

VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

RECEIVED

JUN 28 2013

S.C. Supreme Court

JOY MACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212481

APPENDIX

BENJAMIN J. TRIPP
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ASHLEIGH R WILSON
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

INDEX

INDEX	i
TRIAL TRANSCRIPT	1
FINAL BRIEF OF APPELLANT	564
FINAL BRIEF OF RESPONDENT	579
OPINION	591
REMITTITUR	594
APPLICATION FOR POST-CONVICTION RELIEF	595
RETURN	602
PRETRIAL BRIEF IN SUPPORT OF PETITIONER'S PCR APPLICATION	607
POST-CONVICTION RELIEF HEARING TRANSCRIPT	638
ORDER OF DISMISSAL	680
CLERK OF COURT RECORDS	723

1 avenue, trying to get you there. But what are the things
2 she does tell you? She tells you about the car out
3 there, multiple people use it, okay? She wouldn't be
4 surprised if Darrell Goss would use it, but lo and
5 behold, he would never drive it. What did she say?
6 Because of a driver's license. She said DUS, driving
7 under suspension. That shows you one other time before
8 when he was suspended he was driving, so that doesn't
9 hold a whole lot of water about him not having access to
10 that automobile.

11 They mentioned in the trial about Andy
12 logging items. The man has been beaten, brutally beaten,
13 in the hospital. He's got clothes all over the place.
14 Of course he's not going to log items. He doesn't know
15 exactly what was stolen. The sunglasses, and now they're
16 trying to get you off of the facts.

17 Remember what Andy said, just like Jim said:
18 No sunglasses were stolen in the store that day. But we
19 have Ben Goss's thumbprint on there. Well, I would hope
20 his prints would be in his own house. He lives there.
21 That has no link to the crime scene, absolutely no
22 relevance at all.

23 We go to the automobile. Who's in the house?
24 Ben and Darrell Goss, right outside the driveway, his
25 automobile that we've been told multiple people use it in

1 the house. Okay? There's a weapon in there. What else?
2 Before I get too far ahead of myself, also in the room is
3 a pair of Nikes. Look at the pictures. I know that they
4 objected because I tried to get Hallman to say they were
5 new, but look at the inserts. Obviously, common sense
6 will tell you those are brand new.

7 Pair of Nikes in the room, pair of Nikes in
8 the trunk of the car. Look at the pictures when you get
9 back there of the crime scene. There are boxes of those
10 same Nikes that have been gone through several times.
11 You can see that. Same pair of Nikes the day after the
12 crime, in the house, Darrell Goss is there, with a car
13 right outside, and, of course, we put the DMV lady on
14 there to show, one, that they couldn't argue to you that
15 we don't know whose car that is. It could have been some
16 random friend that pulled up there, but no, where does
17 the car come back to? That residence. It's there.
18 Darrell Goss was there.

19 The testimony, now, put James Hill on there.
20 Old pistol, couldn't trace it. We wanted to be able to
21 tell you who it came back to; otherwise, they would say,
22 We don't know whose gun that is. It could be anybody's
23 gun. They ran fingerprints on it. Three came back.
24 They weren't identifiable. There is nothing you can do
25 about them. It's what they tried to do.

1 And, of course, as Catherine Leisy told you,
2 there is blood on it. Now, remember, look at the
3 pictures of the crime scene. There is blood splatters
4 all over there, drops of blood. When he's down on the
5 ground, getting beat with the gun, he says he sees the
6 pistol. That is where the blood came from. He didn't
7 get hit by the pistol. That is his blood. He's going to
8 try to explain that away.

9 He couldn't do it. Ladies and gentlemen:
10 The latent prints on the front door, they're wet. It's
11 just as good as a facial identification. It takes the
12 guessing game out, okay? It makes it easier on y'all,
13 and there is two theories. There is only two ways to
14 look at this for Darrell Goss: One: Monday, he was in
15 the store. We heard that in testimony, so Tuesday goes
16 by, Wednesday goes by, all day Thursday goes by.

17 Somehow those prints weren't cleaned at all,
18 and they stayed wet the whole time. We know that is not
19 possible. Second theory is by chance the man with the
20 worst luck of any man alive, worst luck of any man alive,
21 stumbles upon a robbery in progress, walks up to the
22 window, throw his hand up on there, doesn't go in,
23 leaves, goes back to his house, the next night, police
24 show up there, I'm just going to randomly hide. I'm just
25 going to randomly have all these tags in the room right

1 beside me. I'm just going to randomly have two pair of
2 Nikes, hadn't been hardly touched, got the inserts in the
3 things, and just randomly, right outside in my driveway,
4 is a pistol that has got the victim's blood on it. That
5 is a lot of hurdles for Mr. Smiley to jump. And I tell
6 you what --

7 MR. SMILEY: Your Honor, I'm going to object.

8 THE COURT: Overruled. Go ahead.

9 MR. LAWTON: Our standard is beyond a
10 reasonable doubt. He wants you to put a standard that is
11 beyond all doubt, and that is not it. You just need to
12 be firmly convinced of Darrell Goss's guilt, ladies and
13 gentlemen, and he also wants you to believe that a hand
14 to one, hand of all doesn't apply.

15 We might as well put the AK47 in Darrell
16 Goss's hand. It doesn't matter. He was there,
17 participating in the crime that led to the kidnapping of
18 David and the beating of Andy and the armed robbery.

19 Ladies and gentlemen: I want to thank y'all
20 for being here this week. I know four days of being away
21 from your family, your jobs and everything is tough, but
22 this is the best judicial system in America, in the
23 world. Nobody does any better than us, okay? This is
24 the way it should be, letting jurors decide guilt and
25 innocence. I wouldn't have it any other way. Put the

1 burden on us. Put the burden on the state to stop these
2 hardened criminals from doing things like this in our
3 community.

4 I don't back down one bit, and that is why
5 we're here today. Ladies and gentlemen: Perfectly fine.
6 I love it that every defendant comes in here with a
7 presumption of innocence, and that is the way it should
8 be here in America, and I can tell you, at the same time
9 that every defendant, just like these two that ever, ever
10 walked into a courtroom or any courtroom in America, have
11 had that same presumption of innocence, that cloak of
12 innocence draped over their shoulders, but, ladies and
13 gentlemen, we've met our burden. That presumption has
14 been lifted. These guys are guilty of these heinous,
15 senseless crimes. Please, I ask you, please do not let
16 them get away with it. Thank you.

17 THE COURT: Mr. Apostolou?

18 MR. APOSTOLOU: Thank you. As briefly as I
19 may, a single accusation, a single accusation is a
20 powerful, powerful thing: I saw him, he did it, and it's
21 a powerful, powerful thing, and that is why we're here.
22 You take that single accusation and you combine it with
23 zero supporting evidence, absolutely zero supporting
24 evidence. Then you add in a stream of inconsistencies,
25 and then you add in the defendant's own words, I mean the

1 victim's own words: I don't think I can identify the
2 guys if I see them again. Those are from that night,
3 6/14/2007, the day of the robbery. That is what the
4 victim said that night.

5 You factor in absolutely no other evidence at
6 all. You factor in the inconsistencies that we've seen
7 throughout the testimony, and you factor in the
8 defendant's words, and you take that single acquisition.
9 Instead of being a powerful, powerful thing, it becomes a
10 dangerous and it becomes a scary thing.

11 What happened to Andy is a tragic thing.
12 Everybody in this courtroom is going to agree on that.
13 He's brand new in this country. He's starting a business
14 right away, and what happens to him is a terrible thing.
15 But that doesn't relieve us of our burden to make sure
16 that we convict the right people for that crime. We're
17 not going to give Andy justice by convicting anybody for
18 that crime. We're here to convict the people that the
19 state has proven to you beyond a reasonable doubt were
20 the ones that committed this crime.

21 So I agree with Mr. Lawton: We're here for
22 justice, we're here for Joy Mack's justice, because he's
23 the one that is on trial today.

24 Analyzing Joy Mack's case is really a
25 two-part analysis. The first part is you're going to

1 analyze the victim's version of what happened. The
2 second part of it is you're going to analyze the accuracy
3 of the identification. I would suggest to you that you
4 have to believe beyond a reasonable doubt the victim's
5 version of the events to even get to the second version,
6 because if you don't believe the victim's versions of
7 events, the accuracy of identification is not possible.
8 So let's talk about the victim's versions of the events.

9 Now, bear in mind, the police report, we
10 learned from the police report, that there is another
11 version of what happened that night, that four black
12 males entered the store, that the fifth black male came
13 in afterwards, and that the man with the AK47 was light
14 skinned, wore a red shirt. That is in the police report.
15 That is the information we got from the police report.

16 But let's talk about Andy's version. It's
17 different from that version. Okay? Now, it's been kind
18 of hard for me to wait all the way through this trial to
19 talk about this version, but Andy's version was that the
20 door opened. He sees Joy Mack walking down, gets to him,
21 he pulls out a gun, gets within five feet, and pulls out
22 a gun. Having the defendant walking to him and pulling
23 out a gun does not do justice to Andy's version of the
24 events. If Andy said he had a pistol that is what the
25 defendant pulled on him, I would say that makes sense.

1 If he walks up, pulls a pistol out, that's fine. But
2 that's not what he's saying. He's saying that he's got
3 an AK47 machine gun in his pants.

4 Stop and think about that for a second. He's
5 got an AK47 hidden in his pants, and he walks 70 feet
6 over there. Andy is watching him the whole time. What
7 was Andy's testimony? Nothing unusual about the way he
8 was walking. Mr. Smiley asked him if he was limping when
9 he was walking there. No, he wasn't limping. Absolutely
10 nothing distinguishable about the way he was walking up
11 to him. The only thing that was distinguishable is when
12 he gets there he pulls out an AK47 out of his pants.

13 How in the world is somebody going to sneak
14 up on somebody that is being watched with a machine gun
15 in their pants, a three to four foot long rifle, was his
16 testimony? I mean, just think about that. But we know
17 that he didn't run, so I'm going to let you think about
18 that, and you can analyze that version of it, but I would
19 suggest to you that somebody with an AK47 in their pants
20 doesn't sneak up on anybody.

21 Look at the other version. That makes a
22 little bit more sense. The four guys come in, the man
23 with the AK47 comes in afterwards. If you believe the
24 second version is possible, it's possible, then you can't
25 come back with a guilty verdict against Joy Mack, because

1 that's not the version of the events that Andy talked
2 about. He talked about this guy walking straight towards
3 him. He saw his hands. His hands were down by his
4 sides. He wasn't carrying anything to hide that AK47,
5 but somewhere in his pants is an AK47 that he doesn't see
6 walking until it gets right there. I suggest to you,
7 ladies and gentlemen, that is really basically an
8 impossibility.

9 But I'm going to let y'all analyze that when
10 y'all get back in the chambers, and y'all can think about
11 that for a little bit more. So let's talk about the
12 accuracy of the identification.

13 Andy makes an identification on Joy Mack.
14 Doesn't do it that night. This is what he said that
15 night: I don't think I can identify him if I see him
16 again.

17 What testimony did he have that night? Well,
18 he testified while he was sitting there that he saw Joy
19 Mack starting to walk towards him. I think Mr. Lawton
20 started at that rail and started walking towards him. I
21 think that's probably not 70 feet. We kick it out a
22 little bit more. How long does it take to walk that
23 distance, five, eight seconds, tops? That's how long he
24 had to look at Joy Mack.

25 Once he's in the store, he testified that

1 he's down on the ground. He said the robbery lasted
2 three to five minutes, but most of that time he was down
3 on the ground. He wasn't looking. So that's the
4 distance that he had to look at Joy Mack. Well, what
5 impressions did he have that night? What did he tell us?
6 He said he had black jeans, he had a red shirt, and he
7 had a gray skull cap.

8 He said he was a little taller than me.
9 That's what he said in his statement, made two hours
10 afterwards. O.J. Faison got on the stand and told us
11 that they want to take a statement from the victim as
12 soon as possible because they want it as fresh as they
13 can get because the way that human's perception works is
14 it goes down over time. They want to get it as soon as
15 it happens to understand, so that is what they got. They
16 got black pants, red shirt, gray skull cap. Defendant, a
17 little taller than me. I don't think I would be able to
18 recognize him if I saw him again.

19 Well, he took the stand and testified at the
20 trial that he was wearing a black hoody, he was wearing a
21 black snow cap. We don't even know what that is, black
22 snow cap, and black jeans. Mr. Smiley asked him a
23 question, he said, Didn't you have a different
24 identification, the night of the robbery?

25 And Andy said, Yeah, I did. You know what?

1 I did, and what I said at the time of the robbery was
2 right. So it's already been brought to his attention.

3 But then I asked him how he was wearing the
4 hoody that night, and he was explaining where the hoody
5 was up on him and where the snow cap is. So Andy went
6 through a traumatic event. This is a terrible thing that
7 happened to him. His impressions, obviously, were off,
8 but he still doesn't know what happened that night.

9 This is a year and a half later. He still
10 can't tell us specifically what happened, and if he
11 doesn't know specifically what happened, how can you
12 possibly know what happened? Andy is eager to find
13 something, to find what happened.

14 His wife testified that he was scared. He
15 was nervous. It's got to be a terrible, terrible thing.
16 His business caters to young black males. He was robbed
17 by five young black males. Every time that door opens,
18 he's hitting the panic button. He's nervous; he's
19 scared. Is this guy going to do it? That is going to
20 put somebody on edge, so let's talk about the actual
21 identifications. Let's talk about the first
22 identification that he's got.

23 He sees Joy Mack pull up to his door. He
24 sees him through the window. Doesn't do anything about
25 it. Okay? He sees him at the store. He's outside of

1 the store. That is the first time he sees him. Doesn't
2 do anything about it. Why not, we ask him. Because he's
3 scared. Does that make any sense? Eighteen hours after
4 the robbery, he's already seen another alleged defendant
5 coming into that same store. Eighteen hours after the
6 robbery he's already called police, seeing somebody that
7 was connected with the crime.

8 He follows him out of the store, and he takes
9 their tag number. He gives it to the police. We also
10 heard testimony that he may have been over at the Dollar
11 Tree, trying to detain the suspect. That is not very
12 consistent with somebody who is scared. Mr. Lawton has
13 talked about hand of one, hand of all, and Andy has
14 talked about the fact that he wasn't scared of that guy
15 because that guy didn't have the AK47.

16 Well, you're going to be scared of all five
17 of these guys. The solicitor is right: All five of
18 these guys that are involved with it are bad guys.
19 You're going to be scared of all five of them. So if
20 he's not scared to chase this guy out of the store, but
21 he is scared to chase Andy out of the store, I would
22 suggest the reason he didn't call the police was because
23 he didn't really know. He wasn't sure.

24 That is one week after the defendant said, I
25 don't think I could identify the guys. That is the first

1 encounter, is one week. Another week goes by for the
2 second encounter. The second encounter occurs inside the
3 store, in cars, in that mall again, so now this is two
4 weeks after Joy Mack allegedly robbed this store, two
5 weeks after Joy Mack's codefendant, Darrell Goss, has
6 been arrested, could have been given information to the
7 police.

8 Most armed robbers are going lay low if their
9 codefendant got picked up a day after the robbery. Most
10 armed robbers that are in a conspiracy like that are
11 going to avoid where the robbery took place, but that is
12 not what Joy Mack did. Joy Mack went right back inside
13 the store. The solicitor said witness intimidation,
14 they're trying to scare him, or something like that.

15 I asked Andy if they had any conversation at
16 all. He said no. He Joy came in, he looked, he shopped,
17 and he left. Andy also said something else important
18 that day. He said, I think that's the guy. I'm almost
19 sure.

20 This is 6/29/07. That is what he said he
21 told his wife: I think that's the guy, I'm almost sure.
22 6/29/07, two weeks after he said he couldn't identify him
23 he's still not sure. Look at the way this identification
24 is going. What did O.J. Faison tell us? That memory and
25 identifications go down. His is going up. He sees him

1 the first time, doesn't do anything about it, but the
2 seed gets planted. He starts thinking. Second time, I
3 think that might be the guy. I think that's the guy who
4 robbed me. I'm almost sure, calls the police that day.

5 Joy Mack is there. He's going around the
6 business. He's not doing anything, so that brings us up
7 to the third identification, happens the day after that.
8 Where does it happen? Again, same mall.

9 Now we're two plus weeks after the victim has
10 said, I couldn't identify him if I saw him. Two weeks
11 after Darrell Goss has been in custody, couldn't have
12 been given information about his codefendants if, in
13 fact, they were actual actually codefendants.

14 So where does the third one occur? It occurs
15 right there. Well, Officer Singletary is the one that
16 talked to us about that. He said that he's standing
17 there in a North Charleston police uniform, that he's
18 standing there with the victim of the armed robbery on
19 the walkway, and Joy Mack comes walking right out of the
20 store and walks right up to him.

21 He also told us that there was a back door to
22 that business that Joy Mack was in. I would suggest to
23 you, ladies and gentlemen of the jury, a guilty man sees
24 a North Charleston police officer and the victim of an
25 armed robbery talking right in front of the store, a

1 guilty man goes out the back door. The innocent man
2 walks out the front door, and I didn't say a not guilty
3 man, I said an innocent man, because I think the evidence
4 shows that Joy Mack is innocent of this entire thing,
5 that this identification is wrong.

6 And whether it's deliberate, I don't think
7 it's deliberate, I'm not going to suggest it's
8 deliberate, but it doesn't matter to Joy Mack. It's
9 wrong. That's what you have to determine, whether it's
10 wrong, not whether it's deliberate or why or anything
11 like that. So what is that third identification? Joy
12 Mack comes walking right up to him. He's not running,
13 he's not avoiding.

14 Officer Singletary says, yeah, he was polite,
15 nice. Officer said, I put him on trespass notice. Joy
16 said okay, went about his business. Is that consistent
17 with a guy who has just had an armed robbery? No, it's
18 not.

19 What did Officer Singletary also tell us? He
20 told us that he wanted to arrest him on the spot because
21 of identification, but he called and he talked to other
22 officers that were more familiar with the case, and they
23 told him, Don't arrest him, just put him on trespass
24 notice.

25 What does that tell you about the North

1 Charleston police department's assessment of this?
2 They've already gotten one call, the day after the
3 robbery, and now he's calling about somebody else? What
4 does that tell you about that?

5 The fourth encounter, Charleston police
6 department takes warrants out to Joy Mack. Doesn't know
7 anything about it. They publish his photo in the
8 newspaper. The defendant cuts it out, keeps it. He
9 comes into this courtroom and identifies Joy Mack, after
10 he's been holding onto the article for a year and a half,
11 showing a picture of Joy Mack. So those are the
12 identifications, four different identifications, that
13 they've had on that.

14 Look at how they're built. It starts with
15 nothing happening. It goes to, I think that's the guy.
16 I'm almost sure, to number three where he's positive.
17 It's growing. That's not the way that humans work.
18 Officer Faison told us that people's memories go down
19 every time. He's building. What he's done,
20 unfortunately, is he's convincing himself, and I can
21 understand why. He went through a traumatic event, and
22 it is a terrible thing, but Joy Mack didn't do it, so
23 it's not Joy Mack's fault.

24 Joy Mack didn't take the stand to testify
25 against you. That is why I get to talk to you last,

1 because Joy Mack didn't put up a defense. Joy Mack
2 doesn't have to put up a defense. There is no burden on
3 this. Mr. Lawton, commendable, he stood up and said the
4 burden is on us. That is how the American justice system
5 works. The burden is on the state to prove to you beyond
6 a reasonable doubt that the defendant's version of what
7 happened, Joy Mack walks 70 feet toward him with an AK47
8 hidden in his pants somewhere, pulls it out when he gets
9 five feet from him, and that identification is 100
10 percent accurate.

11 They have the burden, but Joy Mack doesn't
12 have to prove anything to you, and the judge is going to
13 tell you that you cannot hold the fact that Joy Mack did
14 not testify against him at this trial. That is his
15 right. That doesn't mean anything, but I would suggest
16 to you that Joy Mack has communicated to you already two
17 different things: One, we're in a trial, so he's already
18 told you he didn't do it, or he says he didn't do it, and
19 y'all are going to ultimately make that determination.

20 But the second thing that Joy Mack has told
21 you during this whole trial is look at his conduct. Is
22 this the conduct of a guilty person at all? If you look
23 at it, his conduct is best characterized as oblivious.
24 He doesn't have any idea what's going on. He doesn't
25 have any idea what the factors that are swirling around

1 him are. He's shopping in the store, looking at clothes,
2 the same store that he's allegedly robbed a week earlier
3 without a mask while his codefendants already been picked
4 up. That is not the actions of a guilty man. He's
5 completely oblivious. The 29th when he's there, he goes
6 into the store. He leaves. The police are called. He
7 comes back. He comes back to the mall. If he was really
8 running, he would be out of the way, but that's not the
9 actions of it.

10 On the third time, the officer and the
11 detective -- the officer and the victim are standing
12 there. He's wearing a uniform. What do you think
13 they're talking about? They're obviously talking about
14 the robbery, but Joy Mack just walks right up to him
15 because he doesn't have any idea what's going on. He's
16 totally oblivious, and his obliviousness is very
17 consistent with his innocence, and that is what he's been
18 communicating to you throughout the trial.

19 These gentlemen are codefendants. When this
20 trial started, I told you, the most important thing I'm
21 going to tell you, it's two trials, it's not one. It's
22 two. You're going to have to make a determination based
23 off the evidence they presented against one and the
24 evidence they presented against two, and, fortunately,
25 this is an easy case to do that because there is no

1 evidence overlapping whatsoever. And, in fact, there has
2 been no connection between Joy Mack and Darrell Goss at
3 all. Have you seen anything to show any contact between
4 Joy Mack and Darrell Goss at all? Absolutely not. There
5 hasn't been one iota of evidence. It's their burden of
6 proof.

7 This is a single witness identification case.
8 Those are scary. You probably have the highest rate,
9 because what do we know? We know that sometimes people
10 are just wrong. They're not trying to be malicious,
11 they're not trying to be evil, but sometimes they're just
12 mistaken, and that is what this is, a single witness
13 identification. The judge is going to do something.
14 He's going to send the jury charge in there with you, and
15 he's going to tell you to look. He's going to give you
16 the ability to look at the jury charges and show you what
17 the state has to prove in a single witness identification
18 case.

19 Officer Faison told us they've developed a
20 suspect. They turned the full power of the North
21 Charleston police on him. They do search warrants. They
22 do go out and look for other witnesses. They do all the
23 things, they focus the entire full force of North
24 Charleston police department on it, and this is the best
25 they got. They got nothing else other than that

1 identification.

2 So the judge is going to tell you that the
3 jury instructions say to scrutinize with great care when
4 it's a single witness identification and that the state
5 has the burden to prove the accuracy of that
6 identification beyond a reasonable doubt.

7 If you think it's possible that there is a
8 mistaken identity at the end of this trial, you have a
9 reasonable doubt, and you have to come back with a not
10 guilty against Joy Mack.

11 But you don't have to take my word for it,
12 ladies and gentlemen. You have the words of Andy, the
13 victim, the night of the robbery: I don't think I could
14 identify the guys if I see them again, yet two and a half
15 weeks later, he makes an identification. 6/29/07: I
16 think that's the guy that robbed me. I'm almost sure.

17 Yet, the next day, he makes an
18 identification, so you don't have to take my words for
19 it, you have his words. You also have the words of the
20 other gentleman that is in there, Davuthan Kilic. You
21 also have his words and the actions of his words, because
22 Mr. Smiley is absolutely right: If he ever identified
23 either one of these people, he would be in the courtroom
24 today.

25 So you are the finders of fact. You will

1 make the ultimate decision. I'm asking you to end this
2 nightmare for Joy Mack and come back with a not guilty
3 verdict.

4 Thank you.

5 THE COURT: You want to take your chart down,
6 if you would, please. Thank you.

7 Madame forelady and members of the jury: The
8 state of South Carolina charges the defendant Joy Mack
9 with one count of armed robbery, one count of assault and
10 battery with intent to kill, and one count of kidnapping.
11 The state of South Carolina also charges the defendant
12 Darrell Lee Goss with one count of armed robbery, one
13 count of assault and battery with intent to kill, and one
14 count of kidnapping.

15 I will give you copies of these instructions
16 in written form. During your deliberations, you may
17 refer to the instructions to guide your decision-making.
18 You must consider the instructions as a whole and not
19 follow some and ignore others. Madame forelady, after
20 you finish with the break, I will give you the charge
21 book back.

22 Now, as to these indictments, the defendants
23 have entered a plea of not guilty, which places upon the
24 state the burden of proving the defendant guilty. A
25 person charged with committing a crime in South Carolina

1 is never required to prove himself innocent. I charge
2 you that it's a vital, important rule of the law of
3 evidence that a defendant in a criminal trial, no matter
4 how great or serious may be the offense with which he is
5 charged, must always be presumed innocent until his guilt
6 has been proven beyond a reasonable doubt.

7 This presumption of innocence remains with
8 the defendant at all times. From the moment of his
9 appearance in this court, throughout the trial until you
10 the jury have, upon the testimony and evidence presented,
11 reached a verdict of guilty beyond a reasonable doubt.
12 For it is the solemn duty of the jury, if not clearly
13 convinced of his guilt beyond a reasonable doubt, to
14 acquit the defendant, so the burden of proof is upon the
15 state to establish by evidence to your satisfaction the
16 guilt beyond a reasonable doubt of these defendants.

17 And what is reasonable doubt? A reasonable
18 doubt is the kind of doubt that would cause a reasonable
19 person to hesitate to act. If you have such doubt as to
20 the guilt of the defendant, then he would be entitled to
21 a verdict of not guilty. Reasonable doubt may arise from
22 the evidence which is in the case or from the absence or
23 lack of evidence in the case.

24 You alone must make the determination of
25 whether or not reasonable doubt exists as to the guilt of

1 the defendant. The term reasonable doubt should be given
2 its everyday plain and ordinary meaning. Proof beyond a
3 reasonable doubt is proof that leaves you firmly
4 convinced of the defendant's guilt.

5 There are very few things in this world that
6 we know with absolute certainty, and in criminal cases
7 the law does not require proof that overcomes every
8 possible doubt. If, based on your consideration of the
9 evidence, you're firmly convinced the defendant is guilty
10 of the crime charged, you must find him guilty. On the
11 other hand, if you are not firmly convinced of the
12 defendant's guilt, you must give him the benefit of the
13 doubt and find him not guilty.

14 The evidence from which you will decide the
15 facts consists of the sworn testimony of witnesses, both
16 on direct and cross-examination, regardless of who called
17 the witness; the exhibits that have been received into
18 evidence; any facts which the lawyers have agreed to
19 stipulate.

20 Certain things are not evidence. You may not
21 consider them in deciding what the facts are. I will
22 list them for you: Arguments and statements by lawyers
23 are not evidence. The lawyers are not witnesses. What
24 they've said in opening statements, closing arguments,
25 and at other times is intended to help you interpret the

1 evidence, but it is not evidence. If the facts as you
2 remember them differ from the way the lawyers have stated
3 them, your memory controls.

4 Questions and objections by lawyers are not
5 evidence. Attorneys have a duty to their clients to
6 object when they believe a question is improper under the
7 rules of evidence. You should not be influenced by the
8 objections or by the Court's ruling on the objection.

9 Testimony that has been excluded or stricken, or that
10 you've been instructed to disregard, is not evidence and
11 must be disregarded. Anything you may have seen on
12 television, read in the newspaper, or heard from others
13 when the court was not in session is not evidence. You
14 are to decide the case solely on the evidence received in
15 trial.

16 Under the constitution and laws of South
17 Carolina, you, the jury, can make the findings of facts
18 in this case. I'm not permitted to indicate to you how I
19 may feel about testimony and evidence which has been
20 presented throughout the trial. It's been my intention
21 to be fair and impartial toward each of the parties
22 involved.

23 To determine the facts in this case, you will
24 have to evaluate the credibility, which means the
25 believability of each witness. Some of the things you

1 may consider as you decide whether or not to believe a
2 witness's testimony about a particular matter include
3 what was the manner and appearance of the witness who
4 testified? Was he or she hesitant or straightforward?
5 Was the testimony of witnesses consistent or
6 inconsistent? How did a witness come to know the facts
7 that he or she testified to? Was the person present
8 during the incident, or did he happen on the scene after
9 it occurred?

10 Is there some reason a witness would want to
11 give testimony which would help or hurt one side or the
12 other? In other words, was the witness biased or
13 prejudiced? Was the witness strengthened or weakened by
14 other testimony in evidence?

15 You may believe as much or as little of each
16 witness's testimony as you think proper. You may believe
17 the testimony of single witness against that of many or
18 just the opposite. Of course, you do not determine the
19 truth merely by counting the number of witnesses
20 presented by each side. Throughout this process, you
21 have but one objective: To seek the truth, regardless of
22 its source.

23 The same constitution and laws which
24 designate and make you the finders of the facts, as I
25 just explained, also make me the sole instructor of the

1 law. You should accept the statements of the law as I
2 give them to you. The attorneys are not the instructors
3 of the law. Please base your decision-making on what the
4 law is and not what you think the law should be.

5 There are two types of evidence which are
6 generally presented in a trial, direct evidence and
7 circumstantial evidence. Direct evidence is the
8 testimony of a person who asserts or claims to have
9 actual knowledge of facts, such as an eyewitness.
10 Circumstantial evidence is proof of a chain of facts and
11 circumstances indicating the existence of a fact. The
12 law makes absolutely no distinction between the weight or
13 value to be given to either direct or circumstantial
14 evidence, nor is a greater degree of certainty required
15 of circumstantial evidence than of direct evidence.

16 You should weigh all the evidence in a case
17 on a contested issue. You may find some direct and some
18 circumstantial evidence. To determine the facts in this
19 case, you will have to evaluate the credibility, which
20 means the believability of each witness.

21 The rules of evidence ordinarily do not
22 permit witnesses to testify to opinions or conclusions.
23 An exception to this rule exists with witnesses we call
24 expert witnesses, a witness who by education and
25 experience has become expert in some art, science,

1 profession, may give an opinion as to the subject the
2 witness claims to be an expert in and may also give the
3 reasons for the opinion.

4 You should consider any expert opinion given
5 by a witness, and like any other evidence, give it the
6 weight you think it deserves. If you decide an expert
7 witness's opinion is not based on sufficient education
8 experience, or if you decide that the reasons given to
9 support the opinion are not sound or that the opinion is
10 outweighed by other evidence, you may disregard the
11 opinion entirely.

12 An expert witness's testimony is to be given
13 no greater weight than that of other witnesses simply
14 because the witness is an expert. You do not have to
15 accept the expert's opinion even though it's
16 uncontradicted. An expert's opinion that is otherwise
17 helpful to the jury should not invade the province of the
18 jury just because it is an opinion on the ultimate issue
19 to be decided. The jury still retains the power and duty
20 to judge the credibility of the expert and the weight to
21 be given to his or her opinion.

22 Ladies and gentlemen: I charge you further
23 that the fact that the defendants elect not to testify on
24 their behalf cannot and must not be considered against
25 them under any circumstances or in any manner whatsoever.

1 The decision of any defendants not to take the witness
2 stand or testify in his own behalf does not create any
3 inference against him. I tell you now that you must not
4 permit to weigh in even the slightest degree against such
5 defendants. You should not permit this fact to enter
6 into the discussions or deliberations of the issues in
7 the case.

8 I charge you that it's the law of this state
9 that if a crime is committed by two or more persons who
10 have acted together in the commission of an offense, the
11 act of one is the act of all. By way of illustration,
12 two people can be guilty of killing another of murder
13 only when one of the two had a pistol and only one
14 bullet. If both together, acting together, assisting
15 each other in the crime of the offense, the law says that
16 under those circumstances the act of one is the act of
17 all, and, as it is sometimes said, the hand of one is the
18 hand of all.

19 I charge you there are two defendants in this
20 case, each of whom is charged with armed robbery, assault
21 and battery with intent to kill, and kidnapping.
22 Whatever verdict you find does not have to be the same as
23 to both defendants. You take each defendant, consider
24 the evidence as to him, and write your verdict in
25 accordance and in conformity with the evidence in the

1 case and the instructions I've given to you and will
2 hereafter give you. That is to say, where more than one
3 person is charged with a crime, if the evidence warrants
4 it, you may convict one and acquit the other, or you may
5 acquit both, or you may convict both. It will depend
6 upon your view of the testimony and evidence, which you
7 alone are to act on.

8 An issue in this case is the identification
9 of the defendant as the perpetrator of the crime charged.
10 The state of South Carolina has the burden of proving
11 identity beyond a reasonable doubt. It's not essential
12 that the witness himself be free from doubt as to the
13 correctness of his statement; however, you, the jury,
14 must be satisfied beyond a reasonable doubt that the
15 accuracy of the identification the defendant before you
16 may convict him.

17 Identification testimony is an expression of
18 belief or impression by a witness. In appraising the
19 identification testimony of a witness, you may consider
20 the opportunity the witness had to observe the alleged
21 offender at the time of the offense and to thereafter
22 make an identification, and in doing so, you may consider
23 matters such as how long or short a time was available,
24 how far or close the witness was, and how good were
25 lighting conditions.

1 You must also consider the witness's degree
2 of attention. You must consider the accuracy of the
3 witness's prior description of the criminal. Finally,
4 you may also consider the level of certainty demonstrated
5 by the witness at the confrontation. It is for you, the
6 jury, to determine the accuracy of the identification of
7 the defendant.

8 If the identification by the witness may have
9 been influenced by the circumstances under which the
10 defendant presented to him for identification, you should
11 scrutinize the identification with great care. You may
12 also consider the length of time that elapsed between the
13 occurrence of the crime and the next opportunity of the
14 witness to see the defendant, as a factor bearing on the
15 reliability of identification.

16 You must consider the credibility of each
17 identification witness in the same way as any other
18 witness. You may consider his or her truthfulness as
19 well as the capacity, opportunity, and circumstances of
20 the observation of matters about which he or she
21 testified.

22 What is armed robbery? The crime of armed
23 robbery includes all the elements of larceny and robbery.
24 First I would like to explain to you what is meant by
25 larceny and what is meant by robbery.

1 What is larceny? I charged you that there
2 are four elements which must be present and established
3 beyond a reasonable doubt to make out the crime of
4 larceny. These four elements are: That there was a
5 taking; that the taking was of the personal property;
6 that after being taken the product was carried away; that
7 the taking and carrying away of the property was done
8 with the intent to steal.

9 Robbery includes each of the four elements
10 I've just explained. In addition to these four elements,
11 two other elements are necessary to make out the crime of
12 robbery.. Those elements are the property must be taken
13 from the person of another or in his presence, and that
14 the taking and carrying away of the property must have
15 been accomplished by placing the other person in fear, by
16 violence or threats of violence, so as to make that
17 person surrender that property without their consent and
18 against their will.

19 Therefore, the crime of armed robbery
20 includes all the elements of larceny and robbery. In
21 order to make out the crime of armed robbery, however, an
22 additional element must be proved. The robbery must have
23 been committed while armed with a deadly weapon. The
24 person committing the robbery must have had and used a
25 deadly weapon with which he obtained possession of the

1 property or placed the one possessing the property in
2 fear in order to obtain the property.

3 Section 16-11-338(A) of the code of laws of
4 South Carolina provides a person convicted for the crime
5 of robbery while armed with a pistol, dirk, slingshot,
6 metal knuckles, razor or some other deadly weapon commits
7 armed robbery.

8 Assault and battery with intent to kill: The
9 defendants are charged with assault and battery with
10 intent to kill. In order to prove assault and battery
11 with intent to kill, the state must prove beyond a
12 reasonable doubt that the defendant, with malice
13 aforethought, unlawfully attempted or offered to commit a
14 violent injury upon another person and the present
15 ability to complete the attempted injury.

16 An assault is the intentional creation of a
17 reasonable fear of immediate bodily harm. It's not
18 necessary that the attempted injury or harm actually take
19 place. For example, if I walk up to you, and when we are
20 within arm's reach I draw back to hit you, that is an
21 assault.

22 A battery is the unlawful touching of another
23 person by a person who has committed the assault. An
24 unlawful touching can be caused by a part of the
25 accused's body or by any object the accused puts in

1 motion.

2 A battery is the completion of the assault by
3 using or applying force to another person, however
4 slight, in a rude, angry, or resentful manner without
5 legal justification for doing so. Using my earlier
6 example, if I carry through the assault by hitting you,
7 then that is a battery.

8 Malice is hatred, ill will, or hostility
9 towards another person. It is the intentional doing of a
10 wrongful act without just cause or excuse with an intent
11 to inflict injury or under circumstances that the law
12 will infer an evil intent. Malice aforethought does not
13 require that malice exists for any particular time before
14 the act is committed, but malice must exist in the mind
15 of the defendant just before and at the time the act is
16 committed. Therefore, there must be a combination of the
17 previous evil intent and the act.

18 Malice aforethought may be express or
19 inferred. These terms express and inferred don't mean
20 different kinds of malice but merely the manner in which
21 malice may be shown to exist. That is either by direct
22 evidence or by inference from the facts and circumstances
23 which are proved.

24 Express malice is shown when a person speaks
25 words which express hatred or ill will for another or

1 when the person prepared beforehand to do the act which
2 was later accomplished; for example, lying in wait for a
3 person or any other acts of preparation going to show
4 that the deed was within the defendant's mind would be
5 express malice.

6 Malice may be inferred from conduct showing a
7 total disregard for human life. Inferred malice may also
8 arise when the deed is done with a deadly weapon. A
9 deadly weapon is any article, instrument, or substance
10 which is likely to cause death or great bodily harm.
11 Whether the instrument has been used as a deadly weapon
12 depends on the facts and circumstances of each case.

13 The following are examples of instruments
14 which may be deadly weapons: A pistol, a shotgun, a
15 rifle, a dirk, a dagger, a knife, a slingshot, metal
16 knuckles, a razor, gasoline, a fire bomb or a Molotov
17 cocktail, and lighter fluid.

18 If facts are proved beyond a reasonable doubt
19 sufficient to raise an inference of malice to your
20 satisfaction, this inference would be simply an
21 evidentiary fact to be considered by you, the jury, along
22 with the other evidence in the case, and you may give the
23 weight you decide it should receive.

24 A specific intent to kill is not an element
25 of assault and battery with intent to kill, but there

1 must be a general intent to commit serious bodily injury.
2 Intent means intending the result which actually occurs,
3 not accidentally or involuntary. Intent may be shown by
4 acts and conduct of the defendant and other circumstances
5 from which you may naturally and reasonably infer intent.

6 Evidence of the character of the assault, the
7 character of the instrument used, the manner in which it
8 was used, the purpose to be accomplished, and the
9 resulting wounds or injuries may be considered in
10 determining the intent with which the assault was
11 committed. Intent may be inferred when it is
12 demonstrated that the defendant voluntarily and willfully
13 commits an act, the natural tendency of which is to
14 destroy another's life.

15 Kidnapping: The defendants are charged with
16 kidnapping. The state must prove beyond a reasonable
17 doubt that the defendants knowingly and unlawfully
18 seized, confined, inveigled, decoyed, kidnapped, abducted
19 or carried away another person without authority of law.

20 Knowingly means with knowledge or
21 consciously, not accidentally. Seize means to take hold
22 of suddenly or forcibly. Confine means to limit,
23 restrict, or enclose within bounds, imprison, or shut or
24 keep in. Inveigle means to lure, entice, or lead astray
25 by false representations, promises, or other deceitful

1 means.

