind of droopy, like that." (App'x p. 77). After that, defense counsel did not ask any further questions of the witness. (App'x p. 77).

Following Alston's testimony, Hall recounted his experiences on the night of the robbery, and, during his testimony, defense counsel questioned him about his lack of knowledge that money was actually stolen during the incident while also questioning him about his recollection of the physical appearance of the robbers. (App'x pp. 78-99). Furthermore, Detective Royster discussed the details of his investigation that culminated in Upson's arrest, and, during his testimony, defense counsel questioned him about various purported shortcomings with the investigation while further questioning him about Upson's height, which was inconsistent with Hall's description of the robbers' heights. (App'x p. 87; pp. 100-135).

Beyond that testimony, Desra Fraser, an intelligence research specialist with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, testified about how she assisted in the investigation by using PenLink software to analyze Upson's phone records, which had been obtained from his phone company. (App'x p. 103; p. 138; pp. 147-149). By using PenLink, Fraser indicated she generated maps of the locations where Upson was positioned when various calls were made on the night of the incident, and the maps were admitted into evidence. (App'x p. 149; p. 153). Additionally, Fraser stated some of the maps depicted "possible" movement at the time the calls were being made. (App'x p. 155). Furthermore, Fraser noted Upson's phone was used to call the Captain D's restaurant at 9:37 p.m. on the night of the crime and then was used again to call the restaurant at 9:47 p.m. with the caller identification information intentionally blocked during the second call. (App'x p. 151). Thereafter, on cross-examination, Fraser conceded she had no idea who was using Upson's phone when the calls were made. (App'x pp. 157-158). Likewise, she admitted she had no idea if the phone was actually moving during the calls. (App'x pp. 158-159).

Following the presentation of that testimony and evidence, the State rested, and defense counsel called three alibi witnesses to testify on Upson's behalf. (App'x p. 163; p. 174; pp. 183-203). During the testimony of those witnesses, one indicated he saw Upson before a comedy show that took place in downtown Aiken on the night of the incident, one indicated she saw Upson before and after the show, and the other indicated she saw Upson after the show. (App'x pp. 184-186; pp. 190-194; pp. 196-197; p. 199; p. 201). However, none reported seeing Upson during the course of the show, which purportedly began at some point after 8:00 p.m. or 9:00 p.m. and ended at some point between 10:30 p.m. and midnight. (App'x p. 194; p. 189; pp. 190-191; pp. 195-197; p. 199; p. 201; p. 203).

At the conclusion of the presentation of that testimony, the defense rested, and the parties presented their closing arguments to the jury. (App'x p. 204; pp. 210-238). During defense counsel's closing argument, defense counsel heavily relied on the testimony of the alibi witnesses in arguing Upson was not involved in the robbery. (App'x pp. 211-212; pp. 218-219). Furthermore, throughout the entirety of his closing argument, defense counsel repeatedly questioned the reliability of Alston's identification and conducted four separate demonstrations to illustrate to the jury how difficult it would have been for Alston to accurately identify Upson solely from a glimpse of the robber's nose and eyes. (App'x pp. 213-219). Conversely, during the State's closing argument, the solicitor challenged the reliability of the alibi witnesses based on their inability to provide concrete times and argued Alston's identification of the robber, whom she recognized from an earlier visit to the restaurant, was reliable. (App'x pp. 225-228; p. 230; p. 237). Furthermore, the solicitor conceded the maps of Upson's calls established Upson was downtown prior to the robbery, which was consistent with his claimed alibi, but noted the maps established he was not downtown after the robbery. (App'x p. 184; pp. 232-233).

Subsequently, at the conclusion of trial, the jury convicted Upson as indicted. (App'x p. 258; pp. 279-280). The trial judge then sentenced Upson to an aggregate twenty-year term of imprisonment. (App'x p. 269; pp. 281-283).

Summary of the Post-Conviction Relief Proceedings

Following an unsuccessful appeal, Upson sought post-conviction relief on a number of grounds, including on the basis his defense counsel was allegedly ineffective for failing to fully cross-examine Alston, request a pre-trial hearing about the identification evidence, object to that evidence during trial, and fully refute the State's case. (App'x pp. 352-356; pp. 357-364). In response, the State filed a return requesting an evidentiary hearing. (App'x pp. 366-371).

