

No. 20-6037

ORIGINAL

Supreme Court, U.S.  
FILED

OCT 05 2020

OFFICE OF THE CLERK

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

DAVID WILLIARD

— PETITIONER

(Your Name)

vs.

PEOPLE OF THE STATE OF ILLINOIS

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ILLINOIS APPELLATE COURT FIRST DISTRICT

\_\_\_\_\_  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAVID WILLIARD

\_\_\_\_\_  
(Your Name)

10930 LAWRENCE ROAD

\_\_\_\_\_  
(Address)

SUMNER, ILLINOIS. 62466

\_\_\_\_\_  
(City, State, Zip Code)

(618) 936-2044

\_\_\_\_\_  
(Phone Number)

## **QUESTION(S) PRESENTED**

- I. Appellate Court erred in denying Petitioner's Ineffective Assistance of Counsel claim. Where prejudice was established, in the trial courts findings that the alibi witnesses credibility carried great weight in his decision, and the trial court's decision was based partially on evidence not presented. Violating petitioner's 6th Amendment right to effective assistance of counsel, of the United States Constitution.
- II. The Appellate Court erred in denying petitioner's claim that the State failed to prove beyond a reasonable doubt that David Willard was the shooter, where the sole identification witness's testimony was unreliable given his inability to observe the shooter and the rapid sequence of events and the Appellate Court's failure to consider excepted science on eyewitness identification, and defense alibi witnesses. Violating petitioner's right to due process law under the 5th and 14th Amendment of the United States Constitution.

## **LIST OF PARTIES**

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## **RELATED CASES**

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	9
CONCLUSION.....	15

## INDEX TO APPENDICES

APPENDIX A Opinion of the Illinois Appellate Court First District

APPENDIX B Order of the Illinois Appellate Court Denying Petition for Rehearing

APPENDIX C Denial of Petition for Leave to Appeal by the Illinois Supreme Court

APPENDIX D

APPENDIX E

APPENDIX F

## **TABLE OF AUTHORITIES CITED**

### **CASES**

### **PAGE NUMBER**

HAMPTON V. LEIBACH, 347 F.3d 219 (7th Cir. 2003)	11
LOCKHART V. FREIWELL, 113 S.Ct. 838	9
NEIL V. BIGGERS, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed 2d 401	13
PEOPLE V. ALLEN, 376 Ill.App.3d 511	13
PEOPLE V. BROWN, 2017 IL App (1st) 143877	10
STATE V. HENDERSON, 209 N.J. 208 (2011)	13
STRICKLAND V. WASHINGTON, 466 U.S.668, 80 L.Ed 2d 674, 104 S.Ct.2052	9,11

### **STATUTES AND RULES**

720 ILLINOIS COMPILED STATUTES 5/8-4 (A) (West 2012)

720 ILLINOIS COMPILED STATUTES 5/9-1 (a)(1) (West 2012)

### **OTHER**

IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☐ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☒ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☒ reported at 2019 IL App (1st) 152651-U; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the Illinois Appellate Court 1st Dist. court appears at Appendix A to the petition and is

☒ reported at 2019 IL App (1st) 152651; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 5/25/20.  
A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. The 5th and 14th Amendments of the United States Constitution. Right to Due Process of Law.
2. The 6th Amendment of the United States Constitution. Right to Assistance of Counsel.



## STATEMENT OF THE CASE

David Willard was charged with, multiple counts of attempted first degree murder (720 ILCS 5/8-4(A)(West 2012); 720 ILCS 5/9-1(a)(1)(West 2012)) stemming from the July 10, 2012 shooting of Lamont Jackson. Petitioner waived his right to a jury trial, and proceeded to a bench trial.

At trial, Lamont Jackson testified that in the early morning hours of July 9, 2012, he was involved in a verbal altercation with defendant. As he was talking to his friend and walking backwards on a sidewalk near his home, Jackson accidentally brushed up against defendant, who was standing in the middle of the sidewalk with a group of people. During the encounter, Jackson stood four to five feet away from defendant; he was looking at defendant's face for 20 to 25 seconds. Although it was dark out, streetlights shone down :right on top of the pavement" where the men were standing.

When Jackson and his friend entered his home, Jackson asked his friend what defendant's name was, and his friend responded with a name. Jackson testified that he did not know defendant before that night, although "he may have seen him around" before the incident.