2 Decoy means to lure by, or as if by, decoy.

3 A decoy is something to entice a person into a trap.

4 Kidnap is to remove a person against his will by unlawful
5 force or by fraud. Abduct means to carry off secretly or

6 by force for an illegal purpose. Carry away means to

7 remove. The state does not have to prove that the

8 defendant did all of these things. Instead, if you find

9 beyond a reasonable doubt that the defendant did any of

10 these things, you may find the defendant guilty of

11 kidnapping.

12 Something done without the authority of law

13 is something that the law does not sanction, permit,

14 allow, condone, or provide justification for. The

15 kidnapping does not have to be for any personal or

16 monetary gain for any illegal purpose but may be for any

17 reason whatsoever.

18 You have been selected as fair and impartial

19 jurors to impartially try and determine the facts of the

20 case, and when you comply with your oath to do so, then

21 no one will have a right to criticize your verdict, and

22 you will have fully discharged your duty as jurors. You

23 are to decide this case according to the testimony that

24 you have heard from the lips of the sworn witnesses,

25 along with other evidence introduced.

1 I charge you that as jurors you must decide
2 the issues in this proceeding without bias and without
3 prejudice to any party. You cannot allow yourself to be
4 governed by sympathy, by prejudice, by passion, by public
5 opinion or any other arbitrary factor.

6 Both the state and the defendant have the
7 right to expect that each of you will carefully and
8 impartially consider all the evidence in the case and
9 that you will follow the law as I have explained it to
10 you.

11 Nothing I may have said or done during the
12 course of this trial has been in any way intended to
13 express or suggest a view of the case or an opinion as to
14 the facts, the weight of the evidence, or the credibility
15 of the witnesses. If any of my actions or words have
16 seemed to so indicate, you will disregard such and form
17 your own opinion as to these matters.

18 Madame forelady, ladies and gentlemen of the
19 jury: I have prepared three verdict forms for each
20 defendant, and as you've been charged, I laid out the
21 elements of each crime. Each crime is independent of the
22 other and the state has a responsibility to prove the
23 defendant guilty on each crime beyond a reasonable doubt,
24 and I have prepared one verdict form on each defendant as
25 to each charge.

1 First verdict form has the state versus
2 Daniel Lee Goss. We, the jury, unanimously find the
3 defendant Darrell Lee Goss guilty of armed robbery. We,
4 the jury, unanimously find the defendant Darrell Lee Goss
5 not guilty of armed robbery. Second says we, the jury,
6 unanimously find the defendant Darrell Lee Goss guilty of
7 assault and battery with intent to kill; we, the jury,
8 unanimously find the defendant Darrell Lee got not guilty
9 of assault and battery with intent to kill; and we, the
10 jury, unanimously find the defendant Darrell Lee Goss
11 guilty of kidnapping; we, the jury, unanimously find
12 defendant Darrell Lee Goss not guilty of kidnapping. I
13 have prepared identical verdict forms from the defendant
14 Joy Mack. It has the same information on it for the
15 armed robbery, the assault and battery with intent to
16 kill, and the kidnapping, has a place for the forelady to
17 sign and date.

18 Ladies and gentlemen: You can find both
19 defendants guilty of all three; you can find one
20 defendant guilt of one charge, the rest innocent.
21 Whatever you determine to be the facts in the case will
22 apply as to the not guilty or the guilty verdict of each
23 defendant, if you find both defendants guilty of all,
24 acquit both defendants of all, or whatever combination
25 you determine, based upon the facts that you determine as

1 you apply the law, which I just charged you.

2 Ladies and gentlemen: I will tell you as the
3 verdict form says, your verdict has to be unanimous. All
4 12 of you have to agree. I would tell you that it's a
5 collective reasoning process. I would ask you to listen
6 to each other's opinion, look at the evidence, discuss
7 the evidence, and arrive at a fair and just verdict based
8 upon your view of the facts and the law as I have charged
9 you.

10 Madame forelady, what I'm going to do is ask
11 you to go to the jury room, and before you begin
12 deliberations, I have to take my charge up with the
13 attorneys. I may have to bring you back and add
14 something or take something away. So don't begin your
15 deliberations until the bailiff brings the verdict forms,
16 the charge book, and I will send back to the jury room
17 along with all the exhibits, and instruct you to begin
18 your deliberations.

19 Madame forelady and the two alternates, I
20 believe Ms. Mikell and Ms. Jarrell, if you just keep your
21 seats, Madame Forelady and other members of the jury may
22 follow the bailiff to the jury room.

23 (Jury leaves the courtroom at 11:28 a.m.)

24 THE COURT: All right. Exception to the
25 charge from the state?

1 MR. LAWTON: No, Your Honor.

2 THE COURT: Any exceptions to the charge from
3 the defendants?

4 MR. SMILEY: No, Your Honor.

5 MR. APOSTOLOU: No, Your Honor.

6 THE COURT: All right. If you would, come up
7 and make sure all the exhibits are present, put on the
8 record from the state that all your exhibits are present
9 and the defendants' exhibits are present.

10 MR. SMILEY: Yes, sir.

11 THE COURT: I'll tell the jury to begin their
12 deliberations.

13 (Recess taken.)

14 (In open court, jury not present.)

15 THE COURT: All right.

16 I received two notes from the jury, one note
17 requesting they want to see the police reports, another
18 note requesting Andy's testimony and the initial police
19 report. I informed the jury that the police report is
20 not admissible into evidence, and they would like to
21 listen to the entire testimony, Andy's entire testimony.

22 We are in the big courtroom. The acoustics
23 in this courtroom are not that good from a recording
24 standpoint. What the attorneys have told me and all the
25 parties have agreed is that the court reporter can go in

1 the jury room and play Andy's testimony, and I will sent
2 a deputy in the jury with her, and I will instruct the
3 jury not to talk during the testimony but to listen, and
4 if, in fact, they reach a point where all 12 jurors do
5 not want to listen anymore, she can stop and come back to
6 the courtroom and continue with deliberations.

7 Is that everyone's understanding, Mr. Smiley?

8 MR. SMILEY: Yes, Your Honor.

9 THE COURT: Mr. Apostolou?

10 MR. APOSTOLOU: Yes, Your Honor. Originally
11 we had requested that replaying the tape be done in the
12 big courtroom, which the Court was amenable to, but due
13 to the acoustics, or lack thereof, we are now agreeing to
14 take them into the jury room.

15 THE COURT: Does the state agree with that?

16 MR. LAWTON: They're going to start it from
17 the beginning?

18 THE COURT: Yes. Only thing I'm saying is if
19 the jury, all 12, decide they've heard everything they
20 want to hear, then the court reporter can stop. I'll put
21 the deputy in the jury room to make sure that they don't
22 deliberate or talk while they're listening to the tape.

23 Does that answer your question?

24 MR. LAWTON: Yes, sir.

25 THE COURT: All right. Which deputy wants to

1 go?

2 (Recess taken.)

3 THE COURT: All right.

4 (4:54 p.m. In open court, jury not present.)

5 THE COURT: The forelady said they had
6 reached a decision on one defendant, and they requested a
7 break, which I have given them a break, and the
8 foreperson has given the Court verdict forms on the one
9 defendant.

10 Now, do you want me to bring the defendant up
11 when I read them, or do you want me to wait and put them
12 on the record and postpone any type of --

13 MR. SMILEY: You're looking at me.

14 THE COURT: It's your client.

15 MR. SMILEY: I would like him present when
16 you read it.

17 THE COURT: Will y'all bring Mr. Goss up.
18 I'm looking at you now, so you know which one I'm talking
19 about.

20 MR. SMILEY: I've already instructed his
21 family.

22 THE COURT: All they're going to do is read
23 the verdict. They're not going to do anything else until
24 they reach a verdict on the other case.

25 MR. SMILEY: Yes, sir.

1 THE COURT: I understand we had this
2 discussion and everybody agreed that we would go ahead in
3 court and read the verdict on the one defendant. That
4 defendant happens to be Darrell Lee Goss, and we will put
5 everything on hold until the jury reaches a decision on
6 second defendant; is that correct?

7 MR. SMILEY: That's correct.

8 THE COURT: Is that right, Mr. Smiley?

9 MR. SMILEY: Yes, sir.

10 THE COURT: That correct, Mr. Apostolou?

11 MR. APOSTOLOU: Yes, sir.

12 THE COURT: And from the state?

13 MR. LAWTON: Yes, sir.

14 THE COURT: On the verdict form, the state
15 versus Darrell Lee Goss we, the jury, find the defendant,
16 Darrel Lee Goss, guilty of kidnapping, signed by the
17 forelady, dated February 26, 2009, indictment number
18 2008-GS-10-10805.

19 State of South Carolina versus Darrell Lee
20 Goss, we, the jury, unanimously find the defendant,
21 Darrell Lee Goss, guilty of armed robbery, signed by the
22 forelady and dated February 26.

23 Case number 2008-GS-10-10806, state of South
24 Carolina, plaintiff, versus Darrell Lee Goss, we, the
25 jury, unanimously find the defendant, Darrell Lee Goss,

1 guilty of assault and battery with intent to kill, signed
2 by the foreperson, dated February 26, 2009.

3 The Court has announced those verdicts, and
4 once the jury reaches a verdict on the second, if you
5 want to poll the jury or whatever you want to do at the
6 time, feel free to do --

7 MR. SMILEY: Yes, sir. And we will reserve
8 our right.

9 THE COURT: We'll stand at ease and await the
10 jury verdict on the second defendant.

11 (Recess taken.)

12 THE COURT: Will you go ahead and bring
13 defendants in, please. While we're waiting on
14 Mr. Smiley, let me see you over here.

15 Anything from the defendant before we bring
16 the jury?

17 MR. APOSTOLOU: No, Your Honor.

18 MR. SMILEY: No, Your Honor.

19 THE COURT: Bring the jury in, please.

20 (5:48 p.m., in open court, jury present.)

21 THE COURT: Madame forelady, I understand
22 that you have reached a verdict on Mr. Joy Mack; is that
23 correct?

24 THE FORELADY: Yes, Your Honor.

25 THE COURT: Would you pass the verdict forms

1 to the bailiff please, ma'am. You have previously
2 reached a verdict on Darrell Lee Goss, which we have
3 already announced to the Court.

4 All right. State of South Carolina,
5 plaintiff, versus Joy Mack, case number 2008-GS-10-05695,
6 we the jury, unanimously find the defendant, Joy Mack,
7 guilty of armed robbery, signed by the foreperson, dated
8 today.

9 Indictment No. 2008-GS-10-05697 we, the jury,
10 unanimously find the defendant, Joy Mack, guilty of
11 kidnapping, signed by the forelady and dated today; and
12 case number 2008-GS-10-05696, state of South Carolina
13 versus Joy Mack, we, the jury, unanimously find the
14 defendant, Joy Mack, guilty of assault and battery with
15 intent to kill.

16 I understand the parties would like to have
17 the jury polled; is that correct?

18 MR. SMILEY: Mr. Goss would, yes, sir.

19 MR. APOSTOLOU: Yes, Your Honor, I would like
20 to have the jury polled.

21 THE COURT: What we'll do is we'll poll the
22 jury separately on Mr. Goss first, since that is the
23 first verdict we received, and then we'll poll the jury
24 on Joy Mack.

25 THE CLERK: Ladies and gentlemen, I'll be

1 will give you then ten days if you want it.

2 MR. SMILEY: I don't think I need ten days,
3 Your Honor.

4 THE COURT: All right. I ask Mr. Goss to
5 hear any motions you have.

6 MR. SMILEY: As to motions I have, I renewed
7 the motions I made at the close of the state's case for a
8 directed verdict, based on -- or to set aside the verdict
9 at this point this time, based on the fact of the
10 insufficiency of the evidence.

11 I know your previous ruling and respect that,
12 Your Honor, but I feel to protect the record, I need to
13 make it again, but I think that would be the only motion
14 I have.

15 THE COURT: Those motions are denied. As to
16 Joy Mack?

17 MR. APOSTOLOU: He will take ten days.

18 THE COURT: You want ten days on Joy Mack.
19 That's fine. I'll be happy to give it to you.
20 Solicitor, do you have the sentence sheets?

21 MR. LAWTON: I believe Deputy Solicitor
22 Durant is bringing those up, Your Honor.

23 THE COURT: All right. Madame forelady,
24 ladies and gentlemen of the jury: The only thing that
25 will remain will be sentencing of the defendants. You're

1 welcome to stay, if you want to stay, but we don't have a
2 sentence sheets, and we're waiting for sentence sheets,
3 and I know it's five minutes to 6:00 and you have been
4 hard at it all day. You're welcome to go, and you're
5 welcome to stay. It's your choice.

6 You're free to go if you want to go. Let me
7 ask you this: I believe y'all have to walk a while down
8 to the Cumberland parking lot; is that correct?

9 THE CLERK: Yes, Your Honor.

10 THE COURT: Do you think we could get
11 somebody to escort them, please? I'm going to have the
12 deputy sheriff escort you to the parking garage, okay? I
13 enjoyed working with you this week, and thanks very much
14 for your service. The court wouldn't be able to
15 function. I want to thank you so very much.

16 Winston Churchill used to say the highest
17 service that any citizen could give to its country, other
18 than war time, is serving on a jury, and I think that is
19 probably a true statement. You ones that would like to
20 leave are free to go. If you'll follow the bailiff,
21 he'll show you where to go.

22 All right. Mr. Smiley?

23 MR. SMILEY: Yes, sir.

24 THE COURT: If you, Mr. Goss, would stand,
25 maybe you could come around and stand right here. I'll

1 be glad to hear you concerning sentencing. I know the
2 sentencing sheet is on the way, but I would like to hear
3 anything you have to tell me about sentencing.

4 MR. SMILEY: Yes, sir. I'm going to ask you
5 for a minimum sentence in this case. Of course, Mr. Goss
6 maintains his innocence with respect to the jury, but
7 even looking at the evidence in the light most favorable
8 to Mr. Goss, he was not shown to have struck anybody, not
9 shown to have bound anybody in this case, and would have
10 been one of the persons alleged to have carried away the
11 goods, and I think that is something in mitigation I
12 would offer.

13 I know by any stretch of the imagination,
14 it's hand of one, hand of all is a very serious crime.
15 Also, I would like to say he's 23 years old, Your Honor.
16 He's a young man. A ten-year sentence is a large chunk
17 of time in one's life, eight and a half years before he
18 would even have an opportunity to see the light of day.

19 THE COURT: How old is he?

20 MR. SMILEY: He's 23 now. He was 21 at the
21 time of the incident, Your Honor. He's 23 now, and I
22 will tell you that he has had some brushes in the past.
23 I think the most significant thing he's had on the
24 conviction he has had --

25 THE COURT: I thought he had some motor

1 vehicle --

2 MR. SMILEY: Possession of stolen vehicles,
3 and there was a chop shop allegation he pled guilty to in
4 the past. He's pled guilty to all of his crimes in the
5 past. This is the first trial he's ever had. I believe
6 he had one ABHAN in the past, Your Honor, assault and
7 battery of a high and aggravated nature. He hasn't had
8 any strikes in this case, and I would ask you for a
9 minimum sentence, or as minimal as possible as mitigation
10 for Darrell, would offer up -- he came up in a hard
11 household.

12 You saw his mother. You've seen the
13 conditions that he grew up under. He does have two
14 children, Your Honor, that he has cared for. He has been
15 involved in their life. I've met both of them on
16 different occasions, Your Honor. I've known Darrell
17 since he was 16 or 17 years old. He has always, with one
18 exception, treated me with respect, and we worked that
19 out, and he's an intelligent young man that I would like
20 to see get on the right course and further his life.

21 So given all those factors, I would ask you
22 for a ten-year sentence on each of the crimes, concurrent
23 with credit for any time served. He's been incarcerated
24 since June 15, 2007, since this crime.

25 THE COURT: Have you figured it out?

1 MR. SMILEY: I can real quick, June 15, 2007,
2 that would be --

3 THE COURT: Twelve months, plus, what --

4 MR. SMILEY: Twenty-one months, yes, sir.

5 THE COURT: Solicitor, do you agree with
6 that? Or do you know --

7 MR. LAWTON: They're calculating it, Your
8 Honor.

9 MR. SMILEY: He's been in since June 15th.

10 MR. LAWTON: Yeah, he's been in since the
11 date of arrest.

12 THE COURT: June 15, 2007?

13 MR. SMILEY: Yes, sir.

14 THE COURT: Anything else?

15 MR. SMILEY: That would be all, Your Honor.

16 THE COURT: Mr. Goss, I would like to hear
17 anything you would like to tell me.

18 DEFENDANT GOSS: I just ask you to just have
19 mercy upon me right now, because I was innocent of this
20 situation, but as Mr. Smiley said, I just wish you could
21 just give me the minimum sentence you could. That's all.

22 THE COURT: Thank you very much. I'll be
23 glad to hear from the state. I know you gave me his
24 criminal record before we started trial, but can you give
25 it to me again, please.

1 MR. LAWTON: Yes, sir, Your Honor. He has a
2 2003 B&E; 2003 possession of a stolen motor vehicle; 2003
3 chop shop; 2003 possession of a stolen motor vehicle; an
4 '04 ABHAN, not going to comment on guilt or innocence.

5 I'm not sure what I'll do with this charge at this time.
6 I haven't reviewed it, but he is out on bond, Your Honor,
7 for kidnapping armed robbery, that was 4/27/06 so he was
8 out on bond for armed robbery and kidnapping, Your Honor.

9 I'm not sure we'll go as far as sentencing.
10 I'll certainly put that in your hands, Your Honor. I
11 don't know if the victim --

12 THE COURT: You say he's got charges pending?

13 MR. LAWTON: He was out on bond for armed
14 robbery and kidnapping.

15 THE COURT: This armed robbery and
16 kidnapping?

17 MR. LAWTON: No, different.

18 THE COURT: So those charges are still
19 pending?

20 MR. LAWTON: Yes, sir, and I'll evaluate what
21 I'll do, mainly depending on his sentence.

22 THE COURT: That's up to you. You can
23 prosecute or not prosecute.

24 MR. SMILEY: I hope you wouldn't consider
25 that in your sentence, Your Honor. I could say a whole

1 lot about that case. I'm very familiar with it, and I
2 would be very surprised if the state were able to reach
3 any kind --

4 THE COURT: Well, I don't care about that.
5 It's a charge, it's not a conviction. It was a prior
6 conviction. All right.

7 Solicitor, I'll be glad to hear anything from
8 you or anyone else that would like to say anything.

9 Solicitor, would you like to say something?

10 MR. LAWTON: Your Honor, I would just -- I
11 was talking about these solicitors sitting behind you.

12 THE COURT: Anything you would like to say?

13 MS. WILSON: Your Honor, we certainly
14 appreciate the way you handled court this week. As far
15 as this defendant goes, I don't know how often you've
16 been in this circuit, but one of the things that has been
17 a plague on this community is people who are out on bond.

18 I understand he may not be guilty of that
19 earlier charge but he was certainly on bond where he
20 signed a contract to get out of jail to be on his best
21 behavior. What we do know is after he signed that
22 contract to get out on bond, he committed a heinous armed
23 robbery and a kidnapping.

24 We also know, unfortunately, that a -- we
25 were very fortunate to get a conviction in this case.

1 One of the key witnesses in this case has been in grave
2 fear of his life. We have staked out his home, his work,
3 his school, his medical appointments, and attempts to
4 find him to bring him to testify.

5 The witnesses for the people that he has come
6 in contact with over the past week have said that he is
7 shaking in fear, and that is a reason that he never
8 appeared here in court. That is because of Mr. Goss and
9 Mr. Mack, and anything that you can do on sentencing to
10 ensure this community that Mr. Goss can't plague them
11 again, we certainly would appreciate it.

12 THE COURT: Okay. Thank you very much.
13 Solicitor Lawton, is there anything you would like to
14 tell me?

15 MR. LAWTON: No, Your Honor.

16 THE COURT: You got the sentence sheet?

17 MR. LAWTON: Yes, sir.

18 THE COURT: All right. I guess I should have
19 said solicitor and assistant solicitor. I apologize.
20 Okay. Mr. Goss, indictment number 10807, that is the
21 kidnapping, sentence of the state, department of
22 corrections, period of 20 years as concurrent with the
23 other indictment. Indictment No. 10805, that is armed
24 robbery, sentence of the state, sentence of the state,
25 department of corrections, period of 20 years as

1 concurrent with the other indictments. Credit for jail
2 time since June 15th of '07. Indictment No. 0806, that
3 is the assault and battery with intent to kill, sentence
4 of the state, department of corrections, period of 20
5 years.. That is concurrent with the other indictment,
6 give you credit for jail time since June 15, '07.
7 Concurrent means it runs together.

8 MR. SMILEY: Thank you, Your Honor.

9 MR. LAWTON: May I approach, Your Honor?

10 THE COURT: Yes, sir. All right. I'll be
11 glad to hear you as to Mr. Joy Mack.

12 MR. APOSTOLOU: Thank you, Your Honor.

13 Obviously, while we respect the decision of
14 the jury, we are disappointed. From the first moment I
15 met Joy, he said that he wasn't involved with this. I
16 believed him then; I still believe him. We certainly
17 respect the verdict. It doesn't change my belief in him
18 at all, but, obviously, the time for that has come and
19 gone. He is 23, 24 -- 23 years old. He has a son that
20 is six years old. He's got a girlfriend with whom he has
21 a longstanding relationship.

22 His record is a little bit of drugs. I would
23 suggest to you that he's not a menace to society. I
24 don't think he's -- he hasn't accumulated a lot of
25 charges. I would ask you for the minimum sentence,

1 Judge. I don't think that he's in the category of the
2 Gosses, or the Goss family. I think he is -- I would ask
3 you for the minimum sentence, and I thank you.

4 THE COURT: Let me tell you, I understand
5 Mr. Goss had much more serious criminal record than Mr.
6 Mack. I think he's got, what, distribution?

7 MR. LAWTON: Yes, sir, Your Honor.

8 THE COURT: Is the only charge against him,
9 but my concern -- I'm not going to argue with you whether
10 he's innocent or not innocent. A jury of 12 people have
11 found him guilty, and what concerns me is somebody is
12 willing to put a gun in somebody's face and rob them.
13 That is quite serious, and if he'll do that, he'll kill
14 you. He'll hurt you, and he did hurt this gentleman. He
15 beat him in the head with a rifle. So he is a menace to
16 society, irrespective of his prior record, and I'm just
17 telling you my thoughts.

18 I've really got a problem with somebody
19 walking into a store with a gun, saying, Give me your
20 money, and then beat him and tie him up and ransack the
21 store.

22 MR. APOSTOLOU: I understand that, Judge, and
23 certainly --

24 THE COURT: And this is the man, according to
25 the testimony, that had the gun, Mr. Goss did, so -- at

1 least from the victim's testimony. I understand there
2 was a gun there with the victim's blood, so apparently
3 Mr. Goss and one of other three had the pistol, but this
4 man was identified by the victim that beat him in the
5 head with the rifle. And I understand you think that
6 eyewitness identification is flawed, you know, but it
7 wasn't flawed to 12 people.

8 MR. APOSTOLOU: I understand that, Judge.

9 THE COURT: So I'll be glad to hear you on
10 that.

11 MR. APOSTOLOU: Okay.

12 THE COURT: You said he's been nice to you,
13 he's been a nice guy, and all this kind of stuff, so I'll
14 be glad to hear you, okay? Because I'm seriously
15 thinking about loading him up.

16 MR. APOSTOLOU: Well, Judge, I would -- I
17 think that Joy should get the benefit of the fact that
18 his record isn't that bad. I understand these are
19 serious allegations, and I understand that, you, know
20 that the victim put him at that role, and I understand
21 that the jury has made their decision and they've come
22 back.

23 I would say that he is a young man that has a
24 lot of life left in him. I understand these are serious
25 charges, and he's certainly going to do a significant

1 amount of time on them.

2 If we're going to go with the allegations as
3 they are, the gun was loaded. It was an AK47. This
4 easily could have been a murder. It could have been a
5 double murder. It wasn't. He was in the position to
6 have killed both of them and gotten out of there and
7 eliminated any witnesses, and, frankly, under the facts
8 that we've got, probably would have gotten away with it.

9 So the fact that this didn't end in a murder
10 is what ultimately led to him being convicted today, and
11 I think that that suggests, based on the fact he has
12 nothing violent in his history whatsoever, that he's not
13 a killer and that he is not a menace to society -- and I
14 understand this is a very serious charge, but the fact is
15 it didn't go further than it did.

16 They're in the back of the store. It's
17 closing time, and all the other stores -- they could have
18 been in and out of there and away from all this, and the
19 victims could have been in much worse shape than they
20 are. The victim was treated in the hospital and released
21 on the same day. It could have been a much worse
22 situation, and certainly a serious situation, and we're
23 obviously not going to stand for that, but I think that
24 the fact that he did have a -- if he did, and, obviously,
25 the jury found that he did had an AK47 over top of these

1 people --

2 THE COURT: He also stated what it could have
3 been something else other than an AK47.

4 MR. APOSTOLOU: It easily could have been a
5 much worse situation, and I think that the fact that it
6 didn't, I think I would suggest to you that he should get
7 the benefit of that. And I know it's a terribly serious
8 situation, but there is nothing in his history of any
9 kind of violence whatsoever.

10 THE COURT: How old is he?

11 MR. APOSTOLOU: He's 24 years old. He has
12 one son, six years old.

13 THE COURT: How far did he go in school?

14 DEFENDANT MACK: I have my GED, sir.

15 THE COURT: You have your GED?

16 DEFENDANT MACK: Yes, sir.

17 THE COURT: All right. Mr. Mack -- I'm
18 sorry, Mr. Apostolou. I was just telling you my
19 thoughts. I was thinking out loud to you. I wanted to
20 hear what you had to say.

21 MR. APOSTOLOU: I understand that. I do
22 understand that, Judge. I just feel like this situation
23 could have gone a lot worse. It's a very serious
24 situation, but there is nothing -- it's totally out of
25 character for his record. He's just -- it's totally out

1 of character for his record, and he should get the
2 benefit of that. It could have been a lot worse. It's a
3 very bad situation, but --

4 THE COURT: All right. Mr. Mack, anything
5 you would like to tell me?

6 DEFENDANT MACK: Yes, sir. Basically --

7 THE COURT: I'm sorry. What?

8 DEFENDANT MACK: Basically, from the
9 beginning, from the beginning of the end of the case you
10 made on me, I basically was lost in this whole situation.
11 I'm not disputing the fact that the jury found me guilty
12 of these charges, I'm just basically saying my point of
13 view on this.

14 And I respect the jury's decision on what
15 they did, because, I mean, that was their job. They
16 could either find me guilty or not guilty based upon the
17 facts, and I just ask you, Your Honor, just to have
18 leniency, have mercy on me, Your Honor, because I am
19 innocent, but I just respect -- I respect the decision of
20 the jury because they found me guilty. They did their
21 job.

22 THE COURT: Okay. You got anything else, Mr.
23 Mack? I don't want to cut you off.

24 DEFENDANT MACK: I have a son that I -- that
25 is six years old, lives with me. I got a girlfriend

1 who -- me and her were together for a long, long time.
2 My mother's getting old. She's sick, Your Honor. I just
3 beg that you have leniency on me.

4 MR. APOSTOLOU: He has been in jail about a
5 year about a half as well.

6 THE COURT: When was the arrest?

7 MR. APOSTOLOU: He was arrested July 24th of
8 2007.

9 THE COURT: Solicitor, I'll be glad to hear
10 from the state.

11 MR. LAWTON: Your Honor, I believe Andy would
12 like to address the Court.

13 THE COURT: I'll be glad to hear from him.

14 MR. LAWTON: I think he decided not to, Your
15 Honor.

16 MR. AYAZGOK: I would like to say thank you,
17 Your Honor. Thank you for everything.

18 MR. LAWTON: Your Honor, I just want to put
19 on the record that Mr. Apostolou approached me a while
20 back, said his client maintained his innocence and asked
21 to be put on a polygraph exam, and we did that and it
22 came back as a failed exam.

23 I did that out of respect for Mr. Apostolou.
24 I'm not willing to put somebody on trial that has a
25 chance who was innocent, so I did that just to assure

1 that, and the results came back as deceptive.

2 THE COURT: Came back as deceptive, not
3 unreliable, or what is the other word they use on the lie
4 detector? Inconclusive.

5 MR. LAWTON: There was deception. Deception,
6 yes, sir.

7 THE COURT: All right.

8 MR. LAWTON: And I just respect your
9 decision, Your Honor. I'll put it in your hands.

10 THE COURT: Okay. Thank you very much.
11 Solicitor, do you have anything you would like to add?

12 MS. WILSON: No, sir. I appreciate your
13 earlier comments.

14 THE COURT: All right. Thank you.

15 Mr. Mack, you understand all these are 85
16 percent crimes. You will not be eligible for parole, do
17 you understand?

18 DEFENDANT MACK: Yes, sir.

19 THE COURT: All right. Mr. Mack, indictment
20 5696, that is assault and battery with intent to kill,
21 sentence of the state, department of corrections for a
22 period of 20 years, concurrent with that, give you credit
23 since July the 24th, 2007.

24 Indictment number 5698, as to kidnapping,
25 sentence of the state, department of corrections, period

1 of 22 years as concurrent, give you credit for time
2 served since July 24th, '07; indictment number 5695, that
3 is armed robbery, sentence of the state, department of
4 corrections for a period of 22 years. That is concurrent
5 with the other indictment, and give you credit for time
6 since July the 24th, '07.

7 And I will say to you that your lawyer has
8 done a good job for him because I was quite frankly
9 thinking about giving you 35 years, so your lawyer talked
10 me down to 22. Good luck to you.

11 ---
12 (Whereupon, the proceedings were concluded.)
13 ---

14
15
16
17
18
19
20
21
22
23
24
25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 26th of February 2009.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 19, 2009



Circuit Court Reporter

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOY MACK,

APPELLANT

FINAL BRIEF OF APPELLANT

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT.....	5
CONCLUSION.....	12
CERTIFICATE OF COUNSEL.....	13

TABLE OF AUTHORITIES

Cases

<i>Cross-Racial Identification Errors in Criminal Cases</i> 69 Cornell L. Rev. 934 (1984)	11
<u>Neil v. Biggers</u> 409 U.S. 188 (1972)	6, 10
<u>State v. Cherry</u> , 361 S.C. 588, 606 S.E.2d 475 (2004)	9
<u>State v. Lollis</u> , 343 S.C. 580, 541 S.E.2d 254 (2001)	9
<u>State v. McKnight</u> , 352 S.C. 635, 576 S.E.2d 168, <i>cert. denied</i> , 540 U.S. 819, 124 S.Ct. 101, 157 L.Ed.2d 36 (2003)	8
<u>State v. Mitchell</u> , 341 S.C. 404, 409, 535 S.E.2d 126, 127	9
<u>State v. Rothschild</u> , 351 S.C. 238, 243, 569 S.E.2d 346, 348 (2002)	9
<u>State v. Whaley</u> , 305 S.C. 138, 406 S.E.2d 369 (1991)	11
<u>Stovall v. Denno</u> , 388 U.S. 293, 87 S.Ct. 1967, 18 L.ed.2d 1199 (1967)	10
<u>U.S. v. Telfaire</u> , 469 F.2d 552 (C.A.D.C. 1972)	11
<u>United States v. Wade</u> , 388 U.S. 218, 228-29 (1967)	10

STATEMENT OF ISSUES ON APPEAL

I. Was the evidence presented at trial insufficient to convict Mack where the victim identified Mack over a week after the crime, after having told the officers on the night of the crime that he would not be able to identify any of the perpetrators, and having observed Mack earlier, and prior, to informing the police that he was one of the 5 robbers who burglarized his place of business and assaulted him?

II. Alternatively, did the judge err in allowing the victim to make an identification of Mack during the trial because the identification was unreliable under *Neil v. Biggers*'?

STATEMENT OF THE CASE

Joy Mack was indicted by the Charleston County grand jury for Armed Robbery, Kidnapping, and Assault and Battery with Intent to Kill (2008-GS-5695, -96, -97). He was tried before the Honorable J.C. Nicholson and a jury between February 23rd - 26th, 2009. He was represented by Alex Apostolou, Esquire. He was convicted, and sentenced to 22 years for Assault and Battery with Intent to Kill, and 20 years for Kidnapping and Armed Robbery. The sentences were ordered to run concurrently.

This appeal timely follows.

ARGUMENT

I. The evidence presented at trial was insufficient to convict Mack where the victim identified Mack over a week after the crime, after having told the officers on the night of the crime that he would not be able to identify any of the perpetrators, and having observed Mack earlier, and prior, to informing the police that he was one of the 5 robbers who burglarized his place of business and assaulted him.

The robbery of Urban Gear occurred on June 14, 2007. The victim of the robbery first identified Mack as one of the perpetrators on June 29, 2007. Mack was tried along with his co-defendant, Darryl Goss, although the State never offered any evidence, direct or circumstantial, that the two even knew one another. (ROA 167, ll.4-7). The victim had never seen them together. (ROA 111, ll. 3-5). The sole piece of evidence against Mack presented at trial was the specious identification of the victim, made 15 days after the events. Respectfully, the evidence presented was insufficient to support Mack's conviction.

The victim was a relatively recent immigrant from Turkey and married to a woman in the military. (ROA 70, l. 14—166, l. 12). He opened his store, Urban Gear, at the beginning of June 2007, only a week or two before these events. (ROA 71, ll. 20-24; ROA 106, ll. 1-5). The store caters to a young, hip-hop crowd. (ROA 106, ll.1-5). As he and his cousin (who did not appear at trial) were closing Urban Gear, five black males entered the store. (ROA 73, l. 21—74, l. 12). The victim testified that Mack was the first person to enter. (ROA 75, ll. 6-16). According to the victim, Mack had an AK-47, and told the victim and his cousin to get down on the floor. (ROA 76, l. 17—77, l. 20). The victim was hit with the butt of the gun. He and his cousin were then taken to the back of the store and tied up. (ROA 79, ll. 1-23). They were faced down. The victim did not recall if the person who beat

him up was also the person who bound him. (ROA 101, ll. 11-13). Eventually, the victims loosened their binds and called 911. (ROA 79, l. 19—80, l. 23). These events occurred quickly-- the robbers were present in the store only for about 3-5 minutes. (ROA 108, ll. 15-19).

The victim's contacts with Joy Mack, after the crime, but before Mack's arrest

After these traumatic events, the victim observed Mack approximately two weeks later at the same shopping area. No other investigative tips pointed in Mack's direction until the police received a phone call from the victim. (ROA 168, l. 14—169, l. 2; ROA 170, ll. 4-8). The victim testified that he did not call the police upon this initial viewing—which would have been June 28th, 2007-- because he was "nervous." (ROA 816, l. 19— 82, l. 15).

On June 29th, the victim saw Mack shopping in his store with another male. According to the victim, Mack was not hostile or antagonistic towards him. This was the second time he testified he had seen Mack since the robbery. (ROA 136, l. 3—137, l. 25; 141, ll. 11-19). And even though the victim testified he was absolutely certain Mack was involved, this is what he said at the earlier, *in camera* Neil v. Biggers hearing, which defense counsel elicited during the trial:

Q: The prosecutor asked you: Did you see the defendant come in your store?
You said: Yes, sir.

And he had an individual with him?

Yes, sir. And you said okay, and then this your testimony.

A: Yes.

Q: And then I told my wife, I think that's the guy that robbed me. And that is him right there, and I'm almost sure. It's just some face you don't forget. . . .

Q: I'm going to read the last sentence, and then I told my wife, **I think that is the guy that robbed me**, and that is him right there. **I'm almost sure**. It's just some face you don't forget. That's him right there. Okay? So Andy, after you looked at that—

A: Yes, sir.

Q: -- you would agree that you said, **I think that's him**, and **I'm almost sure**.

A: Yes, sir.

(ROA 144, l. 13—145, l. 13) (emphasis added).

The victim then testified that he came into contact with Mack for a third time, on June 30th. (ROA 145, ll. 22-25). Mack was shopping in 31 Sports, a clothing store in the same shopping area. (ROA 150, l. 14—151, l. 7). As the victim was making his report to the police officer, Mack exited that store. He actually walked in their direction. Behind these stores is a little back alleyway into which Mack could have headed into had he decided to intentionally avoid the police. (ROA 179, ll.5-25). The officer called Mack over and explained that he was being accused of committing armed robbery. (ROA 152, l. 2—154, l. 17). Instead of arresting him, the officer merely placed Mack on trespass notice. (ROA 158, l. 19—159, l. 13). Mack did not attempt to run, and according to the officer, he was very cooperative and polite. He gave the police his ID when asked. (ROA 180, ll.1-4; ROA 181, ll.15-21).

The victim was exposed to Mack's image a 4th time, when his picture was placed in the paper. The victim cut out the picture and saved it. (ROA 159, l. 20—160, l. 19).

Significantly, on the night of the robbery, and only two hours after these events, the victim informed the police that he would not be able to identify any of his assailants. (ROA 99, ll. 14-22; ROA 118, ll. 1-22).

The Mystery Suspect

On the day after the robbery—June 15th, 2007-- the victim called the police to identify someone, other than Mack, who he claimed was one of his assailants. Apparently, the victim was not so “nervous” to call the police to report that he had been victimized by this person. And, even though he gave the police the license tag number of the vehicle this person was spotted in, the police never arrested this mystery person. (ROA 116, ll. 13-25; ROA 128, l. 24—133, l. 16). It appears that the victim, with respect to this mystery person, made an erroneous identification calling into question the integrity of his identification of Mack.

There was a dearth of evidence developed by the police to connect Mack to this crime. For example, a number of fingerprints were lifted from the store by the police, but none of them matched Joy Mack. (ROA 164, l. 23—165, l. 12; ROA 166, ll. 17-21). No testimony was ever presented tying Mack to any gun or to any of the items stolen from the store. The police never received a “tip” involving Mack, unlike his co-defendant. (ROA 163, ll. 8-11). As the lead investigator testified, the only piece of evidence linking Mack to this robbery was the victim’s identification. (ROA 171, ll. 2-9).

Defense counsel moved for a directed verdict at the end of the State’s case. The motion was denied. (ROA 187, ll.5-13). Defense counsel then renewed the motion at the at the end of the case. Again, the motion was denied. (ROA 188, ll.8-10).

The evidence presented at trial was insufficient to support Mack’s convictions because the victim’s identification of him only raised a suspicion that Mack was guilty of the crime. A defendant is entitled to a directed verdict when the state fails to produce

evidence of the offense charged. State v. McKnight, 352 S.C. 635, 642, 576 S.E.2d 168, 171, *cert. denied*, 540 U.S. 819, 124 S.Ct. 101, 157 L.Ed.2d 36 (2003); State v. Rothschild, 351 S.C. 238, 243, 569 S.E.2d 346, 348 (2002). The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Mitchell, 341 S.C. 404, 409, 535 S.E.2d 126, 127. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). *See also* State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004). In this case, the evidence presented by the State did not rise above the level of mere suspicion.

In this case, the victim informed the police on the night of the crime that he would be unable to identify his assailants. Then, after 2 weeks elapsed, he saw Mack and decided he must have been one of the criminals, despite the complete lack of any other evidence. Once the victim identified Mack, the police should have sought more evidence against Mack, if they were able to. Indeed, it appears that they tried, but the evidence simply did not point to him. His fingerprints, after all, were tested, but there were no matches. Additionally the police never developed any evidence relating to a relationship between Mack and his co-defendant. There was no testimony of any stolen items being found in Mack's house or car. There was no evidence linking him to a gun.

The eyewitness identification in this case was not strong enough to support Mack's conviction. It is well known that eyewitness identifications are a weak form of evidence upon which to convict:

The inherent weakness of eyewitness identification is confirmed by the more than 200 post-conviction DNA exonerations, and supported by an increasingly powerful body of social science research. Indeed,

misidentification by eyewitnesses is claimed to be the single largest single source of wrongful convictions and may in fact be responsible for more wrongful convictions than all other causes combined.

