

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge  
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JOY MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212481  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## **ISSUE PRESENTED**

Did the PCR court err in improperly denying Petitioner's claim for ineffective assistance of trial counsel where the only evidence against Petitioner at his criminal trial was a single eyewitness's testimony; where trial counsel's sole strategy was to impeach this identification testimony; where trial counsel did not engage an expert in the field of eyewitness testimony to consult or testify to how easily the eyewitness could mistakenly identify Petitioner; and where the PCR court intentionally ignored the evidence of what such an expert's testimony would have been at the criminal trial?

## STATEMENT

“[T]here were no fingerprints; there was no physical evidence; there was no evidence at all. The only evidence against Mr. Mack was an identification made by the victim . . . it was sixteen days after the armed robbery occurred.” App. 640, ll. 15-21. Petitioner Mack’s trial counsel was recounting where the case went bad. “I know that I did not feel that there was enough evidence for conviction, but obviously – (pause).” App. 670, ll. 1-3.

Petitioner’s trial counsel believed an acquittal at trial was almost guaranteed. As an ex-prosecutor himself, he could not remember a case having a single eyewitness as the only evidence against the accused—“[t]here is usually more evidence in a criminal case than just testimony.” App. 642, ll. 6-11. Moreover, trial counsel had grounds to impeach the store owner’s identification—for example, the owner only saw the unmasked gunman’s face for a few moments as he approached; the owner told police shortly after the robbery that he would not recognize the robbers; and at the time the owner was being prosecuted on charges of selling counterfeit goods by the same office that was prosecuting the case at bar.

In hindsight, Petitioner’s case started heading the way of conviction before his jury trial even began. His case was heard alongside a codefendant in Charleston County before a jury and the Honorable J.C. Nicholson on May 22, 2012. App. 1. He had been indicted on July 2, 2007 on charges of armed robbery, assault and battery with intent to kill, and kidnapping. App. 723-731. His trial counsel was Alex Apostolou, and the State was represented by Trip Lawton and Kevin Hales. App. 1. The State was alleging on June 14, 2007, Petitioner, carrying an AK-47, entered a clothing store around 7:30 p.m. with four other black males. App. 155-156. Petitioner allegedly pointed the rifle at the store owner, Aytekin Ayazgok; ordered him to the ground; and beat him over the head with the rifle multiple times. App. 156. The group then emptied the store owner’s pocket

of over \$1,000, tied him up, and dragged him to the back of the store before leaving. *Id.* The State's case against Petitioner was based solely on the store owner's identification of Petitioner to the police on June 30, 2007. App. 214.

Trial counsel's strategy was alluringly simple: highlight that the eyewitness testimony was the only evidence implicating Petitioner, "poke holes" in the identification, and impeach the credibility of the witness. App. 641, ll. 4-13. Distressingly, however, trial counsel was quickly disarmed of the evidence of the store owner's pending prosecution. In a pretrial colloquy, codefendant's counsel informed the court he intended to introduce the evidence as a prior bad act to impeach the store owner's character for truthfulness and bias. App. 153. "I'm not going to allow you to go into opinion charge. Okay? Period," the court responded. App. 154, ll. 8-9. More fatally, Petitioner's trial counsel, though committed in principle to the position of codefendant's counsel, failed to actually speak up and formally join the motion.

Trial counsel muddled through a cross-examination of the store owner with the rest of the discrediting evidence he had martialed: The owner admitted he only saw the unmasked gunman's face while he approached from the entrance of the store. App. 214; App. 249-250. When the gunman stood up close, he was aiming an AK-47 at the owner's face. App. 215. On the day of the robbery, when the police asked the owner if he could recognize the robbers, he said no, "I can't identify them." App. 213. The owner also told police that day the gunman wore jeans, a red shirt, and gray skull cap, but testified the day before trial that he wore black jeans, a black hoody, and a black snow cap. App. 209-211. And when the owner identified Petitioner standing near his store to a police officer on June 30, he had recently seen Petitioner's photo in a newspaper, and just the day before he saw Petitioner in the store and said to his wife he was not certain Petitioner was the gunman. App. 99, ll. 22-255; App. 249-255.

In spite of this examination and to trial counsel's dismay, he was never able to crack the store owner's steadfastness in his identification of Petitioner:

Q: And you said to [employee], That is the guy.

A: Yes, sir.

...

Q: Okay. Okay. So [employee] saw the person that you said was, 100 percent, one of the robbers?