After Jackson and his friend were in his house for a short period of time, they left the house and walked back toward the sidewalk, where they again encountered defendant. Defendant, who at that point was not wearing a shirt, walked toward Jackson and tried to "start it back up." Jackson noticed that defendant had a tattoo of a six-pointed star on his chest. Defendant said "what's up now" and Jackson told him "we can take it to the street" if he wanted to fight. Defendant said "I got you," got into a green station wagon with tinted windows, and drove away from the scene. Jackson estimated that this second encounter lasted two to three minutes, and he testified that the area was illuminated by street lighting.

Around 1 a.m. on July 10, 2012, Jackson and his friend Jerry Fort were walking back to his house when they heard a sound coming from the bushes just off the path. The men could not determine the source of the sound and continued walking. Fort told Jackson that he needed to use the restroom and stopped in between two parked cars to urinate. Jackson continued walking down the street. A short time later, Jackson "felt something" and turned around. When he turned around, he saw defendant wearing a hood and pointing

a gun toward him. He was able to look directly at defendant's face from a foot away for "a couple of seconds." Jackson further testified that the area was illuminated by street lighting and porch lights on nearby houses.

Jackson hit defendant's arm, and the gun discharged. Defendant then shot him in the right thigh. Jackson fell to the ground, and defendant shot him a total of seven times in the back, side, and right thigh. Defendant then ran away. When police responded to the scene, Jackson said that "Midnight" had shot him.

On July 12, 2012, Hazel Crest Police Detective Ed Beard visited Jackson in the hospital. During the visit, Jackson told Detective Beard that "Midnight" shot him and gave Detective Beard a physical description of defendant. After signing a lineup advisory form, Jackson viewed a photo array and identified a photograph of defendant. He testified that he had no doubt that defendant was the person who had shot him.

On cross-examination, Jackson testified thta he had consumed a shot of alcohol on the night to the shooting but denied telling Detective Beard that he was walking home "to get back to his drink." He explained that defendant's hood was up over his head but was not tightly wrapped around his face. He did not recall telling Detective Beard that the hood "was pulled to his face tightly." He did not recall telling Detective Beard that the shooter had a tattoo on his chest, because the shooter was wearing a hoodie and it would be "impossible to see his chest through his hoodie."

Detective Beard testified, that on July 10, 2012, Fort told him that the shooter was between 5 feet 11 inches and 6 feet tall and had a dark skin complexion and a thick build. On cross-examination, Detective Beard testified that Jackson had told him that he and Fort had been walking home to "get his drink."

Shacora Mohead testified that she was with defendant, who had the nickname "Midnight," in the early morning hours of July 9, 2012. While sitting in her green station wagon, she observed defendant and Jackson have verbal argument after Jackson bumped into him on the sidewalk. She testified that defendant reacted calmly and told Jackson that he was too clsoe to him. Jackson said "my bad" but began yelling and swearing at defendant. When it looked like the men were going to fight each other, Mohead told defendant to get in her vehicle. As she and defendant began to drive away, Jackson stood up on a

light pole and said "come on, bitch, I will stomp your mother---ing ass up under this motherf---ing light." On July 13, 2012, Mohead spoke with Detective Beard and identified a photograph of Jackson as "the guy that Midnight got into a fight with."

The parties stipulated that Doctor Jane Lee, a trauma specialist at Christ Hospital, would testify that she examined Jackson and found three gunshot wounds to his left thigh, three gunshot wounds to his pelvic region, and one gunshot wound to his right thigh. These wounds required multiple surgeries. Upon admission to the hospital, Jackson had a blood alcohol content (BAC) of .033 grams per deciliter.

During the defendant's case-in-chief, Fort testified that in the early morning hours of July 10, he, Jackson, and two other men were smoking, drinking, and playing a game in Jackson's basement. When the other men left the house, Jackson and Fort went outside to see them off. After the men drove away, Jackson and Fort walked to a friend's house, where people were standing on a back porch socializing. After staying at the friend's house for five to ten minutes, Jackson told Fort that he wanted to go back home to grab a drink, and the two men began to walk back to Jackson's house. On the way back, the men heard a noise come from the bushes but continued walking because they could not see what was making the noise.