The Eyewitness Conundrum: How Courts, Police and Attorneys Can Reduce Mistakes by Eyewitnesses, New York State Bar Journal, January 2009. And see United States v. Wade, 388 U.S. 218, 228-29 (1967) ("The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification.") Respectfully, Mack asks this Court to reverse his convictions.

II. Alternatively, the judge erred in allowing the victim to make an identification of Mack during the trial because the identification was unreliable under *Neil v. Biggers*, *supra*.

The judge granted defense counsel's motion to suppress the photographic identification line-up that was created two weeks after Mack's arrest warrants were issued. (ROA 63, l. 6- p. 69, l. 25). The judge should also have disallowed the victim from making an in-court identification of Mack as his assailant because the identification was also unreliable under the Neil v. Biggers factors:

"A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification." Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Even though an identification procedure may be inherently suggestive, it may still be admissible if it is otherwise reliable. To determine whether it is reliable, a Court must consider the factors set forth in Neil v. Biggers, *supra*. (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty

demonstrated by the witness at the confrontation, and (5) the amount of time between the crime and the confrontation. Id.

In this case, the testimony showed that these events occurred exceedingly quickly, and that the victim initially told the police that he would not be able to identify any of his assailants. Additionally, the identification was cross-racial in nature. See U.S. v. Telfaire, 469 F.2d 552 (C.A.D.C. 1972); State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991); *Cross-Racial Identification Errors in Criminal Cases* 69 Cornell L. Rev. 934 (1984). And, the victim observed Mack on at least one prior occasion before he identified him as his assailant. Too, the victim, it appears, had already made one faulty identification of another person as one of his assailants, and exhibited uncertainty regarding his identification of Mack when he initially expressed his concerns to his wife. Under the totality of the circumstances, the identification was unreliable and should have been excluded from trial.

CONCLUSION

For the preceding reasons, Mack respectfully asks this Court to reverse his convictions.

Respectfully submitted,


Elizabeth A. Franklin-Best
Appellate Defender

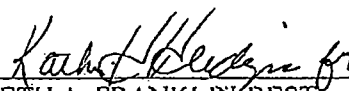
ATTORNEY FOR APPELLANT.

This 11th day of February, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 11th, 2010


ELIZABETH A. FRANKLIN-BEST
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOY MACK,

APPELLANT.

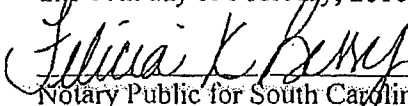
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Harold M. Coombs, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of February, 2010.


Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 11th day of February, 2010.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Honorable J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

JOY MACK,

Appellant.

FINAL BRIEF OF RESPONDENT

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

<u>In the Interest of Robert D.</u> , 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000)	6
<u>Neil v. Biggers</u> , 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)	6
<u>State v. McHoney</u> , 344 S.C. 85, 544 S.E.2d 30 (2001)	4
<u>State v. Saltz</u> , 346 S.C. 114, 551 S.E.2d 240 (2001)	4

Other Authorities:

Rule 207 (b)(4), SCACR	6
------------------------------	---

STATEMENT OF ISSUES ON APPEAL

1. Was the evidence sufficient to convict the defendant since the victim first told the police that he could not identify any perpetrators and identified the defendant over a week after the crime? Further, the victim first observed the defendant and then told police that defendant was one of the perpetrators. (Appellant's Statement of Issues on Appeal I).
2. The defendant says the identification was unreliable under Neil v. Biggers, and asks whether the trial judge erred by allowing an in-court identification. (Appellant's Statement of Issues on Appeal II).

STATEMENT OF THE CASE

The defendant was charged with armed robbery (2008-GS-10-05695), assault and battery with intent to kill (2008-GS-10-05696), and kidnaping (2008-GS-10-05697). The defendant and his counsel came to trial on February 23-26, 2009 before the Honorable J. C. Nicholson, Judge, and a jury. The jury found the defendant guilty, and the court sentenced him to concurrent terms of twenty-two years for armed robbery, twenty years for assault and battery with intent to kill, and twenty-two years for kidnaping. The jointly tried, separately represented, co-defendant (Darrell Lee Goss) was convicted of kidnaping, assault and battery with intent to kill, and armed robbery (2008-GS-10805 - 10807) and sentenced to concurrent terms of twenty years imprisonment. The defendant served opposing counsel a timely Notice of Appeal.

ARGUMENT

I.

The motion for directed verdict was soundly denied.

The victim saw the defendant, followed by four other black males, come into his store at closing time on June 14, 2007. He watched the defendant walk some seventy feet. The defendant pulled an AK47 (a long rifle), from his pants, forced him down, and beat his head with the butt of the gun. The defendant took his money. The assailants - one wielded a handgun and ordered him to look at the ground - bound him and another worker with string from his grand opening sign. (ROA. pp. 70 - 81; p. 96; p. 99, lines 23-25; pp. 115-116; p. 155). The victim focused on the defendant - he had the AK47 and wore black jeans, red shirt, and a gray skull cap. (ROA. p. 81; pp. 97-98). Another day - he guessed about a week later - the victim saw the defendant at the shopping area alone, but he did not call the police. Next, the victim saw the defendant inside his store with another man. He called the police, but they arrived after the defendant had left. The same day he again saw the defendant and called the police. The police returned, but the defendant, again, had left. The next day, the victim saw the defendant at the 31 Sport store and called the police. When the police arrived, the defendant came out of the store, and the victim identified him. (ROA. pp. 82 - 85).

Officer Singletary testified about responding to the store in the afternoon of June 30, 2007 and meeting with the victim. The victim said a person involved in the robbery a couple of weeks earlier had gone into 31 Sports, another nearby store. While they were talking, the defendant came out of the store. The victim identified the defendant to

Officer Singletary, and the victim was 100 percent certain in his identification. (ROA. pp. 172-176).

At the close of the state's case, the defendant [by Mr. Apostolou] moved for a directed verdict on the ground that the victim's identification was not certain enough to go to the jury. The defendant renewed his motion for directed verdict at the close of the evidence. The court denied the motions. (ROA. p. 187, lines 5-13; p. 188, lines 8-10). On appeal the defendant says the victim's identification was "specious" and insufficient to support his conviction. (IBOA p. 5).

In ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. E.g., State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). The defendant's feeling about the weight of the victim's identification was the substance of his motion for directed verdict. It was a matter correctly addressed to the trier of fact.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury.

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)(internal citation omitted). The record includes evidence that the victim positively identified the defendant and testified that the defendant was his main attacker. The motion for directed verdict was correctly denied.

II.

The trial judge soundly permitted the victim to identify the defendant.

In limine the victim said that on the afternoon of June 14, 2007 five black males walked into his store (Urban Gear) around closing. Their faces were not covered. The first assailant took out an AK47 machine gun, told the victim to get down, beat him in the head with the stock of the gun, bound him [and a helper] and threatened to shoot. (ROA. p. 11 - 12, line 17). On June 29 the defendant again came into his store; the victim recognized him and called the police when the defendant left. The police arrived, took the report and left. Minutes later, the victim again saw the defendant in the parking lot. He called the police again, and, again, the defendant left. The next day, June 30, he saw the defendant (Mack) in the parking lot at 31 Sports. He called the police. While he was explaining to the police, the defendant appeared. The victim identified him to the police. He based his identification on the robbery in his store, and he was totally certain in his identification. (ROA. p. 17 - p. 20, line 9). Later, the police showed the victim a photo lineup, and the victim chose the photo of the defendant (Mack). (ROA. p. 20, line 10 - p. 21, line 8).

The defendant asked the court to suppress only the evidence of the [photo] lineup. (ROA. p. 62, line 21 - p. 63, line 3). The trial court granted the motion after noting that this was not a traditional identification where, after a crime, a victim uses a photo array to identify a suspect. Rather, in the present case the victim had already identified the accused, and the [photo] line-up bolstered his identification. (ROA. p. 67, line 6 - p. 69).

On appeal the defendant asks whether the trial judge erred by allowing an in-court identification. First, the defendant does not show where in the trial record that matter was contemporaneously raised to the trial judge and where in the record he secured a ruling on that point. A brief must reference the Record on Appeal to support the facts alleged and "where relevant objections and rulings occurred in the transcript." Rule 207(b)(4), SCACR. There is no matter for the appellate court to address. Further, the record shows that the defendant received the relief he requested. Again, there is no matter for the appellate court to address. Parenthetically, the principle of Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) deals with the suggestiveness of police identification procedure and applies only to state action. In the Interest of Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000). The identification procedure raised on appeal was a result of the victim's personal life experience.. The police photo array merely confirmed the victim's prior identification of the defendant, and the trial court excluded it. There was no error.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

BY: Harold M. Coombs, Jr.
Harold M. Coombs, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 29, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Honorable J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

vs.

Respondent,

JOY MACK,

Appellant.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Elizabeth A. Franklin-Best, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 29th day of January, 2010

Harold M. Coombs, Jr.
HAROLD M. COOMBS, JR.

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
Honorable J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

JOY MACK,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule
211(b), SCACR.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

SCARLETT WILSON
Solicitor, Ninth Judicial Circuit

By: Harold M. Coombs, Jr.
Harold M. Coombs, Jr.

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 29, 2010

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Joy Mack,

Appellant.

Appeal From Charleston County
J. C. "Buddy" Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2011-UP-215
Submitted May 1, 2011 – Filed May 17, 2011

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, Senior
Assistant Attorney General Harold M. Coombs, Jr.,

all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: Joy Mack appeals his convictions for kidnapping, assault and battery with intent to kill, and armed robbery, arguing the trial court erred in the following: (1) allowing the victim to make an in-court identification of Mack when the initial identification was unreliable and (2) denying Mack's motion for a directed verdict when the evidence presented at trial was insufficient to convict Mack. We affirm.¹

1. A review of the Record indicates Mack did not make a contemporaneous objection at trial and did not raise the issue of the victim's in-court identification at any point during trial. Accordingly, the issue is not preserved for appellate review. See State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (holding there must be a contemporaneous objection that is ruled upon by the trial [court] in order to properly preserve an issue for appellate review).

2. Viewing the evidence in the light most favorable to the State, the evidence supports the trial court's decision to deny Mack's motion for a directed verdict and submit the case to the jury. Through an in-court identification, the victim identified Mack as the assailant who first entered the store holding a gun. Because the trial court is concerned "with the existence or nonexistence of evidence, not its weight" when ruling on a directed verdict motion, we hold the trial court properly denied the motion for a directed verdict. See State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.").

AFFIRMED.

SHORT, KONDUROS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

COPY

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOY MACK,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Harold M. Coombs, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; this 22nd day of January, 2010.

Warren T. Ferguson for
Administrative Assistant

SUBSCRIBED AND SWORN TO before me
this 22nd day of January, 2010.

Felicia K Berry (L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010



RECEIVED

JUN - 3 2011

ATTORNEY GENERAL'S
OFFICE

The South Carolina Court of Appeals

TANYA A. GEE
CLERKV. CLAIRE ALLEN
DEPUTY CLERKPOST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 2, 2011

REMITTITURThe Honorable Julie J. Armstrong
100 Broad Street, Suite 106
Charleston, SC 29401-2258Re: The State v. Mack, Joy
2008-GS-10-05695 2008-GS-10-05696 2008-GS-10-05697

Dear Ms. Armstrong:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

A handwritten signature in cursive script, appearing to read "Renee S. Johnson".

Renee S. Johnson
Administrative SpecialistJAG
TAG/rjcc: Appellate Defender Elizabeth A. Franklin-Best
Senior Assistant Attorney General Harold M. Coombs, Jr.
Scarlett Anne Wilson, Esquire

FORM 5

STATE OF SOUTH CAROLINA

County of Charleston2011-CP-10-4724
IN THE COURT OF COMMON PLEASJoy Mack 315439

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

2011 JUL -5 PM 5:28
CLERK OF COURTINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional
P.O. Box 205 Ridgerville, SC 29472
2. Name and location of Court which imposed sentence Charleston
County General Sessions
3. Name(s) of co-defendant(s) (if any) Darrell Goss
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2008-GS-5695 - 96, -97

- (b) _____
(c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
(a) February 26th 2009
(b) _____
(c) _____
6. Check whether a finding of guilty was made:
(a) after a plea of guilty _____
(b) after a plea of not guilty Jury trial
(c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
(a) the name of each Court to which you appealed:
i. SC Court of Appeals
ii. _____
iii. _____
(b) the result in each such Court to which you appealed:
i. DENIED
ii. _____
iii. _____
(c) the date of each such result:
i. _____
ii. _____
iii. _____
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. _____
ii. _____
iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
(a) NA

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistant Counsel
- (b) Denial of 6th and 14th Amendment
- (c) Denial of Due Process
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel fail to subpoena witness's
- (b) Counsel fail to file Notice of alibi
- (c) Only present after the fact.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. NA
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. NA
- ii. _____
- iii. _____

- iv. _____
- (c) the disposition thereof:
- i. NA
- ii. _____
- iii. _____
- iv. _____
- (d) the date of each such disposition:
- i. NA
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. NA
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

first filing PCR

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. NA
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. NA
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) first filing of PCR
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? NA
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Alex Apostolou
Charleston County Bar
- ii. Same as above
- iii. Elizabeth Franklin - Best
South Carolina Appellant Defense
- (b) the proceedings at which each such attorney represented you:
- i. Trial
- ii. Sentencing
- iii. Appeal

19. State clearly the relief you seek in filing this application:

Vacate all Sentencing 1st Conviction
or new trial

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Dorchester)

VERIFICATION

I, Joy Mack, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Joy Mack

SWORN to and subscribed before me this 23RD
 day of June, 2011.

Sylvia Jones (L.S.)
 Notary Public

My Commission Expires: 1/24/2018

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Joy Mack, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Joy Mack
Applicant

SWORN or affirmed to and subscribed before me this
23rd day of June, 2011.

Sylvia Jones
Notary Public

My Commission Expires: 1/24/2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
Joy Mack, #315439,	)	2011-CP-10-4724
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief filed July 5, 2011, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the June 2008 term of the Charleston County Grand Jury for armed robbery (2008-GS-10-5695), assault and battery with intent to kill (ABWIK) (2008-GS-10-5696), and kidnapping (2008-GS-10-5697). Alex Apostolou, Esquire, represented the Applicant. The Applicant proceeded to trial on February 23-26, 2009, after which a jury found him guilty as indicted. The Honorable J.C. Nicholson, Jr. sentenced the Applicant to confinement for twenty (22) years each for armed robbery and kidnapping and twenty (20) years for ABWIK. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Elizabeth Franklin-Best, Esquire, of the South Carolina Commission on Indigent Defense, represented Applicant on appeal. After full briefing by both sides, the South Carolina Court of

Appeals affirmed the conviction and sentence. State v. Mack, Op. No. 2011-UP-215 (S.C. Ct. App. filed May 17, 2010). The Remittitur was issued on June 2, 2011.

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the trial transcript, the Final Brief of Appellant, the Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction and sentence, and the Remittitur dated June 2, 2011.

II.

In his application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that counsel failed to subpoena witnesses or file a notice of alibi.
2. Denial of due process.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant further alleges that he was denied due process of law. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed

to make even a prima facie showing, the Respondent submits that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

Respondent denies each allegation that is not expressly admitted, qualified, or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held on the issue of ineffective assistance of counsel.

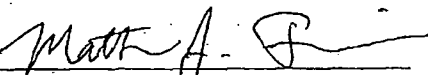
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

September 27 2011.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JOY MACK,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

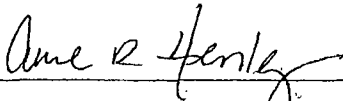
2011-CP-10-4724

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Jonathan L. Yates, Esquire
 145 King St., Ste. 102
 Charleston, SC 29401

DATED this 27th day of September, 2011


 Anne R. Henley, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Joy Mack

PCR Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

CASE NO. 2011-CP-10-4724

PRETRIAL BRIEF IN SUPPORT
OF JOY MACK'S PCR APPLICATION

FILED
2012 MAY 21 AM 11:28
JEREMY J. ARMSTRONG
CLERK OF COURT

Joy Mack, by and through undersigned counsel, submits this Pretrial Brief in support of his PCR Application, which is scheduled for a hearing on May 22, 2012.

Joy Mack, now 26 years old, was convicted by a jury in 2009 and is currently serving three concurrent sentences of 20, 20, and 22 years, respectively, for armed robbery, assault and battery with intent to kill, and kidnapping. It was alleged that on June 14, 2007, Mack was one of five black males who entered a clothing store armed, beat and tied up the store owner and his assistant, and left the store with clothing and cash. Mack was tried alongside a single co-defendant, Darrell Lee Goss. None of the alleged remaining participants in the crime have been identified. At the trial, the State presented a mountain of evidence against co-defendant Goss, including his fingerprints at the scene, stolen clothes in his house, and a gun in his car covered in the store owner's blood.

The State offered *no* evidence against Mr. Mack other than a single, uncorroborated eyewitness identification from one of the two victims, Aytakin Ayazgok, the store owner.¹ Trial counsel, Alex Apostolou, did not effectively challenge that identification on two important grounds, which would have raised reasonable doubt in the minds of the jurors, thus satisfying the Strickland standard for PCR relief. Strickland v. Washington, 466 U.S. 668 (1984).

¹ Notably, the second victim, the store owner's assistant, did not testify, and never corroborated the identification of Mack.

First, trial counsel failed to join co-defendant's motion to impeach the sole eyewitness on pending felony charges for selling counterfeit merchandise, and thus did not preserve that reversible issue for appeal. Specifically, prior to trial, co-defendant's counsel, James Smiley, requested approval from the Court to ask Mr. Ayazgok on cross examination whether he had been arrested and was being prosecuted by the Ninth Circuit Solicitor's Office. See Trial Transcript at p. 152, l. 21 – p. 154, l. 7. Mack's trial counsel did not join that motion and did not object when it was promptly denied by the Trial Judge. Consequently, the Court of Appeals refused to consider that unpreserved argument in Mack's appeal brief. See Court of Appeals Op. No. 2011-UP-215 (May 17, 2010).

Indeed, the Trial Judge should have allowed the impeachment testimony against Mr. Ayazgok. In an analogous case, the South Carolina Supreme Court has held that it was error not to permit impeachment based on pending charges, noting that such error is prejudicial and reversible when the testimony is uncorroborated and important to the prosecution's case – as it clearly was in Mack's case. *State v. Smith*, 446 S.E.2d 411, 413-4, 315 S.C. 547, 552-3 (S.C. 1994). Notably, disallowance of the impeachment testimony was much more prejudicial to Mack than it was to his co-defendant Goss, who was not identified by Mr. Ayazgok, but rather prosecuted on a mountain of forensic evidence, as described above.

Second, particularly because this whole case hinged on one eyewitness, trial counsel should have engaged an expert in the field of eyewitness identification in order to (a) prepare an effective line of questioning to cross examine Mr. Ayazgok, and (b) provide authoritative testimony for the jury explaining the scientifically accepted deficiencies and resulting unreliability of Mr. Ayazgok's identification.

Such an expert has been retained for this PCR hearing – Jennifer L. Beaudry, PhD. In the affidavit attached as Exhibit 1,² she concludes that the identification in the trial transcript was unreliable based on several scientifically proven deficiencies, which she thoroughly explains and supports with references to empirical studies. For example, she finds the duration of Mr. Ayazgok's observation to be too short, comparing it to studies showing a 90% false alarm rate. Ex. 1 at 5, 25. She explains that the difference in race between Mr. Ayazgok (White/Turkish) and Mr. Mack (Black) increases the chances that the identification is incorrect by a factor of 1.56. Ex. 1 at 3-4, 25. She highlights that the alleged presence of an AK47 on the perpetrator diminished the reliability of the identification under what is commonly known as the "weapon focus effect." Ex. 1 at 5-6, 25. Likewise, she concludes that the stress of the robbery, assault, and kidnapping make the identification considerably less reliable. Ex. 1 at 6, 25. She also points out that Mr. Ayazgok, while on alert and searching for the perpetrators after the incident, was susceptible to what is referred to as "unconscious transference," in that he would be likely to mistake a person as a perpetrator that he had seen at a previous unrelated time. Ex. 1 at 7, 25. Additionally, she explains that the fact that the perpetrator was wearing a skull-cap reduced the

² We ask that the Court, in its discretion, consider the expert affidavit in Exhibit 1 in lieu of live testimony, given the cost and difficulty of arranging for the expert to appear in Court, and the fact that this pretrial submission, for which advance notice was provided to the Attorney General's office on May 17, 2012, has given the State opportunity to present countering evidence. See Simpson v. Moore, 627 S.E.2d 701, 712, 367 S.C. 587, (S.C. 2006) ("The State argues that the PCR court erred by considering numerous depositions and affidavits in lieu of live testimony. We disagree. At a PCR evidentiary hearing, the court may receive proof by affidavits, depositions, oral testimony, or other evidence. S.C. Code Ann. § 17-27-80 (1985). Whether to admit such evidence is within the court's discretion. In the present case, the PCR court allowed Simpson to introduce over forty depositions and some twenty-two affidavits into evidence in lieu of live testimony. We find that this decision was within the trial judge's discretion, resulting in no prejudice to the State. Most of the relevant witnesses testified at the PCR hearing and were cross-examined by the State. In addition, the court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson. Therefore, we hold that the PCR court did not err.") (citations omitted).

reliability of the identification. Ex. 1 at 9, 25. She also explains that "witness confidence" has proven to be a weak indicator of accuracy and is often prejudicial to the jury, particularly where the confidence increases over time. She was particularly concerned that Ayazgok's confidence gradually grew from not believing he could identify any of the perpetrators at the time of the incident, to "100% positive" after seeing Mr. Mack three times in or near his store over the course of the next two weeks. She goes on to explain that Ayazgok's confidence was even further manipulated by holding onto a newspaper clipping of Mack's picture and later identifying him in a line up. Ex. 1 at 10-13.

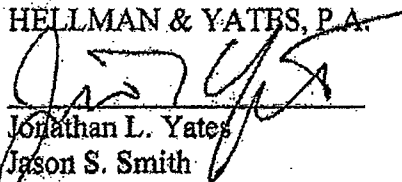
Also in her affidavit, Dr. Beaudry compiles a list of questions she would have advised trial counsel to ask during cross examination to challenge the identification. Ex. 1 at 2-3. Upon review of the transcript, the Court will find that most of those questions were not asked in any form by trial counsel.

Once more, an analogous South Carolina Supreme Court case supports PCR reversal on this instance, where it is clear that engaging an expert would have made a difference in the outcome of the case. Miller v. State, 665 S.E.2d 596, 379 S.C. 108 (S.C. 2008) ("The State established the charge of armed robbery against Bruce Miller based on a single eyewitness . . . In terms of misidentification, trial counsel failed to call an expert witness to testify regarding eyewitness identification testimony."); See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 776-77 (2008) (noting that a PCR applicant can show prejudice from trial counsel's failure to call an expert to challenge an eyewitness identification by presenting such expert testimony at the PCR hearing).

In sum, these failures by trial counsel, rather than the merit of the State's prosecution effort, resulted in Mack's conviction and 22-year prison sentence. This is indeed one of the rare

PCR cases where relief is truly deserved in the interest of justice. We respectfully ask that Joy Mack be given a new trial and full opportunity to defend himself against the State's unconvincing case.

HELLMAN & YATES, P.A.


Jonathan L. Yates

Jason S. Smith

jyl@hellmanyates.com

js@hellmanyates.com

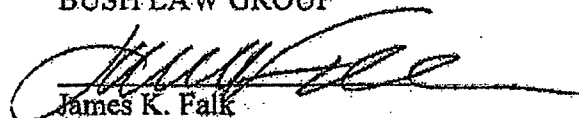
145 King Street, Suite 102

Charleston, SC 29401

(843) 266-9099

(843) 266-9188 (facsimile)

BUSH LAW GROUP


James K. Falk

jfalk@bushlawsc.com

3 Broad Street

Suite 450

Charleston, SC 29401

(843) 300-1047

(843) 628-2403 (facsimile)

ATTORNEYS FOR PCR APPLICANT MACK

May 21, 2012

Affidavit of Jennifer L. Beaudry, Ph.D.
May 18, 2012

The affiant, Jennifer Beaudry, having been duly sworn hereby states, and avers:

I have been asked by counsel James Falk and Jonathan Yates in the matter of Joy Mack v. State of South Carolina, 2011-CP-10-4724, to indicate how the defense of Joy Mack would have benefited from consulting or calling an eyewitness expert. In preparation for this report, I have reviewed case materials including the complete trial transcript from State of South Carolina v. Joy Mack, affidavits, photo lineup, SLED Forensic Lab Request, and the North Charleston Police Department reports, booking reports, and witness statements. This affidavit will address several issues:

- I. My credentials
- II. How an eyewitness identification expert could have benefited Joy Mack's defense
- III. The specific factors in this case that could have impacted the eyewitness's memory
- IV. The general theory of memory
- V. General research methodologies in this area
- VI. Real world evidence of eyewitness errors
- VII. Juror belief of eyewitnesses
- VIII. Expert testimony as a safeguard

I. Credentials of Dr. Jennifer Beaudry

Employment: I am an Assistant Professor of Psychology at the University of South Carolina Beaufort since January 2009. Prior to this appointment as an Assistant Professor, I was a Psychology Instructor from August 2008 – December 2008.

Education: I hold a Ph.D. in Social Psychology from Queen's University (Kingston, Ontario, Canada), a M.A. in Social Psychology from Queen's University, and a B.A. (Honors) in Psychology from Laurentian University (Sudbury, Ontario, Canada).

Experience: I have regularly taught eyewitness research in a Psychology and Law course.

Publications: I am an author or co-author of 9 eyewitness publications including original research articles published in peer-reviewed scientific journals and a book chapter in the *Handbook of Eyewitness Psychology*.

Presentations: I am an author or co-author of more than 30 presentations related to eyewitness research given before professional psychological organizations.

II. Expert Advice to Defense in the Present Case

1. Consultation

Mack's trial counsel would have benefited from consulting an eyewitness identification expert because they would have provided counsel with general advice as well as specific questions for key witnesses.

General Advice

In addition to being able to discuss the research discussed in detail below, as an expert consultant, I would have:

1. Advised counsel to call the officer who investigated Ayazgok's first phone call to the police regarding identifying one of the perpetrators (06/15/2007). This would allow the defense to establish a pattern of accusatory statements made against patrons of the stores in the shopping mall. Furthermore, if the officer had definitive evidence to rule out this person as a perpetrator of the robbery, then it could be used to discredit Ayazgok as a reliable witness.
2. Urged counsel to try to suppress the lineup identification evidence (Apostolou was successful in the suppression hearing).
3. Provided counsel with articles and summaries of the key factors in this case, so that he would be better informed of the issues. This knowledge may have helped him to hone in on the specific issues that he should have been addressing in his cross-examination and closing argument.

Questions for Aytekin "Andy" Ayazgok

1. How long did it take the perpetrator to walk across the store? How long before he pulled out the AK47?
2. When he pulled out the weapon, did your attention shift away from the perpetrator's face to the gun? If not, when did you notice the wood stock and when did you determine the length of the weapon? So, would you say that the weapon drew your attention?
3. Were you looking at the man holding the AK47 the entire time? If yes, how did you know there were four other Black males in the store with him?
4. The only description of this perpetrator (aside from clothing) was that he was a Black male. What was it about the defendant that you recognized the first time you saw him after the robbery?
5. You indicated immediately after the robbery that you could not identify them, but identified the defendant (for the first time) approximately 10 days later. What changed?
6. You indicated he was wearing a skull/snow cap. Could you see any of his hair?
7. When you saw Joy Mack's picture in the newspaper, did you feel like you had gotten the guy?
8. How frightened were you during the robbery? Was your heart pounding? Were you having trouble catching your breath? Did everything going on around you seem to be happening very quickly?
9. Can you explain why you reported increasingly higher levels of confidence after each encounter with the defendant?

Questions for the officer who first took Andy's statement on June 14, 2007 (name is illegible)

1. Was Andy extremely shaken up by the robbery? Was he calm when describing the event? Did you ask him to give additional identifying details regarding the perpetrators?
2. Did Andy indicate that he would not be able to identify the perpetrators if he saw them again? Did he explain why not?

2. Testimony

Mack's trial counsel would have benefited from calling an eyewitness identification expert to testify because an expert witness in this case would have testified to the issues raised in section III.

Specifically, as an expert eyewitness in this case, I would have explained how memory works, how eyewitness identification research is conducted, and the real world evidence for eyewitness errors. Then, I would have discussed the specific factors relevant to this case (as I do below), and I would have explained to the jury the impact of each factor on eyewitness identification accuracy and reliability.

III. Factors in the Present Case that can Affect Eyewitness Memory

In the following sections I identify factors about which there is relevant scientific research demonstrating the impact of the factor on eyewitness identification accuracy. As this research relates to *Joy Mack v. State of South Carolina*, I will specifically discuss the following factors:

1. The cross-racial nature of the identification;
2. Brief exposure to the perpetrator;
3. The weapon focus effect;
4. The effects of stress/fear on memory;
5. Unconscious transference & commitment;
6. Disguise;
7. Witness confidence and accuracy.

1. The Fact that the Eyewitness and Perpetrator Were of Different Races Diminishes the Reliability of the Identification

It is well established that there exists a comparative difficulty in recognizing individual members of a race different from one's own. In fact, several decades of research has shown that individuals are better able to recognize faces of their own race than faces of other races, and more likely to falsely identify faces of other races, a phenomenon known as the own-race bias (e.g., Anthony, Copper, & Mullen, 1982; Behrman & Davey, 2001; Bothwell, Brigham, & Malpass, 1989; Brigham, Bennett, Meissner, & Mitchell, 2007; Brigham, Maass, Snyder, & Spauling, 1982; Malpass & Kravitz, 1969; Meissner & Brigham, 2001; Platz & Hosch, 1988; Shapiro & Penrod, 1986; Wright, Boyd, & Tredoux, 2001). Although most commonly studied with Black and White participants, the own-race bias has also been found in studies including Hispanic participants (MacLin, MacLin, & Malpass, 2001; MacLin & Malpass, 2001, 2003; Platz & Hosch, 1988) and with individuals from other racial and ethnic backgrounds (e.g., Asian as seen in Hiliar, Kemp, & Denson, 2010).

Meissner and Brigham (2001) published what I consider to be the best review of the research on the problems of the own-race bias (ORB), which has sometimes been called the other-race or cross-race effect. Meissner and Brigham analyzed data from 39 research articles, with 91 independent samples involving nearly 5,000 witness-participants. Measures of hit and false alarm rates, and aggregate measures of discrimination accuracy and response criterion were examined. Overall, they reported that the chance of a mistaken identification is 1.56 times greater in other-race than in same-race conditions and witnesses were 1.4 times more likely to correctly identify a previously viewed own-race face than an other-race face. Overall, in terms of discrimination between new versus old faces, participants were more than 2.2 times as likely to accurately identify own-race faces as "new" when compared with performance on other-race faces.

Meissner and Brigham reported that the own-race bias resulted in greater impairment of identification of other-race faces (especially with respect to false identifications) with short exposure times and longer periods of time between viewing and identification. Furthermore, White participants showed more ORB than other groups (especially with respect to false identifications of Black suspects).

Meissner and Brigham also explored the question of whether cross-race contact might reduce these effects and found that overall, contact played a small role in the ORB, accounting for just 2% of the variability across participants. They also found that the amount of viewing time available to witnesses significantly influenced accuracy in the ORB—particularly through an increase in false alarms to other-race faces when study time is limited. That is to say, there is little reason to think other-race contact would play an important role in reducing own-race bias and some reason to think the brief exposure to the perpetrator would aggravate the problem.

With regard to the current case

The eyewitness/victim is White (emigrated from Turkey to the United States) and the perpetrator was described as a Black male. The fact that the witness is married to an African-American woman does not eliminate the cross-race nature of the identification as a factor to consider when weighing the reliability of this evidence. The evidence discussed above indicates—regardless of interracial contact—the own-race bias can negatively impact the accuracy of an eyewitness's identification.

2. The Eyewitness' Brief Exposure Duration Impacts His Ability to Make an Accurate Identification

Exposure duration refers to how long the witness is exposed to the target's face. In general, studies have found that as exposure time increases, identification accuracy increases. As discussed in Bornstein, Deffenbacher, Penrod, and McGorty's (in press) meta-analysis, shorter durations range from a few tenths of a second to 12 s, while longer durations typically hover around 45 to 60 s (although a few studies examined durations longer than 180 s). The updated meta-analysis confirmed findings from Shapiro and Penrod's (1986) meta-analysis. Specifically, longer durations produce higher hit rates and lower false identification rates compared to shorter exposures, but exposure impacts hit rates to a greater degree than false alarms. In comparing the two effect sizes, Bornstein et al. concluded that exposure duration is even more influential than researchers originally thought.

Exposure durations in real crimes may be longer than those typically used in eyewitness and facial recognition studies; however, the effect of exposure duration is nonlinear, meaning that beyond a certain point (approximately 30 s), any further increase has minimal impact on identification accuracy. Further evidence of the generalizability of laboratory findings to the real world is that research paradigm (facial recognition vs. eyewitness identification) did not significantly moderate the relationship; exposure duration had similar effects regardless of whether or not the witness's memory was studied under ecologically valid conditions.

The effects of exposure time are well illustrated in a study by Memon, Hope and Bull (2003) in which mock witnesses viewed a realistic crime video that lasted either one minute, forty seconds (clear view of face for 45 seconds) or one minute seven seconds (clear view of face for 12 seconds). Witnesses were tested with target-present and target-absent arrays 40 minutes later. As shown in the following Table, the proportion of correct rejections in target-absent arrays increased substantially when

exposure time increased—though mistaken identifications in target-absent arrays remained relatively high. It should be underscored that in this study the attention of the mock witnesses was focused on the video so witnesses had a good view, the target was of the same race, stress levels would have been much lower than in a real crime and no weapon was directly visible in the videotaped crime, and witnesses were tested almost immediately after viewing the crime rather than following a long delay—these are all factors that contribute to better performance than would be observed with a crime that involved less-focused attention, cross-race identification, high stress, weapon-visible, brief exposure, and a ten-day delay. In short, the accuracy levels observed in this study are surely higher than those that would be expected from the actual crime involved in this case.

Performance of Young Adults in the Short and Long Exposure Groups with Target-Present and Target-Absent Lineups -- Tested 40 Minutes After Exposure

	Short Exposure			Long Exposure		
	Hit	False Alarm	Non-Choice	Hit	False Alarm	Non-Choice
Target Present	29%	42%	29%	95%	5%	0%
Target Absent	--	90%	10%	--	41%	59%

Note. Errors are bolded

With regard to the current case

The victim did not indicate exactly how long the perpetrator was in view, but instead reported that he watched the perpetrator walk toward him across a 70ft room. Based on that description I would conclude that the victim had only a brief opportunity to view the perpetrators.

3. The Presence of a Weapon Impacts the Eyewitness's Ability to Make an Accurate Identification

Weapon focus refers to the attention witnesses give to a perpetrator's weapon during a crime. It is expected that the attention the witness focuses on a weapon will reduce their ability to later recognize the perpetrator. Researchers have assessed eyewitness accuracy in an attempt to assess the effects of weapon-focus effects on memory. The relevant studies were reviewed in two meta-analyses: the first by Steblay (1992), and an update by Fawcett, Russell, Peace, and Christie (2011). Steblay's meta-analysis included 19 studies, while Fawcett et al.'s updated meta-analysis included 28 studies. The most recent meta-analysis—which is based on the existing and most up-to-date results, and thus provides a better understanding of the state of the field regarding this issue—reported an overall moderate effect of weapon presence on memory performance. Retention interval and exposure duration significantly moderated this effect. As the length of time between exposure and test increased, the weapon focus effect decreased. The relationship with exposure duration is a little more complicated: weapon presence is most detrimental when witnesses are exposed to the weapon for 10–60 s, with smaller effects when exposure is less than 10 s or greater than 60 s.

Research by Mitchell, Livosky, and Mather (1998), Pickel (1998, 1999), and Shaw and Skolnick (1999) indicates that any surprising object can draw attention away from the perpetrator and that novelty, rather than threat, may be the critical ingredient in the effect. Indeed, Fawcett et al.'s meta-analysis indicated that compared to non-unusual objects, the presence of an unusual object (e.g. raw,

whole chicken) was associated with a greater detriment to memory performance. Researchers have tried to detect weapon-focus effects in field studies, and although the results are conflicting (likely because the methods used are fraught with problems detailed by Pickel (2007)), Tollestrup, Turtle, and Yuille (1994) examined the effect of weapon focus on the rate of suspect identification and obtained data consistent with laboratory findings.

With regard to the current case

The witness claimed that the defendant is the perpetrator who pulled an AK47 out of his pants before beating him with it.

4. Stress Reduces Identification Accuracy

Recently Deffenbacher, Bornstein, Penrod, and McGorty (2004) published a new meta-analysis examining the impact of stress on eyewitness memory. The meta-analysis was conducted on 27 tests of the effects of heightened stress on identification accuracy and on 36 tests of its effect on recall of crime-related details. The researchers found that high levels of stress negatively impact both types of memory. The effect of stress was notably larger for target-present than for target-absent lineups—that is, stress particularly reduced correct identification rates. The effect was considerably larger for eyewitness identification studies that simulated eyewitness conditions (e.g., staged crimes in the eyewitness identification paradigm) than for facial recognition studies.

These effects are well-illustrated in a study by Morgan et al. (2004) who studied the eyewitness capabilities of more than 500 active-duty military personnel enrolled in a survival school program. After 12 hours of confinement in a mock prisoner of war camp, participants experienced two 40-minute interrogations 4 hours apart. One was a high-stress interrogation with real physical confrontation and one was a low-stress interrogation without physical confrontation. The interrogators in each instance were different individuals. A day after release from the prisoner of war camp, and having recovered from food and sleep deprivation, participants were asked to identify the interrogators from both the high- and low-stress interrogations. Researchers tested three identification procedures: a 15-person live lineup, a 16-person photo-spread, or a serial-presentation photo lineup of up to 16 persons. Regardless of testing method, as the following table shows, memory accuracy for the high-stress interrogator suffered a dramatic decline from the level displayed for the low-stress interrogator.

	High Stress	Low Stress
CORRECT IDS [Target-Present]		
Live line-up method	27%	62%
Photo-spread method	36%	76%
Sequential photo method	49%	75%
FALSE ALARMS [Target-absent]		
Live line-up method	45%	50%
Photo-spread method	48%	61%
Sequential photo method	0%	0%

With regard to the current case

The robbery, kidnapping, and assault can be presumed to have been extremely stressful. It should be noted here that the length of exposure to the interrogators in the Morgan et al. study described above

was a relatively long period of time (40 minutes), which is much longer than the exposure duration of the current case, and yet identification accuracy was still relatively low in the high stress conditions.

5. *Unconscious Transference and Commitment can Lead to Mistaken Identifications*

Unconscious transference is a term applied when there is a "transfer of one person's identity to that of another person from a different setting, time, or context" (Read et al., 1990, p. 3). Williams (1963) originally coined the phrase in reference to an English murder case, in which an innocent person may have been executed. Williams indicates that one of the eyewitnesses who identified the defendant had briefly seen him before the crime and may have unconsciously transferred the identity of the actual perpetrator to the defendant. Unconscious transference has generally been examined during a mugshot search that is followed by a lineup identification procedure.