During the ensuing hearing, Thomas Slovenski, an expert in mobile phone forensics, testified on Upson's behalf, and, during his testimony, several maps of Upson's phone calls on the night of the incident that had been admitted during trial were introduced into evidence along with some maps Slovenski had personally generated using a more modern program than the one available to Fraser when she created the maps used at trial. (App'x pp. 380-381; p. 383; p. 386; pp. 389-395; pp. 397-398; p. 402; pp. 468-474). Relying on his maps along with his belief the robbery had occurred around 10:40 p.m. to 10:47 p.m., Slovenski opined no calls were made from Upson's phone "that encompassed the incident location at the incident date and time."[1] (App'x pp. 383-384). Additionally, Slovenski asserted Fraser's maps could have been better while contending the program he used, which was not available until 2015, was better than the "good" one used by Fraser. (App'x p. 386; p. 402). Slovenski further indicated his program generated maps different from the maps generated using the "old methodology," which was the "pie method," and he stated he believed the maps generated by his program were more accurate

[1] Contrary to Slovenski's belief of when the robbery occurred, the victims testified during trial it took place around 10:00 p.m. or 10:15 p.m. (App'x p. 53; p. 58; p. 79).

than Fraser's maps, which he contended could have "potentially" suggested Upson was closer to the restaurant than he might have been at various times. (App'x p. 386; p. 390; p. 402). However, Slovenski conceded the program used by Fraser was commonly used at the time of Upson's trial, and he asserted he, in fact, would have used the "pie method" at the time of trial because "that was all that was available at that time." (App'x pp. 401-402). Furthermore, Slovenski acknowledged some of the maps generated by Fraser had the same results as his maps, and he conceded the State never suggested during Upson's trial their maps showed Upson was at the scene of the crime at the time of the robbery. (App'x pp. 387-388; p. 403).

In addition to Slovenski's testimony, Upson testified on his own behalf and, based on his view of the trial testimony, opined Alston must have had a list of names at the time she identified him during her independent investigation following the robbery.[2] (App'x pp. 426-431). Furthermore, he asserted Alston's identification was based on him having a "lazy eye," which he claimed was inaccurate. (App'x pp. 431-432).

Following that testimony, Grant Gibbons, who assisted defense counsel with the trial, testified for the State about his recollection of the trial and indicated the defense strategy was to assert an alibi defense.[3] (App'x pp. 438-440). However, he noted Upson's whereabouts could not be completely accounted for by the alibi witnesses. (App'x p. 440). Additionally, Gibbons indicated they reviewed the phone records, which he stated would have been meaningful only if they placed Upson at the scene of the crime, with a knowledgeable attorney to prepare for trial, and he stated Upson admitted to them he had called the restaurant before the robbery, which was

[2] Significantly, during his testimony, Upson also *confirmed* Alston's account of seeing him at the restaurant just days before the robbery. (App'x p. 427).

[3] Notably, defense counsel had moved to Colorado by the time of the hearing, was not present for it, and was not permitted to testify by telephone following an objection from Upson. (App'x pp. 376-378).

reflected in the records. (App'x p. 151; pp. 441-442; pp. 446-447). Furthermore, in regard to the identification evidence, Gibbons explained no challenge was raised to it because no government action was involved in the out-of-court identification, which meant there was no basis upon which to challenge it. (App's pp. 442-444; p. 450). Likewise, Gibbons disagreed with Upson's interpretation of Alston's testimony, and he noted defense counsel thoroughly challenged Alston's identification to the jury in a "really effective" manner by demonstrating the difficulty in identifying people just from their eyes and noses. (App'x pp. 442-444; pp. 452-453).

Thereafter, once all the testimony and evidence had been introduced, the parties made their arguments for and against a grant of relief in Upson's case. (App'x pp. 456-466). The post-conviction relief judge then took the matter under advisement. (App'x p. 466).

Subsequently, upon considering the matter, the post-conviction relief judge issued an order—and amended order—granting post-conviction relief to Upson.[4] (App'x pp. 475-493). In granting relief, the post-conviction relief judge concluded defense counsel was deficient for: (1) failing to either seek a pre-trial hearing to determine the admissibility of the identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own. (App'x pp. 492-493). Furthermore, without explanation or analysis, the post-conviction relief judge concluded defense counsel's deficiencies resulted in some undefined prejudice to Upson. (App'x p. 493). The State then sought for the post-conviction relief judge to reconsider his ruling, but he summarily declined to do so. (App'x pp. 494-508).