Fort then walked off of the sidewalk to urinate and saw someone wearing a black hoodie run past him. After the person in the hoodie exited his field of view, Fort heard gunshots. Fort went back to the sidewalk and saw Jackson lying on the ground 40 to 45 feet away. He testified that the street had lighting, but that all of the street lights were on the opposite side of the street, and that Jackson was lying in a dark area between two streetlights. The person with the black hoodie was standing over Jackson. Fort could not see the person's face, and testified that the person's hood was "kind of like real tight, like they had the strings pulled tight." When officers arrived on the scene, he told them that he did not know who the shooter had been. A couple of days later, he went to the Hazel Crest police station to speak with Detective Beard. He could not recall the details of his conversations with Detective Beard because he was "kind of shaken up." He testified that defendant's nickname was "Midnight," and that he had known defendant for

10 Or

10 or 12 years, but that he did not see defendant at the scene of the shooting.

Shonta Baker testified that she remembered July 9, 2012, because her favorite television show "Love & Hip Hop" was on at 7 p.m. On Mondays, a rerun of "Love & Hip Hop" airs at 7 p.m. and a new episode airs at 7:30 p.m. At 10 that morning, Baker's boyfriend Marcus left her apartment to go to the store. Defendant, who was Marcus's friend, knocked on the door to the apartment at 10:30 a.m. Baker told defendant that he would have to wait until Marcus came home before he could come in the apartment. When Marcus came home at 10:45 a.m., he and defendant entered the apartment. Baker made breakfast at 11 a.m., and they finished eating breakfast at 11:30 a.m. At sometime between 2 or 3 p.m., defendant left the apartment to get a pizza from a restaurant "right up the street" and returned to the apartment by 4 p.m. Defendant was still at Baker's apartment when "Love & Hip Hop" came on and did not leave her apartment until 11 p.m. on July 10, 2012. In other words, at the time of the shooting at 1:15 a.m. on July 10, 2012, defendant was at her house.

On cross-examination, Baker explained that defendant stayed at her apartment from the evening of July 9 until 11 p.m. on July 10 because her car had broken down and he was waiting for a ride. She denied telling a State's Attorney investigator that she did not see defendant on Tuesday, July 10, 2012. She also denied telling the investigator that "she was unsure that the shooting took place on Tuesday, July 10, 2012. She also denied telling the investigator that "she was unsure that the shooting took place on Tuesday at 1:15 a.m., but even if she was mistaken, defendant didn't come until Tuesday at 11:30 in the morning."

During closing argument, defense counsel argued that Jackson's identification of defendant was unreliable because of his poor opportunity to observe the shooter and low degree of attention at the time of the shooting. Counsel also argued that Baker credibility testified that new episodes of "Love & Hip Hop" air on Mondays, and that defendant had stayed at her house from Monday evening until Tuesday at 11:30 p.m.

The trial court found defendant guilty of attempted first degree murder and aggravated battery. The court noted that it found Jackson's testimony to be "coherent, consistent, and credible." The court found Baker's testimony

that defendant had been at her house from 10:45 a.m. on July 9 to 11 p.m. on July 10, because he could not find a ride, to be incredible. It also found that Baker's testimony was "totally impeached" by Kucharczyk. After a sentencing hearing, the court merged one count of attempted first degree murder and the aggravated battery count into the remaining attempted first degree murder count and sentenced defendant to 31 years' imprisonment.

## **REASONS FOR GRANTING THE PETITION**

I. Appellate Court erred in denying Petitioner's Ineffective Assistance of Counsel claim. Where prejudice was established, in the trial courts findings that the alibi witnesses credibility carried great weight in his decision, and the trial court's decision was based partially on evidence not presented. Violating Petitioner's right to effective assistance of counsel under the Sixth Amendment of the United States Constitution.

The Illinois Appellate Court erred in denying petitioner's claim of ineffective assistance of counsel. Where counsel failed to rehabilitate alibi witness Shonta Baker.

The case of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052, 2064. Established that a two part test is required for a claim of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

In establishing the standard of prejudice, reasonable probability has been determined by this court, "defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*" and that the reasonable probability standard "is not a sufficiency of evidence test." *Kyles v. Whitley*, 115 S.Ct. 1155, 1156, (1986); Rather, "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.; In other words, a "counsel's unprofessional errors must so upset the adversarial balance between the defense and prosecution that the trial was rendered unfair and the verdict suspect." *Lockhart v. Fretwell*, 113 S.Ct. 838, 842.