Mugshot Exposure Effects

Deffenbacher, Bornstein, and Penrod wrote in 2006:

The phenomenon of the photobias lineup has existed for as long as police have, in the furtherance of their criminal investigations, engaged in the practice of exposing eyewitnesses to mugshots. If a witness is exposed to mugshots subsequent to viewing a perpetrator and prior to an additional test of recognition memory, there is the possibility that exposure to the mugshot photos may bias the witness's decision at that test, usually a photo or live lineup. Defense attorneys have labeled a photobias lineup as one in which a possibly innocent person has been arrested because his/her photo was initially included in a set of mugshots but not identified by the witness; subsequently, however, he/she was identified by that witness at a lineup. Any bias thus engendered would be due to the previous exposure of the witness to the mugshot photo of the suspect identified at the subsequent lineup.

In such cases, the witness may well have suffered a failure of memory for the circumstances of previous encounter of the face identified at the lineup. This sort of failure of memory for facial source or context is all the more problematic when viewing of the perpetrator has occurred under less than optimal viewing conditions (Brown, Deffenbacher, & Sturgill, 1977). Indeed, the United States Supreme Court had opined that this was the case, even before there was empirical support for their view (*Simmons v. United States*, 1968).

The first empirical examination of the possibility of bias imposed by mugshot exposure more generally as well as the more specific sort of bias that might be engendered by a photobias lineup was that of Brown et al. (1977). In all three of their experiments, these investigators noted that recognition memory for a once-seen face is much greater than is the capacity to recall the circumstances under which that previously unfamiliar face had been encountered. In Experiments 2 and 3, they employed what we will henceforth refer to as a *transference design* to test for specific biasing effects of mugshot presentation between exposure to live targets and a subsequent lineup...

In addition to the passive effect of familiarity gained by mere mugshot exposure to a previously unfamiliar face, Gorenstein and Ellsworth (1980) sought to determine whether there was a further increase in interference with witness memory for the target face engendered by the witness actively choosing the mugshot of an innocent person.

Would witness commitment to a prior choice of a particular mugshot as the target person cause the mugshot image to be retained as strongly or even more strongly than that of the target? In brief, then, a mugshot commitment design involves a control group and an experimental group both being exposed to a target person, followed by mugshot exposure for the latter group. Witnesses in the experimental condition may be urged to pick an innocent person from the mugshots, despite the target's face not being included. At the lineup the target face may or may not be included, but the previously chosen mugshot image definitely is. Gorenstein and Ellsworth (1980) found that whereas control witnesses identified the target from a six-person photo array at a significantly above chance rate (.39), mugshot commitment witnesses failed to identify her at an above chance rate (.22) but did identify their mugshot choice's image at an above chance level (.44), a level somewhat greater than the rate at which control witnesses identified the target person (p. 288-290).

In their (2006) meta-analysis of 15 mugshot studies Deffenbacher, Bornstein, and Penrod found the overall proportion of correct identifications from target-present and target-absent arrays following mugshot exposure was .43 whereas the comparable figure for the no-mugshot control conditions was .50 correct—indicating that mugshot exposure inserted between exposure to the target and a subsequent lineup test has a negative effect on eyewitness memory. In 11 of those 15 studies only innocent people were shown in the mugshots and the negative effects of exposure were even greater: the proportion of correct identifications from target-present and target-absent arrays following mugshot exposure was .48 versus .61 for the no-mugshot control condition. If the witness actually made an identification of a mugshot image as that of the target, the subsequent appearance of that image or person at an identification procedure had an even larger negative impact upon lineup accuracy, with mean proportion correct of .32 for the mugshot commitment condition versus .55 for the control condition. Identification of an innocent mugshot interferes with a witness's memory of the actual target so as to reduce both the hit rate and correct rejection rate for target present and target absent lineups, respectively.

Deffenbacher et al. also specifically examined witness performance when they are shown mugshots and a subsequent presentation that does not contain the target/perpetrator. The overall false alarm rate at a lineup for mugshot exposure conditions was .37, and the comparable figure for the no-mugshot control conditions was .15, less than half the former rate. More alarmingly, if the witness selected an innocent person in a mugshot and that person was included in a subsequent target-absent array, the mean false alarm rate for the mugshot commitment condition was .53 versus just .20 for the control condition.

It should be noted that the transference effect is not a uniquely forensic phenomenon. In addition to the previously cited studies of eyewitness memory, memory researchers have for the past quarter of a century obtained strong support for a variety of transference-related phenomena. These phenomena include "familiarity without awareness" (Mandler, 1980), "retention without awareness" (Roediger, 1990), the "false fame effect" (Jacoby, Kelley, Brown, & Jasechko, 1989), and failures in reality monitoring (Johnson & Raye, 1981) and source monitoring (Johnson, Hashtroudi, & Lindsay, 1993).

With regard to the current case

The witness was not exposed to mugshots; however, during the two weeks after the robbery, the witness called the police multiple times to report that he believed that he had seen at least two of the perpetrators at his store or the shopping mall (one of whom was the defendant). Although this situation does not precisely mimic the research studies, similar principles apply. The witness was on alert and searching the general area for the perpetrators of the robbery, which makes him susceptible to unconscious transference in that he might mistake a person as being present at the crime scene rather than recognizing that he had previously seen him at the shopping mall at an unrelated time. Furthermore, with each subsequent viewing of the defendant, the witness becomes more committed to his belief that he had previously seen the defendant during the criminal event (Dysart, Lindsay, Hammond, and Dupuis, 2001).

6. Even Minimal Disguise can Impact Identification Accuracy

Full face masks, stockings, hats, hoods, and sunglasses can be quite effective in diminishing the facial feature cues that are necessary for recognition. Cutler, Penrod, and Martens (1987a, 1987b), Cutler et al. (1986), and O'Rourke et al. (1989) examined the effects of masking a target's hair and hairline cues on subsequent identification accuracy. In these experiments participants viewed a videotaped liquor store robbery and later attempted an identification from a videotaped lineup. In half of the robberies the robber wore a knit pullover hat that covered his hair and hairline. In the other half the robber did not wear a hat. The robber was less accurately identified when he was disguised. For example, in one of the experiments (Cutler et al., 1987a) 45% of the participants gave correct judgments on the lineup test if the robber wore no hat during the robbery, but only 27% gave a correct judgment if the robber wore the hat during the robbery. Pozzulo & Marciniak (2006) found that correct identifications fell by half when a target's hairstyle changed (short versus long hair). Similarly, Mansour, Beaudry, Bertrand, Kalmet, Melsom, & Lindsay (in press) found that the correct identifications were significantly lower when the target covered his head with a toque (aka skull cap or beanie) than when he wore no disguise (66% vs. 77%, respectively).

In Shapiro and Penrod's (1986) meta-analysis, experiments were coded for whether or not the facial stimuli had undergone changes in facial features between the encoding and recognition phases. Facial transformations included changes in facial hair and deliberate disguises such as those used in the experiment just described. Non-transformed faces were more accurately recognized ($d = 1.05$; 75% non-transformed vs. 54% for transformed) and less often falsely identified ($d = .40$; 22% vs. 30%) than transformed faces.

With regard to the current case

The perpetrator was described as wearing a skull or snow cap (analogous to the toque condition in Mansour et al.).

7. Witness Confidence is only Weakly Related to Identification Accuracy

The problems with respect to witnesses' confidence about the accuracy of their identifications and the actual accuracy of those identifications are manifold. Some of these problems relate to jurors' over-reliance on witness confidence as a guide to witness accuracy and some relate to the weak association between confidence and accuracy (CA). In addition, witness confidence can be influenced by post-

identification factors such as repeated questioning, briefings in anticipation of cross examination, and feedback about the behavior of other witnesses. The most useful expression of confidence is one made at the time the initial identification was made, which is not present in this case because there appears to be no record of the witness's statement when he first saw the defendant (in a casual, non-identification procedure setting) approximately ten days after the robbery. Research demonstrates that jurors over-believe eyewitnesses, have difficulty reliably differentiating accurate from inaccurate eyewitnesses, and (as discussed previously) are not adequately sensitive to aspects of witnessing and identification conditions that affect witness performance. A major source of juror unreliability is reliance on witness confidence, a dubious indicator of eyewitness accuracy. Juror reliance on witness confidence appears to be unaffected by traditional safeguards such as cross-examination and judges' instructions in eyewitness cases.

Although there is a presumption among many actors in the legal system that there is a positive confidence-accuracy relation, serious questions about whether that is true have been raised by researchers within the law-psychology community. Many experimental studies of witness identification have reported correlations between confidence and accuracy that, although generally positive, are not always significantly different from zero. (A correlation of zero would indicate no relationship and a correlation of 1.0 would indicate a perfect relationship between confidence and accuracy.)

Confidence and accuracy in jury studies

There is consistent evidence to indicate that the confidence that an eyewitness expresses in his or her identification during testimony is the most powerful single determinant of whether or not observers of that testimony will believe that the eyewitness made an accurate identification (e.g., see Cutler, Penrod & Dexter, 1990; Leippe & Romanczyk, 1987, 1989; Leippe, Manion, & Romanczyk, 1991; Lindsay, Wells, & O'Connor, 1989; Lindsay, Wells, & Rumpel, 1981; Turtle & Wells, 1988; Wells, Ferguson, & Lindsay, 1981; Wells, Lindsay, & Ferguson, 1979; Wells & Murray, 1984).

Overall, it is clear that jurors do rely on witness confidence as an indicator of witness accuracy—but to what extent does witness confidence predict identification accuracy? Should jurors (and attorneys and judges) rely so heavily on witness confidence as a guide to witness accuracy?

To what extent does witness confidence predict identification accuracy? Should jurors (and attorneys and judges) rely so heavily on witness confidence as a guide to witness accuracy?

Post-identification confidence and accuracy

Over the past several decades researchers have examined the results from the growing numbers of studies that measure both witness accuracy and witness post-identification confidence in an effort to arrive at a reliable estimate of the magnitude of their relation. Deffenbacher (1980) reviewed a set of studies conducted since the turn of the century and concluded that there was little support for a strong reliance on witness confidence as a guide to witness accuracy. In a review of 31 studies Wells & Murray (1984) reported an average $r = .07$. In contrast, Sporer, Penrod, Read & Cutler (1995) divided participants depending on whether they chose someone from the lineup or rejected it, and found a confidence-accuracy correlation of .41 among (forensically-relevant) choosers. In the most exhaustive review to date, Bothwell, Deffenbacher, & Brigham (1987) meta-analyzed 35 studies involving staged incidents that yielded an average post-identification confidence and accuracy correlation of $r = .25$.

These findings suggest that witnesses who are highly confident in their identifications are somewhat more likely to be correct as compared to witnesses who display little confidence.

Factors affecting confidence, accuracy, and their relation

There is evidence that the strength of the confidence-accuracy correlation depends on a variety of cognitive and social factors such as timing of the confidence judgment (Cutler & Penrod, 1989a; Sporer, 1992, 1993), the optimality of information processing conditions at encoding (Bothwell et al., 1987; Cutler & Penrod, 1989a; Deffenbacher, 1980), the distinctiveness of the to-be-recognized persons (Brigham, 1990; Cutler & Penrod, 1989b), and the match between a target's appearance at encoding and at retrieval (Read, Vokey, & Hammersley, 1990).

Confidence is highly malleable

Confidence malleability refers to the tendency for an eyewitness to become more (or less) confident in his or her identification as a function of events that occur after the identification. The confidence malleability problem is particularly important because actors in the legal system can contaminate the confidence of an eyewitness in ways that can make an eyewitness's in-court expression of confidence a meaningless indicator of the eyewitness's memory. An eyewitness who expresses high confidence in their identification is expressing a strong belief that the identified person and the culprit are the same person. Clearly, an eyewitness's belief that the identified person is the culprit can arise out of pure memory judgments; that is, a perception of a remarkable resemblance between the identified person and the eyewitness's memory of the culprit (Leippe, 1980; Wells, Ferguson, & Lindsay, 1981). This would be ideal.

Unfortunately, an eyewitness's belief that the identified person is the culprit can also arise for reasons other than the eyewitness's memory (Leippe, 1980; Wells, Ferguson, & Lindsay, 1981; Luus & Wells, 1994; Wells & Bradfield, 1998). For example, Hastie, Landsman, and Loftus (1978) found that witnesses who were questioned repeatedly grew more confident about the accuracy of details in their reports (see also Shaw, 1996; Shaw & McClure, 1996; Turtle & Yuille, 1994).

Wells, Ferguson, & Lindsay (1981) demonstrated they could increase witness confidence simply by briefing witnesses about the types of questions they might encounter in an upcoming cross-examination. When cross-examined, the briefed witnesses (who were no more accurate than the unbriefed witnesses) were significantly more confident about their identifications than were the unbriefed witnesses. Moreover, the jurors believed the more confident briefed witnesses more than the unbriefed witnesses. Unfortunately, the briefing effect occurred among inaccurate eyewitnesses, whose levels of confidence rose dramatically, whereas confidence levels among accurate witnesses were unchanged.

In a dramatic illustration of confidence malleability, Luus & Wells (1994) used a staged-crime to secure false identifications from 136 eyewitnesses. These eyewitnesses viewed a theft in pairs and were separated shortly after the theft. After being separated false identifications were obtained from the witnesses using a photospread (the eyewitnesses were unaware they had made a false identification). After making their identifications eyewitnesses were randomly assigned to one of several experimental conditions. In the control condition, eyewitnesses were told nothing about the identification decision of their co-witness. In various experimental conditions, eyewitnesses were given information that their co-witness ostensibly identified the same person, that their co-witness identified someone else, or that

their co-witness indicated that the culprit was not in the lineup. They were then interviewed by an assistant to the experimenter (posing as a campus police officer) who solicited the witnesses' confidence levels (on 10-point scales) in the accuracy of their identifications. Each eyewitness was videotaped while giving statements to the police officer.

The results indicated dramatic increases in the confidence that eyewitnesses expressed in their false identifications in the condition in which they were told that their co-witness identified the same person (the average confidence on a 10 pt. scale was 8.8 versus 6.9 in the no-information control condition). The lowest confidence levels were found among witnesses who were told that the co-witness had indicated that the perpetrator was not in the array (3.6). When Luus and Wells had mock jurors evaluate the witness statements the pattern of ratings closely paralleled the pattern of witness confidence levels (a result that is consistent with the research on juror reliance on witness confidence reviewed earlier). The manipulations had similar effects on juror ratings of the witnesses' quality of view, believability, and detail of description.

Even stronger and broader effects have been shown to emerge when eyewitnesses are told after their identification that they identified the suspect (versus being told nothing). Wells and Bradfield (1998) found that eyewitnesses who received confirming feedback were not only much more confident than the witnesses with no feedback and witnesses with disconfirming feedback—the confirming feedback witnesses distorted their reports of their witnessing conditions by exaggerating how good their view was of the culprit, how much attention they paid to the culprit's face while observing the event, and so on. Furthermore, Douglas et al. (2010) found that people rate witnesses receiving confirming post-identification feedback as more accurate and confident than witnesses who have not received feedback.

Parenthetically, it should be noted that any in-court recognition of the defendant cannot be independent of the identifications the witness made at the lineup. It is sometimes helpful to point out that memory is akin to trace evidence in the sense that it is possible (and relatively easy) to contaminate. Further, it is sometimes difficult to determine when the contamination occurred and the extent of the influence of the contamination on the outcome of the test (i.e., identification). It is crucial to keep in mind that a witness's memory should be treated with caution and that all reasonable measures to preserve and record a witness's memory *as soon as possible* after an event should be taken.

With regard to the current case

The witness's confidence increased over time. Immediately after the robbery, the witness indicated that he would not be able to identify the perpetrators if he saw them again. Then, approximately 10 days after the robbery, the witness indicated that he saw the defendant outside his store and believed he was the perpetrator that pulled a weapon, but he did not call the police. Then, approximately 5 days later on June 29th, the witness saw the defendant in his store and reportedly told his wife "I think that's the guy that robbed me. And that is him right there, and I'm almost sure. It's just some face you don't forget" (page 99 of State of South Carolina v. Joy Mack trial transcript). The witness did call the police after this "identification," and after a subsequent sighting of the defendant on this day. The following day, June 30th, Andy again saw the defendant at the shopping mall, and in a police report, he indicated that he was "100% positive that this is the same guy who participated in the robbery of my store" (6-30-2007 North Charleston Police Department Witness Statement). On July 2nd, 2007, the paper published the defendant's picture, which the witness cut out and kept with him until the trial date. Finally, on July 17th, 2007, the lead detective in this case provided the witness with a simultaneous lineup that

contained the defendant, and after not having received the proper admonition that the perpetrator may or may not be in the lineup, the witness selected the defendant and indicated that he was sure "that is the one" (p. 102 of trial transcript). The reports and testimony suggest that the witness's confidence increases with each subsequent (casual, non-identification procedure) contact with the defendant.

The defense did successfully suppress the identification procedure on July 17th, 2007, mainly because of the suggestiveness of the procedure because the officer knew the suspects identity, the officer did not present unbiased lineup instructions, and the procedure was unnecessary and prejudicial because the witness had already identified the defendant. Nonetheless, although the jury did not hear the ID evidence, the simple process of making that identification decision and being told that he had selected the defendant would have boosted the witness's confidence in his identification decision (Wells & Bradfield, 1998).

IV. General Theory of Memory

Over a period of decades, researchers have established that when we experience an important event, we do not simply record it in our memory as a video recorder would. The situation is much more complex. Most theoretical analyses of the memory process divide it into three major stages. First, the event is perceived by a witness, and information is entered into the memory system. This is called the *acquisition* stage. Second, some time passes before a witness tries to remember the event, and this is period of time during which the witness "holds on" to the memory but does not actively try to recall it is called the *retention* stage. Third, the witness tries to recall the stored information (e.g., to describe the perpetrator, or to attempt an identification of a suspect), and this is called the *retrieval* stage where memories are reconstructed. This three-stage analysis is central to the concept of human memory. Psychologists who conduct research in this area try to identify and study the important factors that play a role in each of the three stages.

Numerous factors at each stage affect the accuracy and completeness of an eyewitness account. Some of the factors affecting eyewitness performance are: Lighting conditions, Duration of the event, Violence, Stress/fear, Age, Sex, Expectations, Length of retention interval, Postevent information, Method of questioning, and confidence.

V. Research Methodologies Used in Eyewitness Research

In general, eyewitness identification researchers employ several techniques to come to the scientific conclusions that will be discussed in this affidavit. The three most common are: experimental research, archival research, and meta-analyses.

1. Experimental Research

Without a doubt, the most common form of research conducted in the area of eyewitness testimony is experimental research. The primary reason for conducting experimental research is that it gives us the ability to make cause and effect statements, such as "Y happened *because* of X." For example, a well-conducted experiment can tell us that using a specific identification procedure will cause an improvement in identification accuracy.

Experimental studies are defined by two key components: (1) that the researcher is able to manipulate the variable of interest (i.e., X), and (2) that participants are randomly assigned to conditions. When we say that the researcher must manipulate something, it means that the researcher must change some aspect of the study so that the participants are receiving different treatments. For example, if the variable of interest, X, was stress, the researcher would assign one group to a low level of stress and another group to a high level of stress. This will allow the research to compare the groups to determine whether the participants performed differently on some other variable, say Y, which might be eyewitness accuracy. Randomly assigning participants to the different groups allows us to say with reasonable certainty that the two groups are not systematically different from each other (i.e., they are equivalent), and therefore, any difference found in the variable of interest, Y, must be the result of the manipulated variable, X. In other words, randomly assigning participants to two groups allows researchers to test whether or not the manipulation (low or high stress) impacted the variable of interest (eyewitness accuracy).

The two most common experimental research paradigms used to examine people's memory for a face are facial identification and eyewitness identification studies. Facial identification paradigms involve two phases: (1) the encoding phase, and (2) the testing phase. In the encoding phase, participants are presented with a series of faces. In the testing phase, participants are presented another series of faces, some which of which had been previously presented. The participants' task is to indicate which of the faces are "old" (presented during the encoding phase) and which are "new". Researchers typically rely on facial identification studies to examine theoretical questions about memory processes, in part because each participant makes multiple decisions (one for each face). Eyewitness identification studies, on the other hand, are generally used to examine applied issues regarding factors that could affect real-world eyewitness identification performance. In these studies, participants are exposed to a mock-crime and are asked to make an identification decision from some form of identification procedure, typically a lineup. Most often, researchers will manipulate the presence of the perpetrator (aka culprit or target) in the lineup to investigate two forensically relevant situations: (1) a target-present lineup contains the perpetrator, and (2) a target-absent lineup, in which the perpetrator is replaced with an innocent lineup member (representing a situation in which the police's suspect is *not* the perpetrator). A witness's selection or choice from the lineup is considered to be a correct identification if the witness selects the target from a target-present lineup; on the other hand, the selection is considered a false identification if the witness selects the innocent suspect from the target-absent lineup. In a single-suspect lineup—regardless of whether the perpetrator is present or absent—a selection of a filler (known innocent lineup member) is considered to be a false positive, which should discredit the witness.

There is, of course, overlap between the two research approaches, including a consideration of practical applications based on facial recognition studies, as well as common independent variables such as exposure time, disguise, and retention interval. For this reason, some researchers use the term facial identifications to encompass results from facial recognition and eyewitness identification studies (Shapiro & Penrod, 1986). Both types of studies will be discussed in this report, as the findings from both paradigms provide relevant and applicable information regarding eyewitness memory. When relevant, I will discuss findings from facial identification and eyewitness identification studies separately.

2. *Archival Research*

When eyewitness researchers examine existing records or data, they are conducting archival research. This type of research is important for understanding how witnesses in real-world cases behave. For example, several archival studies have found that approximately 20% of witnesses in real cases select a lineup filler—a known innocent person and thus have made an identification error (e.g., Wright & McDaid, 1996). These results are consistent with results from lab studies, which have found very similar rates of filler selections. The DNA exonerations in the United States, discussed in section IV below, are an example of archival research.

3. *Meta-analysis*

Generally, a meta-analysis is a statistical summary of research that has already been conducted, rather than setting out to collect new data with new participants in a new experiment. A benefit of using the meta-analysis technique is that it would inform the researcher about eyewitness performance over a large number of studies using many different participants conducted in many different laboratories (and perhaps from many different countries around the world).

VI. Real World Eyewitness Error Rates

I begin by noting, briefly, some important facts about eyewitness errors. For starters, the Innocence Project website (<http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>) currently implicates mistaken eyewitness identifications in over 75% of DNA exculpations—as of May 15th, 2012, the Innocence Project has been involved in 291 DNA exonerations. Brandon L. Garrett (2008), a law professor at the University of Virginia, has systematically examined the first 200 DNA exculpation cases, in which the innocent people served an average of 12 years in prison. Garrett reports that the leading cause of the wrongful convictions was erroneous eyewitness identification—which occurred in 79% of the cases. In a quarter of the cases, eyewitness testimony was the only direct evidence against the defendant.

Additionally, a series of archival studies underscores that eyewitnesses are a source of relatively unreliable evidence. A series of archival studies of the performance of actual eyewitnesses attempting identifications have become available in recent years (e.g., Slater, 1994; Wright & McDaid, 1996). When using archival data/police reports it is not possible for researchers to determine when an identification is correct because we don't know if the police suspect is, in fact, the perpetrator. Nonetheless, it is possible, if sound records are maintained, to determine error rates as reflected in choices of non-suspect fillers. A properly constructed lineup includes only one suspect (who might or might not be the perpetrator) and everyone else is a known-innocent filler who would not be charged even if they were identified by the eyewitness. Filler choices are not the type of error that could send an innocent person to jail, but they are identification errors.

As Gary Wells, Amina Memom, and Steven Penrod note in a 2006 paper titled "Eyewitness Evidence: Improving Its Probative Value":

Archival analyses of filler identifications have yielded very interesting results. Wright and McDaid (1996) analyzed 1,561 lineup outcomes in London and found filler identification rates

of 19.9%. These data are similar to the 21% filler identification rate reported by Slater (1994) in a study of 843 lineups conducted by the Metropolitan Police in London. Behrman and Davey (2001) reported that 24% of identifications from live lineups in Sacramento, California, were identifications of fillers. Valentine, Pickering, and Darling (2003) analyzed 119 lineups in the greater London area and found that 21.6% of the eyewitness identified fillers. In these four studies of actual eyewitnesses to serious crimes, filler identifications constituted approximately one third of all positive identifications. These archival results represent a very important complement to the experimental studies of eyewitnesses for several reasons. First, they indicate filler-identification results that are quite consistent with rates obtained in experiments (Ebbeson & Flowe, n.d.; Steblay, Dysart, Fulero, & Lindsay, 2001). Second, these archival results address a common criticism of experiments—namely, that participant witnesses in experiments are not as cautious as actual crime witnesses are, because the consequences of a mistaken identification in an experiment are not serious. But the witnesses in the archival studies were actual witnesses to crimes and yet mistakenly identified fillers in one third of their positive identifications. Third, the filler identification rates in the archival studies permit us to make conservative estimates of the risk that an innocent suspect would face in these lineups. For example, with five fillers in each lineup (six-person lineups minus the suspect) and a 20% filler identification rate, the risk to any given filler is 4%. If an innocent suspect has the same risk as a filler, the estimated risk to an innocent suspect is 4%.

These estimates of risk to an innocent suspect are conservative for two reasons. First, lineups rarely yield equal distributions of error because the innocent suspect will commonly stand out for any number of reasons, including the selection of fillers that bear a poor resemblance to the description of the perpetrator given by the witness (Valentine & Heaton, 1999; Brigham, Meissner, & Wasserman, 1999). Second, when the actual perpetrator is not in the lineup (i.e., the suspect is innocent), the rates of filler identification increase (see Wells & Olson, 2002). Assuming that the perpetrator was present in a large proportion of the lineups in these archival studies, the filler-identification rates underestimate the expected error rate for any given lineup in which the perpetrator is absent (pp. 50-51).

With respect to lineup bias against suspects, a number of studies of actual police arrays (including Brigham, Meissner, & Wasserman, 1999; Valentine & Hayton, 1999; and Wells & Bradfield, 1999) demonstrate that when individuals who were not at the scene of the crime are merely provided the descriptions given by crime witnesses and then shown the corresponding array, suspects are picked 2 to 2.5 times more often than the average filler.

The archival studies (of real cases) thus underscore several important points:

1. Witnesses make errors at fairly high rates—about one in three positive identifications is clearly incorrect—and those numbers do not include an unknown number of erroneous identifications of innocent suspects.
2. Filler identification rates are fairly high—20-25% across studies.
3. To the extent witnesses are guessing when choosing fillers, we have to expect other witnesses are guessing when choosing suspects—some of whom are innocent.
4. If a six-person lineup is fair, there is a 1 in 6 chance of an innocent suspect being chosen. Police arrays, however, tend to be biased against the suspect; thus, innocent suspect misidentification rates—as a result of guessing—are greater than the 1 in 6 risk.

VII. Jurors' Understanding of Factors that Affect Eyewitness Memory

In section III, I focused on the current case and discussed several of the key factors that could have influenced the witness's memory, and outline the general testimony that I, as an eyewitness expert, would have provided had I been called to testify in this case. As discussed in section II, consultation with an eyewitness expert would have highlighted (for the defense and/or the court) the importance of these factors. Below I summarize the research regarding people's knowledge of the factors affecting eyewitness memory and identification decisions. This discussion will focus on jurors, but will also draw upon some research conducted with prosecutors, defense attorneys, and judges.

Effective defense requires that the attorney is aware of—and introduces—the factors that can affect the reliability of an eyewitness identification. Furthermore, effective defense requires that that juries are sensitive to the factors that influence eyewitness identification accuracy. Suppose that an attorney, through cross examination, establishes that the perpetrator was of a different race than the eyewitness, that the perpetrator was disguised and brandished a weapon, that the eyewitness was highly intoxicated, and that the lineup test from which the suspect was identified suffered from instruction bias, foil bias, and presentation bias. What good will this do if the jury does not understand how these factors are likely to influence eyewitness identification accuracy? The attorney can argue during closing arguments that these factors enhance the likelihood of false identifications, but the jury may find such arguments implausible, especially if they perceive the attorney as biased and the arguments as inconsistent with common sense.

Three types of studies examine juror sensitivity to the factors that influence eyewitness identifications, all of which are reviewed below. The first type assesses lay knowledge using multiple-choice questions in survey research. The second type examines the abilities of laypersons to predict the outcome of eyewitness identification experiments. The third involves simulated jury decision making experiments; some of these studies examine mock jurors' belief of accurate and inaccurate eyewitnesses, while others investigate factors that influence mock jurors' decisions. Below is a brief summary of the research findings from each of these types of studies; for a more detailed review see Boyce, Beaudry, and Lindsay (2007).

1. Survey Studies of Lay Knowledge

A number of studies have addressed lay (i.e., juror) and professional (lawyers and judges) knowledge about the factors that influence eyewitness identification. Early studies include Deffenbacher & Loftus (1982), McConkey & Roche (1989), and Noon & Hollin (1987). More recent ones include Alonzo & Lane (2010), Benton, Ross, Bradshaw, Thomas, & Bradshaw (2006), Lane, Groot, Roussel, & Alonzo (2007), Mitchell & Haw (2008), Schmechel et al., (2006), Wise & Safer (2004 & 2010), and Wise, Pawlenko, Safer, & Meyer (2009). Read and Desmarais (2009) review these studies and present their own data. Across studies it is common to find that 50-65% of respondents chose answers similar to those of the experts. While this performance may look relatively good, the data generally indicate significant disagreements among jurors about how factors influence eyewitness performance and, to some extent the seeming agreement with experts likely arises from "good" guessing by laypersons. Unfortunately, picking answers on a questionnaire is very different from assessing trial evidence where jurors have to generate and apply their own evaluative criteria. As Read & Desmarais observe:

These (survey) results, however, do not tell us whether community respondents' comprehension of the topics is of the requisite depth to appreciate conceptual distinctions made at trial by eyewitness experts. Nor do they indicate whether jurors would successfully apply their knowledge to the case at hand (cf. Schmechel et al.). In recent unpublished research [this paper was published in a peer-reviewed journal in 2010], Alonzo and Lane (2006) compared survey responses (to the Kassin et al. items) of students to their answers about eyewitness case vignettes and found that survey responses to specific case-relevant features did not well predict actual decisions made by these same participants about the case simulations. With the use of varied formats that centred on some similar issues, Schmechel et al. also concluded that how participants respond to one statement does not necessarily predict how they will respond to another. Indeed, on several True/False items (postevent information, unconscious transference and cross-race bias), Schmechel et al.'s participants responded in a manner highly similar to our participants but then went on to demonstrate inconsistencies on problem-solving questions that involved these same factors (p. 318).

Judges and juries appear to perform on par: Wise and Safer (2004) tested 160 judges' knowledge on 14 statements about factors whose effects on eyewitness accuracy are supported by strong empirical evidence. Judges averaged only 55% correct and their knowledge about these factors was unrelated to the number of years they practiced law, whether they practiced criminal law, how long they had served as a judge, and whether they served as a state or federal judge or a trial or appellate judge. The same authors (2010) compared 160 U.S. judges, 57 law students, and 121 undergraduates with respect to their knowledge and beliefs about factors affecting eyewitness accuracy and found judges (55%) were no more knowledgeable than undergraduates (58%), and both groups were less knowledgeable than law students (66%). Notably, after controlling for guessing, the percentages for correct answers were 10%, 16%, and 31% for judges, undergraduates, and law students, respectively. For all groups, increased knowledge about factors influencing eyewitness performance was associated with beliefs that might reduce wrongful convictions. All three groups underestimated what potential jurors know about eyewitness testimony. Wise and Safer concluded that: "The results suggest that increasing judges' knowledge of eyewitness testimony might help them reduce wrongful convictions and to more accurately assess when eyewitness experts are needed" (p. 1400).

2. Prediction Studies

In prediction studies, subjects are provided with descriptions of the methodology used in eyewitness identification experiments and are asked to predict the results. If subjects are sensitive to the factors that influence identification accuracy, they should be reasonably accurate at predicting study outcomes.

Kassin's (1979) subjects were not sensitive to the influence of crime-seriousness on identification accuracy nor to the absolute level of the identification accuracy rates. Wells (1984) reported several prediction studies. In one, participants believed confidence was strongly related to accuracy (it is not). In another, participants were not sensitive to the influence of one factor that clearly contributes to the suggestiveness of identification procedures: instructional bias (i.e., suggesting that the perpetrator is in the lineup).

Brigham and Bothwell (1983) conducted a prediction study with a random sample of 90 community members from Leon County, Florida, all of whom were registered to vote and therefore eligible jurors.

Their results further reinforced the findings of Kassin and Wells and indicate that prospective jurors overestimate the accuracy of eyewitness identifications.

3. *Mock-Juror Studies of Juror Decision Making*

Most relevant to the question of juror sensitivity are studies that attempt to simulate the jury's actual task of evaluating eyewitness identifications. I will discuss research from two major approaches within this general framework: (1) jurors' ability to discriminate between accurate and inaccurate eyewitnesses, and (2) juror sensitivity to the factors that influence identification accuracy. Throughout these studies the judgments of hundreds of prospective jurors (and some experienced jurors) are examined in response to a wide variety of simulated cases.

Mock Jury Evaluations of Accurate and Inaccurate Eyewitnesses

Wells, Lindsay, and Ferguson (1979) had 201 undergraduate mock-jurors evaluate identification testimony of witnesses. When the cross-examination questions addressed to the witnesses were non-leading, inaccurate eyewitnesses were believed by more jurors (86%) than were accurate eyewitnesses (76%). In contrast, when the questions were leading, accurate eyewitnesses were believed by more jurors (84%) than were inaccurate eyewitnesses (73%). In terms of the accuracy of their decisions, among jurors exposed to non-leading cross-examination, 76% correctly identified accurately eyewitnesses but only 14% correctly identified inaccurate eyewitnesses. Among jurors exposed to leading cross-examination, 84% correctly identified accurate eyewitnesses but only 27% correctly identified inaccurate eyewitnesses. Wells et al. also found that the confidence of the eyewitness in his/her identification accuracy correlated significantly ($r = .53$) with whether or not the juror *believed* the eyewitness, but nonsignificantly ($r = .05$) with the *actual accuracy* of the witness's decision. In other words, jurors were more likely to believe confident eyewitnesses but confident eyewitnesses were no more likely to have made a correct identification than less confident eyewitnesses.

A partial replication of this study by Lindsay, Wells, & O'Connor (1989) tested whether cross-examination of eyewitnesses conducted by experienced attorneys (versus inexperienced attorneys) might aid jurors in differentiating between accurate and inaccurate witnesses. The 16 experienced attorneys (with at least five years past their admission to practice, average experience of 12 years) and 16 inexperienced senior law students examined and cross-examined witnesses to a staged crime. The direct examinations generally ranged from 5 to 15 minutes and the cross-examinations from 3 to 35 minutes. Mock jurors' beliefs in eyewitness accuracy (as indexed by verdicts) were unrelated to witness accuracy—jurors could not differentiate accurate from inaccurate eyewitnesses. Greater attorney experience did not aid jurors in making the differentiation.

Wells and Leppe (1981) found that the accuracy of eyewitness recall of details was significantly negatively correlated ($r = -.56$) with juror belief in the eyewitness identification. In other words, the more peripheral details recalled incorrectly, the less likely jurors were to believe the identification. In short, to a substantial degree mock jurors evaluated identification testimony on the basis of witness memory for peripheral details. Examination that underscored errors in memory for peripheral details significantly weakened the credibility of accurate witnesses but did not reveal the inaccurate witnesses. This set of results is further compounded by the fact that, in Wells and Leppe's study, eyewitnesses' memory for peripheral details was inversely associated with identification accuracy. That is, the more peripheral details recalled, the less likely they were to make an accurate identification!

Lindsay, Wells, and Rumpel (1981) also examined mock jurors' ability to discriminate accurate from inaccurate eyewitnesses. Thefts were staged before 108 undergraduates, each assigned to one of three viewing conditions designed to produce low, moderate, and high levels of identification accuracy. Eyewitnesses later attempted to identify the thief from six-person photoarrays. A sample of eyewitnesses who made positive identifications were then cross-examined while being videotaped. The viewing condition manipulation was successful: of the eyewitnesses who made a positive identification, the correct identification rates for the low, moderate, and high conditions were 33%, 50%, and 74%, respectively. These percentages were significantly different from one another.

Lindsay, Wells, and Rumpel then presented 96 undergraduates with the video-taped cross-examinations of eight accurate and eight inaccurate eyewitnesses from each viewing condition. Overall, 62% of the low accuracy condition witnesses were believed, 66% of the moderate accuracy condition witnesses were believed, and 77% of the high accuracy condition witnesses were believed. Thus, jurors thought more witnesses were correct than was merited by the performance of the witnesses in the different witnessing conditions. Furthermore, the jurors gave the witnesses much more credence than was merited by the levels of accuracy of the witnesses they actually viewed—half the eyewitnesses selected from each witnessing condition had actually made correct identifications and perfect performance by jurors would thus have produced 50% belief rates for each of the three conditions.

In addition, Lindsay, Wells, and Rumpel found that witness confidence had a significant impact on belief, such that 77% of high confidence witnesses were believed versus 59% of low confidence witnesses. Moreover, confidence and witnessing condition interacted: among witnesses with high confidence, viewing condition had a trivial influence on juror beliefs—belief rates for low, moderate, and high accuracy conditions were 76%, 76%, and 78%, respectively. In contrast, among witnesses with low confidence, viewing condition now played a role. The corresponding percentages of eyewitnesses believed were: 47%, 54%, and 76%, respectively. Thus, jurors ignored witnessing conditions when the witness was very confident, but gave the witnessing conditions consideration when the witness was not highly confident. Jurors appear to suspend their critical powers when confronted by confident witnesses. As in other studies, the results of Lindsay, Wells, and Rumpel demonstrate that jurors cannot discriminate between accurate and inaccurate eyewitnesses. Indeed, accuracy levels were roughly 50% in all three conditions.

There are two unfortunate aspects to Lindsay, Wells, and Rumpel's results. First, to the extent that the criminal justice system differentially eliminates witnesses low in confidence from the prosecution process (because, for example, prosecutors are hesitant to proceed with cases based on identifications by less confident witnesses) these results suggest that jurors may commonly find themselves in a situation where they are inclined to rely on (high) witness confidence, and thus, may be less likely to critically examine the circumstances under which an identification was made. Second, in this study, witness confidence was only weakly correlated with witness accuracy ($r = .26$), thus the jurors were relying on less than fully diagnostic information when using confidence to gauge witness accuracy.

Lindsay, Wells, & O'Connor (1989) conducted an experiment to examine whether the findings of their previous research would generalize to a more realistic trial situation. Simulated trials were shown to 178 undergraduates, each of whom viewed one taped trial. Mock jurors rendered verdicts and answered other questions about the trials. The conviction rate did not differ significantly as a function

of accuracy of the eyewitness (jurors could not differentiate accurate from inaccurate eyewitnesses): guilty verdicts were rendered by 68% of the participants exposed to eyewitnesses who made correct identifications and by 70% of participants exposed to eyewitnesses who made false identifications. The degree of experience of attorneys did not significantly influence verdict.

In sum, (1) jurors overestimate the accuracy of identifications (there are more convictions than there are accurate identifications), (2) jurors fail to distinguish between accurate and inaccurate eyewitnesses, and (3) jurors tend to ignore viewing conditions that are known to influence identification accuracy and instead base their decisions, in part, on eyewitness memory for peripheral details and witness confidence—both of which tend to be poor predictors of identification accuracy. The studies of mock jurors' abilities (or lack thereof) to differentiate between accurate and inaccurate eyewitnesses converge on a dismal conclusion about jurors' ability.