[4] Interestingly, there do not appear to be any substantive differences between the original order and amended order. (App'x pp. 475-493).

STANDARD OF REVIEW

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the post-conviction relief judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the post-conviction relief judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief judge reversibly erred by finding—in a legally-erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own.

In the case sub judice, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for: (1) failing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own. To the contrary, defense counsel was not deficient in any manner during Upson's trial, and there was no reasonable probability the result of the proceeding would have been different but for the tactical decisions defense counsel made in carrying out his representation.[5] As a result, the post-conviction relief judge erred as a matter of law by finding defense counsel was constitutionally ineffective, and his ruling was legally erroneous and without factual support. The post-conviction relief judge's grant of relief should be reversed.

Law Applicable to Ineffective Assistance of Counsel Claims

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the

[5] Notably, in granting relief, the post-conviction relief judge did not specifically find there was a reasonable probability the result of the proceeding would have been different but for defense counsel's purported errors despite the fact such a finding was necessary for a grant of relief to be warranted and proper. (App'x pp. 491-493).

United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1910 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of

reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb").

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the *objective* reasonableness of counsel's performance, not counsel's subjective state of mind" (emphasis added)). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of

hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689; see Shaw v. State, 276 S.C. 190, 195, 277 S.E.2d 140, 142 (1981) ("The actions and decisions of the trial counsel are not to be measured in terms of results[.]"). In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105; see Dunn v. Reeves, __ U.S. __, 141 S. Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that *no* competent lawyer would have chosen." (emphasis added and citation, internal quotations, and brackets in original omitted)); State v. Woullard, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) ("Defense counsel's strategy must have been outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff' before a conviction will be reversed on the basis of ineffective assistance." (citations omitted)).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386

S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112 (emphasis added); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Application of the Relevant Law to Upson's Case

A. The post-conviction relief judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing either to seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or to challenge the admission of that evidence during trial because—just as the post-conviction relief judge found in his order incorrectly granting relief—the victim made the identification without the involvement of any suggestive circumstances created by law enforcement, which necessarily meant defense counsel could not have been deficient for failing to challenge the identification evidence through a pre-trial hearing request or a trial objection since there were no valid legal grounds supporting such a request or objection.

In his order granting relief, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for failing to either seek a pre-trial hearing to determine the admissibility of the evidence of Alston's eyewitness identification of Upson as the robber or seek the exclusion of that evidence during trial. (App'x pp. 492-493). In reaching that conclusion, the post-conviction relief judge found "the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement" and who was subsequently presented with a list of names that included Upson's name "[w]hen she did speak with law enforcement[.]"[6] (App'x p. 492). The post-conviction relief judge further found

[6] To the extent the post-conviction relief judge found Alston was presented with a list of names *containing Upson's name*, no evidence was ever presented—or identified by the post-conviction

defense counsel failed to challenge the eyewitness identification evidence by seeking a pre-trial hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972), or by objecting to its admission during trial. (App'x p. 492). Based on those findings, the post-conviction relief judge—without further explanation or analysis—ruled Upson met his burden of proving both defense counsel was deficient and the deficiency resulted in some unspecified prejudice and, therefore, granted post-conviction relief to him. (App'x pp. 492-493).

Contrary to the post-conviction relief judge's legally-and-factually-erroneous conclusion, defense counsel was not constitutionally ineffective for failing to either seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or seek its exclusion during trial as defense counsel had no proper grounds upon which to request a pre-trial hearing or object due to the circumstances that actually led to Alston's out-of-court identification of Upson. Significantly, just as the post-conviction relief judge found in his order, Alston located Upson's photograph and identified him as one of the robbers through independent internet research conducted *prior to* her speaking to the detective about the identification, and her research efforts that led to the identification were *not* conducted with the assistance of or at the request of any law enforcement officers. Cf. State v. Tisdale, 338 S.C. 607, 613, 527 S.E.2d 389, 392 (Ct. App. 2000) ("[B]ecause the police were not involved in the media identifications in this case, the trial judge did not err in allowing the tellers' identification testimony."). Based on that, the events that led to Alston's identification of Upson were simply *not* the product of any circumstances—suggestive or otherwise—created by government officials, which meant defense counsel did not

