THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE COURT OF APPEALS

Appellate Case No.: 2018-001674

Opinion No. 6049, Heard 12/7/23 – Filed 1/31/24)

JOHN UPSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for rehearing was made and ruled on by the Supreme Court on March 1, 2024. (App. p. 623-629)

QUESTIONS PRESENTED

1. THE POST-CONVICTION RELIEF JUDGE'S CONCERNS ABOUT THE ADMISSIBILITY OF EYEWITNESS TESTIMONY DUE TO THE INCONSISTENCIES IN ALSTON'S STORY REGARDING HER FACEBOOK RESEARCH AND CONVERSATIONS WITH LAW ENFORCEMENT WERE VALID, AND TRIAL COUNSEL'S FAILURE TO ATTEMPT TO SUPRESS THIS TESTIMONY OR OBJECT WHEN IT EMERGED AS DEFICIENT AND PREJUDICIAL TO THE POINT WHERE ONE CANNOT RELY UPON THE OUTCOME OF THE CASE.

2. THE POST-CONVICTION RELIEF JUDGE'S CONCERN ABOUT THE VALIDITY OF EYEWITNESS TESTIMONY DUE TO THE INCORRECT "LAZY EYE" TESTIMONY WAS VALID, AND TRIAL COUNSEL'S FAILURE TO ADDRESS IT IN ANY FORM OR FASHION WAS DEFICIENT PERFORMANCE AND PREJUDICIAL TO RESPONDENT.

3. THE POST-CONVICTION RELIEF JUDGE PROPERLY RULED THAT TRIAL COUNSEL FAILED TO CHALLENGE THE STATE'S EXPERT TESTIMONY AT TRIAL REGARDING CELL PHONE TOWER DATA AND, UPON PRESENTATION OF AN EXPERT AT THE EVIDENTIARY HEARING, RESPONDENT CREATED SIGNIFICANT DOUBT ABOUT THE ACCURACY OF THE INITIAL EXPERT'S TESTIMONY.

4. THE FINDINGS AND CONCLUSIONS PRESENTED IN THE PCR COURT ORDER ARE FINDINGS OF FACT AND NOT ERRORS OF LAW. THE APPELLATE COURT IMPROPERLY FOUND THAT THE PCR COURT'S ORDER RULINGS WERE ERRORS OF LAW.

STATEMENT OF THE CASE

Respondent is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. In January 2014, the Aiken County Grand Jury indicted Respondent for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire and De Grant Gibbons, Esquire represented Respondent. Solicitor Jeffrey Alan Slocum, Jr., Esquire and Kevin R. Molony, Esquire prosecuted the case. On April 15-16, 2014, Respondent proceeded to trial before the Honorable Donald B. Hocker. The jury found Respondent guilty as indicted. Judge Hocker sentenced Respondent to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

Respondent filed a timely notice of appeal. John H. Strom, Esquire, of the Office of Appellate Defense perfected the appeal. The issue raised on appeal was whether trial court erred in denying Respondent's directed verdict motion where the evidence presented at Respondent's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson. The South Carolina Court of Appeals affirmed Respondent's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the Circuit Court on June 17, 2016.

In his application for Post-Conviction Relief, which was filed on January 23, 2017, Respondent alleged that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"

    a. "Failure to fully cross-examine Jameshia Alston."
    b. "Failure to ask for Neils v. Biggers hearing."
    c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright and Brenda Smith."

d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Respondent."
e. "Failure to object to Respondent being charges and standing trial for armed robbery when the 14th and 6th Amendments were violated by the confrontation clause."
f. "Failure to object to in-court identification."
g. "Failure to object to bolstering by the State during closing arguments."

The State filed its Return on May 16, 2017. Present at the evidentiary hearing, held on May 5, 2018 before the Honorable R. Scott Sprouse, was Julie Coleman, Esquire from the Office of the Attorney General representing Petitioner. Respondent was present and represented by his attorney, Tommy A. Thomas. Respondent testified on his own behalf and called Tom Slovenski. Petitioner called Second Circuit Public Defender De Grant Gibbons. At the close of the hearing, Judge Sprouse ordered, at the State's request and without objection from Respondent, that the record remain open for thirty (30) days in the event that lead trial counsel, who was not available for the hearing, wished to submit testimony.

An order granting post-conviction relief was signed by Judge Sprouse July 13, 2018, and amended order was signed August 10, 2018. The Court found, in part, the basis for granting post-conviction relief was:

> The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the [Respondent's] claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.
>
> Therefore, based upon the foregoing, the Court finds and concludes:
>
> 1. The identification of the [Respondent] was a key issue at trial.
>
> 2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the [Respondent's] name. Counsel for the [Respondent] failed to challenge this by either requesting a Neil v. Biggers hearing or by objecting to its admission at trial.
>
> 3. The Court is particularly concerned with the testimony regarding [Respondent's] "lazy eye." The testimony provided a significant basis upon which

the State's witness relied in making her identification. Once elicited at trial, Counsel for the [Respondent] failed to challenge this on cross-examination.

a. The Court observed the [Respondent] at the evidentiary hearing and had the opportunity to personally study the [Respondent's] facial features. The Court found that the [Respondent] clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the [Respondent's] conviction.