Mock Jury Studies of the Factors That Influence Juror Decisions

A number of studies have examined variations in trial evidence that might affect juror assessments of eyewitness identifications. Lindsay, Lim, Marando and Cully (1986) found that in the presence of conflicting eyewitness identifications, alibis influenced verdicts, but witness consistency and witness viewing time did not.

Ball & Loftus (1989) found that detail of testimony influenced participants' verdicts, but given that eyewitness research (Cutler, Penrod & Martens, 1987a; Wells & Leippe, 1981) shows that memory for physical characteristics and peripheral details does not predict eyewitness identification accuracy, these data provide further evidence that jurors are insensitive to some of the factors that influence eyewitness identification accuracy and inappropriately sensitive to factors that are not diagnostic of eyewitness accuracy.

Cutler, Penrod, and Stuve (1988) and Cutler, Penrod, and Dexter (1990) also conducted mock jury experiments to examine the factors that jurors use to evaluate eyewitness identification evidence. A simulated trial was shown to 321 University of Wisconsin undergraduates and 129 former jurors from Dane County, Wisconsin. The trial concerned a defendant accused of the armed robbery of a liquor store. A number of forms of evidence were systematically manipulated in these trials (e.g. disguise, weapon focus, level of violence, retention interval, instruction bias, foil bias, and witness confidence). Only confidence influenced verdicts despite the fact that research indicates that eyewitness confidence and identification accuracy are only modestly related (e.g., Bothwell, Deffenbacher, & Brigham, 1987). Detailed analyses of juror memory for the evidence (see Cutler, Penrod & Stuve, 1988) indicates that the subjects paid attention to the testimony and recalled it with high accuracy rates, hence, lack of attention and poor memory cannot explain the null effects of eyewitness evidence on mock jurors' decisions. In addition, this research indicates that the judgment processes of eligible and experienced jurors are comparable to those of college student subjects and supports the generalizability of the research described above.

Conclusions

In sum, there are a variety of reasons to be concerned about jury decision making in eyewitness identification cases:

1. Jurors apparently have difficulty reliably differentiating accurate from inaccurate eyewitnesses.
2. A major source of juror unreliability is their reliance on witness confidence, which is:
 - a. A dubious indicator of eyewitness accuracy even when measured at the time an identification is made (before any feedback can be provided), and
 - b. Appears to be highly malleable and influenced by post-identification factors such as repeated questioning, briefings in anticipation of cross-examination, feedback about the behavior of other witnesses, and information about their identification choice. These factors cannot increase witness accuracy and are therefore likely to further reduce any relationship between witness confidence and accuracy.
3. Jurors appear to "overbelieve" eyewitnesses.
4. Jurors are not adequately sensitive to aspects of witnessing and identification conditions that are arguably better predictors of witness accuracy than is witness confidence but are sometimes sensitive to factors (such as recall of peripheral details) that are not diagnostic of witness accuracy.

VIII. Expert Testimony as a Safeguard

Beliefs about the necessity or impact of expert testimony are varied. Some judges and lawyers believe that the information is common sense and not beyond the average juror's ken (Benton, McDonnell, Ross, Thomas, & Bradshaw, 2007; Wise, Pawlenko, Safer, & Meyer, 2009). The research regarding juror understanding of the factors that affect eyewitness accuracy, however, indicates that this information is not common sense. Others are concerned that the expert testimony will confuse or prejudice the jury. I will discuss the possible effects of expert testimony on jurors before summarizing the empirical findings regarding the actual impact of expert testimony.

1. *The Expert's Influence on the Jury: Plausible Effects*

Plausible effects of expert testimony can generally be classified into three categories: juror confusion, juror sensitivity, and juror skepticism.

Juror Confusion

The first possible outcome is that expert testimony will have no effect whatsoever on the judgments of jurors. Though pessimistic, this hypothesis is really quite reasonable given that jurors have been shown to have difficulty in understanding and applying a variety of legal concepts at virtually every stage of the trial process (Penrod & Cutler, 1987).

Juror Sensitivity: Knowledge and Integration

If expert testimony does in fact influence juror decision making, what effect should it have? Clearly a desirable effect is to improve juror sensitivity to the factors that influence eyewitness memory (McCloskey et al., 1986; Wells, 1986). Sensitivity refers to the knowledge of how a given factor influences eyewitness memory and the ability to render decisions in accordance with that knowledge. Thus, sensitivity contains two components: knowledge and integration. Knowledge refers to awareness of how a factor influences eyewitness memory, including the direction and magnitude (size/strength) of the effect for a given factor. Integration, in this context, refers to the ability to render decisions that reflect knowledge.

How are knowledge and integration pertinent to the issue of juror sensitivity? It might be the case that jurors are unaware of the manner in which some factors influence eyewitness memory. For example, the survey studies described in the previous chapter revealed that jurors are insensitive to the equivocal effects of training on eyewitness identification accuracy. But they are somewhat sensitive to the influence of the own-race bias. Even if jurors are aware of the relative effects of a given factor on eyewitness memory, the magnitude of that effect might be attenuated in the juror's integration of the evidence. In other words, the jurors' judgments might not reflect their *a priori* beliefs. Decision making research in a variety of psychological domains (e.g., Goldberg, 1968) shows that integration is quite difficult to achieve, even by trained experts.

The mock jury studies discussed above demonstrated that jurors are insensitive to many forms of eyewitness evidence, but it is not clear whether this insensitivity is due to lack of knowledge, poor integration skills, or some combination of the two. One plausible effect of expert testimony is that it could improve both knowledge and integration of eyewitness evidence.

Juror Skepticism

Though it is agreed that improved juror sensitivity is a desirable effect of expert testimony (McCloskey et al., 1986; Wells, 1986), there is considerable disagreement as to whether jurors should be made more skeptical of the accuracy of eyewitness identifications. There is ample evidence that eyewitness identifications are often inaccurate. The prediction studies and Wells' studies of mock jurors' abilities to discriminate between accurate and inaccurate eyewitnesses provide some evidence that jurors "overbelieve" eyewitnesses; but few conclusions can be reached about the desirability of a skepticism effect.

2. Research on the Effects of Expert Psychological Testimony

It is possible to independently examine skepticism and sensitization effects, and it is possible to detect juror confusion, as well. Unfortunately, in early research on expert witness effects, the procedures designed to test the effects of expert testimony confounded skepticism and sensitization effects and made it difficult to determine exactly how jurors are affected by expert testimony. To test sensitization effects participants must be presented with some combination of expert versus no-expert testimony and good versus poor witnessing conditions.

We have seen that jurors are largely insensitive to variations in trial evidence that ought to permit them to (at least partially) differentiate between good and poor eyewitnessing conditions (and therefore, between accurate and inaccurate eyewitnesses). The critical question is whether expert testimony enhances jurors' abilities to make those differentiations. A perhaps less critical issue is whether expert testimony simply makes jurors more skeptical of eyewitness evidence but does not produce enhanced differentiation of good versus poor witnessing conditions.

Early expert testimony research revealed some consistent findings with respect to expert testimony. Most evident is that reduced belief and fewer convictions are obtained if expert testimony is presented (Fox & Walters, 1986; Hosch et al., 1980; Loftus, 1980; Maass et al., 1985; Wells et al., 1980). It is not clear whether this reduced belief is due to improved sensitivity to factors that might have impaired the witness's ability to make a correct identification, to enhanced skepticism, or to both. The only experiments that simultaneously and independently varied witnessing factors that influence

identification accuracy and the presence of expert testimony were those by Loftus (1980) and Wells et al. (1980), and both show trends (albeit weak) toward improved sensitivity.

In order to redress some of the deficiencies in the prior research Cutler, Dexter, and Penrod (1989) and Cutler, Penrod, and Dexter (1989) designed experiments to allow for independent tests of the sensitization and skepticism effects of expert testimony on jurors' judgments. A videotaped trial was used. The expert testimony was very realistic and the expert was rigorously cross-examined. Three factors, each having two levels, were manipulated in the videotaped trial: witnessing and identification conditions (WIC), witness confidence, and expert testimony. In the "poor WIC" condition the eyewitness and police officer testified that the robber was disguised (i.e., wore a hat that covered his hair and hairline), the robber outwardly brandished a handgun (presumably invoking a weapon focus effect); the retention interval between the crime and the identification was 14 days, and the officer in charge of the lineup did not explicitly offer the witness the option of rejecting the lineup (suggestive lineup instructions). In the "good WIC" conditions the witness and police officer testified that the robber was not disguised, that the handgun was hidden throughout the robbery, that the retention interval was two days, and that the lineup instructions were not suggestive. The witness testified either that she was 80% or 100% confident that she had correctly identified the robber. In conditions containing expert testimony, the expert gave the testimony regarding the impact of these factors on eyewitness identification accuracy. In conditions containing no expert testimony, the prosecuting and defense attorneys nonetheless reiterated the witnessing and identification conditions surrounding the identification. After viewing one version of the trial, mock-jurors rendered verdicts and rated the credibility of the eyewitness and the strength of the prosecution's and defense's cases. Ratings were recorded on seven-point scales.

Participants were 96 eligible and experienced jurors who were called for jury duty in Dane County, Wisconsin. All subjects were recruited by telephone within one year of having served (or having been called to serve) on a jury. In the Cutler, Dexter, and Penrod (1989) study, data from the 96 subjects were combined with data from a sample of 538 undergraduates. Combining these two subsamples ($N = 634$) allowed the researchers to test the effects of expert testimony with maximum power and permitted a comparison of the effects of expert testimony on eligible jurors' and undergraduate jurors' decisions.

Expert testimony produced sensitizing effects on witness credibility ratings and on prosecution and defense case strength ratings. Among jurors who heard expert testimony, witness confidence produced a weaker effect on eyewitness credibility ratings ($d = .17$) and on defense case strength ratings ($d = .02$) than for jurors who heard no expert testimony ($d = .50$ and $.26$, respectively). Jurors exposed to expert testimony were less likely to use witness confidence in evaluating the credibility of the eyewitness than were jurors not exposed to expert testimony. Likewise, among jurors who heard expert testimony, WIC had a greater impact on both prosecution ($d = .49$) and defense ($d = .56$) case strength ratings than among jurors who heard no expert testimony ($d = .11$ and $.16$, respectively). Jurors exposed to expert testimony used WIC to a greater extent in evaluating the strength of the prosecution's and defense's cases than did jurors not exposed. Thus, these findings show that expert testimony sensitizes jurors to the importance of WIC and the relative lack of importance of witness confidence. There was little evidence for expert-induced skepticism. Expert testimony produced no main effects on eyewitness credibility ratings, prosecution case strength ratings, or verdicts. Inclusion

of the expert testimony did improve the defense case strength ratings. This effect was greater among eligible jurors than among undergraduate jurors.

The results of this study provide support for expert psychological testimony in eyewitness cases. Without such testimony, jurors demonstrate poor knowledge and/or integration of knowledge about eyewitness issues. Further, there is little evidence that expert testimony caused jurors to become more skeptical. The research found that eligible and experienced jurors were essentially comparable to undergraduate jurors.

The Cutler et al. framework for analyzing the effects of expert testimony can be applied to an experiment conducted by Wells & Wright (1983; cited in Wells, 1986). In that study, mock-jurors not exposed to expert testimony showed little sensitivity to the influence of witnessing conditions. Their judgments simply did not vary substantially or systematically with the witnessing and identification conditions. In contrast, among subjects exposed to expert testimony, mock-juror beliefs reflected sensitivity to the witnessing conditions. Accurate eyewitnesses were most likely to be believed in the good, less likely to be believed in the moderate, and least likely to be believed in the poor witnessing conditions. This finding indicates that the expert testimony enhanced juror sensitivity.

Conclusions

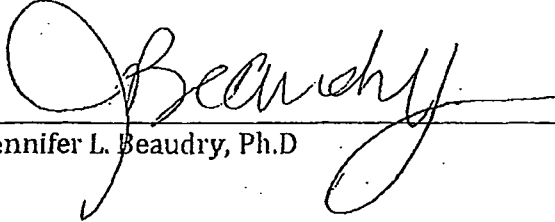
Taken together, these studies indicate that expert psychological testimony can serve as a safeguard against mistaken identification. There is little empirical evidence that jurors are confused by the testimony or are prejudiced by it (at least insofar as skepticism is an index of prejudice) and measures of recall of expert testimony in the studies where this has been measured indicate that jurors do recall and understand the testimony. Expert testimony appears to have the beneficial effect of educating jurors about factors that influence eyewitness identification and enhancing their reliance on those factors when rendering decisions in eyewitness cases. Indeed, results indicate that expert testimony on eyewitness memory can work on the behalf of the prosecution as well as the defense.

With regard to the current case

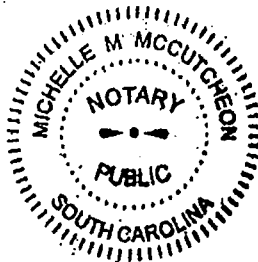
The poor witnessing and identification conditions in the Cutler et al. (1989) studies are similar to those of the current case. The perpetrator wore a similar disguise (a skull cap or snow cap that was pulled over his hair) and he brandished a large rifle. In addition, the first time the witness claims to have seen the defendant was approximately 10 days after the robbery; but he did not call the police until he viewed the defendant 5 days later, 15 days after the robbery. Finally, the witness made an identification from a lineup, but the officer did not present the admonition beforehand, and thus, effectively, provided biased lineup instructions. Although this evidence was suppressed before trial, the witness has knowledge that he made a lineup identification of the suspect, and this can only serve to bolster his confidence the suspect is in fact the perpetrator. In the studies described above, even though the defense attorney highlighted these factors in the case, the jurors still benefited significantly from expert testimony. In the current case, the defense attorney did discuss either during cross-examination or his closing arguments that there was a delay of two weeks between the robbery and the witness's first identification, and that the perpetrator was wearing a skull cap and carrying a rifle of some sort (reported as an AK47); however, the defense did not explain how any of these factors could have impacted the accuracy of the eyewitness's identification. Had the defense consulted an eyewitness expert, he would have been provided the research regarding how these (and other) factors

impact identification accuracy—and thus been able to explain the importance and relevance of these issues to the jury. Moreover, the results of the study above indicate that the jurors' understanding of the factors involved in the case and their impact on the eyewitness could have been enhanced greatly by the testimony of an expert witness.

FURTHER THE AFFIANT SAYETH NAUGHT!

 05/18/2012

Jennifer L. Beaudry, Ph.D



STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Joy Mack,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 11-CP-10-4724
	)	
State of South Carolina ,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within post-conviction relief Hearing was held in the above-captioned case on May 22, 2012, before The Honorable Kristie Harrington in Courtroom 4B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

James F. Falk, Esq.
 39 Broad Street, Suite 450
 Charleston, SC 29401
 Appearing for Applicant

Karen Ratigan, Assistant Attorney General
 OFFICE OF ATTORNEY GENERAL
 P O Box 11549
 Columbia, SC 29211-1549
 Appearing for State of South Carolina

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
 Post Office Box 901
 Johns Island, South Carolina 29457
 (843) 768-1438
dGarrison@sccourts.org

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

2

1 THE COURT: You may call your first
2 witness.

3 MR. FALK: Alex Apostolou.

4 (WITNESS TAKES STAND)

5 ALEX APOSTOLOU, being duly sworn to
6 tell the truth, the whole truth and nothing but
7 the truth, testified, as follows:

8 DIRECT EXAMINATION

9 BY MR. FALK:

10 Q. Thank you for coming in today. Obviously
11 we are juggling the schedule here. Mr.
12 Apostolou, did you represent Mr. Mack?

13 A. I did.

14 Q. In the process of representing Mr. Mack,
15 did you review the Brady materials with him?

16 A. I did, yes.

17 Q. Do you recall what those materials were?

18 A. I -- (pause).

19 Q. Do you remember what evidence was
20 incriminating in the Brady materials?

21 A. Yes, I do.

22 Q. What was that evidence?

23 A. The only evidence against Joy Mack in this
24 case was the identification of the witness.

25 Q. Okay

1 A. Or the victim. The identification of the
2 witness.

3 Q. Okay. The prosecuting witness, is his name
4 -- can you help me?

5 A. He was a foreign gentleman. I think he
6 went by "Andy" as kind of a moniker.

7 Q. Okay. Well, for purposes of going forward,
8 we will continue to refer to him as "Andy", but
9 he was the prosecuting witness?

10 A. That's correct.

11 Q. Andy?

12 A. (Affirmative nod).

13 Q. So there were no fingerprints that were no
14 fingerprints implicating Mr. Mack?

15 A. (Affirmative nod), there were no
16 fingerprints; there was no physical evidence;
17 there was no evidence at all. The only evidence
18 against Mr. Mack was an identification made by
19 the victim, Andy, some -- over two weeks or -- I
20 think it was sixteen days after the armed
21 robbery occurred.

22 Q. So now you're looking at this case where
23 the only link where -- between the crime scene
24 and this defendant, and that was -- you said
25 that it was uncorroborated? There was nothing

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

4

1 else?

2 A. There was nothing else other than that
3 information.

4 Q. So given a case like that, what was your
5 trial strategy?

6 A. I think the proper trial strategy would be
7 highlight the fact that there was absolutely no
8 evidence other than the eyewitness testimony.

9 I think that it would have been proper to poke
10 holes at that identification as far as any
11 physical or any inconsistencies in that and I
12 think that it would be important to impeach that
13 person and their credibility as far as possible.

14 Q. So part of your strategy, you weren't going
15 to call any other witnesses; were you?

16 A. It evolved into that strategy, yes.

17 Q. But is it fair to say that it was going to
18 be Andy's testimony, your cross-examination of
19 Andy; was basically what the trial was going to
20 boil down to?

21 A. That's correct.

22 Q. Okay. Of course if your cross-examination
23 of Andy proved ineffective, then the only thing
24 that Mr. Mack would have to rely on was the
25 presumption of innocence?

1 A. That's correct.

2 Q. Have you ever had any case before or that
3 you prosecuted where you were the defense
4 counsel?

5 A. I was a prosecutor before defense counsel.

6 Q. Have you had cases before where there was
7 just one eyewitness as the only evidence against
8 the defendant, or your client?

9 A. I would say probably not. There is usually
10 more evidence in a criminal case than just
11 testimony.

12 Q. Now, when you went through Andy's
13 testimony, did you have any reason to question
14 it?

15 A. (No verbal response).

16 Q. Did you have any reason to question the
17 accuracy of his testimony?

18 A. Absolutely, (affirmative nod).

19 Q. Can you maybe summary some of those points?

20 A. Andy's testimony was that he was inside the
21 store, that these individuals walked in, from a
22 distance of seventy feet; that Mr. Mack -- I
23 believe -- was the first person in, and that he
24 walked across that distance of about seventy
25 feet, that Andy watched him walk across that

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

6

1 distance; that he didn't notice anything unusual
2 about his walk or anything to that effect. That
3 when he got across the distance of seventy feet,
4 he pulled out an AK-47 from his pants, that he
5 had stuffed down in his pants/trousers,
6 unrecognizable up to that point, and he pulled
7 out the AK-47.

8 All of the physical identifications that
9 Andy had that day were completely wrong. He
10 described him as light-skinned, he described him
11 as wearing a red hat, he testified later that he
12 was wearing a black hoodie. He testified that
13 he was small. Joy is tall. So I think the
14 actual physical identification itself did not
15 match at all.

16 Q. Okay.

17 A. I think that the statement that he made
18 when the police took his statement that day was
19 that he could not identify him if he saw him
20 away.

21 Then there was the important fact that he
22 had pending criminal charges pending in the 9th
23 Circuit, being prosecuted by the exact same
24 office that was prosecuting this case as well.

25 Q. Okay. Let's put those charges aside for

1 just a second because I am going to talk about
2 those. I want to talk about those in a minute.
3 So your attack on Andy's testimony was going to
4 be its inherent improbability, how could he be
5 walking with a gun down your leg and not have a
6 noticeable change in your gait? And the
7 inconsistencies: red hat, black hat? So you
8 basically were going to attack on the
9 improbability and its being inconsistent. Is
10 that right?

11 A. Yes.

12 Q. Okay. And you also talked about that you
13 might have had some ability to attack his
14 evidence based on bias. You had some
15 impeachment evidence against Andy. Is that
16 right?

17 A. That is correct.

18 Q. And the conflict, you kind of went over it
19 when you were describing that for us but -- what
20 was that evidence that you had got?

21 A. Andy had been arrested. He'd been charged,
22 he had pending charges in the 9th Circuit
23 Solicitor's Office, he was being prosecuted for
24 selling counterfeit goods. There was a story in
25 the newspaper about it. I opened the newspaper,

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

8

1 was reading it and was, like, 'Wow. I can't
2 believe.' You know, there it was.

3 Those charges were pending by the exact
4 same office, the Solicitor's office, and I think
5 that they were subsequently nol prossed fairly
6 shortly thereafter.

7 Q. So those were charges that -- he had some
8 pending charges, so maybe there some bias such
9 that you could have dropped that inference.

10 A. (Affirmative nod).

11 Q. Then, of course, selling counterfeit goods,
12 that maybe would affect his ability to be
13 telling the truth. It certainly would question
14 his ability for truthfulness, wouldn't you say?

15 A. I absolutely would say that.

16 Q. So did you offer that evidence at trial?

17 A. I did not. No.

18 Q. Why was that?

19 A. That was, in the parlance of the day, a
20 mistake.

21 Q. Did -- is it true that Mr. Smiley's, the
22 codefendant's lawyer, offered that evidence?

23 A. Well, that's exactly right -- and I
24 appreciate that. What happened in that
25 situation was that Mr. Smiley made a pretrial

1 Motion to get into that information. The judge
2 excluded that information. I did intend to,
3 obviously, go into that -- that information.
4 But the judge excluded it from the trial when
5 Mr. Smiley made the pretrial Motion. I did not
6 thereafter cross-examine him on it and I did not
7 preserve that evidence -- that Motion for
8 appellate review.

9 Q. Okay. So, now, you were kinda stunned by
10 the judge's decision; right?

11 A. It -- it -- to my mind it was an absolute
12 nonissue. I mean, it was a hundred percent
13 impeachable. It was -- it -- I thought that it
14 was an absolute right to impeach it and I was
15 not even thinking that it would be excluded at
16 all. It was a large part of what we intended to
17 do.

18 Q. And certainly in this case -- let's say
19 that -- that if it didn't go up on appeal, it
20 would be one of those kinds of cases that,
21 probably on appeal where the appellate court may
22 say 'you know, maybe the judge didn't let the
23 evidence in but there was overwhelming evidence
24 of guilt, so it wouldn't have made any
25 difference.' Because in this case this was the

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

10

1 only piece of evidence against Mr. Mack?

2 A. That's right. I was actually called the
3 day after this trial or spoken with one of the
4 jurors after this trial, was very upset about
5 it, and felt that ---

6 MS. RATIGAN: Objection, Your Honor.
7 Hearsay.

8 THE COURT: Sustained.

9 DIRECT EXAMINATION CONTINUED

10 BY MR. APOSTOLOU:

11 Q. But you have some reason to believe that
12 maybe that could have influenced the jury?

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

17 Q. So there was no preserving of the evidence
18 as an issue for appeal?

19 A. Yes.

20 Q. Let's talk about trial strategy again:
21 attacking the credibility of the prosecution's
22 witness, -- you said that one of the legs was
23 cut off because you couldn't use the impeachment
24 evidence, so now we're going to go back to --
25 just through your cross-examination -- that you

1 needed to convince the jury that the prosecuting
2 witness was not telling the truth.

3 A. I needed to convince the jury that the
4 prosecutor -- that the prosecuting witness was
5 not correct in his identification. He has
6 previously also accused other people of being
7 the robber and I needed to also look at how his
8 identification was made sixteen days after the
9 -- (pause).

10 Q. But, still, if your cross-examination is
11 only going to be that he is not being truthful
12 on the stand, aren't you still leaving the jury
13 with this question as to why would he lie? I
14 mean, that's still going to be something that
15 you're going to have to overcome. Right? I
16 mean, because he is a business owner and your
17 client is wearing a jumpsuit, or whatever --
18 that the jury is seeing 'here is a nice
19 businessman', 'here is a kid in a jumpsuit',
20 'who are you going to believe?' Right?

21 A. Yes.

22 Q. I mean, that is the kind of the issue that
23 you were facing, right?

24 THE COURT: Mr. Apostolou, was he
25 wearing a jumpsuit during trial?

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

12

1 MR. APOSTOLOU: No, Your Honor.

2 DIRECT EXAMINATION CONTINUED

3 BY APPLICANT'S ATTORNEY:

4 Q. Nevertheless, that was the strategy?

5 A. It was, yes.

6 Q. Okay. Did you have the strategy or did you
7 think about the strategy of trying to tell the
8 jury why someone could be making a good faith
9 mistake in his identification?

10 A. Uh, ---.

11 Q. Because that's what you posited as a
12 strategy, too; right? 'Here's somebody that am
13 'I am dead sure that's the guy.' I've got to
14 convince this jury that he's making a mistake.
15 I don't have to convince the jury that he is
16 "lying." He's darn confident about it and I
17 ...' -- but don't you have to give the jury some
18 reason -- you have to give the jury some
19 explanation for why he could be mistaken.

20 A. Yes, I think that's right.

21 Q. Do you have any familiarity with The
22 Innocence Project?

23 A. Yes.

24 Q. Okay. Would you be surprised to know that
25 -- I think the current number now is about three

1 hundred people that have been exonerated by DNA
2 evidence?

3 A. I would not be surprised in the least to
4 know that.

5 Q. Would you be surprised to know that twenty-
6 five percent of those cases of people who have
7 been exonerated by DNA evidence, that the only
8 evidence against the client was an eyewitness
9 identification?

10 A. No. I think that there is no more scary
11 case in criminal justice than these single
12 identification cases. Does it surprise me to
13 learn that there are serious, serious errors in
14 those cases and that technology has allowed that
15 to be proof positive, absolutely not.

16 Q. Well, I would agree with you that I think
17 that those are pretty scary cases to be
18 presented with.

19 Since maybe we've agreed on that point of
20 view, did you ever consider talking to -- maybe
21 consult with an eyewitness expert? Possibly
22 someone who is a forensic psychologist, who
23 could maybe help you prepare a cross-examination
24 for the witness?

25 A. Did I consider it, yes. Did I do it, no.

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

14

1 Q. Was that a trial decision?

2 A. No, that was a situation that should have
3 been done.

4 Q. Are you familiar, possibly, with any of the
5 scientific studies, psychological studies that
6 were done to show some of the causes for
7 inaccurate identifications by witnesses?

8 A. Yes, I looked at some of that information.

9 Q. We will mark this as an exhibit. What I've
10 handed you, that's the CV for Jennifer Bogarty
11 (phonetic). We retained Jennifer Bogarty in
12 this case. Do you see on that affidavit -- can
13 you see on that CV that she is an assistant
14 professor at USC-Beaufort?

15 A. Yes, I do see that.

16 Q. Do you see the area of her study?

17 A. I do, yes.

18 Q. If you would, read through some of her
19 publications. It looks like she is somebody who
20 has had some experience with identification and
21 eyewitness testimony.

22 A. Absolutely. This document had been
23 provided to me previously, and I did look through
24 it.

25 Q. Thank you.

1 (SO MARKED AS APPLICANT'S EXHIBIT 1)

2 DIRECT EXAMINATION CONTINUED

3 BY MR. FALK:

4 Q. I am going to show you an affidavit that
5 Ms. Bogarty prepared, (tendering).

6 A. (Upon review), okay.

7 MR. FALK: Let me give this back to
8 you and mark this as the next exhibit?

9 MS. RATIGAN: Are you marking that
10 just for identification?

11 MR. FALK: Just for identification.
12 And I will also show you Exhibit 3, which has my
13 markings of identification on it.

14 (SO MARKED AS APPLICANT'S EXHIBIT 2)

15 (SO MARKED AS APPLICANT'S EXHIBIT 3)

16 DIRECT EXAMINATION CONTINUED

17 BY MR. FALK:

18 Q. I previously provided counsel with the
19 original copy of the affidavit. This is here is
20 one that I made some notations on it as I read
21 through the affidavit.

22 Would you please ---

23 THE COURT: Hold on one second. I am
24 a little confused how Mr. Apostolou is just
25 going to be able to summarize some affidavit.

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

16

1 MR. FALK: I'm sorry. Here's the
2 summary.

3 THE COURT: Is this affidavit part of
4 your trial?

5 MR. FALK: No, Your Honor.

6 THE COURT: How is -- how -- how are
7 we getting here?

8 MR. FALK: Your Honor, I move to
9 admit Ms. Bogarty's affidavit ---

10 THE COURT: On what grounds?

11 MR. FALK: I think --

12 THE COURT: Where is she? Why can't
13 she come in and testify?

14 MR. FALK: Your Honor, I believe the
15 Court has latitude to present affidavit
16 testimony in a PCR hearing. I believe that our
17 burden here is provide the Court with evidence
18 of what her testimony would be had she been
19 called to testify. I believe that her CV would
20 certainly pass any kind of test or question
21 about her ---

22 THE COURT: Did you know about her,
23 Mr. Apostolou; did you know about this
24 individual?

25 MR. APOSTOLOU: I was aware that

1 they had retained an expert.

2 THE COURT: For you? During your
3 trial?

4 MR. APOSTOLOU: Oh, no, I did not.

5 THE COURT: Because isn't that -- I'm
6 sorry, Ms. Ratigan, I'm doing your ---

7 MS. RATIGAN: Thank you, Your
8 Honor, for making all the points that I would
9 make. While the statute does allow the Court,
10 in its discretion, during a PCR to admit an
11 affidavit, we object because it's hearsay. I
12 can't examine the witness, we can't -- I mean, I
13 do have her affidavit about her findings, but I
14 can't question her about her methodology. So we
15 would object to the admission of her affidavit
16 during this hearing.

17 MR. FALK: Your Honor, may I speak
18 to the point?

19 THE COURT: You may.

20 MR. FALK: I would of course agree
21 that the State is not given any opportunity to
22 cross-examine the witness, but
23 I think our burden here is to show what evidence
24 that we could have proffered in trial if we'd
25 had the opportunity to ---

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

18

1 THE COURT: Mr. Falk, if I let you
2 come in and there's no chance for cross-
3 examination, you could have brought in anything.
4 Wouldn't you agree?

5 MR. FALK: Well, Your Honor, it's --
6 I would agree but I believe here ---

7 THE COURT: Mr. Apostolou didn't know
8 about this witness. It would be different if
9 Mr. Apostolou said, 'I didn't have the money to
10 give her, I didn't know about her.' But he is
11 testifying that he doesn't know her. So I fail
12 to see your just picking somebody. In the
13 benefit of hindsight, you could have found
14 anybody to come in and write an affidavit.

15 Now you've hob-legged the solicitor, or
16 the attorney general, because she cannot cross-
17 examine this individual.

18 Sustained. Move on.

19 COURT REPORTER: What do you want to
20 mark as number two?

21 MR. FALK: What we are going to do
22 is to mark the original affidavit as number two.

23 COURT REPORTER: And number three?

24 MR. FALK: Your Honor, could we
25 still move to admit these affidavits on file,

1 just to make the record.

2 THE COURT: You can admit them as
3 Exhibits 1, 2 and so on so that that record is
4 clear for your appeal of this decision, should
5 that be necessary.

6 MR. FALK: Thank you.

7 DIRECT EXAMINATION CONTINUED

8 BY MR. FALK:

9 Q. Mr. Apostolou -- excuse me, Alex. You said
10 that you had some familiarity with some of the
11 psychology, some of the questioning about
12 witness ID testimony; is that accurate?

13 A. Yes.

14 Q. Okay. Are you familiar with the notion
15 that there is a cross racial bias sometimes in
16 witnesses making identifications?

17 A. Absolutely, yes.

18 Q. What is your understanding of what a cross
19 racial bias would be?

20 A. I would say in a nutshell that it is
21 perhaps more difficult for one person of a race
22 to identify other -- it would be easier for them
23 to identify people of their own race, and it
24 would be more difficult for them to make correct
25 identifications in other races.

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

20

1 Q. Okay. In this case, the -- Andy was
2 Caucasian.

3 A. Andy was Caucasian and Joy Mack was African
4 American.

5 Q. Okay. Did you try and raise -- did you try
6 and confuse that argument or raise that argument
7 with the jury in your cross-examination and/or
8 your closing, the notion of cross racial bias?

9 A. No.

10 Q. Would you be surprised to find out that in
11 case some of the scientific studies say that
12 somebody is one and a half times more likely to
13 make an inaccurate identification of somebody
14 that is not of the same race?

15 A. No, that would not surprise me.

16 Q. Now, I think in this case that we talked
17 about, when you were talking about his
18 identification, it was over a very short period
19 of time; is that correct?

20 A. Yes. The original identification where he
21 said that he saw Mr. Mack coming in the store
22 was a very brief period of time, however long it
23 would take someone to walk from the door there
24 to here. He also said that during part of that
25 time that he was looking down, so -- (pause).

1 So I would guess somewhere in the neighborhood
2 of eight to ten seconds, at the most, would be
3 that time.

4 Then when he made the identification the
5 second time, it had been several weeks.

6 Q. Are you familiar with any of the forensic
7 psychological studies, read any literature that
8 would show the amount, the effect that
9 somebody's exposure to an incident, the amount
10 of time that they actually see the incident
11 occurring, affects their ability to make an
12 identification at a later time?

13 A. Yes, definitely.

14 Q. For example, have you seen the rate that if
15 somebody were exposed to something for ten
16 seconds they may -- may four hours later only be
17 able to identify that person -- only be half as
18 likely to be able to identify that person. Do
19 you have any quantitative -- do you know
20 specifically -- do you know how great the effect
21 is?

22 A. I know that there is an effect. How great
23 the effect is, how substantial, I don't know the
24 specifics.

25 Q. Now, I think in the testimony here that

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

22

1 there was testimony that the assailant in this
2 case put a gun in Andy's face; is that correct?

3 A. Yes.

4 Q. Ordered him to get down, get on his belly,
5 I guess.

6 A. Yes.

7 Q. Are you familiar with what is called the
8 weapon focus effect?

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

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

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

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

24 A. I think that is absolutely another
25 aggravating factor that lessens the credibility

1 of that identification.

2 Q. Are you familiar with any of the studies
3 that show just how significant that impact is?

4 A. I think that it is significant. I don't
5 know quantitatively the precise amount of what
6 someone could say that it would be, but I do
7 know that it is a very important factor in
8 making an identification.

9 Q. When the assailant came into the store,
10 wasn't it Andy's testimony that he was wearing
11 a disguise at the time?

12 A. Uh, ---

13 Q. Excuse me, wasn't it his testimony that he
14 was wearing a hat at the time?

15 A. Yes, he was wearing a hat.

16 Q. Do you recall what the testimony was as to
17 how much of the assailant's features were
18 obstructed by the hat?

19 A. As I recall, there was a hat that had been
20 pulled all the way down on his head.

21 Q. So from what you recall from the testimony,
22 the assailant's hairline was obscured by the
23 hat?

24 A. Yes.

25 Q. Do you recall from any of the testimony

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

24

1 whether or not when Andy made the subsequent
2 identification of Mr. Mack if he was wearing any
3 type of hat at the time?

4 A. No, the identification that Andy made
5 sixteen days after this robbery resulted in --
6 he first identified the car that Mr. Mack was
7 driving. When the assailant left his business,
8 they ran outside, they jumped inside a burgundy
9 American-made, boxy, big-type car and sped off.
10 There was video captured by one of the cameras
11 at that mall of the car racing off.

12 Mr. Mack drove a very loud, very large --
13 like a Pontiac, purple Pontiac car.

14 When Mr. Mack -- in the period between when
15 that armed robbery occurred and when his
16 identification was made, Andy had seen that
17 purple car driving around the mall several
18 times. He had called the police once to report
19 that he thought that he saw the car. When he
20 made the actual identification on Mr. Mack, he
21 saw the car pull into the parking space, he --
22 that drew his attention. He's seen it several
23 times, he'd already called the police on that
24 vehicle, he looked to see who the driver of that
25 vehicle. When Mr. Mack got out of the car, he

1 told his wife that he thinks that is the person
2 that did it, he's almost sure. Then Mr. Mack
3 went into another business that I believe was
4 located next door, and he called the police.

5 The police came out, they made contact with Mr.
6 Mack, they put him on trespass notice, they got
7 his identifications, they investigated the car.

8 Then they subsequently cleared the car,
9 that it was not the car that the robbers had.
10 They had a picture from the video camera and it
11 did not match the car.

12 Yet the identification of Mr. Mack was --
13 held.

14 Q. And I believe in all of that that there was
15 never any testimony that Mr. Mack was wearing a
16 hat?

17 A. Correct.

18 Q. So each time Andy identified Mr. Mack he
19 was not wearing a hat. The only time that he
20 saw the assailant, he was wearing a hat.

21 A. Yes.

22 Q. Okay. If you were aware of psychological
23 studies that would show that somebody would be
24 half as likely to make a positive identification
25 of somebody where the first time that they saw

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

26

1 him he was wearing a hat, or something that was
2 covering his hairline, and the second time he
3 was not wearing a hat -- tests with mock juries,
4 in that situation, a person is half as likely to
5 make a positive identification. Would that
6 information have been helpful for you at this
7 trial?

8 A. Yes.

9 Q. Would you have tried to bring some of that
10 information into the trial?

11 A. Yes.

12 Q. Do you believe that if a juror was
13 presented with information as to explain why
14 Andy was confident in his identification,
15 although absolutely inaccurate, some explanation
16 as to why he made those mistakes, do you think
17 that would have been helpful?

18 MS. RATIGAN: Objection,
19 speculation.

20 THE COURT: Sustained.

21 DIRECT EXAMINATION CONTINUED

22 BY MR. FALK:

23 Q. If you'd had information to explain why the
24 prosecuting witness could have been making a
25 good faith mistake in his identification, would

1 you have introduced that evidence?

2 A. Yes.

3 Q. Is the reason -- can you tell the court why
4 you did not introduce that evidence?

5 A. I did not introduce that evidence because I
6 did not have that evidence.

7 Q. Okay. If you knew of an expert who you
8 could have called, who could have testified to
9 the psychological, forensic psychological
10 studies that could show why an eyewitness expert
11 (sic) could be both confident and at the same
12 time mistaken, if you could have -- if you would
13 have known of an expert who could have testified
14 to those facts, would you have called that
15 expert?

16 A. Yes.

17 Q. You think that your client was prejudiced by
18 the fact that you did not call that expert?

19 A. Yes, sir.

20 Q. Do you think that your client was
21 prejudiced by the fact that you didn't consult
22 with an expert?

23 A. Yes.

24 Q. Had you consulted with an expert -- if you
25 had known all of the factors or the significance

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

28

1 of these factors that affect a witness' ability
2 to make a good faith but mistaken
3 identification, would you have tried to weave
4 some of those factors into your cross-
5 examination or your closing?

6 A. Yes.

7 Q. Possibly would you have brought in the
8 cross racial identification?

9 A. Yes.

10 Q. The fact that the assailant was disguised
11 or was wearing a partial disguise and on
12 subsequent identifications he was not disguised?

13 A. Yes. I think that the identification was
14 not correct and I would have done everything
15 that I could to show that was incorrect to the
16 jury -- jurors.

17 MR. FALK: May I have a moment,
18 please?

19 THE COURT: You may.

20 DIRECT EXAMINATION CONTINUED

21

22 BY MR. FALK:

23 Q. Just kinda in closing, do you think that
24 your cross examination adequately presented the
25 jury with an explanation as to why this witness,

1 though confident, was mistaken?

2 A. I would say obviously not.

3 MR. FALK: I have no further
4 questions. Your Honor, once again, I would move
5 to admit these -- checking my record, I am
6 moving to admit the CV, moving to admit the
7 affidavit of my expert.

