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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2018-001674

JOHN UPSON

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, John Upson ("Respondent") respectfully files this Petition for Rehearing. Petitioner requests that rehearing be granted regarding Opinion No. 6049 (Filed January 31, 2024 hereafter "Opinion" or "Op."), and that this Court issue a new opinion ruling in favor of Respondent or, failing that, order rehearing and further oral argument because:

The Court's opinion misapprehends facts central to its analysis and holding in the following grounds.

1. TRIAL COUNSEL'S FAILURE TO CHALLENGE ALSTON'S OUT OF COURT IDENTIFICATION OF RESPONDENT

The primary aim of a *Neil v. Biggers* hearing is "to deter law enforcement use of improper lineups, showups, and photo arrays." Perry, 565 U.S. at 241.

In this case, the PCR court found that Alston "pulled a photograph from Facebook *before* speaking with law enforcement." However, Alston also testifies that she was presented with a list of names that included Respondent's name. (App. p. 75, lines 20-21) Trial counsel failed to challenge Alston's out of court identification by either requesting a *Neil v. Biggers* hearing or by objecting to its admission at trial. This is where the problem begins.

Alston stated in her testimony that she was searching for a picture she recognized. Specifically, Alston explained that you can scroll through a Facebook friends list. And she saw his picture and clicked on his name. That she didn't know his name at the time but she clicked on it because she knew his face. But she also testified that "I just looked at his name, who I was looking for" (App. p. 73, Lines 1-25)

Alston testified that she had seen the Respondent before at Captain D's. Respondent admitted to visiting the restaurant where he spoke to an employee, William Keels, earlier that week. He had once dated Keels' sister, so the two had a brief conversation that Alston witnessed. At trial, Alston testified that she knew she recognized the robber, so she "went home and looked it up." (App. p. 58 lines 5-9)

Alston's testimony is problematic in that the perpetrators faces were covered except for their eyes. When reviewing the transcript, it is apparent that Alston contradicts herself. She states that she was scrolling through pictures on Facebook until she found Respondent's name. Then she jumped when she saw his picture. This testimony reads as if she knew his name and went to find his picture for confirmation. Additionally, Alston testified that she was shown a list of names (without photos) by law enforcement. (App. p. 75 lines20 - p.76 line 2) Based on her testimony,

it is possible that her timeline could be confused. At the very least, it is enough to question the veracity and reliability of her identification.

For these reasons, trial counsel should have requested a hearing pursuant to Neil v. Biggers, 408- U.S. 188 (1972) or, at the very least, objected to the admission of this testimony during trial. The order granting post-conviction relief included a finding she conducted her independent Facebook research before speaking to law enforcement. But both the trial and PCR transcripts show Alston's confusion regarding the timeline. The Courts analysis from both the PCR Court and this Court shows the complexity of this important issue. Without trial counsel requesting a *Neil v. Biggers* hearing or objecting at trial, it is impossible to know the answer to these questions. Trial Counsel created this issue by not requesting a hearing or making an objection which would have resolved this issue.

The Respondent would respectfully request that the Court reconsider the failure of trial counsel to address this issue.

2. TRIAL COUNSEL'S FAILURE TO CROSS-EXAMINE ALSTON'S TESTIMONY THAT SHE RECOGNIZED UPSON FROM HIS LAZY EYE

During trial, Alston testified that she recognized Respondent because of his "bald head and lazy eye." (App. p. 58 lines 1-3) In fact, she said, "that's the thing that caught [her] eye." (App. p. 58 lines 1-3) This is, surprising, despite the fact the perpetrators of the robbery had their heads and faces covered with only their eyes visible. The post-conviction relief court held Alston's incorrect description of Respondent's eyes caused it particular concern because it could have led to a misidentification that resulted in Respondent's conviction.

The PCR court also found that Respondent did not have a lazy eye based on its "opportunity to personally study" Upson during the hearing. This Court finds in its opinion that the jurors had the same opportunity to study Upson at trial and decide for themselves if they believed Alston's

description of Upson was consistent with his appearance in the courtroom. Alston also identified Upson by "his bald head". How is this possible when the perpetrators had their head and faces covered.