A: Yes, sir.

App. 229, ll. 15-23.

Q: And did you say [to your wife], I'm 100 percent positive that's the robber?

A: Yes, sir.

Q: You were 100 percent positive?

A: Yes, sir.

Q: Or did you say, I think that is the guy. I'm almost sure.

A: No, sir. I said 100 percent sure.

App. 233, ll. 11-18.

Q: You saw him in your store?

A: Correct.

...

Q: And this second time, I'm asking if you were instantly sure?

A: Yes, sir.

Q: And you said that you were 100 percent sure, right?

A: Yes.

App. 237, l. 12 – App. 238, l. 2.

Q: Okay. And after Joy came into the store, you turned to your wife and you said something.

A: Yes, sir.

Q: Okay. What did you say when you turned to your wife and said something to her?

A: I said, I'm 100 percent sure that is the guy who robbed me. He had an AK47.

Q: And now you've looked at that document to compare your testimony when your prosecutor asked you that question yesterday.

A: Yes, sir.

Q: And you still want to have that answer?

A: Yes, sir.

Q: You still say that you were 100 percent sure?

A: I'm still saying I'm 100 percent sure.

...

Q: . . . My question is, yesterday when you testified, did you say you were 100 percent sure? . . .

A: I don't remember what I say yesterday, but I'm 100 percent sure it was him. I don't remember what was my statement. I always say I'm 100 percent sure.

App. 237, l. 20 – App. 238, l. 20.

In his closing argument, trial counsel recapped the impeaching evidence before attempting to reconcile his theory of the case with the store owner's convictions in identifying Petitioner:

This is a single witness identification case. Those are scary. You probably have the highest rate, because what do we know? We know that sometimes people are just wrong. They're not trying to be malicious, they're not trying to be evil, but sometimes they're just mistaken, and that is what this is, a single witness identification.

App. 519, LL. 7-13. The jury returned a verdict of guilty on all charges. App. 545.

The trial court sentenced Petitioner to concurrent sentences of twenty years for the charge of assault and battery with intent to kill, twenty-two years for the charge of kidnapping, and twenty-years for the charge of armed robbery. App. 561-562. Petitioner timely appealed and argued in his brief that the evidence presented at trial was insufficient to support a conviction and that the trial judge erred in allowing the store owner's identification testimony under *Neil v. Biggers*.<sup>1</sup> App. 564-576. On May 17, 2011, the South Carolina Court of Appeals affirmed Petitioner's conviction, ruling that the evidence viewed in the light most favorable to the State supported the trial court's denial of a directed verdict and that Petitioner did not object to the store owner's in-court identification and preserve the issue for review. App. 591-592.

On July 5, 2011, Petitioner filed an application for post-conviction relief, arguing that he was denied effective assistance of trial counsel. App. 595-600. The State filed a return on September 27, 2011. App. 602-606. On May 21, 2012, Petitioner filed a pretrial brief arguing that trial counsel was ineffective in failing to join the codefendant's motion to allow impeachment by the store owner's pending charges and in failing to engaging an expert witness in the field of eyewitness identification for consultation and testimony.<sup>2</sup> App. 607-611. On May 22, 2012, a hearing was held before the Honorable Kristi Harrington. App. 638. Petitioner was represented by James K. Falk, and the State was represented by Karen Ratigan. *Id.*

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<sup>1</sup> 409 U.S. 188, (1972).

<sup>2</sup> Petitioner attached to the brief a twenty-six page affidavit from an expert in the field of eyewitness identification. The affidavit was the same that Petitioner would later offer into evidence at trial. The brief notified the court that Petitioner had already provided a copy to the State and that Petitioner would offer the affidavit in lieu of live testimony under *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

Trial counsel testified that not joining codefendant's motion to impeach the store owner with evidence of his pending prosecution was "a mistake." App. 645, ll. 19-20. He recognized he did not preserve the issue for review, and having a jury deciding Petitioner's case to hear that information was important:

A: . . . I was actually called the day after this trial or spoken with one of the jurors after this trial, was very upset about it, and felt that –

...

Q: But you have some reason to believe that maybe could have influenced the jury?

A: That was — yes, I have reason to believe was something that would have resonated with the jury and they didn't understand why that information was not before them.

App. 647, ll. 2-19.