8 THE COURT: I am granting -- the
9 State has moved and I have overruled that
10 request for the marking of Court's 1 and 2, so
11 that the record is clear for appeal.

12 MR. FALK: Thank you. No further
13 questions.

14 THE COURT: Ms. Ratigan?

15 MS. RATIGAN: Thank you, Your
16 Honor.

17 CROSS EXAMINATION

18 BY MS. RATIGAN:

19 Q. Mr. Apostolou, you testified that part of
20 your trial strategy was to highlight that there
21 was no evidence aside from the identification;
22 is that correct?

23 A. Yes.

24 Q. And did you not during Al Holman's cross
25 examination ask him whether there was any

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

30

1 evidence found linking your client to the crime?

2 A. I'm sorry, I didn't understand your
3 question.

4 Q. Do you recall that during Al Holman's cross
5 examination your asking him whether or not he
6 found any kind of forensic evidence linking your
7 client to the crime?

8 A. Could you identify your person?

9 Q. Al Holman is the forensic supervisor.

10 A. Yes, I do recall that.

11 Q. You had that witness -- or you had a
12 witness, and there was no forensic evidence
13 found linking Joy Mack to either the store or
14 to the codefendant's house; is that correct?

15 A. Yes.

16 Q. And you also had a witness no cross
17 examination and there was no DNA linking your
18 client to any of these events?

19 A. Yes.

20 Q. And another part of your trial strategy,
21 you testified, was to try to poke holes in
22 Andy's identification by Andy; is that correct?

23 A. Yes, that was a trial strategy.

24 Q. And in your opinion -- so your opinion is
25 that you did not adequately attack the

1 identification by Andy?

2 A. Can you repeat the question?

3 Q. So your opinion today is that you did not
4 properly attack the identification, is that what
5 you're testifying to? Or that you just, in
6 addition, wish that you had gotten an expert
7 witness?

8 A. Well, I wish I'd gotten an expert witness.

9 Q. But you did impeach Andy -- what he
10 testified?

11 A. I cross-examined Andy, yes.

12 Q. Did you impeach him with his statement
13 about the physical disparity of what he put in
14 his statement and what he testified to at trial?

15 A. I impeached him about the identification.
16 I did not impeach him about his pending charge.

17 Q. Right. And you also were able to impeach
18 Andy based on the testimony that he gave at the
19 Neil v. Biggers hearing the day before. Do you
20 recall?

21 A. That's correct. Yes.

22 Q. And you also had the opportunity to ask him
23 about whether seeing your client's picture in
24 the newspaper had any impact on his
25 identification?

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

32

1 A. Yes.

2 Q. And did you kind of point out the timeline
3 to the jury, the length of time between the
4 crime itself, the various times that the victim
5 says that he saw your client, and the actual
6 identification?

7 A. I pointed out the length of time. I did
8 not point out the -- the onus of that
9 identification being that he "thought" that he
10 recognized the car.

11 Q. Did you develop this kind of timeline
12 through both Andy and the officers who
13 investigated the case?

14 A. Yes.

15 Q. Do you recall pointing out during cross
16 examination that the initial tip to the officers
17 did not even match your client?

18 A. Yes.

19 Q. You testified on direct that you had
20 considered talking to an eyewitness expert and
21 that you did not do so. Can you recall why you
22 just decided against it?

23 A. Well, I've thought about that. It was
24 something that I thought about. I -- to be
25 honest, I am not a hundred percent sure why I

1 didn't consult with them. I know that I did
2 not feel that there was enough evidence for
3 conviction, but obviously -- (pause).

4 Q. And one of the things Mr. Falk asked you
5 about was the idea of a cross racial bias. But
6 wasn't the victim's wife African American and
7 he was Caucasian?

8 A. Yes.

9 Q. So you still think that even though the
10 victim was married to an African American that
11 you should have argued the idea of cross racial
12 identification problem?

13 A. Well, I think that the question that he
14 asked me was whether I was aware of that and if
15 that was something that could have helped,
16 would I have presented it.

17 Q. Okay. Well, I guess I did not artfully ask
18 the question then. Even though the victim's
19 wife was a different race than her husband, do
20 you believe that that would have been a good
21 avenue for you to go down, cross racial
22 identification?

23 A. The fact that he had that African American
24 wife impacted my decision whether to go down
25 that road.

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

34

1 Q. And it was also brought up on direct that
2 you were familiar with the idea the short
3 period of time that you would have to look at
4 somebody could possibly affect the
5 identification. Isn't that something that you
6 brought out with the victim during cross-
7 examination? The length of time that he was
8 able to view the perpetrators?

9 A. I certainly tried to.

10 Q. And on a similar bent, the idea of the
11 weapons focus effect, is that something that
12 you attempted to bring out on your cross-
13 examination of the victim, as well?

14 A. I did.

15 MS. RATIGAN: That's all that I've
16 got.

17 THE COURT: Mr. Falk?

18 REDIRECT EXAMINATION

19 BY MR. FALK:

20 Q. She raised the issue of cross racial bias.
21 You said that you didn't use that issue because
22 of the fact that Andy was married to a African
23 American woman; is that correct?

24 A. I think that impacted the thinking at the
25 time.

1 Q. Do you think that it would have been a good
2 argument, though, if that weren't the fact; is
3 that right?

4 A. I think that is a true -- I think that
5 cross racial bias exists. I think that it
6 probably played a role in this identification
7 regardless of whether he was married to an
8 African American woman or not.

9 Q. Well, let's say that he wasn't married to
10 an African American. Would you have pursued
11 that argument?

12 A. (No verbal response).

13 Q. Would you have hit that argument harder?
14 Would you have rang that bell harder?

15 A. Yes.

16 Q. Okay. Now, how about if you were aware of
17 forensic scientific studies that would tell you
18 that in cases of cross racial identifications
19 that the fact that someone of their own race --
20 that someone is more likely to make an
21 inaccurate -- excuse me. Let's say that you
22 were aware of psychological studies that said
23 that a place where somebody is making a cross
24 racial identification, that they are more than
25 one and a half times more likely -- that's a

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

36

1 hundred and fifty percent more, one and a half
2 times more likely -- to make an inaccurate ID.
3 If you were aware of that, that in those cases
4 when somebody has had significant contact with
5 that other race -- married, whatever -- that
6 that could only account for two percent of that
7 one hundred fifty percent inaccuracy range, if
8 you had known that, would you have hit that
9 argument harder?

10 A. Yes. If I had known that, I would have
11 pursued that ---

12 Q. It almost would be like knowing -- that
13 would almost be like the situation that he
14 wouldn't have been married to an African
15 American woman.

16 A. The information -- if I had that
17 information, then it probably would have
18 negated any concerns that I had about the jury
19 not -- that argument not resonating with the
20 jury.

21 Q. Could you have then maybe called an expert
22 to testify to that fact?

23 A. Yes.

24 Q. You could have educated the jury to that
25 fact?

1 A. Yes.

2 Q. It might have been one of the things that
3 the jurors are going to know, that people --
4 everybody kind of knows that people have
5 problems making cross racial identifications?
6 That it is easier to identify their own race
7 than another race. Is that right?

8 A. Yes, I think so. I think that information
9 would have said that it's almost an irrelevant
10 factor whether they are married to an African
11 American or someone of a different race.

12 Q. Does it surprise you that Jennifer Bogarty
13 didn't supply you with that information?

14 A. No.

15 Q. Thank you.

16 MR. FALK: No further questions.

17 MS. RATIGAN: I have no questions
18 either.

19 THE COURT: Mr. Apostolou, so based
20 on your studies, it was your understanding that
21 an inter-racial marriage does or does not
22 impact on cross racial identification?

23 THE WITNESS: Well, the truth of
24 the matter is, Your Honor, that I didn't do any
25 studies. I ---

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

38

1 THE COURT: That's enough. Thank
2 you. Based on that, any questions?

3 MS. RATIGAN: None.

4 MR. FALK: No, Your Honor.

5 THE COURT: All right. You may step
6 down. Thank you for accommodating the Court's
7 schedule, Mr. Apostolou. Feel free to remain
8 with us, but I feel free that you have other
9 things to get on with your day.

10 (WITNESS STEPS DOWN)

11 THE COURT: Any additional
12 witnesses?

13 MR. FALK: No further witnesses.

14 THE COURT: Does the State have any
15 witnesses?

16 MS. RATIGAN: The State would rest
17 for the record, Your Honor.

18 THE COURT: All right. Mr. Falk, I
19 will be happy to hear from you. Do you have
20 any argument? If not, I am going to take this
21 -- just so that you know, I am taking this
22 matter under advisement. So if you would like
23 to save any of your arguments for your Order,
24 feel free to do so.

25 MR. FALK: Well, Your Honor, maybe

1 one last plea. In this situation, where we are
2 appointed counsel, we obviously took it upon
3 ourselves to locate an expert to help us
4 prepare. I think that the Court certainly has
5 a lot of discretion to allow affidavit
6 testimony here. I think our burden only was to
7 show that it was -- what kind of evidence could
8 have been presented to the court. I have
9 attempted to show that her evidence could have
10 been presented to the court. Granted, it could
11 have been cross examined. But I think it would
12 have been -- I think as a science, ---

13 THE COURT: I think I have already
14 made -- I think the record is clear. Your
15 issue is preserved for appellate purposes.

16 MR. FALK: Again, Your Honor, I
17 think that goes back to the fact that a lot of
18 time we focus on the fact that Mr. Apostolou
19 didn't consult with an expert, and he didn't.
20 He admitted that was a failure on his part.
21 The most significant part is that there was a
22 very real appellate issue on the impeachment
23 evidence against the prosecuting witness.
24 Again, this is a case where the only evidence
25 against the prosecuting -- against my client is

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

40

1 the prosecuting witness' testimony. We proved
2 damaging evidence that would impeach his
3 credibility, both by bias and by possibly not
4 telling the truth, was not admitted and was not
5 appealed because the issue was not preserved
6 for appeal. I think that's clear prejudice.
7 Thank you.

8 THE COURT: Thank you. Ms. Ratigan?

9 MS. RATIGAN: Briefly, Your Honor,
10 you obviously have the transcript before you.
11 It has many examples of Mr. Apostolou's concern
12 about the identification by the victim, also to
13 the officers. He pointed out to the jury that
14 while the codefendant's print was actually
15 found on the door that there was no physical
16 evidence linking his client to the crime. None
17 of the fruits of that crime were found in his
18 possession.

19 I also just note that -- and Mr.
20 Apostolou clearly made a strong impression on
21 Judge Nicholson, as Judge Nicholson states at
22 the very end, I believe it's Page 564, that it
23 was based on Mr. Apostolou's representation
24 that he was able to talk Judge Nicholson from
25 thirty-five years down to twenty-two.

1 So we would argue that Mr. Apostolou
2 did a fantastic job for his client.
3 Unfortunately you cannot predict what a jury is
4 going to do. It's completely speculative at
5 this point that any issues raised today would
6 have changed the outcome of the case.

7 THE COURT: Brief response?

8 MR. FALK: We are done, Your Honor.

9 THE COURT: Thank you. I am going
10 to take this matter under advisement. I will
11 allow both sides to submit proposed orders
12 within ten days of today's date. Mr. Mack,
13 good luck to you. Thank you.

14 Mr. Falk, I appreciate your
15 accommodating the Court's schedule, just as Mr.
16 Apostolou did. We had a gap in our afternoon,
17 so this really, really did benefit the Court
18 and we appreciate that.

19 (HEARING CONCLUDED)

20

21

22

23

24

25

Joy Mack v. State of South Carolina
Case No. 11-CP-10-4724
Hearing of May 22, 2012
before The Honorable Kristie Harrington

42

1 CERTIFICATE OF REPORTER

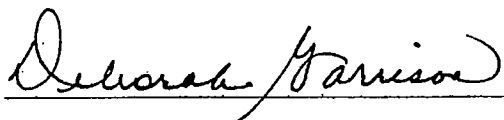
2

3 I, the undersigned, Deborah Garrison,
4 official court reporter for the 9th Judicial
5 Circuit of the State of South Carolina, do
6 hereby certify that the foregoing is a true,
7 accurate and complete transcript of the hearing
8 held before The Honorable Kristie Harrington on
9 May 22, 2012;

10 I further certify that I am neither kin nor
11 counsel to any of the parties and have no
12 interest in the outcome of this action.

13

14



15

Deborah Garrison

16

Circuit Court Reporter

17

9th Judicial Circuit

18

19

20

21

22 Charleston, South Carolina

23

680
NR
30L
GS
AT

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

2011-CP-10-4724

Joy Mack,
S.C.D.C. No. 315439,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2012 JUN -8 AM 9:38

FILED

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 5, 2011. The Respondent made its return on September 27, 2011. An evidentiary hearing into the matter was convened on May 22, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by James K. Falk, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant's trial counsel, Alex Apostolou, Esquire, testified at the PCR hearing. The Court had before it the trial transcript, the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, the appellate records, and Court Exhibits 1 and 2.¹

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the June 2008 term of the Charleston County Grand Jury for armed robbery (2008-GS-10-

¹ This Court sustained the Respondent's objection to the admission of a curriculum vitae and affidavit from purported expert witness, Jennifer Beaudry. These items were instead marked as Court's Exhibits.

[Handwritten signature]

5695), assault and battery with intent to kill (ABIK) (2008-GS-10-5696), and kidnapping (2008-GS-10-5697). He was represented by Alex Apostolou, Esquire.

After the State called the case to trial, the Applicant was found guilty. On February 26, 2009, the Applicant was sentenced by the Honorable J.C. Nicholson, Jr. to concurrent sentences of twenty-two (22) years for armed robbery, twenty-two (22) years for kidnapping, and twenty (20) years for ABIK.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Mack, Op. No. 2011-UP-215 (S.C. Ct. App. filed May 17, 2010).

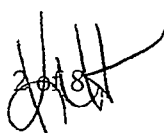
ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failure to subpoena witnesses.
 - b. Failure to file notice of alibi.
2. Denial of Sixth and Fourteenth Amendments.
3. Denial of due process.

In a "Pre-Trial Brief in Support of [the Applicant]'s PCR Application" filed May 21, 2012, the Applicant raised the following issues:

1. Ineffective assistance of trial counsel:
 - a. Failure to join co-defendant's motion to impeach the victim regarding pending criminal charges and thereby failed to preserve that issue for appeal.
 - b. Failure to engage an "expert in the field of eyewitness identification" in order to:
 - i. Prepare a line of questioning for the cross-examination of the victim.


2018

- ii. Provide authoritative testimony explaining the "scientifically accepted deficiencies and resulting unreliability" of the victim's identification.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

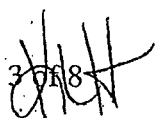
This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe the witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

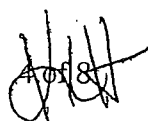
For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

3018


Trial counsel testified he filed discovery motions and reviewed those materials with the Applicant. Trial counsel testified the only evidence against the Applicant was the identification by the victim sixteen (16) days after the robbery. Trial counsel testified his trial strategy was to highlight the lack of corroborating evidence against the Applicant, "poke holes" in the victim's identification, and impeach the victim's credibility. Trial counsel testified there was reason to question the victim because there were improbabilities and inconsistencies in his testimony. Trial counsel admitted he did not join co-defendant's motion to impeach the victim with his pending criminal charges. Trial counsel stated that, while the trial judge denied that motion, he believed he should have made the argument. Trial counsel stated he considered consulting an expert witness on eyewitness identifications but did not recall why he did not do so. Trial counsel stated he was familiar with the following concepts but failed to either argue or point them out at trial: cross-racial bias, a short period of time affects the ability to identify someone, and weapons-focus effect.

Initially, this Court notes trial counsel is an experienced attorney with many years of practice in the area of criminal defense. This Court finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation both before and during the trial of this case.

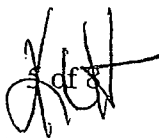
This Court finds the Applicant failed to meet his burden of proving trial counsel was ineffective for failing to join co-defendant's motion to impeach the victim with his pending criminal charges. Prior to opening arguments, co-defendant's counsel argued that he should be able to question the victim about his pending criminal charges because it went to the victim's credibility and bias. (Trial transcript, pp.152-54). The trial judge ruled he would not allow such questions. (Trial transcript, p.154). It is undisputed that trial counsel did not join in the

4 of 8


argument to impeach the victim with his pending criminal charges. This Court notes the purpose of this line of questioning was to impeach the victim's credibility. This Court finds, however, that trial counsel adequately impeached the victim's credibility without referring to his pending charges. Trial counsel subjected the victim to a thorough cross-examination in which he impeached the victim's description of his primary assailant (ostensibly the Applicant) with the description given in both his statement to police and in the Neil v. Biggers² hearing the prior day. Trial counsel also questioned the victim about whether his identification of the Applicant was influenced by noticing the Applicant's photograph in the newspaper and having seen the Applicant several times since the robbery. Trial counsel also questioned the victim about how he was able to identify the Applicant when he told police immediately after the robbery that he could not identify his assailants. (Trial transcript, pp.209-57). Accordingly, this Court finds the Applicant failed to demonstrate how his case was prejudiced because of trial counsel's decision not to argue in favor of impeaching the victim with pending criminal charges. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court finds the Applicant failed to meet his burden of proving trial counsel was ineffective in failing to both consult and subpoena an expert in eyewitness identification. While counsel for the Applicant argued trial counsel erred in not consulting and subpoenaing an expert witness for trial, such an expert did not testify at the PCR hearing. Though an affidavit from a purported expert was admitted as a Court's Exhibit, this Court cannot speculate upon what difference this testimony would have made at the Applicant's trial because she did not testify at the PCR hearing. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative"). Regardless, this Court finds the outcome of the Applicant's

² 409 U.S. 188, 93 S. Ct. 375 (1972)



trial would not have been different if an expert had been consulted about how studies in the field of eyewitness identification could shape potential lines of questioning for the victim. Trial counsel testified he was familiar with the concept of a cross-racial bias in witness identification, and he admitted the fact that the victim (who was Caucasian) was married to an African-American impacted his decision not to explore this line of questioning (as the Applicant was also African-American). Trial counsel also testified he was familiar with the concepts that a short time period and a weapons-focus could affect an identification. This Court finds trial counsel thoroughly cross-examined the Applicant on these points. Therefore, trial counsel's decision not to consult an expert in eyewitness identification did not affect the outcome of the trial. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. Further, this Court finds the outcome of the Applicant's trial would not have been different if an expert had testified at trial about the issue of eyewitness identification. As discussed supra, trial counsel thoroughly cross-examined the victim about both the circumstances of the crime and the identification of the Applicant several days later. Trial counsel also cross-examined the law enforcement officers associated with the case about: (1) the time line of the identification – from the June 14th incident through the June 29th and June 30th identifications of the Applicant, (2) the lack of any evidence linking the Applicant to the crime, (3) the initial tip in this matter not mentioning the Applicant, and (4) discrepancies between testimony and written reports. (Trial transcript, pp.267-68; pp.308-10; pp.341-47; pp.377-88; p.411; pp.417-25). This Court finds trial counsel did an excellent job of both impeaching the victim's identification and credibility and highlighting the lack of physical evidence against the Applicant. As such, this Court finds there is no reasonable probability that the addition of an expert in eyewitness identification to the defense case would have changed the outcome of the trial. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625; Johnson v.

6/18
Hest

State, 325 S.C. at 186, 480 S.E.2d at 735.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

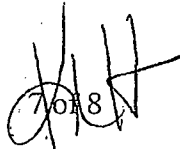
All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules

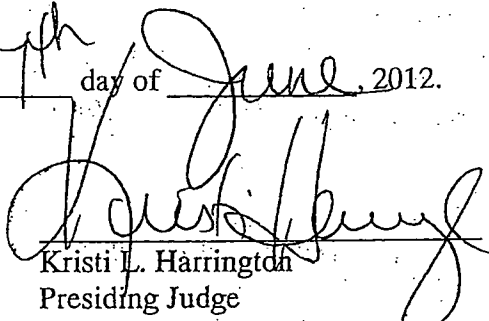

7/1/8

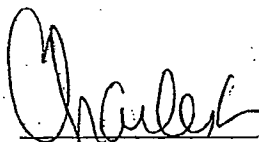
for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 14th day of June, 2012.


Kristi L. Harrington
Presiding Judge
Ninth Judicial Circuit

Charles, South Carolina.

**Affidavit of Jennifer L. Beaudry, Ph.D.
May 18, 2012**

The affiant, Jennifer Beaudry, having been duly sworn hereby states, and avers:

I have been asked by counsel James Falk and Jonathan Yates in the matter of Joy Mack v. State of South Carolina, 2011-CP-10-4724, to indicate how the defense of Joy Mack would have benefited from consulting or calling an eyewitness expert. In preparation for this report, I have reviewed case materials including the complete trial transcript from State of South Carolina v. Joy Mack, affidavits, photo lineup, SLED Forensic Lab Request, and the North Charleston Police Department reports, booking reports, and witness statements. This affidavit will address several issues:

- I. My credentials
- II. How an eyewitness identification expert could have benefited Joy Mack's defense
- III. The specific factors in this case that could have impacted the eyewitness's memory
- IV. The general theory of memory
- V. General research methodologies in this area
- VI. Real world evidence of eyewitness errors
- VII. Juror belief of eyewitnesses
- VIII. Expert testimony as a safeguard

I. Credentials of Dr. Jennifer Beaudry

Employment: I am an Assistant Professor of Psychology at the University of South Carolina Beaufort since January 2009. Prior to this appointment as an Assistant Professor, I was a Psychology Instructor from August 2008 – December 2008.

Education: I hold a Ph.D. in Social Psychology from Queen's University (Kingston, Ontario, Canada), a M.A. in Social Psychology from Queen's University, and a B.A. (Honors) in Psychology from Laurentian University (Sudbury, Ontario, Canada).

Experience: I have regularly taught eyewitness research in a Psychology and Law course.

Publications: I am an author or co-author of 9 eyewitness publications including original research articles published in peer-reviewed scientific journals and a book chapter in the *Handbook of Eyewitness Psychology*.

Presentations: I am an author or co-author of more than 30 presentations related to eyewitness research given before professional psychological organizations.

II. Expert Advice to Defense in the Present Case

1. Consultation

Mack's trial counsel would have benefited from consulting an eyewitness identification expert because they would have provided counsel with general advice as well as specific questions for key witnesses.

General Advice

In addition to being able to discuss the research discussed in detail below, as an expert consultant, I would have:

1. Advised counsel to call the officer who investigated Ayazgok's first phone call to the police regarding identifying one of the perpetrators (06/15/2007). This would allow the defense to establish a pattern of accusatory statements made against patrons of the stores in the shopping mall. Furthermore, if the officer had definitive evidence to rule out this person as a perpetrator of the robbery, then it could be used to discredit Ayazgok as a reliable witness.
2. Urged counsel to try to suppress the lineup identification evidence (Apostolou was successful in the suppression hearing).
3. Provided counsel with articles and summaries of the key factors in this case, so that he would be better informed of the issues. This knowledge may have helped him to hone in on the specific issues that he should have been addressing in his cross-examination and closing argument.

Questions for Aytekin "Andy" Ayazgok

1. How long did it take the perpetrator to walk across the store? How long before he pulled out the AK47?
2. When he pulled out the weapon, did your attention shift away from the perpetrator's face to the gun? If not, when did you notice the wood stock and when did you determine the length of the weapon? So, would you say that the weapon drew your attention?
3. Were you looking at the man holding the AK47 the entire time? If yes, how did you know there were four other Black males in the store with him?
4. The only description of this perpetrator (aside from clothing) was that he was a Black male. What was it about the defendant that you recognized the first time you saw him after the robbery?
5. You indicated immediately after the robbery that you could not identify them, but identified the defendant (for the first time) approximately 10 days later. What changed?
6. You indicated he was wearing a skull/snow cap. Could you see any of his hair?
7. When you saw Joy Mack's picture in the newspaper, did you feel like you had gotten the guy?
8. How frightened were you during the robbery? Was your heart pounding? Were you having trouble catching your breath? Did everything going on around you seem to be happening very quickly?
9. Can you explain why you reported increasingly higher levels of confidence after each encounter with the defendant?

Questions for the officer who first took Andy's statement on June 14, 2007 (name is illegible)

1. Was Andy extremely shaken up by the robbery? Was he calm when describing the event? Did you ask him to give additional identifying details regarding the perpetrators?
2. Did Andy indicate that he would not be able to identify the perpetrators if he saw them again? Did he explain why not?

2. Testimony

Mack's trial counsel would have benefited from calling an eyewitness identification expert to testify because an expert witness in this case would have testified to the issues raised in section III.

Specifically, as an expert eyewitness in this case, I would have explained how memory works, how eyewitness identification research is conducted, and the real world evidence for eyewitness errors. Then, I would have discussed the specific factors relevant to this case (as I do below), and I would have explained to the jury the impact of each factor on eyewitness identification accuracy and reliability.

III. Factors in the Present Case that can Affect Eyewitness Memory

In the following sections I identify factors about which there is relevant scientific research demonstrating the impact of the factor on eyewitness identification accuracy. As this research relates to *Joy Mack v. State of South Carolina*, I will specifically discuss the following factors:

1. The cross-racial nature of the identification;
2. Brief exposure to the perpetrator;
3. The weapon focus effect;
4. The effects of stress/fear on memory;
5. Unconscious transference & commitment;
6. Disguise;
7. Witness confidence and accuracy.

1. The Fact that the Eyewitness and Perpetrator Were of Different Races Diminishes the Reliability of the Identification

It is well established that there exists a comparative difficulty in recognizing individual members of a race different from one's own. In fact, several decades of research has shown that individuals are better able to recognize faces of their own race than faces of other races, and more likely to falsely identify faces of other races, a phenomenon known as the own-race bias (e.g., Anthony, Copper, & Mullen, 1982; Behrman & Davey, 2001; Bothwell, Brigham, & Malpass, 1989; Brigham, Bennett, Meissner, & Mitchell, 2007; Brigham, Maass, Snyder, & Spauling, 1982; Malpass & Kravitz, 1969; Meissner & Brigham, 2001; Platz & Hosch, 1988; Shapiro & Penrod, 1986; Wright, Boyd, & Tredoux, 2001). Although most commonly studied with Black and White participants, the own-race bias has also been found in studies including Hispanic participants (MacLin, MacLin, & Malpass, 2001; MacLin & Malpass, 2001, 2003; Platz & Hosch, 1988) and with individuals from other racial and ethnic backgrounds (e.g., Asian as seen in Hiliar, Kemp, & Denson, 2010).

Meissner and Brigham (2001) published what I consider to be the best review of the research on the problems of the own-race bias (ORB), which has sometimes been called the other-race or cross-race effect. Meissner and Brigham analyzed data from 39 research articles, with 91 independent samples involving nearly 5,000 witness-participants. Measures of hit and false alarm rates, and aggregate measures of discrimination accuracy and response criterion were examined. Overall, they reported that the chance of a mistaken identification is 1.56 times greater in other-race than in same-race conditions and witnesses were 1.4 times more likely to correctly identify a previously viewed own-race face than an other-race face. Overall, in terms of discrimination between new versus old faces, participants were more than 2.2 times as likely to accurately identify own-race faces as "new" when compared with performance on other-race faces.

Meissner and Brigham reported that the own-race bias resulted in greater impairment of identification of other-race faces (especially with respect to false identifications) with short exposure times and longer periods of time between viewing and identification. Furthermore, White participants showed more ORB than other groups (especially with respect to false identifications of Black suspects).

Meissner and Brigham also explored the question of whether cross-race contact might reduce these effects and found that overall, contact played a small role in the ORB, accounting for just 2% of the variability across participants. They also found that the amount of viewing time available to witnesses significantly influenced accuracy in the ORB—particularly through an increase in false alarms to other-race faces when study time is limited. That is to say, there is little reason to think other-race contact would play an important role in reducing own-race bias and some reason to think the brief exposure to the perpetrator would aggravate the problem.

With regard to the current case

The eyewitness/victim is White (emigrated from Turkey to the United States) and the perpetrator was described as a Black male. The fact that the witness is married to an African-American woman does not eliminate the cross-race nature of the identification as a factor to consider when weighing the reliability of this evidence. The evidence discussed above indicates—regardless of interracial contact—the own-race bias can negatively impact the accuracy of an eyewitness's identification.

2. The Eyewitness' Brief Exposure Duration Impacts His Ability to Make an Accurate Identification

Exposure duration refers to how long the witness is exposed to the target's face. In general, studies have found that as exposure time increases, identification accuracy increases. As discussed in Bornstein, Deffenbacher, Penrod, and McGorty's (in press) meta-analysis, shorter durations range from a few tenths of a second to 12 s, while longer durations typically hover around 45 to 60 s (although a few studies examined durations longer than 180 s). The updated meta-analysis confirmed findings from Shapiro and Penrod's (1986) meta-analysis. Specifically, longer durations produce higher hit rates and lower false identification rates compared to shorter exposures, but exposure impacts hit rates to a greater degree than false alarms. In comparing the two effect sizes, Bornstein et al. concluded that exposure duration is even more influential than researchers originally thought.

Exposure durations in real crimes may be longer than those typically used in eyewitness and facial recognition studies; however, the effect of exposure duration is nonlinear, meaning that beyond a certain point (approximately 30 s), any further increase has minimal impact on identification accuracy. Further evidence of the generalizability of laboratory findings to the real world is that research paradigm (facial recognition vs. eyewitness identification) did not significantly moderate the relationship; exposure duration had similar effects regardless of whether or not the witness's memory was studied under ecologically valid conditions.

The effects of exposure time are well illustrated in a study by Memon, Hope and Bull (2003) in which mock witnesses viewed a realistic crime video that lasted either one minute, forty seconds (clear view of face for 45 seconds) or one minute seven seconds (clear view of face for 12 seconds). Witnesses were tested with target-present and target-absent arrays 40 minutes later. As shown in the following Table, the proportion of correct rejections in target-absent arrays increased substantially when

exposure time increased—though mistaken identifications in target-absent arrays remained relatively high. It should be underscored that in this study the attention of the mock witnesses was focused on the video so witnesses had a good view, the target was of the same race, stress levels would have been much lower than in a real crime and no weapon was directly visible in the videotaped crime, and witnesses were tested almost immediately after viewing the crime rather than following a long delay—these are all factors that contribute to better performance than would be observed with a crime that involved less-focused attention, cross-race identification, high stress, weapon-visible, brief exposure, and a ten-day delay. In short, the accuracy levels observed in this study are surely higher than those that would be expected from the actual crime involved in this case.

Performance of Young Adults in the Short and Long Exposure Groups with Target-Present and Target-Absent Lineups – Tested 40 Minutes After Exposure

	Short Exposure			Long Exposure		
	Hit	False Alarm	Non-Choice	Hit	False Alarm	Non-Choice
Target Present	29%	42%	29%	95%	5%	0%
Target Absent	--	90%	10%	--	41%	59%

Note. Errors are bolded

With regard to the current case

The victim did not indicate exactly how long the perpetrator was in view, but instead reported that he watched the perpetrator walk toward him across a 70ft room. Based on that description I would conclude that the victim had only a brief opportunity to view the perpetrators.

3. The Presence of a Weapon Impacts the Eyewitness's Ability to Make an Accurate Identification

Weapon focus refers to the attention witnesses give to a perpetrator's weapon during a crime. It is expected that the attention the witness focuses on a weapon will reduce their ability to later recognize the perpetrator. Researchers have assessed eyewitness accuracy in an attempt to assess the effects of weapon-focus effects on memory. The relevant studies were reviewed in two meta-analyses: the first by Steblay (1992), and an update by Fawcett, Russell, Peace, and Christie (2011). Steblay's meta-analysis included 19 studies, while Fawcett et al.'s updated meta-analysis included 28 studies. The most recent meta-analysis—which is based on the existing and most up-to-date results, and thus provides a better understanding of the state of the field regarding this issue—reported an overall moderate effect of weapon presence on memory performance. Retention interval and exposure duration significantly moderated this effect. As the length of time between exposure and test increased, the weapon focus effect decreased. The relationship with exposure duration is a little more complicated: weapon presence is most detrimental when witnesses are exposed to the weapon for 10–60 s, with smaller effects when exposure is less than 10 s or greater than 60 s.

Research by Mitchell, Livosky, and Mather (1998), Pickel (1998, 1999), and Shaw and Skolnick (1999) indicates that any surprising object can draw attention away from the perpetrator and that novelty, rather than threat, may be the critical ingredient in the effect. Indeed, Fawcett et al.'s meta-analysis indicated that compared to non-unusual objects, the presence of an unusual object (e.g. raw,

whole chicken) was associated with a greater detriment to memory performance. Researchers have tried to detect weapon-focus effects in field studies, and although the results are conflicting (likely because the methods used are fraught with problems detailed by Pickel (2007)), Tollestrup, Turtle, and Yuille (1994) examined the effect of weapon focus on the rate of suspect identification and obtained data consistent with laboratory findings.

With regard to the current case

The witness claimed that the defendant is the perpetrator who pulled an AK47 out of his pants before beating him with it.

4. Stress Reduces Identification Accuracy

Recently Deffenbacher, Bornstein, Penrod, and McGorty (2004) published a new meta-analysis examining the impact of stress on eyewitness memory. The meta-analysis was conducted on 27 tests of the effects of heightened stress on identification accuracy and on 36 tests of its effect on recall of crime-related details. The researchers found that high levels of stress negatively impact both types of memory. The effect of stress was notably larger for target-present than for target-absent lineups—that is, stress particularly reduced correct identification rates. The effect was considerably larger for eyewitness identification studies that simulated eyewitness conditions (e.g., staged crimes in the eyewitness identification paradigm) than for facial recognition studies.

These effects are well-illustrated in a study by Morgan et al. (2004) who studied the eyewitness capabilities of more than 500 active-duty military personnel enrolled in a survival school program. After 12 hours of confinement in a mock prisoner of war camp, participants experienced two 40-minute interrogations 4 hours apart. One was a high-stress interrogation with real physical confrontation and one was a low-stress interrogation without physical confrontation. The interrogators in each instance were different individuals. A day after release from the prisoner of war camp, and having recovered from food and sleep deprivation, participants were asked to identify the interrogators from both the high- and low-stress interrogations. Researchers tested three identification procedures: a 15-person live lineup, a 16-person photo-spread, or a serial-presentation photo lineup of up to 16 persons. Regardless of testing method, as the following table shows, memory accuracy for the high-stress interrogator suffered a dramatic decline from the level displayed for the low-stress interrogator.

	High Stress	Low Stress
CORRECT IDS [Target-Present]		
Live line-up method	27%	62%
Photo-spread method	36%	76%
Sequential photo method	49%	75%
FALSE ALARMS [Target-absent]		
Live line-up method	45%	50%
Photo-spread method	48%	61%
Sequential photo method	0%	0%

With regard to the current case

The robbery, kidnapping, and assault can be presumed to have been extremely stressful. It should be noted here that the length of exposure to the interrogators in the Morgan et al. study described above

was a relatively long period of time (40 minutes), which is much longer than the exposure duration of the current case, and yet identification accuracy was still relatively low in the high stress conditions.

5. *Unconscious Transference and Commitment can Lead to Mistaken Identifications*

Unconscious transference is a term applied when there is a "transfer of one person's identity to that of another person from a different setting, time, or context" (Read et al., 1990, p. 3). Williams (1963) originally coined the phrase in reference to an English murder case, in which an innocent person may have been executed. Williams indicates that one of the eyewitnesses who identified the defendant had briefly seen him before the crime and may have unconsciously transferred the identity of the actual perpetrator to the defendant. Unconscious transference has generally been examined during a mugshot search that is followed by a lineup identification procedure.

Mugshot Exposure Effects

Deffenbacher, Bornstein, and Penrod wrote in 2006:

The phenomenon of the photobias lineup has existed for as long as police have, in the furtherance of their criminal investigations, engaged in the practice of exposing eyewitnesses to mugshots. If a witness is exposed to mugshots subsequent to viewing a perpetrator and prior to an additional test of recognition memory, there is the possibility that exposure to the mugshot photos may bias the witness's decision at that test, usually a photo or live lineup. Defense attorneys have labeled a photobias lineup as one in which a possibly innocent person has been arrested because his/her photo was initially included in a set of mugshots but not identified by the witness; subsequently, however, he/she was identified by that witness at a lineup. Any bias thus engendered would be due to the previous exposure of the witness to the mugshot photo of the suspect identified at the subsequent lineup.

In such cases, the witness may well have suffered a failure of memory for the circumstances of previous encounter of the face identified at the lineup. This sort of failure of memory for facial source or context is all the more problematic when viewing of the perpetrator has occurred under less than optimal viewing conditions (Brown, Deffenbacher, & Sturgill, 1977). Indeed, the United States Supreme Court had opined that this was the case, even before there was empirical support for their view (*Simmons v. United States*, 1968).

The first empirical examination of the possibility of bias imposed by mugshot exposure more generally as well as the more specific sort of bias that might be engendered by a photobias lineup was that of Brown et al. (1977). In all three of their experiments, these investigators noted that recognition memory for a once-seen face is much greater than is the capacity to recall the circumstances under which that previously unfamiliar face had been encountered. In Experiments 2 and 3, they employed what we will henceforth refer to as a *transference design* to test for specific biasing effects of mugshot presentation between exposure to live targets and a subsequent lineup...

In addition to the passive effect of familiarity gained by mere mugshot exposure to a previously unfamiliar face, Gorenstein and Ellsworth (1980) sought to determine whether there was a further increase in interference with witness memory for the target face engendered by the witness actively choosing the mugshot of an innocent person.

Would witness commitment to a prior choice of a particular mugshot as the target person cause the mugshot image to be retained as strongly or even more strongly than that of the target? In brief, then, a mugshot commitment design involves a control group and an experimental group both being exposed to a target person, followed by mugshot exposure for the latter group. Witnesses in the experimental condition may be urged to pick an innocent person from the mugshots, despite the target's face not being included. At the lineup the target face may or may not be included, but the previously chosen mugshot image definitely is. Gorenstein and Ellsworth (1980) found that whereas control witnesses identified the target from a six-person photo array at a significantly above chance rate (.39), mugshot commitment witnesses failed to identify her at an above chance rate (.22) but did identify their mugshot choice's image at an above chance level (.44), a level somewhat greater than the rate at which control witnesses identified the target person (p. 288-290).

In their (2006) meta-analysis of 15 mugshot studies Deffenbacher, Bornstein, and Penrod found the overall proportion of correct identifications from target-present and target-absent arrays following mugshot exposure was .43 whereas the comparable figure for the no-mugshot control conditions was .50 correct—indicating that mugshot exposure inserted between exposure to the target and a subsequent lineup test has a negative effect on eyewitness memory. In 11 of those 15 studies only innocent people were shown in the mugshots and the negative effects of exposure were even greater: the proportion of correct identifications from target-present and target-absent arrays following mugshot exposure was .48 versus .61 for the no-mugshot control condition. If the witness actually made an identification of a mugshot image as that of the target, the subsequent appearance of that image or person at an identification procedure had an even larger negative impact upon lineup accuracy, with mean proportion correct of .32 for the mugshot commitment condition versus .55 for the control condition. Identification of an innocent mugshot interferes with a witness's memory of the actual target so as to reduce both the hit rate and correct rejection rate for target present and target absent lineups, respectively.

Deffenbacher et al. also specifically examined witness performance when they are shown mugshots and a subsequent presentation that does not contain the target/perpetrator. The overall false alarm rate at a lineup for mugshot exposure conditions was .37, and the comparable figure for the no-mugshot control conditions was .15, less than half the former rate. More alarmingly, if the witness selected an innocent person in a mugshot and that person was included in a subsequent target-absent array, the mean false alarm rate for the mugshot commitment condition was .53 versus just .20 for the control condition.