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relief judge—to establish or support such a factual finding. (App'x pp. 75-76; p. 492). Instead, the unrefuted record from trial established Alston was only presented with a list of names *after* she independently identified Upson as one of the robbers and provided his information to Detective Royster, and no evidence or information was presented suggesting Upson's name was included in the list shown to Alston subsequent to her providing Upson's information to the detective. (App'x pp. 56-57; p. 61; p. 65; pp. 72-76).

have any grounds upon which he could have legally sought a pre-trial hearing in regard to the identification evidence or upon which he could have sought the exclusion of that evidence during trial. See Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (recognizing "a due process check on the admission of eyewitness identification" is applicable *only* "when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime"). Therefore, defense counsel's failure to undertake actions for which no valid legal basis existed simply could not have constituted representation falling outside reasonable professional norms, and the post-conviction relief judge erred as a matter of law by concluding otherwise. See Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) ("One of the key circumstances a court must consider in its examination of counsel's decision not to make a particular objection is whether there was any law to support the objection."); State v. Liverman, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (recognizing preliminary judicial inquiry regarding the reliability of identification evidence is only required when "it is contended that an identification is obtained under unnecessarily suggestive circumstances *arranged by state action*" (emphasis added)); see also Roseboro v. State, 841 S.E.2d 706, 711 (Ga. Ct. App. 2020) ("When trial counsel's failure to file a motion to suppress is the basis for a claim of ineffective assistance, the defendant must make a strong showing that the damaging evidence would have been suppressed had counsel made the motion." (citation and internal quotations omitted)); cf. Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (holding a post-conviction relief judge's grant of relief based on defense counsel's failure to raise an objection to be without factual support where "there was no sustainable objection" defense counsel could have made).

Moreover, notwithstanding the fact there was no legal basis upon which defense counsel could have challenged the admissibility of the identification evidence, the post-conviction relief

judge did not identify any reasons as to why or how the circumstances of Alston's out-of-court identification of Upson were unnecessarily and unduly suggestive or created a substantial likelihood of misidentification. Without such reasons identified or present in the record, there was simply no basis upon which to conclude the eyewitness identification evidence in Upson's case was so manifestly suspect that the extreme sanction of exclusion would have been warranted. 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"). Thus, there were no grounds upon which the post-conviction relief judge could have found defense counsel's purported deficiency in regard to the identification evidence resulted in the prejudice necessary to warrant a grant of relief since the post-conviction relief judge did not even find the evidence would have been inadmissible had defense counsel attempted to prevent its admission in some manner. See Johnson, 325 S.C. at 186, 480 S.E.2d at 735 ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness *and, but for counsel's errors, there is a reasonable probability the result at trial would have been different*." (emphasis added)); cf. People v. Caro, 442 P.3d 316, 340 (Cal. 2019) (rejecting Caro's claim her counsel was constitutionally ineffective for failing to make a suppression motion because Caro failed to establish such a motion "would have been meritorious" if it had been raised); State v. Jones, 715 S.E.2d 896, 904 (N.C. Ct. App. 2011) ("Because we conclude the photo identification evidence and the in-court identifications of defendant by the two witnesses were properly admissible, defendant's trial counsel did not err in failing to move to suppress or object to such evidence.").

Accordingly, for the foregoing reasons, the post-conviction relief judge erred as a matter of law in concluding defense counsel was constitutionally ineffective for failing to either seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or seek its exclusion during trial, and his ruling granting relief was legally and factually erroneous. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (recognizing a post-conviction relief judge's decision will be reversed when it is controlled by an error of law); see also State v. Schwaderer, 898 N.W.2d 318, 332 (Neb. 2017) ("As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument."); cf. Legare v. State, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998) (reversing a finding defense counsel was constitutionally ineffective for failing to pursue suppression of identification testimony because it was not supported by the record). The post-conviction relief judge's ruling should be reversed.

B. The post-conviction relief judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing to cross-examine Alston in some unspecified manner about testimony indicating Upson had a "lazy eye" because defense counsel thoroughly attacked Alston's identification of Upson as the robber in an appropriate and reasonable manner throughout the trial and because no prejudice could have resulted from defense counsel's failure to question Alston about her "lazy eye" testimony in light of the fact the jurors had a full opportunity to view Upson's eyes throughout the trial, which enabled them to make their own determinations regarding the reliability of Alston's testimony even without any additional questioning.