Trial counsel also testified that he understood "serious, serious errors" occur in single-eyewitness identification cases, and engaging an expert to develop the evidence eliciting these errors was "a situation that should have been done." App. 650, l. 10 – App. 651, ll. 3. For example, trial counsel was familiar with the "weapon focus effect," the effect of stress during perception, and how these reduce the accuracy of an identification:

Q: Are you familiar with what is called the weapon focus effect?

A: Yes. That's basically where someone presents a weapon that your focus is solely on the weapon and not on the individual presenting it.

Q: Again, are you familiar with any of the studies that show great that effect is and how much that affects one's ability to make an adequate recall?

A: I think it dramatically impacts it. You know, I don't know specifically that number but I think that it dramatically impacts it and I think it makes it much less likely that it is an accurate identification.

Q: How about the fact that they are under any kind of stress at the time?

A: I think that is absolutely another aggravating factor that lessens the credibility of that identification.

App. 659, l. 7 – App. 670, l. 1. Trial counsel was also aware of the greater inaccuracy in cross-racial identifications. App. 665. He stated Petitioner was prejudiced by his failure to engage and examine an expert on eyewitness identification. App. 664. He further stated that his cross-examination did “obviously” did not adequately present why the store owner could be mistaken yet confident, and had he engaged an expert, he would have specifically focused on these effects contributing to “good faith but mistaken identifications” in his cross examination and closing. App. 664, ll. 20 — App. 666, l. 2.

During the PCR hearing, PCR counsel offered the affidavit from an expert in the field of eyewitness identification as discussed in the pretrial brief. App. 652-653. The affidavit described, inter alia, what specifically an eyewitness identification expert specializes in and how her expertise could have provided relevant evidence in Petitioner’s criminal trial. App. 612-637. PCR counsel explained that he was offering it to show such an expert could have presented testimony at the criminal trial undermining the accuracy of the store owner’s identification. App. 653-654. The PCR court admitted the affidavit into evidence as a court exhibit. App. 684.

On June 7, 2012, the PCR court issued an order dismissing Petitioner’s claim, ruling that Petitioner failed to prove his trial counsel was ineffective for failing to join codefendant’s motion to impeach the store owner by his pending prosecution and for failing to engage an expert witness. App. 680-687. Initially, the order noted that trial counsel “is an experienced attorney with many years of practice in the area of criminal defense.” App. 683. The PCR court found that trial counsel adequately cross-examined the store owner with the evidence at hand, and the inability to impeach

with the pending charges therefore did not prejudice Petitioner. App. 684. The PCR court also found that no evidence existed showing what additional evidence an expert witness could have provided because, since the author of the affidavit did not testify, the court could not examine and consider the content of the testimony. App. 684. Further, the court found consulting an expert would not have changed the outcome of the trial because a cross-racial bias was inapposite because the store owner, who was Caucasian, had an African-American wife, and trial counsel adequately cross-examined the store owner to highlight the effects of a short time period of perception and focusing on the gunman's weapon. App. 685. The PCR court also found that having an expert testify at trial would not change the outcome because trial counsel adequately cross-examined the store owner. *Id.*

This Petition for Writ of Certiorari follows.

## ARGUMENT

### STANDARD OF REVIEW

“This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law.” *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

### DISCUSSION

**This Court should reverse the PCR court’s denial of Petitioner’s claim because the evidence in the record in no way supported the findings in the PCR court’s order.**

This Court should reverse the PCR court’s denial of Petitioner’s claim because the evidence in the record in no way supported the findings in the PCR court’s order. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

First, the PCR court found that trial counsel adequately cross-examined the store owner with the evidence at hand, and the inability to impeach with the pending charges therefore did not prejudice Petitioner. The record does not support this finding to any extent for two reasons. First, trial counsel’s sole strategy was to neutralize the store owner’s identification testimony. Despite his attempts to do so in cross-examination, the store owner repeatedly averred that Petitioner was the gunman. This testimony was plainly the sine qua non compelling the jury to accept the State’s case. Therefore, to neutralize this testimony, trial counsel had to provide the jury with some explanation why the testimony was untrustworthy. Evidence that the State office prosecuting the case at bar was simultaneously prosecuting a case against the witness would show a bias and provide that

explanation. Second, trial counsel himself expressly admitted that not preserving the issue to secure the ability to present the impeachment testimony was a mistake, and in having to decide a verdict in this case, the jury members would have desired that information and it would have resonated with them. Considering the PCR court made a point in its order to note trial counsel's experience in criminal defense, ignoring this testimony was indeed anomalous.