It should be noted that the transference effect is not a uniquely forensic phenomenon. In addition to the previously cited studies of eyewitness memory, memory researchers have for the past quarter of a century obtained strong support for a variety of transference-related phenomena. These phenomena include "familiarity without awareness" (Mandler, 1980), "retention without awareness" (Roediger, 1990), the "false fame effect" (Jacoby, Kelley, Brown, & Jasechko, 1989), and failures in reality monitoring (Johnson & Raye, 1981) and source monitoring (Johnson, Hashtroudi, & Lindsay, 1993).

With regard to the current case

The witness was not exposed to mugshots; however, during the two weeks after the robbery, the witness called the police multiple times to report that he believed that he had seen at least two of the perpetrators at his store or the shopping mall (one of whom was the defendant). Although this situation does not precisely mimic the research studies, similar principles apply. The witness was on alert and searching the general area for the perpetrators of the robbery, which makes him susceptible to unconscious transference in that he might mistake a person as being present at the crime scene rather than recognizing that he had previously seen him at the shopping mall at an unrelated time. Furthermore, with each subsequent viewing of the defendant, the witness becomes more committed to his belief that he had previously seen the defendant during the criminal event (Dysart, Lindsay, Hammond, and Dupuis, 2001).

6. Even Minimal Disguise can Impact Identification Accuracy

Full face masks, stockings, hats, hoods, and sunglasses can be quite effective in diminishing the facial feature cues that are necessary for recognition. Cutler, Penrod, and Martens (1987a, 1987b), Cutler et al., (1986), and O'Rourke et al. (1989) examined the effects of masking a target's hair and hairline cues on subsequent identification accuracy. In these experiments participants viewed a videotaped liquor store robbery and later attempted an identification from a videotaped lineup. In half of the robberies the robber wore a knit pullover hat that covered his hair and hairline. In the other half the robber did not wear a hat. The robber was less accurately identified when he was disguised. For example, in one of the experiments (Cutler et al., 1987a) 45% of the participants gave correct judgments on the lineup test if the robber wore no hat during the robbery, but only 27% gave a correct judgment if the robber wore the hat during the robbery. Pozzulo & Marciniak (2006) found that correct identifications fell by half when a target's hairstyle changed (short versus long hair). Similarly, Mansour, Beaudry, Bertrand, Kalmet, Melsom, & Lindsay (in press) found that the correct identifications were significantly lower when the target covered his head with a toque (aka skull cap or beanie) than when he wore no disguise (66% vs. 77%, respectively).

In Shapiro and Penrod's (1986) meta-analysis, experiments were coded for whether or not the facial stimuli had undergone changes in facial features between the encoding and recognition phases. Facial transformations included changes in facial hair and deliberate disguises such as those used in the experiment just described. Non-transformed faces were more accurately recognized ($d = 1.05$; 75% non-transformed vs. 54% for transformed) and less often falsely identified ($d = .40$; 22% vs. 30%) than transformed faces.

With regard to the current case

The perpetrator was described as wearing a skull or snow cap (analogous to the toque condition in Mansour et al.).

7. Witness Confidence is only Weakly Related to Identification Accuracy

The problems with respect to witnesses' confidence about the accuracy of their identifications and the actual accuracy of those identifications are manifold. Some of these problems relate to jurors' over-reliance on witness confidence as a guide to witness accuracy and some relate to the weak association between confidence and accuracy (CA). In addition, witness confidence can be influenced by post-

identification factors such as repeated questioning, briefings in anticipation of cross examination, and feedback about the behavior of other witnesses. The most useful expression of confidence is one made at the time the initial identification was made, which is not present in this case because there appears to be no record of the witness's statement when he first saw the defendant (in a casual, non-identification procedure setting) approximately ten days after the robbery. Research demonstrates that jurors overbelieve eyewitnesses, have difficulty reliably differentiating accurate from inaccurate eyewitnesses, and (as discussed previously) are not adequately sensitive to aspects of witnessing and identification conditions that affect witness performance. A major source of juror unreliability is reliance on witness confidence, a dubious indicator of eyewitness accuracy. Juror reliance on witness confidence appears to be unaffected by traditional safeguards such as cross-examination and judges' instructions in eyewitness cases.

Although there is a presumption among many actors in the legal system that there is a positive confidence-accuracy relation, serious questions about whether that is true have been raised by researchers within the law-psychology community. Many experimental studies of witness identification have reported correlations between confidence and accuracy that, although generally positive, are not always significantly different from zero. (A correlation of zero would indicate no relationship and a correlation of 1.0 would indicate a perfect relationship between confidence and accuracy.)

Confidence and accuracy in jury studies

There is consistent evidence to indicate that the confidence that an eyewitness expresses in his or her identification during testimony is the most powerful single determinant of whether or not observers of that testimony will believe that the eyewitness made an accurate identification (e.g., see Cutler, Penrod & Dexter, 1990; Leippe & Romanczyk, 1987, 1989; Leippe, Manion, & Romanczyk, 1991; Lindsay, Wells, & O'Connor, 1989; Lindsay, Wells, & Rumpel, 1981; Turtle & Wells, 1988; Wells, Ferguson, & Lindsay, 1981; Wells, Lindsay, & Ferguson, 1979; Wells & Murray, 1984).

Overall, it is clear that jurors do rely on witness confidence as an indicator of witness accuracy—but to what extent does witness confidence predict identification accuracy? Should jurors (and attorneys and judges) rely so heavily on witness confidence as a guide to witness accuracy?

To what extent does witness confidence predict identification accuracy? Should jurors (and attorneys and judges) rely so heavily on witness confidence as a guide to witness accuracy?

Post-identification confidence and accuracy

Over the past several decades researchers have examined the results from the growing numbers of studies that measure both witness accuracy and witness post-identification confidence in an effort to arrive at a reliable estimate of the magnitude of their relation. Deffenbacher (1980) reviewed a set of studies conducted since the turn of the century and concluded that there was little support for a strong reliance on witness confidence as a guide to witness accuracy. In a review of 31 studies Wells & Murray (1984) reported an average $r = .07$. In contrast, Sporer, Penrod, Read & Cutler (1995) divided participants depending on whether they chose someone from the lineup or rejected it, and found a confidence-accuracy correlation of .41 among (forensically-relevant) choosers. In the most exhaustive review to date, Bothwell, Deffenbacher, & Brigham (1987) meta-analyzed 35 studies involving staged incidents that yielded an average post-identification confidence and accuracy correlation of $r = .25$.

These findings suggest that witnesses who are highly confident in their identifications are somewhat more likely to be correct as compared to witnesses who display little confidence.

Factors affecting confidence, accuracy, and their relation

There is evidence that the strength of the confidence-accuracy correlation depends on a variety of cognitive and social factors such as timing of the confidence judgment (Cutler & Penrod, 1989a; Sporer, 1992, 1993), the optimality of information processing conditions at encoding (Bothwell et al., 1987; Cutler & Penrod, 1989a; Deffenbacher, 1980), the distinctiveness of the to-be-recognized persons (Brigham, 1990; Cutler & Penrod, 1989b), and the match between a target's appearance at encoding and at retrieval (Read, Vokey, & Hammersley, 1990).

Confidence is highly malleable

Confidence malleability refers to the tendency for an eyewitness to become more (or less) confident in his or her identification as a function of events that occur after the identification. The confidence malleability problem is particularly important because actors in the legal system can contaminate the confidence of an eyewitness in ways that can make an eyewitness's in-court expression of confidence a meaningless indicator of the eyewitness's memory. An eyewitness who expresses high confidence in their identification is expressing a strong belief that the identified person and the culprit are the same person. Clearly, an eyewitness's belief that the identified person is the culprit can arise out of pure memory judgments; that is, a perception of a remarkable resemblance between the identified person and the eyewitness's memory of the culprit (Leippe, 1980; Wells, Ferguson, & Lindsay, 1981). This would be ideal.

Unfortunately, an eyewitness's belief that the identified person is the culprit can also arise for reasons other than the eyewitness's memory (Leippe, 1980; Wells, Ferguson, & Lindsay, 1981; Luus & Wells, 1994; Wells & Bradfield, 1998). For example, Hastie, Landsman, and Loftus (1978) found that witnesses who were questioned repeatedly grew more confident about the accuracy of details in their reports (see also Shaw, 1996; Shaw & McClure, 1996; Turtle & Yuille, 1994).

Wells, Ferguson, & Lindsay (1981) demonstrated they could increase witness confidence simply by briefing witnesses about the types of questions they might encounter in an upcoming cross-examination. When cross-examined, the briefed witnesses (who were no more accurate than the unbriefed witnesses) were significantly more confident about their identifications than were the unbriefed witnesses. Moreover, the jurors believed the more confident briefed witnesses more than the unbriefed witnesses. Unfortunately, the briefing effect occurred among inaccurate eyewitnesses, whose levels of confidence rose dramatically, whereas confidence levels among accurate witnesses were unchanged.

In a dramatic illustration of confidence malleability, Luus & Wells (1994) used a staged-crime to secure false identifications from 136 eyewitnesses. These eyewitnesses viewed a theft in pairs and were separated shortly after the theft. After being separated false identifications were obtained from the witnesses using a photospread (the eyewitnesses were unaware they had made a false identification). After making their identifications eyewitnesses were randomly assigned to one of several experimental conditions. In the control condition, eyewitnesses were told nothing about the identification decision of their co-witness. In various experimental conditions, eyewitnesses were given information that their co-witness ostensibly identified the same person, that their co-witness identified someone else, or that

their co-witness indicated that the culprit was not in the lineup. They were then interviewed by an assistant to the experimenter (posing as a campus police officer) who solicited the witnesses' confidence levels (on 10-point scales) in the accuracy of their identifications. Each eyewitness was videotaped while giving statements to the police officer.

The results indicated dramatic increases in the confidence that eyewitnesses expressed in their false identifications in the condition in which they were told that their co-witness identified the same person (the average confidence on a 10 pt. scale was 8.8 versus 6.9 in the no-information control condition). The lowest confidence levels were found among witnesses who were told that the co-witness had indicated that the perpetrator was not in the array (3.6). When Luus and Wells had mock jurors evaluate the witness statements the pattern of ratings closely paralleled the pattern of witness confidence levels (a result that is consistent with the research on juror reliance on witness confidence reviewed earlier). The manipulations had similar effects on juror ratings of the witnesses' quality of view, believability, and detail of description.

Even stronger and broader effects have been shown to emerge when eyewitnesses are told after their identification that they identified the suspect (versus being told nothing). Wells and Bradfield (1998) found that eyewitnesses who received confirming feedback were not only much more confident than the witnesses with no feedback and witnesses with disconfirming feedback—the confirming feedback witnesses distorted their reports of their witnessing conditions by exaggerating how good their view was of the culprit, how much attention they paid to the culprit's face while observing the event, and so on. Furthermore, Douglas et al. (2010) found that people rate witnesses receiving confirming post-identification feedback as more accurate and confident than witnesses who have not received feedback.

Parenthetically, it should be noted that any in-court recognition of the defendant cannot be independent of the identifications the witness made at the lineup. It is sometimes helpful to point out that memory is akin to trace evidence in the sense that it is possible (and relatively easy) to contaminate. Further, it is sometimes difficult to determine when the contamination occurred and the extent of the influence of the contamination on the outcome of the test (i.e., identification). It is crucial to keep in mind that a witness's memory should be treated with caution and that all reasonable measures to preserve and record a witness's memory *as soon as possible* after an event should be taken.

With regard to the current case

The witness's confidence increased over time. Immediately after the robbery, the witness indicated that he would not be able to identify the perpetrators if he saw them again. Then, approximately 10 days after the robbery, the witness indicated that he saw the defendant outside his store and believed he was the perpetrator that pulled a weapon, but he did not call the police. Then, approximately 5 days later on June 29th, the witness saw the defendant in his store and reportedly told his wife "I think that's the guy that robbed me. And that is him right there, and I'm almost sure. It's just some face you don't forget" (page 99 of State of South Carolina v. Joy Mack trial transcript). The witness did call the police after this "identification," and after a subsequent sighting of the defendant on this day. The following day, June 30th, Andy again saw the defendant at the shopping mall, and in a police report, he indicated that he was "100% positive that this is the same guy who participated in the robbery of my store" (6-30-2007 North Charleston Police Department Witness Statement). On July 2nd, 2007, the paper published the defendant's picture, which the witness cut out and kept with him until the trial date. Finally, on July 17th, 2007, the lead detective in this case provided the witness with a simultaneous lineup that

contained the defendant, and after not having received the proper admonition that the perpetrator may or may not be in the lineup, the witness selected the defendant and indicated that he was sure "that is the one" (p. 102 of trial transcript). The reports and testimony suggest that the witness's confidence increases with each subsequent (casual, non-identification procedure) contact with the defendant.

The defense did successfully suppress the identification procedure on July 17th, 2007, mainly because of the suggestiveness of the procedure because the officer knew the suspects identity, the officer did not present unbiased lineup instructions, and the procedure was unnecessary and prejudicial because the witness had already identified the defendant. Nonetheless, although the jury did not hear the ID evidence, the simple process of making that identification decision and being told that he had selected the defendant would have boosted the witness's confidence in his identification decision (Wells & Bradfield, 1998).

IV. General Theory of Memory

Over a period of decades, researchers have established that when we experience an important event, we do not simply record it in our memory as a video recorder would. The situation is much more complex. Most theoretical analyses of the memory process divide it into three major stages. First, the event is perceived by a witness, and information is entered into the memory system. This is called the *acquisition* stage. Second, some time passes before a witness tries to remember the event, and this is period of time during which the witness "holds on" to the memory but does not actively try to recall it is called the *retention* stage. Third, the witness tries to recall the stored information (e.g., to describe the perpetrator, or to attempt an identification of a suspect), and this is called the *retrieval* stage where memories are reconstructed. This three-stage analysis is central to the concept of human memory. Psychologists who conduct research in this area try to identify and study the important factors that play a role in each of the three stages.

Numerous factors at each stage affect the accuracy and completeness of an eyewitness account. Some of the factors affecting eyewitness performance are: Lighting conditions, Duration of the event, Violence, Stress/fear, Age, Sex, Expectations, Length of retention interval, Postevent information, Method of questioning, and confidence.

V. Research Methodologies Used in Eyewitness Research

In general, eyewitness identification researchers employ several techniques to come to the scientific conclusions that will be discussed in this affidavit. The three most common are: experimental research, archival research, and meta-analyses.

1. Experimental Research

Without a doubt, the most common form of research conducted in the area of eyewitness testimony is experimental research. The primary reason for conducting experimental research is that it gives us the ability to make cause and effect statements, such as "Y happened *because* of X." For example, a well-conducted experiment can tell us that using a specific identification procedure will cause an improvement in identification accuracy.

Experimental studies are defined by two key components: (1) that the researcher is able to manipulate the variable of interest (i.e., X), and (2) that participants are randomly assigned to conditions. When we say that the researcher must manipulate something, it means that the researcher must change some aspect of the study so that the participants are receiving different treatments. For example, if the variable of interest, X, was stress, the researcher would assign one group to a low level of stress and another group to a high level of stress. This will allow the research to compare the groups to determine whether the participants performed differently on some other variable, say Y, which might be eyewitness accuracy. Randomly assigning participants to the different groups allows us to say with reasonable certainty that the two groups are not systematically different from each other (i.e., they are equivalent), and therefore, any difference found in the variable of interest, Y, must be the result of the manipulated variable, X. In other words, randomly assigning participants to two groups allows researchers to test whether or not the manipulation (low or high stress) impacted the variable of interest (eyewitness accuracy).

The two most common experimental research paradigms used to examine people's memory for a face are facial identification and eyewitness identification studies. Facial identification paradigms involve two phases: (1) the encoding phase, and (2) the testing phase. In the encoding phase, participants are presented with a series of faces. In the testing phase, participants are presented another series of faces, some which of which had been previously presented. The participants' task is to indicate which of the faces are "old" (presented during the encoding phase) and which are "new". Researchers typically rely on facial identification studies to examine theoretical questions about memory processes, in part because each participant makes multiple decisions (one for each face). Eyewitness identification studies, on the other hand, are generally used to examine applied issues regarding factors that could affect real-world eyewitness identification performance. In these studies, participants are exposed to a mock-crime and are asked to make an identification decision from some form of identification procedure, typically a lineup. Most often, researchers will manipulate the presence of the perpetrator (aka culprit or target) in the lineup to investigate two forensically relevant situations: (1) a target-present lineup contains the perpetrator, and (2) a target-absent lineup, in which the perpetrator is replaced with an innocent lineup member (representing a situation in which the police's suspect is *not* the perpetrator). A witness's selection or choice from the lineup is considered to be a correct identification if the witness selects the target from a target-present lineup; on the other hand, the selection is considered a false identification if the witness selects the innocent suspect from the target-absent lineup. In a single-suspect lineup—regardless of whether the perpetrator is present or absent—a selection of a filler (known innocent lineup member) is considered to be a false positive, which should discredit the witness.

There is, of course, overlap between the two research approaches, including a consideration of practical applications based on facial recognition studies, as well as common independent variables such as exposure time, disguise, and retention interval. For this reason, some researchers use the term facial identifications to encompass results from facial recognition and eyewitness identification studies (Shapiro & Penrod, 1986). Both types of studies will be discussed in this report, as the findings from both paradigms provide relevant and applicable information regarding eyewitness memory. When relevant, I will discuss findings from facial identification and eyewitness identification studies separately.

2. Archival Research

When eyewitness researchers examine existing records or data, they are conducting archival research. This type of research is important for understanding how witnesses in real-world cases behave. For example, several archival studies have found that approximately 20% of witnesses in real cases select a lineup filler—a known innocent person and thus have made an identification error (e.g., Wright & McDaid, 1996). These results are consistent with results from lab studies, which have found very similar rates of filler selections. The DNA exonerations in the United States, discussed in section IV below, are an example of archival research.

3. Meta-analysis

Generally, a meta-analysis is a statistical summary of research that has already been conducted, rather than setting out to collect new data with new participants in a new experiment. A benefit of using the meta-analysis technique is that it would inform the researcher about eyewitness performance over a large number of studies using many different participants conducted in many different laboratories (and perhaps from many different countries around the world).

VI. Real World Eyewitness Error Rates

I begin by noting, briefly, some important facts about eyewitness errors. For starters, the Innocence Project website (<http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>) currently implicates mistaken eyewitness identifications in over 75% of DNA exculpations—as of May 15th, 2012, the Innocence Project has been involved in 291 DNA exonerations. Brandon L. Garrett (2008), a law professor at the University of Virginia, has systematically examined the first 200 DNA exculpation cases, in which the innocent people served an average of 12 years in prison. Garrett reports that the leading cause of the wrongful convictions was erroneous eyewitness identification—which occurred in 79% of the cases. In a quarter of the cases, eyewitness testimony was the only direct evidence against the defendant.

Additionally, a series of archival studies underscores that eyewitnesses are a source of relatively unreliable evidence. A series of archival studies of the performance of actual eyewitnesses attempting identifications have become available in recent years (e.g., Slater, 1994; Wright & McDaid, 1996). When using archival data/police reports it is not possible for researchers to determine when an identification is correct because we don't know if the police suspect is, in fact, the perpetrator. Nonetheless, it is possible, if sound records are maintained, to determine error rates as reflected in choices of non-suspect fillers. A properly constructed lineup includes only one suspect (who might or might not be the perpetrator) and everyone else is a known-innocent filler who would not be charged even if they were identified by the eyewitness. Filler choices are not the type of error that could send an innocent person to jail, but they are identification errors.

As Gary Wells, Amina Memom, and Steven Penrod note in a 2006 paper titled "Eyewitness Evidence: Improving Its Probative Value":

Archival analyses of filler identifications have yielded very interesting results. Wright and McDaid (1996) analyzed 1,561 lineup outcomes in London and found filler identification rates

of 19.9%. These data are similar to the 21% filler identification rate reported by Slater (1994) in a study of 843 lineups conducted by the Metropolitan Police in London. Behrman and Davey (2001) reported that 24% of identifications from live lineups in Sacramento, California, were identifications of fillers. Valentine, Pickering, and Darling (2003) analyzed 119 lineups in the greater London area and found that 21.6% of the eyewitness identified fillers. In these four studies of actual eyewitnesses to serious crimes, filler identifications constituted approximately one third of all positive identifications. These archival results represent a very important complement to the experimental studies of eyewitnesses for several reasons. First, they indicate filler-identification results that are quite consistent with rates obtained in experiments (Ebbeson & Flowe, n.d.; Steblay, Dysart, Fulero, & Lindsay, 2001). Second, these archival results address a common criticism of experiments—namely, that participant witnesses in experiments are not as cautious as actual crime witnesses are, because the consequences of a mistaken identification in an experiment are not serious. But the witnesses in the archival studies were actual witnesses to crimes and yet mistakenly identified fillers in one third of their positive identifications. Third, the filler identification rates in the archival studies permit us to make conservative estimates of the risk that an innocent suspect would face in these lineups. For example, with five fillers in each lineup (six-person lineups minus the suspect) and a 20% filler identification rate, the risk to any given filler is 4%. If an innocent suspect has the same risk as a filler, the estimated risk to an innocent suspect is 4%.

These estimates of risk to an innocent suspect are conservative for two reasons. First, lineups rarely yield equal distributions of error because the innocent suspect will commonly stand out for any number of reasons, including the selection of fillers that bear a poor resemblance to the description of the perpetrator given by the witness (Valentine & Heaton, 1999; Brigham, Meissner, & Wasserman, 1999). Second, when the actual perpetrator is not in the lineup (i.e., the suspect is innocent), the rates of filler identification increase (see Wells & Olson, 2002). Assuming that the perpetrator was present in a large proportion of the lineups in these archival studies, the filler-identification rates underestimate the expected error rate for any given lineup in which the perpetrator is absent (pp. 50-51).

With respect to lineup bias against suspects, a number of studies of actual police arrays (including Brigham, Meissner, & Wasserman, 1999; Valentine & Hayton, 1999; and Wells & Bradfield, 1999) demonstrate that when individuals who were not at the scene of the crime are merely provided the descriptions given by crime witnesses and then shown the corresponding array, suspects are picked 2 to 2.5 times more often than the average filler.

The archival studies (of real cases) thus underscore several important points:

1. Witnesses make errors at fairly high rates—about one in three positive identifications is clearly incorrect—and those numbers do not include an unknown number of erroneous identifications of innocent suspects.
2. Filler identification rates are fairly high—20-25% across studies.
3. To the extent witnesses are guessing when choosing fillers, we have to expect other witnesses are guessing when choosing suspects—some of whom are innocent.
4. If a six-person lineup is fair, there is a 1 in 6 chance of an innocent suspect being chosen. Police arrays, however, tend to be biased against the suspect; thus, innocent suspect misidentification rates—as a result of guessing—are greater than the 1 in 6 risk.

VII. Jurors' Understanding of Factors that Affect Eyewitness Memory

In section III, I focused on the current case and discussed several of the key factors that could have influenced the witness's memory, and outline the general testimony that I, as an eyewitness expert, would have provided had I been called to testify in this case. As discussed in section II, consultation with an eyewitness expert would have highlighted (for the defense and/or the court) the importance of these factors. Below I summarize the research regarding people's knowledge of the factors affecting eyewitness memory and identification decisions. This discussion will focus on jurors, but will also draw upon some research conducted with prosecutors, defense attorneys, and judges.

Effective defense requires that the attorney is aware of—and introduces—the factors that can affect the reliability of an eyewitness identification. Furthermore, effective defense requires that that juries are sensitive to the factors that influence eyewitness identification accuracy. Suppose that an attorney, through cross-examination, establishes that the perpetrator was of a different race than the eyewitness, that the perpetrator was disguised and brandished a weapon, that the eyewitness was highly intoxicated, and that the lineup test from which the suspect was identified suffered from instruction bias, foil bias, and presentation bias. What good will this do if the jury does not understand how these factors are likely to influence eyewitness identification accuracy? The attorney can argue during closing arguments that these factors enhance the likelihood of false identifications, but the jury may find such arguments implausible, especially if they perceive the attorney as biased and the arguments as inconsistent with common sense.

Three types of studies examine juror sensitivity to the factors that influence eyewitness identifications, all of which are reviewed below. The first type assesses lay knowledge using multiple-choice questions in survey research. The second type examines the abilities of laypersons to predict the outcome of eyewitness identification experiments. The third involves simulated jury decision making experiments; some of these studies examine mock jurors' belief of accurate and inaccurate eyewitnesses, while others investigate factors that influence mock jurors' decisions. Below is a brief summary of the research findings from each of these types of studies; for a more detailed review see Boyce, Beaudry, and Lindsay (2007).

1. Survey Studies of Lay Knowledge

A number of studies have addressed lay (i.e., juror) and professional (lawyers and judges) knowledge about the factors that influence eyewitness identification. Early studies include Deffenbacher & Loftus (1982), McConkey & Roche (1989), and Noon & Hollin (1987). More recent ones include Alonzo & Lane (2010), Benton, Ross, Bradshaw, Thomas, & Bradshaw (2006), Lane, Groft, Roussel, & Alonzo (2007), Mitchell & Haw (2008), Schmechel et al., (2006), Wise & Safer (2004 & 2010), and Wise, Pawlenko, Safer, & Meyer (2009). Read and Desmarais (2009) review these studies and present their own data. Across studies it is common to find that 50-65% of respondents chose answers similar to those of the experts. While this performance may look relatively good, the data generally indicate significant disagreements among jurors about how factors influence eyewitness performance and, to some extent the seeming agreement with experts likely arises from "good" guessing by laypersons. Unfortunately, picking answers on a questionnaire is very different from assessing trial evidence where jurors have to generate and apply their own evaluative criteria. As Read & Desmarais observe:

These (survey) results, however, do not tell us whether community respondents' comprehension of the topics is of the requisite depth to appreciate conceptual distinctions made at trial by eyewitness experts. Nor do they indicate whether jurors would successfully apply their knowledge to the case at hand (cf. Schmechel et al.). In recent unpublished research [this paper was published in a peer-reviewed journal in 2010], Alonzo and Lane (2006) compared survey responses (to the Kassir et al. items) of students to their answers about eyewitness case vignettes and found that survey responses to specific case-relevant features did not well predict actual decisions made by these same participants about the case simulations. With the use of varied formats that centred on some similar issues, Schmechel et al. also concluded that how participants respond to one statement does not necessarily predict how they will respond to another. Indeed, on several True/False items (postevent information, unconscious transference and cross-race bias), Schmechel et al.'s participants responded in a manner highly similar to our participants but then went on to demonstrate inconsistencies on problem-solving questions that involved these same factors (p. 318).

Judges and juries appear to perform on par: Wise and Safer (2004) tested 160 judges' knowledge on 14 statements about factors whose effects on eyewitness accuracy are supported by strong empirical evidence. Judges averaged only 55% correct and their knowledge about these factors was unrelated to the number of years they practiced law, whether they practiced criminal law, how long they had served as a judge, and whether they served as a state or federal judge or a trial or appellate judge. The same authors (2010) compared 160 U.S. judges, 57 law students, and 121 undergraduates with respect to their knowledge and beliefs about factors affecting eyewitness accuracy and found judges (55%) were no more knowledgeable than undergraduates (58%), and both groups were less knowledgeable than law students (66%). Notably, after controlling for guessing, the percentages for correct answers were 10%, 16%, and 31% for judges, undergraduates, and law students, respectively. For all groups, increased knowledge about factors influencing eyewitness performance was associated with beliefs that might reduce wrongful convictions. All three groups underestimated what potential jurors know about eyewitness testimony. Wise and Safer concluded that: "The results suggest that increasing judges' knowledge of eyewitness testimony might help them reduce wrongful convictions and to more accurately assess when eyewitness experts are needed" (p. 1400).

2. *Prediction Studies*

In prediction studies, subjects are provided with descriptions of the methodology used in eyewitness identification experiments and are asked to predict the results. If subjects are sensitive to the factors that influence identification accuracy, they should be reasonably accurate at predicting study outcomes.

Kassin's (1979) subjects were not sensitive to the influence of crime-seriousness on identification accuracy nor to the absolute level of the identification accuracy rates. Wells (1984) reported several prediction studies. In one, participants believed confidence was strongly related to accuracy (it is not). In another, participants were not sensitive to the influence of one factor that clearly contributes to the suggestiveness of identification procedures: instructional bias (i.e., suggesting that the perpetrator is in the lineup).

Brigham and Bothwell (1983) conducted a prediction study with a random sample of 90 community members from Leon County, Florida, all of whom were registered to vote and therefore eligible jurors.

Their results further reinforced the findings of Kassin and Wells and indicate that prospective jurors overestimate the accuracy of eyewitness identifications.

3. *Mock-juror Studies of Juror Decision Making*

Most relevant to the question of juror sensitivity are studies that attempt to simulate the jury's actual task of evaluating eyewitness identifications. I will discuss research from two major approaches within this general framework: (1) jurors' ability to discriminate between accurate and inaccurate eyewitnesses, and (2) juror sensitivity to the factors that influence identification accuracy. Throughout these studies the judgments of hundreds of prospective jurors (and some experienced jurors) are examined in response to a wide variety of simulated cases.

Mock-Jury Evaluations of Accurate and Inaccurate Eyewitnesses

Wells, Lindsay, and Ferguson (1979) had 201 undergraduate mock-jurors evaluate identification testimony of witnesses. When the cross-examination questions addressed to the witnesses were non-leading, inaccurate eyewitnesses were believed by more jurors (86%) than were accurate eyewitnesses (76%). In contrast, when the questions were leading, accurate eyewitnesses were believed by more jurors (84%) than were inaccurate eyewitnesses (73%). In terms of the accuracy of their decisions, among jurors exposed to non-leading cross-examination, 76% correctly identified accurately eyewitnesses but only 14% correctly identified inaccurate eyewitnesses. Among jurors exposed to leading cross-examination, 84% correctly identified accurate eyewitnesses but only 27% correctly identified inaccurate eyewitnesses. Wells et al. also found that the confidence of the eyewitness in his/her identification accuracy correlated significantly ($r = .53$) with whether or not the juror *believed* the eyewitness, but nonsignificantly ($r = .05$) with the *actual accuracy* of the witness's decision. In other words, jurors were more likely to believe confident eyewitnesses but confident eyewitnesses were no more likely to have made a correct identification than less confident eyewitnesses.

A partial replication of this study by Lindsay, Wells, & O'Connor (1989) tested whether cross-examination of eyewitnesses conducted by experienced attorneys (versus inexperienced attorneys) might aid jurors in differentiating between accurate and inaccurate witnesses. The 16 experienced attorneys (with at least five years past their admission to practice, average experience of 12 years) and 16 inexperienced senior law students examined and cross-examined witnesses to a staged crime. The direct examinations generally ranged from 5 to 15 minutes and the cross-examinations from 3 to 35 minutes. Mock jurors' beliefs in eyewitness accuracy (as indexed by verdicts) were unrelated to witness accuracy—jurors could not differentiate accurate from inaccurate eyewitnesses. Greater attorney experience did not aid jurors in making the differentiation.

Wells and Lieppe (1981) found that the accuracy of eyewitness recall of details was significantly negatively correlated ($r = -.56$) with juror belief in the eyewitness identification. In other words, the more peripheral details recalled incorrectly, the less likely jurors were to believe the identification. In short, to a substantial degree mock jurors evaluated identification testimony on the basis of witness memory for peripheral details. Examination that underscored errors in memory for peripheral details significantly weakened the credibility of accurate witnesses but did not reveal the inaccurate witnesses. This set of results is further compounded by the fact that, in Wells and Lieppe's study, eyewitnesses' memory for peripheral details was inversely associated with identification accuracy. That is, the more peripheral details recalled, the less likely they were to make an accurate identification!

Lindsay, Wells, and Rumpel (1981) also examined mock jurors' ability to discriminate accurate from inaccurate eyewitnesses. Thefts were staged before 108 undergraduates, each assigned to one of three viewing conditions designed to produce low, moderate, and high levels of identification accuracy. Eyewitnesses later attempted to identify the thief from six-person photoarrays. A sample of eyewitnesses who made positive identifications were then cross-examined while being videotaped. The viewing condition manipulation was successful: of the eyewitnesses who made a positive identification, the correct identification rates for the low, moderate, and high conditions were 33%, 50%, and 74%, respectively. These percentages were significantly different from one another.

Lindsay, Wells, and Rumpel then presented 96 undergraduates with the video-taped cross-examinations of eight accurate and eight inaccurate eyewitnesses from each viewing condition. Overall, 62% of the low accuracy condition witnesses were believed, 66% of the moderate accuracy condition witnesses were believed, and 77% of the high accuracy condition witnesses were believed. Thus, jurors thought more witnesses were correct than was merited by the performance of the witnesses in the different witnessing conditions. Furthermore, the jurors gave the witnesses much more credence than was merited by the levels of accuracy of the witnesses they actually viewed—half the eyewitnesses selected from each witnessing condition had actually made correct identifications and perfect performance by jurors would thus have produced 50% belief rates for each of the three conditions.

In addition, Lindsay, Wells, and Rumpel found that witness confidence had a significant impact on belief, such that 77% of high confidence witnesses were believed versus 59% of low confidence witnesses. Moreover, confidence and witnessing condition interacted: among witnesses with high confidence, viewing condition had a trivial influence on juror beliefs—belief rates for low, moderate, and high accuracy conditions were 76%, 76%, and 78%, respectively. In contrast, among witnesses with low confidence, viewing condition now played a role. The corresponding percentages of eyewitnesses believed were: 47%, 54%, and 76%, respectively. Thus, jurors ignored witnessing conditions when the witness was very confident, but gave the witnessing conditions consideration when the witness was not highly confident. Jurors appear to suspend their critical powers when confronted by confident witnesses. As in other studies, the results of Lindsay, Wells, and Rumpel demonstrate that jurors cannot discriminate between accurate and inaccurate eyewitnesses. Indeed, accuracy levels were roughly 50% in all three conditions.

There are two unfortunate aspects to Lindsay, Wells, and Rumpel's results. First, to the extent that the criminal justice system differentially eliminates witnesses low in confidence from the prosecution process (because, for example, prosecutors are hesitant to proceed with cases based on identifications by less confident witnesses) these results suggest that jurors may commonly find themselves in a situation where they are inclined to rely on (high) witness confidence, and thus, may be less likely to critically examine the circumstances under which an identification was made. Second, in this study, witness confidence was only weakly correlated with witness accuracy ($r = .26$), thus the jurors were relying on less than fully diagnostic information when using confidence to gauge witness accuracy.

Lindsay, Wells, & O'Connor (1989) conducted an experiment to examine whether the findings of their previous research would generalize to a more realistic trial situation. Simulated trials were shown to 178 undergraduates, each of whom viewed one taped trial. Mock jurors rendered verdicts and answered other questions about the trials. The conviction rate did not differ significantly as a function

of accuracy of the eyewitness (jurors could not differentiate accurate from inaccurate eyewitnesses): guilty verdicts were rendered by 68% of the participants exposed to eyewitnesses who made correct identifications and by 70% of participants exposed to eyewitnesses who made false identifications. The degree of experience of attorneys did not significantly influence verdict.

In sum, (1) jurors overestimate the accuracy of identifications (there are more convictions than there are accurate identifications), (2) jurors fail to distinguish between accurate and inaccurate eyewitnesses, and (3) jurors tend to ignore viewing conditions that are known to influence identification accuracy and instead base their decisions, in part, on eyewitness memory for peripheral details and witness confidence—both of which tend to be poor predictors of identification accuracy. The studies of mock jurors' abilities (or lack thereof) to differentiate between accurate and inaccurate eyewitnesses converge on a dismal conclusion about jurors' ability.

Mock Jury Studies of the Factors That Influence Juror Decisions

A number of studies have examined variations in trial evidence that might affect juror assessments of eyewitness identifications. Lindsay, Lim, Marando and Cully (1986) found that in the presence of conflicting eyewitness identifications, alibis influenced verdicts, but witness consistency and witness viewing time did not.

Bell & Loftus (1989) found that detail of testimony influenced participants' verdicts, but given that eyewitness research (Cutler, Penrod & Martens, 1987a; Wells & Leippe, 1981) shows that memory for physical characteristics and peripheral details does not predict eyewitness identification accuracy, these data provide further evidence that jurors are insensitive to some of the factors that influence eyewitness identification accuracy and inappropriately sensitive to factors that are not diagnostic of eyewitness accuracy.

Cutler, Penrod, and Stuve (1988) and Cutler, Penrod, and Dexter (1990) also conducted mock jury experiments to examine the factors that jurors use to evaluate eyewitness identification evidence. A simulated trial was shown to 321 University of Wisconsin undergraduates and 129 former jurors from Dane County, Wisconsin. The trial concerned a defendant accused of the armed robbery of a liquor store. A number of forms of evidence were systematically manipulated in these trials (e.g. disguise, weapon focus, level of violence, retention interval, instruction bias, foil bias, and witness confidence). Only confidence influenced verdicts despite the fact that research indicates that eyewitness confidence and identification accuracy are only modestly related (e.g., Bothwell, Deffenbacher, & Brigham, 1987). Detailed analyses of juror memory for the evidence (see Cutler, Penrod & Stuve, 1988) indicates that the subjects paid attention to the testimony and recalled it with high accuracy rates, hence, lack of attention and poor memory cannot explain the null effects of eyewitness evidence on mock jurors' decisions. In addition, this research indicates that the judgment processes of eligible and experienced jurors are comparable to those of college student subjects and supports the generalizability of the research described above.

Conclusions

In sum, there are a variety of reasons to be concerned about jury decision making in eyewitness identification cases:

1. Jurors apparently have difficulty reliably differentiating accurate from inaccurate eyewitnesses.
2. A major source of juror unreliability is their reliance on witness confidence, which is:
 - a. A dubious indicator of eyewitness accuracy even when measured at the time an identification is made (before any feedback can be provided), and
 - b. Appears to be highly malleable and influenced by post-identification factors such as repeated questioning, briefings in anticipation of cross-examination, feedback about the behavior of other witnesses, and information about their identification choice. These factors cannot increase witness accuracy and are therefore likely to further reduce any relationship between witness confidence and accuracy.
3. Jurors appear to "overbelieve" eyewitnesses.
4. Jurors are not adequately sensitive to aspects of witnessing and identification conditions that are arguably better predictors of witness accuracy than is witness confidence but are sometimes sensitive to factors (such as recall of peripheral details) that are not diagnostic of witness accuracy.

VIII. Expert Testimony as a Safeguard

Beliefs about the necessity or impact of expert testimony are varied. Some judges and lawyers believe that the information is common sense and not beyond the average juror's ken (Benton, McDonnell, Ross, Thomas, & Bradshaw, 2007; Wise, Pawlenko, Safer, & Meyer, 2009). The research regarding juror understanding of the factors that affect eyewitness accuracy, however, indicates that this information is not common sense. Others are concerned that the expert testimony will confuse or prejudice the jury. I will discuss the possible effects of expert testimony on jurors before summarizing the empirical findings regarding the actual impact of expert testimony.

1. *The Expert's Influence on the Jury: Plausible Effects*

Plausible effects of expert testimony can generally be classified into three categories: juror confusion, juror sensitivity, and juror skepticism.

Juror Confusion

The first possible outcome is that expert testimony will have no effect whatsoever on the judgments of jurors. Though pessimistic, this hypothesis is really quite reasonable given that jurors have been shown to have difficulty in understanding and applying a variety of legal concepts at virtually every stage of the trial process (Penrod & Cutler, 1987).