Shonta Baker testified that Willard came to her house on the morning of Monday, July 9, 2012. She remembered that it was a Monday because that was the day the television show "Love & Hip Hop" came on at 7 p.m. (R.FF130) The State in its surrebutal presented the testimony of investigator Marta Kucharczyk. Kucharczyk testified that she spoke with Shonta Baker on October 30,

2014. (R. FF155) Baker told her that she did not see Willard on July 10, 2012 (R. FF156). The State asked Kucharczyk: "Did Ms. Baker also indicate that she was aware that the shooting took place on Tuesday at 1:15 a.m., and even if she was mistaken he came on Tuesday rather than Wednesday that he came at 11:30 a.m.?" (R. FF156) Kucharczyk responded, "That correct." (R. FF156)

Appellate Counsel argued on direct appeal that if trial counsel would have presented the evidence that the show "Love & Hip Hop" aired on Monday July 9, 2012, was correct. That she could have rehabilitated Baker's testimony about Willard's whereabouts at the time of the shooting. That trial counsel's failure to present this readily available information was objectively unreasonable and prejudiced Willard.

The Appellate Court in its opinion reasoned: "Here we find the defendant's claim fails, because he cannot show a reasonable probability that the introduction of evidence that new episodes of "Love & Hip Hop" aired on Mondays would have changed the result of his trial. See *People v. Brown*, 2017 IL App (1st) 143877, ¶55 (ineffective assistance claims may be resolved on prejudice grounds without reaching the issue of deficient performance). Although the court found that Kucharczyk's testimony impeached Baker's testimony regarding which day "Love & Hip Hop" aired and, therefore, which day defendant was at her apartment, it also discredited Baker's testimony because it found her explanation for the extraordinary length of defendant's visit to her apartment, that defendant was waiting for a ride because his car broke down, was unbelievable. The court specifically stated:

"There is testimony of the alibi witness who testified that the defendant was at her house, in essence, for about 36 hours from 10:45 on July 9th all the way to 11:00 p.m. on July 10th.

But what's interesting, she indicated during the course of her testimony a couple of times, maybe three times, that he was there all that time because he couldn't get a ride.

I don't find that credible. She said their car was broken down. It's almost like he was stuck for 36 hours. I don't believe that. I don't find her credible in that regard."

Thus, even if trial counsel had rehabilitated Baker by showing that "Love

& Hip Hop" aired on Mondays, it is not reasonably probable that the outcome at trial would have changed.

In assessing petitioner's claim the Appellate Court erred in the standard used to determine the prejudice prong, by failing to include the test when the evidence is closely balanced. As well the court relied on evidence not presented at trial, but interjected by trial court in it's credibility determination that is the basis of the claim.

In U.S. ex rel. Hampton v. Leibach, 347 F.3d 219 (7th Cir. 2003) explaining the Strickland, prejudice prong determined, "Rather, a "reasonable probability" is one sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068. Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established so long as the chances of acquittal are better than negligible."

In Strickland v. Washington, 104 S.Ct. 2052, 2065 the court stated "The making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgement on grounds of evidentiary insufficiency, that the judge or jury acted according to law." Id. at 2068.

In this case the trial court made its credibility determination relied on its own conclusions, rather than the facts in evidence, and the Appellate Court affirmed the conviction upon that erroneous conclusion, and the impeachment of that witness.

The trial court's interjecting that alibi witness Baker was not credible because defendant was at her home for 36 hours. The court made an improper conclusion that defendant was "stuck" at her home for 36 hours.

The evidence presented at trial was clear that Willard went to her home to visit with his friend Marcus Offord. That he did not attempt to obtain a ride home until "about maybe 2:00 o'clock, but they never came to pick him up until 10:30, 11:00 o'clock" on Tuesday, July 10. (R. FF144). The court also went on to reason that it didn't have the option of calling a cab, another form of public transportation, or other friends that he could have contacted for a ride. (R. FF203)

With the trial court drawing these conclusions upon evidence not presented at trial makes those conclusions unreliable, and unable to support its credibility determination. With that



In determining counsel's ineffectiveness, the court is to make it's determination with the balance of the weight of the evidence. Where the evidence is closely balanced, counsel's ineffectiveness is more likely than not to have prejudiced defendant's trial. Here the evidence presented by the prosecution outside of the victim's testimony was circumstantial, and did not go to confirm guilt. Defense presentation of evidence through testimony to defendant's actual innocence, created a clear counter to the State's case-in-chief. Therefore it is clear that the evidence was closely balanced.