The PCR court secondly found that no evidence existed showing what additional evidence an expert witness could have provided because, since the author of the affidavit did not testify, the court could not examine and consider the content of the testimony. The record fails to support this finding because the PCR court properly admitted the expert's affidavit into evidence.<sup>3</sup> Therefore, the PCR court's finding that Petitioner did not show how an expert could provide more evidence to adequately support his case was based not on a dearth of such evidence in the record, but on the court's disregard of probative evidence that it was obligated to consider.

Third, the PCR court found consulting an expert would not have changed the outcome of the trial because a cross-racial bias was inapposite since the store owner had a black wife, and trial counsel adequately cross-examined the store owner to highlight the effects of a short time period of perception and focusing on the gunman's weapon. Fourth, the PCR court found that having an expert testify at trial would not change the outcome because trial counsel adequately cross-examined the store owner. The evidence in the record also fails to support these last two findings for two reasons. First, a cross-racial bias was not inapposite in the case. Cross-racial bias refers to

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<sup>3</sup> *State v. Frazier*, 357 S.C. 161, 165, 592 S.E.2d 621, 623 (2004) ("In *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991), we recognized that, although the admission of expert testimony is generally a matter within the trial court's discretion, the exclusion of expert testimony on the issue of eyewitness reliability constitutes an abuse of discretion in cases in which, 'the main issue is the identity of the perpetrator, the sole evidence of identity is eyewitness identification, and the identification is not substantially corroborated by evidence

the phenomenon that members of one race have greater difficulty in accurately identifying members of another race. *U.S. v. Telfaire*, 469 F.2d 552, 559 (Dist. Ct. Cal. 1972) (Bazelon, C.J., concurring). *Accord State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991). Nothing in the record or in commonsense suggests that this phenomenon disappears when a person marries someone from another race. Ostensibly, the PCR court equivocated in using the term cross-racial bias, incorrectly contemplating a meaning involving racial prejudice in addition to the term's actual meaning. Second, the record does not support the findings that trial counsel adequately cross-examined the store owner or that having an expert testify would not change the outcome because, as discussed above, trial counsel's strategy *required* an explanation as to why the store owner's testimony in identifying Petitioner was untrustworthy. Trial counsel could not muster one in closing. A credentialed expert in the field of the psychology of eyewitness identification would have provided that explanation through scientific, authoritative testimony that the weapon-focus effect, the cross-racial bias, and the effect of stress on the witness during perception tend to betray reality in the witness's mind. Thus, the jury could consider that the store owner's identification of Petitioner was simply wrong, due to no fault of his own, despite his internal good faith, wholehearted belief. Trial counsel also testified to his belief that he was mistaken not to have an expert testify and that better development of these considerations would have impacted the jury and was necessary for adequate representation. Indeed, it is inherent that the testimony would have had a significant impact because it describes how wrong human intuition is about the accuracy of identifications, both for the witness on the stand and for the fact-finder sitting in the jury box. Accordingly, as discussed above, the

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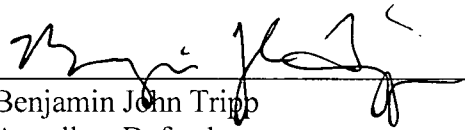
giving it independent reliability.'"). *See also Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

failure to provide the finder of fact with such evidence in a single-eyewitness identification case was decidedly unacceptable.<sup>4</sup>

**CONCLUSION**

For the foregoing reasons, this Court should grant Petitioner Joy Mack's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of June, 2013.

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<sup>4</sup> See also *Miller v. State*, 379 S.C. 108, 116, 665 S.W.2d 596, 600 (S.C. 2008) (“[T]rial counsel . . . maintained that the defense theory was misidentification and third-party guilt. In terms of misidentification, trial counsel failed to call an expert witness to testify regarding eyewitness identification testimony. Thus, the key defense was third-party guilt.”).

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County  
Kristi Lea Harrington, Circuit Court Judge

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JOY MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

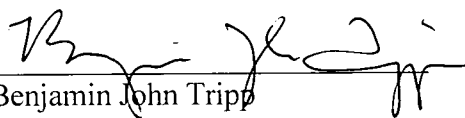
RESPONDENT

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CERTIFICATE OF SERVICE

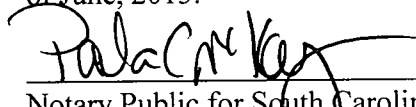
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of June, 2013.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of June, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.