In his order granting relief, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for failing to challenge Alston's testimony regarding Upson's purported "lazy eye" through cross-examination.[7] (App'x pp. 492-493). In reaching that conclusion, the post-conviction relief judge indicated he was "particularly concerned" with the "lazy eye" testimony and asserted Upson "clearly" did not have a "lazy eye" based on his own

[7] Throughout his order, the post-conviction relief judge repeatedly referred to Alston incorrectly as "Austin." (App'x p. 52; p. 489).

personal study of Upson's facial features during the post-conviction relief proceedings. (App'x pp. 492-493). For that reason, the post-conviction relief judge indicated he was "concerned" the "lazy eye" testimony "evidence[d] a misidentification that led to [Upson]'s conviction." (App'x p. 493). Notably though, the post-conviction relief judge did *not* identify any specific questions he believed defense counsel should have asked of Alston on cross-examination or explain in any manner how he believed the "lazy eye" testimony should have been challenged. (App'x pp. 492-493). He further made no reference to the fact Alston did not simply say Upson's had a "lazy eye" but further explained she viewed his eyes as being "droopy." (App'x p. 487; pp. 492-493). Instead, he simply concluded—without explanation or analysis—both deficiency and prejudice had been established in regard to the "lazy eye" testimony. (App'x p. 493).

Initially, contrary to the post-conviction relief judge's ruling, defense counsel was not deficient for failing to specifically cross-examine Alston about the "lazy eye" testimony because he did, in fact, thoroughly challenge Alston's identification of Upson as the robber in a variety of different ways. Specifically, during the trial, defense counsel challenged the reliability of the identification by eliciting testimony from Alston establishing the robbers' faces were partially covered and she was only able to see Upson's eyes and nose. He then attempted to exploit that testimony by repeatedly attacking the reliability of the identification throughout his closing argument and by conducting a "really effective" demonstration for the jury in an effort to show just how difficult it would be to accurately identify even a well-known person solely from a view of the person's eyes and nose. In light of the fact defense counsel did thoroughly challenge Alston's identification of Upson as the robber in the manner he believed would be the best and most effective means of doing so, defense counsel was not deficient or objectively unreasonable for failing to *also* challenge the identification in a different manner by questioning Alston—in

some unspecified way—about her testimony regarding Upson's purported "lazy eye." See Strickland, 466 U.S. at 688-689 (recognizing there typically exists a "range of legitimate decisions regarding how best to represent a criminal defendant" and instructing defense counsel must have "wide latitude" in making tactical decisions); cf. Butler v. State, 541 S.E.2d 653, 659 (Ga. 2001) ("[T]he transcript reveals that counsel conducted a substantial cross-examination of the witness. What is more, a matter such as the cross-examination of a witness is most often grounded in matters of trial tactics and strategy and, in those instances, provides no basis for finding counsel's performance deficient.").

Moreover, as to the "lazy eye" testimony specifically, it remains entirely unclear what questions the post-conviction relief judge believed defense counsel should have asked of Alston about that particular subject matter as none have so far been identified. However, through her testimony, Alston indicated she believed Upson had a distinctive "lazy eye," and she quickly qualified that statement by explaining she perceived his eyes as being "droopy." Therefore, had defense counsel sought to challenge Alston's "lazy eye" testimony on cross-examination, he would have simply given Alston an opportunity to further explain what she meant by her testimony, and she very well might have explained—just as she appears to have done—her view of a "lazy eye" was an eye that was "droopy," which, notably, would have been consistent with what the phrase "lazy eye" is perceived by many to mean.[8] Compare Wikipedia, "Amblyopia," available at https://en.wikipedia.org/w/index.php?title=Amblyopia&oldid=1050875062 (explaining amblyopia is "a disorder of sight in which the brain fails to process inputs from one eye" that "results in decreased vision in an eye that *otherwise typically appears normal*" and noting the disorder is also called "lazy eye" (emphasis added)); with Wikipedia, "Ptosis,"

[8] Significantly, Upson clearly *does* appear to have "droopy" eyelids in the photograph of him available through his inmate records. (App'x p. 285).