Juror Sensitivity: Knowledge and Integration

If expert testimony does in fact influence juror decision making, what effect should it have? Clearly a desirable effect is to improve juror sensitivity to the factors that influence eyewitness memory (McCloskey et al., 1986; Wells, 1986). Sensitivity refers to the knowledge of how a given factor influences eyewitness memory and the ability to render decisions in accordance with that knowledge. Thus, sensitivity contains two components: knowledge and integration. Knowledge refers to awareness of how a factor influences eyewitness memory, including the direction and magnitude (size/strength) of the effect for a given factor. Integration, in this context, refers to the ability to render decisions that reflect knowledge.

How are knowledge and integration pertinent to the issue of juror sensitivity? It might be the case that jurors are unaware of the manner in which some factors influence eyewitness memory. For example, the survey studies described in the previous chapter revealed that jurors are insensitive to the equivocal effects of training on eyewitness identification accuracy. But they are somewhat sensitive to the influence of the own-race bias. Even if jurors are aware of the relative effects of a given factor on eyewitness memory, the magnitude of that effect might be attenuated in the juror's integration of the evidence. In other words, the jurors' judgments might not reflect their a priori beliefs. Decision making research in a variety of psychological domains (e.g., Goldberg, 1968) shows that integration is quite difficult to achieve, even by trained experts.

The mock jury studies discussed above demonstrated that jurors are insensitive to many forms of eyewitness evidence, but it is not clear whether this insensitivity is due to lack of knowledge, poor integration skills, or some combination of the two. One plausible effect of expert testimony is that it could improve both knowledge and integration of eyewitness evidence.

Juror Skepticism

Though it is agreed that improved juror sensitivity is a desirable effect of expert testimony (McCloskey et al., 1986; Wells, 1986), there is considerable disagreement as to whether jurors should be made more skeptical of the accuracy of eyewitness identifications. There is ample evidence that eyewitness identifications are often inaccurate. The prediction studies and Wells' studies of mock jurors' abilities to discriminate between accurate and inaccurate eyewitnesses provide some evidence that jurors "overbelieve" eyewitnesses, but few conclusions can be reached about the desirability of a skepticism effect.

2. Research on the Effects of Expert Psychological Testimony

It is possible to independently examine skepticism and sensitization effects, and it is possible to detect juror confusion, as well. Unfortunately, in early research on expert witness effects, the procedures designed to test the effects of expert testimony confounded skepticism and sensitization effects and made it difficult to determine exactly how jurors are affected by expert testimony. To test sensitization effects participants must be presented with some combination of expert versus no-expert testimony and good versus poor witnessing conditions.

We have seen that jurors are largely insensitive to variations in trial evidence that ought to permit them to (at least partially) differentiate between good and poor eyewitnessing conditions (and therefore, between accurate and inaccurate eyewitnesses). The critical question is whether expert testimony enhances jurors' abilities to make those differentiations. A perhaps less critical issue is whether expert testimony simply makes jurors more skeptical of eyewitness evidence but does not produce enhanced differentiation of good versus poor witnessing conditions.

Early expert testimony research revealed some consistent findings with respect to expert testimony. Most evident is that reduced belief and fewer convictions are obtained if expert testimony is presented (Fox & Walters, 1986; Hosch et al., 1980; Loftus, 1980; Maass et al., 1985; Wells et al., 1980). It is not clear whether this reduced belief is due to improved sensitivity to factors that might have impaired the witness's ability to make a correct identification, to enhanced skepticism, or to both. The only experiments that simultaneously and independently varied witnessing factors that influence

identification accuracy and the presence of expert testimony were those by Loftus (1980) and Wells et al. (1980), and both show trends (albeit weak) toward improved sensitivity.

In order to redress some of the deficiencies in the prior research Cutler, Dexter, and Penrod (1989) and Cutler, Penrod, and Dexter (1989) designed experiments to allow for independent tests of the sensitization and skepticism effects of expert testimony on jurors' judgments. A videotaped trial was used. The expert testimony was very realistic and the expert was rigorously cross-examined. Three factors, each having two levels, were manipulated in the videotaped trial: witnessing and identification conditions (WIC), witness confidence, and expert testimony. In the "poor WIC" condition the eyewitness and police officer testified that the robber was disguised (i.e., wore a hat that covered his hair and hairline), the robber outwardly brandished a handgun (presumably invoking a weapon focus effect); the retention interval between the crime and the identification was 14 days, and the officer in charge of the lineup did not explicitly offer the witness the option of rejecting the lineup (suggestive lineup instructions). In the "good WIC" conditions the witness and police offered testimony that the robber was not disguised, that the handgun was hidden throughout the robbery, that the retention interval was two days, and that the lineup instructions were not suggestive. The witness testified either that she was 80% or 100% confident that she had correctly identified the robber. In conditions containing expert testimony, the expert gave the testimony regarding the impact of these factors on eyewitness identification accuracy. In conditions containing no expert testimony, the prosecuting and defense attorneys nonetheless reiterated the witnessing and identification conditions surrounding the identification. After viewing one version of the trial, mock-jurors rendered verdicts and rated the credibility of the eyewitness and the strength of the prosecution's and defense's cases. Ratings were recorded on seven-point scales.

Participants were 96 eligible and experienced jurors who were called for jury duty in Dane County, Wisconsin. All subjects were recruited by telephone within one year of having served (or having been called to serve) on a jury. In the Cutler, Dexter, and Penrod (1989) study, data from the 96 subjects were combined with data from a sample of 538 undergraduates. Combining these two subsamples ($N = 634$) allowed the researchers to test the effects of expert testimony with maximum power and permitted a comparison of the effects of expert testimony on eligible jurors' and undergraduate jurors' decisions.

Expert testimony produced sensitizing effects on witness credibility ratings and on prosecution and defense case strength ratings. Among jurors who heard expert testimony, witness confidence produced a weaker effect on eyewitness credibility ratings ($d = .17$) and on defense case strength ratings ($d = .02$) than for jurors who heard no expert testimony ($d = .50$ and $.26$, respectively). Jurors exposed to expert testimony were less likely to use witness confidence in evaluating the credibility of the eyewitness than were jurors not exposed to expert testimony. Likewise, among jurors who heard expert testimony, WIC had a greater impact on both prosecution ($d = .49$) and defense ($d = .56$) case strength ratings than among jurors who heard no expert testimony ($d = .11$ and $.16$, respectively). Jurors exposed to expert testimony used WIC to a greater extent in evaluating the strength of the prosecution's and defense's cases than did jurors not exposed. Thus, these findings show that expert testimony sensitizes jurors to the importance of WIC and the relative lack of importance of witness confidence. There was little evidence for expert-induced skepticism. Expert testimony produced no main effects on eyewitness credibility ratings, prosecution case strength ratings, or verdicts. Inclusion

of the expert testimony did improve the defense case strength ratings. This effect was greater among eligible jurors than among undergraduate jurors.

The results of this study provide support for expert psychological testimony in eyewitness cases. Without such testimony, jurors demonstrate poor knowledge and/or integration of knowledge about eyewitness issues. Further, there is little evidence that expert testimony caused jurors to become more skeptical. The research found that eligible and experienced jurors were essentially comparable to undergraduate jurors.

The Cutler et al. framework for analyzing the effects of expert testimony can be applied to an experiment conducted by Wells & Wright (1983; cited in Wells, 1986). In that study, mock-jurors not exposed to expert testimony showed little sensitivity to the influence of witnessing conditions. Their judgments simply did not vary substantially or systematically with the witnessing and identification conditions. In contrast, among subjects exposed to expert testimony, mock-juror beliefs reflected sensitivity to the witnessing conditions. Accurate eyewitnesses were most likely to be believed in the good, less likely to be believed in the moderate, and least likely to be believed in the poor witnessing conditions. This finding indicates that the expert testimony enhanced juror sensitivity.

Conclusions

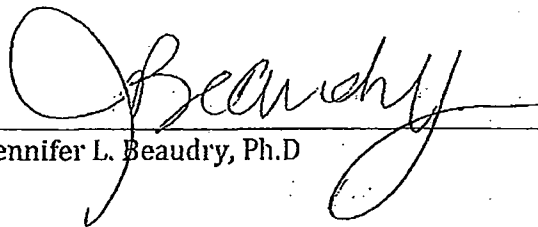
Taken together, these studies indicate that expert psychological testimony can serve as a safeguard against mistaken identification. There is little empirical evidence that jurors are confused by the testimony or are prejudiced by it (at least insofar as skepticism is an index of prejudice) and measures of recall of expert testimony in the studies where this has been measured indicate that jurors do recall and understand the testimony. Expert testimony appears to have the beneficial effect of educating jurors about factors that influence eyewitness identification and enhancing their reliance on those factors when rendering decisions in eyewitness cases. Indeed, results indicate that expert testimony on eyewitness memory can work on the behalf of the prosecution as well as the defense.

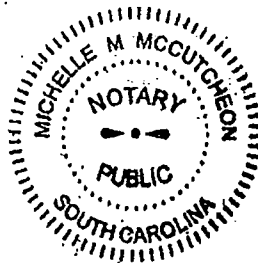
With regard to the current case

The poor witnessing and identification conditions in the Cutler et al. (1989) studies are similar to those of the current case. The perpetrator wore a similar disguise (a skull cap or snow cap that was pulled over his hair) and he brandished a large rifle. In addition, the first time the witness claims to have seen the defendant was approximately 10 days after the robbery, but he did not call the police until he viewed the defendant 5 days later, 15 days after the robbery. Finally, the witness made an identification from a lineup, but the officer did not present the admonition beforehand, and thus, effectively, provided biased lineup instructions. Although this evidence was suppressed before trial, the witness has knowledge that he made a lineup identification of the suspect, and this can only serve to bolster his confidence the suspect is in fact the perpetrator. In the studies described above, even though the defense attorney highlighted these factors in the case, the jurors still benefited significantly from expert testimony. In the current case, the defense attorney did discuss either during cross-examination or his closing arguments that there was a delay of two weeks between the robbery and the witness's first identification, and that the perpetrator was wearing a skull cap and carrying a rifle of some sort (reported as an AK47); however, the defense did not explain how any of these factors could have impacted the accuracy of the eyewitness's identification. Had the defense consulted an eyewitness expert, he would have been provided the research regarding how these (and other) factors

impact identification accuracy—and thus been able to explain the importance and relevance of these issues to the jury. Moreover, the results of the study above indicate that the jurors' understanding of the factors involved in the case and their impact on the eyewitness could have been enhanced greatly by the testimony of an expert witness.

FURTHER THE AFFIANT SAYETH NAUGHT!

 05/18/2012
Jennifer L. Beaudry, Ph.D



April 5th, 2012

JENNIFER L. BEAUDRY

Department of Social Sciences
University of South Carolina Beaufort
1 University Blvd
Bluffton, SC 29909

Cell: (843) 441-9597
Office: (843) 208-8339
E-mail: beaudry@uscb.edu
Citizenship: Canadian

Employment

2009-present **Assistant Professor, Department of Social Sciences, Psychology**
University of South Carolina Beaufort

Aug-Dec 2008 **Instructor, Department of Social Sciences, Psychology**
University of South Carolina Beaufort

Education

2004-2008 **Doctor of Philosophy, Social-Personality Psychology**
Queen's University, Kingston, Ontario, Canada
Dissertation: Video-recorded lineup procedures and detecting identification accuracy.
Supervisor: Dr. R. C. L. Lindsay

2002-2004 **Master of Arts, Social-Personality Psychology**
Queen's University, Kingston, Ontario, Canada
Thesis: A thorough examination of the Multiple-choice, Sequential, Large lineup.
Supervisor: Dr. R. C. L. Lindsay

1996-2000 **Bachelor of Arts, Honors, Psychology**
Laurentian University, Sudbury, Ontario, Canada
Thesis: The two-process theory of learning and the effect of the magnitude of the unconditioned stimulus with *Rattus norvegicus*.
Supervisors: Drs. Michael Persinger and Ken Gunn

Publications (* undergraduate student co-author)

Refereed Publications

Mansour, J. K., Beaudry, J. L., Bertrand, M. I., Kalmet, N., Melsom, E. & Lindsay, R. C. L. (in press). Impact of disguise on identification decision and confidence with simultaneous and sequential lineups. *Law and Human Behavior*.

Leach, A.-M., Lindsay, R. C. L., Koehler, R.*, Beaudry, J. L., Bala, N. C., Lee, K., & Talwar, V. (2009). The reliability of lie detection performance. *Law and Human Behavior*, 33, 96-109.

Lindsay, R. C. L., Mansour, J., Beaudry, J. L., Leach, A. M., & Bertrand, M. I. (2009). Sequential lineup presentation: Patterns and policy. *Legal & Criminological Psychology*, 14, 13-24.

Jennifer L. Beaudry

2

Lindsay, R. C. L., Mansour, J. K., Beaudry, J. L., Leach, A.-M., & Bertrand, M. I. (2009). Beyond sequential presentation: Misconceptions and misrepresentations of sequential lineups. *Legal & Criminological Psychology*, 14, 31–34.

Beaudry, J. L., & Lindsay, R. C. L. (2006). Current identification procedure practices: A survey of Ontario Police Officers. *The Canadian Journal of Police and Security Services*, 4, 178–183.

Book Chapters

Boyce, M. A., Beaudry, J. L., & Lindsay, R. C. L. (2007). Belief of eyewitness identification evidence. In R. Lindsay, D. Ross, D. Read, & M. Toglia (Eds.), *Handbook of Eyewitness Psychology: Memory for People* (pp. 501–525). Mahwah, NJ: Lawrence Erlbaum and Associates.

Beaudry, J. L., Lindsay, R. C. L., & Dupuis, P. R. (2006). Procedural recommendations to increase the reliability of eyewitness identifications. In M. Kebbell & G. M. Davies (Eds.), *Practical Psychology for Forensic Investigations and Prosecutions* (pp. 25–45). Chichester: John Wiley & Company.

Encyclopedia Entries

Beaudry, J. L., Bullard, C. L.*, & Dolin, J. R.* (accepted by editor). Existing state of knowledge on estimator variables. In G. J. N. Bruinsma & D. L. Weisburd (Eds.), *The Encyclopedia of Criminology and Criminal Justice*. New York, NY: Springer. Expected publication date: 2013.

Bertrand, M. I., Beaudry, J. L., Mansour, J., & Lindsay, R. C. L. (2008). Clothing bias in identification procedures. In B. L. Cutler (Ed.) *Encyclopedia of Psychology and Law, Volume 1* (pp. 94–95). Thousand Oaks, CA: Sage.

Mansour, J., Beaudry, J. L., Bertrand, M. I., & Lindsay, R. C. L. (2008). Simultaneous and sequential lineup presentation. In B. L. Cutler (Ed.) *Encyclopedia of Psychology and Law, Volume 2* (pp. 747–748). Thousand Oaks, CA: Sage.

Manuscripts in Preparation

Beaudry, J. L., Otis, C. C., & Penrod, S. D. (2012). *The influence of eyewitness identification evidence on attorneys' plea-bargaining decisions*. Manuscript in preparation, University of South Carolina Beaufort.

Beaudry, J. L., Lindsay, R. C. L., Leach, A.-M., Mansour, J. K., & Bertrand, M. I. (2012). *Video-recorded lineup procedures and detecting identification accuracy*. Manuscript revisions in progress, University of South Carolina Beaufort.

Beaudry, J. L., Tam, M.*, Mansour, J. K., Bertrand, M. I., Kalmet, N. E., & Lindsay, R. C. L. (2012). *When the suspect stands out: Tattoo design and location similarities on eyewitness identifications*. Manuscript in preparation, University of South Carolina Beaufort.

Mansour, J. K., Lindsay, R. C. L., Beaudry, J. L., Bertrand, M. I., Kalmet, N., Melsom, E., & Munhall, K. G. (2012). *The role of quality of memory and clothing cues in lineup identification decisions*. Manuscript in preparation, Simon Fraser University.

Jennifer L. Beaudry

3

- Mansour, J. K., Beaudry, J. L., Bertrand, M. I., Kalmet, N., Melsom, E. & Lindsay, R. C. L. (2012). *The role of quality of memory in decision making from simultaneous and sequential lineups*. Manuscript in preparation, Simon Fraser University.
- Mansour, J. K., Lindsay, R. C. L., Beaudry, J. L., & Munhall, K. G. (2012). *Using eye tracking to explore a habituation explanation for the weapon focus effect*. Manuscript in preparation, Simon Fraser University.
- Mansour, J. K., Beaudry, J. L., Bertrand, M. I., Kalmet, N., Melsom, E. & Lindsay, R. C. L. (2012). *Confidence-accuracy calibration across viewing and lineup conditions*. Manuscript in preparation, Simon Fraser University.

Refereed Conference Presentations (* undergraduate student co-author)

- Beaudry, J. L., Otis, C. C., & Penrod, S. D. (2012, March). *Prosecutor and defense attorneys' perceptions of video-recorded eyewitness identifications*. Paper presented at the annual meeting of the American Psychology-Law Society, San Juan, Puerto Rico.
- Mansour, J. K., Beaudry, J. L., Kalmet, N. E., Bertrand, M. I., Lindsay, R. C. L., & Munhall, K. (2012, March). *Using eye tracking to explore the weapon focus effect*. Poster presented at the annual meeting of the American Psychology-Law Society, San Juan, Puerto Rico.
- Beaudry, J. L., Tam, M.*, Mansour, J. K., Bertrand, M. I., Kalmet, N. E. & Lindsay, R. C. L. (2011, June). *Tattoo design and location similarities*. Paper presented at the biannual meeting for the Society for Applied Research in Memory and Cognition, New York, NY.
- Bertrand, M. I., Lindsay, R. C. L., Mansour, J. K., Beaudry, J. L., & Kalmet, N. K. (2011, June). *Within-subjects designs in lineup research: Target-present lineup presentation impacts identification accuracy*. Poster presented at the Society for Applied Research in Memory and Cognition, New York, NY.
- Lindsay, R. C. L., Beaudry, J. L., Mansour, J. K., Bertrand, M. I., & Kalmet, N. E. (2011, June). *Stability of lineup fairness measures*. Paper presented at the biannual meeting for the Society for Applied Research in Memory and Cognition, New York, NY.
- Kalmet, N. K., Mansour, J. K., Bertrand, M. I., Lindsay, R. C. L., & Beaudry, J. L. (2011, June). *Combining descriptions: Impact on measures of lineup fairness*. Poster presented at the Society for Applied Research in Memory and Cognition, New York, NY.
- Mansour, J. K., Bertrand, M. I., Beaudry, J. L., Kalmet, N. K., & Lindsay, R. C. L. (2011, June). *Protecting the guilty: Why lineup fairness measures favour criminals*. Poster presented at the Society for Applied Research in Memory and Cognition, New York, NY.
- Beaudry, J. L., Mansour, J. K., Lindsay, R. C. L., Kalmet, N., & Bertrand, M. I. (2011, March). *Detecting identification accuracy: The impact of evidence type and biased administration on evaluators' perceptions*. Paper presented at the 4th International Congress on Psychology and Law, Miami, FL.

Jennifer L. Beaudry

4

- Bertrand, M. I., Lindsay, R. C. L., Beaudry, J. L., Mansour, J. K., & Whaley, E. I. (2010, June). *Do American and Canadian officers use the sequential lineup and do they follow the recommended procedure?* Poster presented at the meeting of the Canadian Psychological Association, Winnipeg, Manitoba.
- Anthony, K. G.*, & Beaudry, J. L. (2010, March). *Coding eyewitness identifications: Do accurate and inaccurate eyewitnesses exhibit different behavioral cues?* Poster presented at the annual meeting of the American Psychology-Law Society, Vancouver, British Columbia.
- Bertrand, M. I., Lindsay, R. C. L., Beaudry, J. L., Mansour, J. K., & Whaley, E. (2010, March). *Are they listening? Police officers and policy recommendations.* Poster presented at the annual meeting of the American Psychology-Law Society, Vancouver, British Columbia.
- Bertrand, M. I., Lindsay, R. C. L., Beaudry, J. L., Mansour, J. K., & Whaley, E. (2009, June). *A survey of lineup procedures of Canadian police officers.* Poster presented at the Canadian Psychological Association, Montreal, QC, Canada.
- Kalmet, N., Stober, D.*, Mansour, J. K., Bertrand, M. I., Whaley, E., Beaudry, J. L., & Lindsay, R. C. L. (2009, July). *Multiple lineup identifications: Utility with face-only lineups.* Paper presented at the Society for Applied Research in Memory and Cognition, Kyoto, Japan.
- Bertrand, M. I., Lindsay, R. C. L., Beaudry, J. L., Mansour, J. K., & Whaley, E. (2009, August). *A survey of American officers' lineup procedures.* Poster presented at the American Psychological Association, Toronto, ON, Canada.
- Beaudry, J. L., Lindsay, R. C. L., Leach, A.-M., Mansour, J. K., Bertrand, M. I., & Kalmet, N. (2009, March). *Beyond introspection: Mock-jurors' perceptions of eyewitness identifications.* Paper presented at the annual meeting of the American Psychology-Law Society, San Antonio, Texas.
- Mansour, J. K., Lindsay, R. C. L., Beaudry, J. L., Bertrand, M. I., & Kalmet, N. (2009, March). *The impact of biased initial police contact with eyewitnesses.* Poster presented at the annual meeting of the American Psychology-Law Society, San Antonio, Texas.
- Hope, L., & Beaudry, J. L. (2008, July). *"I don't know - it might be him": Examining the use of non-committal responses in eyewitness identification.* Paper presented at the 18th Conference of the European Association for Psychology and Law, Maastricht, The Netherlands.
- Beaudry, J. L., Lindsay, R. C. L., & Leach, A.-M. (2008, March). *Detecting identification accuracy: The impact of viewing the identification procedure on belief of an eyewitness.* Paper presented at the annual meeting of the American Psychology-Law Society, Jacksonville, FL.
- Kalmet, N., Beaudry, J. L., Mansour, J. K., Lindsay, R. C. L., & Bertrand, M. I. (2008, March). *The impact of tattoo treatment on identification decisions.* Poster presented at the annual meeting of the American Psychology-Law Society, Jacksonville, FL.
- Lindsay, R. C. L., Brewer, N., Lindsay, M. R., Mansour, J. K., Weber, N., Semmler, C., Beaudry, J. L. (2008, March). *Police comments and identification decisions.* Poster presented at the annual meeting of the American Psychology-Law Society, Jacksonville, FL.

Jennifer L. Beaudry

- Beaudry, J. L., MacLennan, K.*, & Lindsay, R. C. L. (2007, July). Does disguise reduce correct identification more rapidly for sequential than simultaneous lineups? In R. C. L. Lindsay (Chair), *Issues with simultaneous and sequential lineups*. Symposium conducted at the Society of Applied Research in Memory and Cognition, Lewiston, ME.
- Hope, L., & Beaudry, J. L. (2007, July). "I don't know:" Use of non-committal responses with sequential lineups. In R. C. L. Lindsay (Chair), *Issues with simultaneous and sequential lineups*. Symposium conducted at the Society of Applied Research in Memory and Cognition, Lewiston, ME.
- Beaudry, J. L., & Lindsay, R. C. L. (2007, March). *Identification procedures: A survey of Ontario police officers' current practices*. Paper presented at the meeting of Off the Witness Stand: Using Psychology in the Practice of Justice, CUNY, New York, NY.
- Leach, A.-M., Lindsay, R. C. L., & Beaudry, J. L. (2007, March). *Guess again? The reliability of assessments of adults' naturalistic and experimentally-manipulated deception*. Paper presented at the meeting of Off the Witness Stand: Using Psychology in the Practice of Justice, CUNY, New York, NY.
- Lindsay, R. C. L., Beaudry, J. L., Mansour, J., Bertrand, M. I. (2007, March). *Multiple independent lineups: Stimulus sampling and a replication of the effect*. Paper presented at the meeting of Off the Witness Stand: Using Psychology in the Practice of Justice, CUNY, New York, NY.
- Beaudry, J. L., Leach, A.-M., Mansour, J., Bertrand, M. I., & Lindsay, R. C. L. (2006, March). *The element of surprise: The impact of participants' knowledge of a subsequent lineup task*. Paper presented at the annual meeting of the American Psychology-Law Society, St. Petersburg, FL.
- Beaudry, J. L., Dupuis, P. R., Mansour, J., Bertrand, M. I., & Lindsay, R. C. L. (2006, March). *A cautionary tale? The impact of instructions on the Multiple-choice, Sequential, Large lineup*. Poster presented at the annual meeting of the American Psychology-Law Society, St. Petersburg, FL.
- Bertrand, M. I., Beaudry, J. L., Mansour, J., & Lindsay, R. C. L. (2006, March). *Is increasing lineup size an alternative to sequential presentation? The question revisited and revamped*. Poster presented at the annual meeting of the American Psychology-Law Society, St. Petersburg, FL.
- Beaudry, J. L., Boyce, M. A., Dupuis, P. R., & Lindsay, R. C. L. (2005, March). *An assessment of the Multiple-Choice, Sequential, Large lineup*. Poster presented at the annual meeting of the American Psychology-Law Society, San Diego, CA.
- Bertrand, M. I., Beaudry, J. L., Dupuis, P. R., Mansour, J., & Lindsay, R. C. L. (2005, March). *Is increasing lineup size an alternative to sequential presentation?* Poster presented at the annual meeting of the American Psychology-Law Society, San Diego, CA.
- Mansour, J., Jahangeer, R. A.*, Beaudry, J. L., Boyce, M. A., Dupuis, P. R., Bertrand, M. I., & Lindsay, R. C. L. (2005, March). *Can both frontal and profile face photos be used as independent lineups?* Poster presented at the annual meeting of the American Psychology-Law Society, San Diego, CA.

Lindsay, R. C. L., Jahangeer, R. A.*, Beaudry, J. L., Boyce, M. A., & Dupuis, P. R. (2005, January). *Are multiple independent lineups really independent?* Paper presented at the biennial meeting of the Society for Applied Research in Memory and Cognition, Wellington, New Zealand.

Lindsay, M. R., Lindsay, R. C. L., Bertrand, M. I., & Beaudry, J. L. (2005, January). *Two less radical, but highly promising, lineup techniques.* Paper presented at the biennial meeting of the Society for Applied Research in Memory and Cognition, Wellington, New Zealand.

Beaudry, J. L., & Lindsay, R. C. L. (2003, July). Detecting children's lies: Age matters, training doesn't. In V. Talwar (Chair), *Assessing child witness credibility*. Symposium conducted at the International Psychology and Law Conference in Edinburgh, Scotland.

Invited Talks

Beaudry, J. L. (2009, April). *Justice gone bad: The causes of wrongful convictions.* Presentation to USCB Gamma Beta Phi Student Honors Society.

Beaudry, J. L. (2011, April). *Eyewitness identifications: Issues, perceptions, & recommendations.* USCB Professional Development Committee Brown Bag Presentation.

Academic Honors & Awards

2012	National Science Foundation, PI co-PI James Sauer (\$375,255)	<i>decision pending</i>
2012	Mentor for USC Magellan Scholar & Mini-grant Award (Christina Bullard)	\$3,806
2011	Sea Islands Institute Research Grant	\$5,000
2011	USCB Professor of the Year	\$500
2011	Outstanding USCB Student Club Advisor of the Year	
2010	USC Rising Star (<i>Nominee</i>)	
2010	USC Distinguished Undergraduate Research Mentor (<i>Nominee</i>)	
2010	Funding from The Phoenix Group to conduct CORE Alcohol & Drug Survey at USCB (Stacey Gerards)	~\$1500
2010	Mentor for USC Voyager Travel Award (Kayla Anthony)	\$500
2009	NSF Research Opportunity Award (PI: Steve Penrod)	\$16,056
2009	USC Research Opportunity Program Award	\$10,000
2009	Mentor for USC Magellan Scholar (Kayla Anthony)	\$3,000
2007	American Psychology-Law Society Grant-in-Aid	\$500
2007	Queen's University Graduate Award	\$10,872
2004-2007	SSHRC CGS Doctoral Award	\$105,000
2004	SSHRC Doctoral Award (<i>declined</i>)	\$80,000
2002 & 2003	Queen's University Graduate Award	\$10,718
2002	Queen's University McLaughlin Fellowship	\$10,000
2000	Laurentian University Dean's Honor's List	
1998 & 1999	Laurentian University Dean's Honor's List Scholarship	\$2,000
1996	Sudbury Regional Police Service Bursary	\$300

Jennifer L. Beaudry

7

Supervision of Undergraduate Honors Theses & Research Projects

2011-	Christina Bullard
2009-2010	Stacey Gerards
2009-2010	Kayla Anthony
2007-2008	Martina Tam*
2006-2007	Kate MacLennan*
2006-2007	Teresa Mateus*
2003-2004	Roshan Jahangeer*

* co-supervisor with Dr. R. C. L. Lindsay

Teaching Experience

University of South Carolina Beaufort

Summer 2012	Special Topics: Psychology & the Law	BPSY 490
Spring 2012	Research Methods	BPSY 200
	Human Sexual Behavior	BPSY 214
	Social Psychology	BPSY 331
	Special Topics: Social Influence	BPSY 490
Fall 2011	Introduction to Psychology (double-section)	BPSY 101
	Research Methods	BPSY 200
	Social Psychology	BPSY 331
	Independent Study (Jennifer Dolin)	BPSY 399
	Independent Study (Christina Bullard)	BPSY 399
Summer 2011	Special Topics: Psychology & the Law	BPSY 490
Spring 2011	Introduction to Psychology	BPSY 101
	Research Methods	BPSY 200
	Human Sexual Behavior	BPSY 214
	Social Psychology	BPSY 331
Fall 2010	Introduction to Psychology (double-section)	BPSY 101
	Special Topics: Social Influence	BPSY 490
Spring 2010	Human Sexual Behavior	BPSY 214
	Social Psychology	BPSY 331
	Supervisor for Internship III (Edna Coombs)	BHSV 490
	Advanced Independent Study (Kathleen Blackman)	BPSY 498
	Independent Study (Stacey Gerards)	BPSY 399
Fall 2009	Introduction to Psychology (double-section)	BPSY 101
	Social Psychology	BPSY 331
	Supervisor for Internship II (Edna Coombs)	BHSV 298
	Independent Study (Kathleen Blackman)	BPSY 399
Summer 2009	Special Topics: Psychology & the Law	BPSY 489
	Supervisor for Internship I (Kathleen Blackman)	BHSV 290
Spring 2009	Introduction to Psychology (two sections)	BPSY 101
	Social Psychology	BPSY 331
Fall 2008	Introduction to Psychology (two sections)	BPSY 101
	Social Psychology	BPSY 331

Queen's University

Spring 2006	Instructor for Social Psychology
Winter 2005	Instructor for Social Psychology (Correspondence)

Jennifer L. Beaudry

8

Spring 2003

Instructor for Social Psychology Module of Intro Psychology

Professional Affiliations

American Psychology-Law Society

Society for Applied Research in Memory and Cognition

Professional & Administrative Experience

2011-present	Consultant & Data Analyst for United States Marine Corps Prime for Life Alcohol Intervention Program
2011-present	USCB Faculty Fund Committee Member
2011-present	USCB Quality Enhancement Plan Committee Member
2010-present	USCB Sea Island Institute Committee Member
2009-present	USCB Library Committee Member
2009-present	USCB Psychology Club Faculty Advisor
2009-present	USCB Psychology Participant Pool Creator & Coordinator
2008-present	USCB Faculty Senate Member
2008-present	USCB Student Research & Scholarship Day Committee Member
2008-present	Reviewer for Law and Human Behavior
2005-present	Reviewer for American Psychology-Law Society conferences (except 2006, 2007, & 2010)
2012	Session Chair for the American Psychology-Law Society conference
2011	Reviewer for Society for Applied Research in Memory and Cognition conference
2011	Session Chair for 4 th International Congress on Psychology and Law Conference
2010 & 2011	USCB Psychology Search Committee Member (Two searches)
2010	USCB Department of Social Sciences Promotion & Tenure Guidelines Committee Member
Spring & Summer 2010	USCB Psychology Program Coordinator (Interim) • Scheduling • Advising 100+ Majors • Miscellaneous administrative responsibilities
2009-2010	USCB Student Research and Scholarship Day Co-chair
2009	USCB Faculty Mentor for South Carolina Psychological Association Academic Day
2009	Session Chair for American Psychology-Law Society Conference
2009	USC Discovery Day Judge (Undergraduate Research Competition)
2009	Reviewer for Applied Cognitive Psychology
2006-2008	Queen's University Association for Graduate Students in Psychology (AGSIP) Graduate Committee Representative
2004-2006	Member of the Psychology Research Ethics Board
2003-2005	AGSIP Social Program Committee Representative

Jennifer L. Beaudry

9

Non-Academic Employment Experience

- 2011- Eyewitness Expert for *State v. Holterman* (South Carolina)
- 2012- Eyewitness Expert for *State v. Roberts* (South Carolina)
- 2000-2002 Emergency Services Child Protection Worker for the Children's Aid Society for the Districts of Sudbury and Manitoulin
- Investigated allegations of abuse: interviewed parents and children, contacted collaterals, assessed the safety of children in their homes
 - When necessary, I worked jointly with Ontario Provincial Police or Greater Sudbury Police Service, as well as paediatricians at St. Joseph's Health Centre
 - Placed children with appropriate foster families or in group homes
 - Above duties performed after hours when it was determined that there was an immediate risk to the child
- 1999 & 2000 Greater Sudbury Police Service Communication Coordinator's Assistant (Summer Position)
- Monitored police surveillance cameras
 - Trained police officers, students, and Ontario Works participants

NSW20070608189

WITNESSES

OLENTHIAL FAISON
North Charleston Police Department

AGENCY CASE NUMBER

2007024986

ARREST WARRANT NUMBER

K257464

DATE OF ARREST

July 24, 2007

ACTION OF GRAND JURY

Lddie Cochran
Foreperson of Grand Jury JUN 10 2008
Date:

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2008GS1005695

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

June Term 2008

THE STATE

vs.

JOY MACK
DOB: [REDACTED]
B/M

Indictment for:

Armed Robbery

FILED

2008 JUN 13 AM 11:09

JULIE J. ARMSTRONG
CLERK OF COURT

07-4674-4
✓

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on June 9, 2008 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about June 14, 2007, in Charleston County, South Carolina, at 4400 Dorchester Road #105, Urban Gear, by use of force, threats or intimidation and while armed with a deadly weapon, to wit: gun, the Defendant, JOY MACK, did take and carry away goods and/or monies from the persons or immediate presence of Aytekin "Andy" Ayazgok and/or Davuthan Kille with the intent to permanently deprive them of their possessions thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


TRIP LAWTON
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

STATE VS.

JOY MACK

AKA:

Race: B

Sex: M

Age: 25

DOB: 05-19-1985

SS#: 249-61-0576

Address:

DL#: 090599509

SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS1005695

A/W#: K257464

Date of Offense: 6/14/2007

S.C. Code § : 16-11-0330(A)

CDR Code #: 0139

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Armed Robbery

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC) ☐ §17-25-45
w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTES

Lawton, Trip

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 22 days/months/years or 22 under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 7/24/07

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waiver Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public De/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§ 50-21-114(BU) (Breath Test Fee)	\$50	\$
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ 3.75
§ 90.11 TP (SCCJA Surcharge)	\$5	\$ 5.00
TOTAL		\$ 133.75

Clerk of Court/ Deputy Clerk

Court Reporter: A. Haptonden

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol testing

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel §35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 3/11/07

Sentence Date: 7/26/09

SCCA/217 (07/2008)

NSW20070608189

WITNESSES

OLENTIAL FAISON

North Charleston Police Department

AGENCY CASE NUMBER

2007024986

ARREST WARRANT NUMBER

K257465

DATE OF ARREST

July 24, 2007

ACTION OF GRAND JURY

Eddie Cochran

Foreperson of Grand Jury

JUN 10 2008

Date:

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2008GS1005696

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

June Term 2008

THE STATE

vs.

JOY MACK

DOB:

B/M

Indictment for

Assault and Battery with Intent to Kill

FILED

2008 JUN 13 AM 11:09

JULIE J. ARMSTRONG
CLERK OF COURT

67-4674-3

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

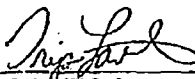
INDICTMENT

At a Court of General Sessions, convened on June 9, 2008 the Grand Jurors of Charleston County present upon their oath:

Assault and Battery with Intent to Kill

That in Charleston County, South Carolina, on or about June 14, 2007, the Defendant, with malice aforethought, did commit an unlawful act of a violent nature upon the victim, Aytakin "Andy" Ayazgok and Davuthan Kilic, to wit: the Defendant did strike the Victims Davuthan Kilic and Aytakin Ayazgok about the head and body with a gun; all in violation of the Common Law of South Carolina and Section 16-03-620 of the Code of Laws of South Carolina (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



TRIP LAWTON
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
STATE VS.

JOY MACK

AKA: _____

Race: B Sex: M Age: 23DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]DL#: 090599509 STD#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS1005696A/W#: K257465Date of Offense: 6/14/2007S.C. Code §: 16-03-0620CDR Code #: 0014

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: ABWIK/Assault and Battery with Intent to Killin violation of § 16-03-0620 of the S.C. Code of Laws, bearing CDR Code # 0014☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or 2nd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Lawton, Trip

Defendant

Attorney for Defendant

SC Bar# _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 7/24/07☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 35-13 (Public Def/Prob)

§ 73-3, 1B TP (Law Enforce. Funding)

§ 33-7, 1B TP (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

§ 90-11 TP (SCCA Surcharge)

TOTAL

\$ 133.75

Clerk of Court/ Deputy Clerk

Court Reporter: A. Haffenden

PTUP

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35-13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 2147Sentence Date: 7/26/07

SCCA/217 (07/2008)

NSW20070608189

WITNESSES

OLENTHIAL FAISON

North Charleston Police Department

AGENCY CASE NUMBER

2007024986

ARREST WARRANT NUMBER

K257467

DATE OF ARREST

July 24, 2007

ACTION OF GRAND JURY

Eddie Cochran
Foreperson of Grand Jury

JUN 10 2008

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2008GS1005697

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

June Term 2008

THE STATE

vs.

JOY MACK

DOB: [REDACTED]
B/M

Indictment for

Kidnapping

FILED

2008 JUN 13 AM 11:09

JULIE J. ARMSTRONG
CLERK OF COURT

07-4674-2
✓

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

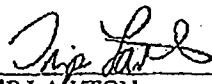
INDICTMENT

At a Court of General Sessions, convened on June 9, 2008 the Grand Jurors of Charleston County present upon their oath:

Kidnapping

That in Charleston County, South Carolina, on or about June 14, 2007, the Defendant, JOY MACK, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Aytekin "Andy" Ayazgok and/or Davuthan Kilic, without authority of law; all in violation of Section 16-3-910 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



TRIP LAWTON
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
STATE VS.

JOY MACK

AKA:

Race: B Sex: M Age: 23DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]DL#: 090599509 SID#: [REDACTED]

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS1005697

A/W#: K257467

Date of Offense: 6/14/2007

S.C. Code § : 16-03-0910

CDR Code #: 0095

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Kidnappingin violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Lawton, Trip

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 22 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 7/24/07☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 35-13 (Public Def/Prob) \$500 \$ _____

§ 73-1, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§ 33-7, 1B TP (Drug Court Surcharge) \$100 \$ _____

§ 50-21-114(BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ 3.75§ 90-11 TP (SCCA Surcharge) \$5 \$ 5.00TOTAL \$ 133.75

Clerk of Court/ Deputy Clerk

Court Reporter: A. H. AndersonPRESIDING JUDGE: [Signature]Judge Code: 2017Sentence Date: 7/26/07

SCCA/217 (07/2008)