The Court cites State v. Odom, 412 S.C. 253, 772 S.E.2d 149 (2015) for the proposition that jurors' ability to observe defendants during trial and attach whatever credibility they deem necessary to a witness's identification. While that is true, it still leaves defense counsel open to exploit inconsistencies between the witness's description and the appearance of the defendant. In this case, the obvious fact that Respondent does not have a lazy eye should have been identified and used by trial counsel in order to discredit her testimony at every juncture. The Respondent would respectfully request that the court reconsider the impact of Counsels failure to address these issues.

3. TRIAL COUNSEL'S FAILURE TO CHALLENGE THE STATE'S CELL PHONE DATA EVIDENCE USED TO DISCREDIT UPSON'S ALIBI

At trial, the State presented an expert from the Bureau of Alcohol, Tobacco and Firearms ("ATF") to analyze the cell phone data retrieved from Respondent's phone. In doing so, the State attempted to show Respondent was near the Captain D's at the time of the robbery. Though trial counsel had the cell phone data prior to trial, it was not analyzed by an expert nor was any expert testimony presented on behalf of Respondent.

At the evidentiary hearing, Respondent presented an expert, Tom Slovenski. He testified, initially, that the PenLink system used by ATF to analyze cell phone data with the pie method was highly susceptible to user error, more than other methods or manual analysis. (App. p. 402, lines 9-12) In fact, Slovenski testified he would have manually plotted the data using the pie method if he were analyzing the data at the time of trial because that was all that was available.

Petitioner argued repeatedly that Slovenski used a method – TraX – that was unavailable at the time of trial to develop his testimony for the evidentiary hearing. While that is true, it was for the purpose of double-checking his findings for the analysis done in 2013. His conclusions were never solely based on the use of a more modern technology. Slovenski's analysis shows Respondent farther from Captain D's at the time of the incident than the ATF's did. (App. p. 395 lines 9-14).

The Respondent would request that the Court reconsider this issue. The fact that Slovenski was able to validate his finding through a more modern technology does not take away from his finding using the same technology that existed at the time of trial.

4. THE FINDINGS AND CONCLUSIONS PRESENTED IN THE PCR COURT ORDER ARE FINDINGS OF FACT AND NOT ERRORS OF LAW

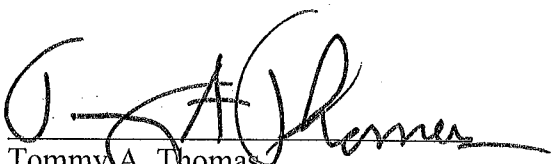
The standard of review in PCR cases depends on the specific issue before the Court. The Court should defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). However, the Court can reverse the [PCR] court's decision if it is controlled by an error of law. *Milledge v. State,* 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018). The Respondent asks the Court to reconsider its decision regarding the PCR Court finding and conclusions as they were finding of facts by the PCR Court.

CONCLUSION

For the reasons discussed above, as well as the prior filings and oral argument, all of which are incorporated herein, this Court should grant rehearing and issue a new opinion reversing its

decision and entering judgment in favor of Respondent as a matter of law. Failing that, this Court should order rehearing and further oral argument regarding this matter.

Respectfully submitted,



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Appellate Case No.: 2018-001674

John Upson #229134, ..., Respondent

v.

State of South Carolina, ...Petitioner,

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Respondent, hereby certify that I emailed a copy of a Petition for Rehearing to Mark Farthing at:

Mark Farthing, Esq.
Attorney General's Office
P.O. Box 11549
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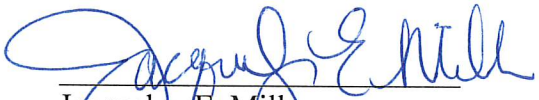
mfarthing@scag.gov



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THOMAS LAW

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Via Email

V. Clare Allen, Deputy Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: John Upson v. State
Appellate Case No.: 2018-001674

Dear Ms. Allen:

Please find attached a Petition for Rehearing as well as a Certificate of Service for filing in the above referenced matter.

Thank you and should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,

Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Mark R. Farthing, Esq. - via email

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