available at https://en.wikipedia.org/w/index.php?title=Ptosis_(eyelid)&oldid=1054866799 (explaining ptosis is a medical condition involving drooping of the eyelid and noting the condition is sometimes referred to as "lazy eye"). As a result, defense counsel simply could not have provided objectively unreasonable representation or otherwise been constitutionally ineffective by failing to ask some so-far-unidentified questions of Alston that would not have necessarily elicited any testimony remotely favorable to his client. See Ward v. Whitley, 21 F.3d 1355, 1362 (5th Cir. 1994) ("It is a basic rule of cross-examination: Never ask a question for which you do not know the answer."); see also Strickland, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."); Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) ("[M]ere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."); cf. Vanover v. State, 433 S.C. 31, 44, 856 S.E.2d 160, 167 (Ct. App. 2021) ("We have no idea what Daughter's answer or explanation for the Doe allegation would have been. Daughter did not testify at the PCR hearing. We do not see how we could find this alleged deficiency to be prejudicial without some sense of what Daughter's explanation would have been.").

However, even assuming defense counsel was somehow deficient for failing to ask some unspecified questions about Alston's "lazy eye" testimony, defense counsel's failure to conduct further questioning could not have resulted in any prejudice to Upson because the jurors—just like the post-conviction relief judge—had a full and direct opportunity to personally view Upson for themselves and make their own determination as to whether Alston's testimony about Upson's "lazy" and "droopy" eyes negatively impacted the reliability of the identification. Cf. State v. Odom, 412 S.C. 253, 268, 772 S.E.2d 149, 156 (2015) (finding "the jury's ability to

view [Odom]'s appearance in the courtroom" contributed to an error being rendered harmless); State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (1996) ("Because the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification, the identification is not unreliable."). Under those circumstances coupled with the fact defense counsel thoroughly attacked the reliability of Alston's identification in other ways, defense counsel's failure to conduct some unidentified probing of the "lazy eye" testimony simply could not have created a reasonable probability the result of the trial would have been different, which was needed for a grant of post-conviction relief to be warranted. See Strickland, 466 U.S. at 693-694 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Accordingly, as defense counsel was not objectively unreasonable for failing to specifically challenge the "lazy eye" testimony and no prejudice could have resulted from his failure to do so, the post-conviction relief judge erred as a matter of law by finding defense counsel was constitutionally ineffective for failing to ask some unspecified questions of Alston in regard to her description of Upson's eyes. See Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998) ("As to allegations of ineffective assistance of counsel, the applicant must show his counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different."); see also Whitelock v. State, 825 S.E.2d 426, 435 (Ga. Ct. App. 2019) (explaining it is impossible to establish there is a reasonable probability the results of a proceeding would have been different but for defense counsel's failure to employ or elicit some evidence not presented

during trial if the post-conviction relief applicant never makes any proffer of the evidence that purportedly should have been employed or elicited). The post-conviction relief judge's ruling should be reversed.

C. The post-conviction relief judge erred as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own because the evidence the post-conviction relief judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding.

In his order granting relief, the post-conviction relief judge concluded defense counsel was constitutionally ineffective for failing to challenge the State's testimony that purportedly discredited Upson's alibi defense by presenting an expert to testify for the defense. (App'x p. 493). In reaching that conclusion, the post-conviction relief judge noted Upson presented expert testimony during the evidentiary hearing that "created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the 'pie method.' "[9] (App'x p. 493). As to the substance of the doubt-creating testimony, the post-conviction relief judge indicated Slovenski, who was Upson's expert, was able to generate more accurate maps than those created with the "older" program used by Fraser, the State's witness. (App'x p. 489). Additionally, the post-conviction relief judge stated none of Slovenski's data "encompassed the location" where the robbery took place, which he found—incorrectly—was "contrary to the testimony and presentation" from the trial. (App'x p. 489). Furthermore, the post-conviction relief judge noted Slovenski had explained the "pie method" inaccurately involved the use of

[9] Although the post-conviction relief judge repeatedly referred to the State's witness as an expert, the State's witness was not actually qualified as an expert witness during trial. (App'x pp. 147-163).

directional wedges while cell phone towers operated more like clouds. (App'x p. 489). Notably though, the post-conviction relief judge made no reference whatsoever to the fact Slovenski used a program not in existence until well after Upson's trial had concluded or to the fact Slovenski admitted he *personally* would have used the "pie method" at the time of Upson's trial due to fact it "was all that was available at that time." (App'x p. 386; p. 402). Moreover, the post-conviction relief judge ignored the fact many of the State's maps—by Slovenski's own admission—were consistent with the ones he generated and the ones he claimed were not so appeared to have actually been largely consistent with his maps aside from having wedged-shaped areas highlighted as opposed to round-shaped ones. (App'x pp. 468-474). Likewise, the post-conviction relief judge ignored Slovenski's acknowledgement the State never argued its maps showed Upson was actually at the scene of the robbery at the time it was committed. (App'x p. 403). Finally, the post-conviction judge made no reference to the fact the solicitor *conceded* in closing argument the State's maps demonstrated Upson was, in fact, downtown prior to the robbery, which corroborated the claims made by several of his alibi witnesses as opposed to discrediting them. (App'x p. 184; pp. 232-233).