Because the evidence was closely balanced, the effect of counsel's failure to rehabilitate his main defense witness, and the court's reliance on evidence not in the record as to that witnesses credibility, clearly prejudiced defendant. The court's decision to convict defendant was made in consistency with the impeachment of the witnesses, and the court's misinterpretation of the testimony of Shonta Baker. The court pointed to nothing other than this balance in determining defendant's guilt.

Also in note to this claim petitioner is challenging the identification of defendant by the victim in this case. The question of victim's identification weighs also to the balancing test.

Wherefore, Petitioner believes he has shown that counsel was ineffective for failing to rehabilitate defense witness, and that petitioner was prejudiced by such failure.

II. The Appellate Court erred in denying Petitioner's claim that the State failed to prove beyond a reasonable doubt that David Willard was the shooter, where the sole identification witness's testimony was unreliable given his inability to observe the shooter and the rapid sequence of events and the Appellate Court's failure to consider excepted science on eyewitness identification, and defense alibi witnesses. Violating petitioner's right to due process of law under the 5th and 14th Amendments of the United States Constitution.

The Appellate Court erred in its denial of his claim that the State failed to prove beyond a reasonable doubt that petitioner was the shooter.

In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 the United States Supreme Court set 5 factors to be considered in determining the reliability of an identification; 1) the opportunity of the witnesses to view the offender at the time of the crime; 2) the witnesses' degree of attention; 3) the accuracy of the witnesses' prior descriptions of the offender; 4) the level of certainty demonstrated by the witnesses at the confrontation; and 5) the length of time between the crime and confrontation.

It has been widely accepted that certain conditions can compromise a witnesses's accuracy in identification. These include in relevant part that the presence of a weapon can interfere with a witnesses degree of attention, and the effects of alcohol consumption can interfere with a witnesses degree of attention. This is a widely excepted set of principles by both the Illinois Courts and Federal Courts. See *People v. Allen*, 376 Ill.App.3d 511, 524-25(1st Dist.2007), and *State v. Henderson*, 209 N.J. 208, 265 (2011).

In this case the stress of the brief, nighttime incident, Jackson had a poor opportunity to view the offender. Jackson was approached by the offender from behind and the shooting occurred at an unlit stretch of the street. (R. EE44, FF109-110) Thus, Jackson's ability to observe the shooter was significantly compromised. Moreover, based on Jackson's testimony, he was shot right away, limiting the time he had to observe the shooter. (R. E44)

Jackson's degree of attention, the second factor, was also compromised. First, research has consistently shown that the presence of a weapon makes identifications less reliable because "a witness's focus on a weapon indicates less attention is paid to encoding the perpetrator's characteristics."

Also, Jackson's degree of attention was compromised by his drinking earlier in the night. Jackson admitted that he had been drinking before the incident. (R. EE69), and after the passage of time his blood alcohol content was .033 grams per deciliter when he was admitted to the hospital.

The State's entire case relied on the identification of Jackson. With all the conditions taken into account, Jackson's identification was clearly compromised. The State presented no physical or forensic evidence--i.e., no fingerprints, and no DNA--matching Williard. gave no inculpatory statement. Finally alibi testimony provided by Shonta Baker, while impeached at trial, actually supported Williard's defense. (See Argument I) Taken together, all of this evidence demonstrates that State failed to prove Williard guilty beyond a reasonable doubt.

Wherefore, petitioner has shown that the State failed to prove beyond a reasonable doubt that he was the shooter, and his conviction should be overturned.

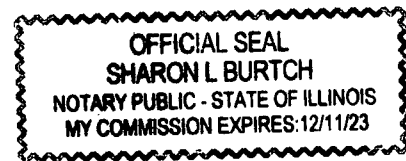
### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dan Willard

Date: September 30, 2020



Sharon L. Burtch  
Notary Public 9/30/2020