Contrary to the post-conviction relief judge's legally-and-factually-erroneous ruling, defense counsel was not—and could not have been—deficient for failing to present the expert testimony the post-conviction relief judge found he should have presented to call into question Fraser's testimony during trial. Critically, that is true because—just as Upson's expert readily acknowledged—the information presented during the evidentiary hearing to challenge the accuracy of Fraser's testimony *did not exist* until well after Upson's trial took place. Based on that fact coupled with the fact Upson's expert conceded he would have used the same "pie method" used by Fraser at the time of trial, defense counsel simply could not have been deficient

for failing to avail himself of technology and evidence that was not yet in existence, and the post-conviction relief judge's conclusion to the contrary was utterly illogical.[10] See Tillman v. State, 244 S.C. 259, 264-265, 136 S.E.2d 300, 303 (1964) ("He is not required to be infallible, *nor to do the impossible*, since the defendant is entitled to a fair trial and not a perfect one or a perfect result." (emphasis added)); see also Thornes v. State, 310 S.C. 306, 309-310, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or *facts which did not exist*, at the time of the trial." (emphasis added)).

Beyond that, even if the impossible could have been achieved and the then-non-existent evidence identified by the post-conviction relief judge somehow could have been presented during trial, that evidence nonetheless could not have altered the result of the proceeding. That is true because the evidence Upson's expert introduced during the evidentiary hearing was largely

[10] Notably, although he did not have the benefit of then-non-existent evidence and testimony at the time of trial, defense counsel did—in addition to reviewing the information related to Upson's phone records with a knowledgeable attorney as part of his trial preparations—thoroughly challenge Fraser's testimony by cross-examining her about the limited nature of the information Upson's phone records conveyed and about purported differences in some of the generated maps. (App'x pp. 157-162; p. 441). In light of that, defense counsel was able to—and did—take active steps to attack the reliability and value of Fraser's testimony even without offering the testimony of a defense expert. See Richter, 562 U.S. at 111 ("Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense."); cf. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) ("[C]ounsel'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."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (concluding trial counsel's decision not to present an expert witness to rebut the testimony of the State's expert witness constituted a legitimate trial strategy under the circumstances and reversing a ruling reaching a contrary conclusion), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); Frasier v. State, 306 S.C. 158, 160-161, 410 S.E.2d 572, 573 (1991) ("Petitioner . . . argues that trial counsel was deficient in failing to procure an expert witness to challenge the DNA evidence presented at trial. We disagree. 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.").

consistent with the evidence introduced by the State during trial aside from being slightly more accurate due to advances in technology that only came about well *after* the trial took place. Similarly, just like the State's evidence, Upson's evidence showed he was in Aiken on the date of the incident without directly placing him at the scene of the robbery at the time it was committed, and the evidence in no way called into question Fraser's testimony establishing Upson suspiciously called the restaurant several times just before it was robbed, including one time while blocking his identifying information. Under those circumstances, the evidence presented by Upson to support his post-conviction relief claims was not sufficient to establish the requisite prejudice needed for him to be entitled to relief as it could not have impacted the outcome of trial. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Accordingly, as defense counsel was not—and could not possibly have been—deficient for failing to present evidence that did not yet exist and which could have had no impact on the result of the trial, the post-conviction relief judge erred as a matter of law by finding defense counsel was constitutionally ineffective for failing to present expert testimony to challenge the State's evidence generated from Upson's phone records. See Yarborough, 540 U.S. at 8 ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."); cf. Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 90-91 (1992) ("We cannot say that trial counsel was ineffective for failing to present evidence of a complex psychological phenomenon which had not yet been recognized by this Court, and which only recently had been identified by the scientific community."). The post-conviction relief judge's ruling should be reversed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the post-conviction relief judge's grant of relief should be reversed.

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