4. The [Respondent] also asserted an alibi defense that the State discredited through expert testimony that Counsel for the [Respondent] failed to challenge.

a. At the evidentiary hearing, the [Respondent] presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the "pie method."

This Court specifically found and concluded that both prongs of Strickland have been met by the [Respondent]. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the [Respondent].

App. 475-483.

Appellant filed a Motion to Alter or Amend Pursuant to Rule 59(e) on or about August 20, 2018. App. 494-506. Judge Sprouse denied the Motion on August 24, 2018. (App. 508). Appellant filed a Notice of Appeal on September 17, 2018.

On November 12, 2021 Certiorari was Granted by the South Carolina Court of Appeals. On December 7, 2023 oral arguments were heard. On January 31, 2024 the Court of Appeals made its decision to Reverse the Lower Court's decision in Opinion No. 6049. On February 14, 2024 a Petition for Rehearing was filed. On March 1, 2024 the Petition for Rehearing was denied.

Petition now files this Petition for Writ of Certiorari.

ARGUMENT

1. THE POST-CONVICTION RELIEF JUDGE'S CONCERNS ABOUT THE ADMISSIBILITY OF EYEWITNESS TESTIMONY DUE TO THE INCONSISTENCIES IN ALSTON'S STORY REGARDING HER FACEBOOK RESEARCH AND CONVERSATIONS WITH LAW ENFORCEMENT WERE VALID, AND TRIAL COUNSEL'S FAILURE TO ATTEMPT TO SUPRESS THIS TESTIMONY OR OBJECT WHEN IT WAS EMERGED AS DEFICIENT AND PREJUDICIAL TO THE POINT WHERE ONE CANNOT RELY UPON THE OUTCOME OF THE CASE.

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. Moreover, because it was only after the Facebook search that Alston identified Respondent, trial counsel should have requested a pre-trial hearing to ensure that there were no improper actions taken by law enforcement. After all, "reliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwait, 432 U.S. 98, 154 (1977).

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

2. THE POST-CONVICTION RELIEF JUDGE'S CONCERN ABOUT THE VALIDITY OF EYEWITNESS TESTIMONY DUE TO THE INCORRECT "LAZY EYE" TESTIMONY

WAS VALID, AND TRIAL COUNSEL'S FAILURE TO ADDRESS IT IN ANY FORM OR FASHION WAS DEFICIENT PERFORMANCE AND PREJUDICIAL TO RESPONDENT.

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. The Court of Appeals 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 proposition that the Jury could have determined this issue upon observation on their own is deficient without Trial Counsel drawing the Jury's attention to this issue.

The Court of Appeals requested a color SCDC admission photo. (App. p. 608) A color photo was provided to the Court pursuant to their request. (App. p. 610) The Respondent would respectfully request that the court grant Certiorari on the issue of the impact of Counsel's failure to address these issues.

3. THE POST-CONVICTION RELIEF JUDGE PROPERLY RULED THAT TRIAL COUNSEL FAILED TO CHALLENGE THE STATE'S EXPERT TESTIMONY AT TRIAL REGARDING CELL PHONE TOWER DATA AND, UPON PRESENTATION OF AN EXPERT AT THE EVIDENTIARY HEARING, RESPONDENT CREATED SIGNIFICANT DOUBT ABOUT THE ACCURACY OF THE INITIAL EXPERT'S TESTIMONY.

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 only 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).

Also, there are areas of overlap in several maps that were not identified or explained by Fraser, the ATF expert. (App. p. 396, lines 21-25) Ultimately, Slovenski testified that, without knowledge of cell phone data or the ability to analyze the maps and analysis presented by ATF, trial counsel would not have had the ability to ask appropriate questions to rebut this information. (App. p. 399, lines 13-16)

Respondent argued and the PCR court agreed that the presentation of cell phone evidence was ineffective, inaccurate, and caused prejudice to Respondent. Because of the failure of trial counsel to fully research and use the cell phone data, this "trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The Respondent would request that the Court grant Certiorari on 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.

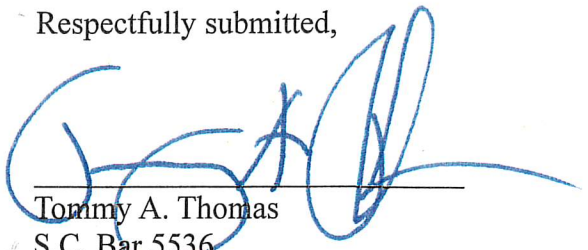
4. THE FINDINGS AND CONCLUSIONS PRESENTED IN THE PCR COURT ORDER ARE FINDINGS OF FACT AND NOT ERRORS OF LAW. THE APPELLATE COURT IMPROPERLY FOUND THAT THE PCR COURT'S ORDER RULINGS WERE ERRORS OF LAW.

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 grant Certiorari on this issue as the PCR Court finding and conclusions are findings of fact by the PCR Court.

CONCLUSION

The Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari and order full briefing on the issues presented.

Respectfully submitted,



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March 28, 2024

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THE STATE OF SOUTH CAROLINA
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JOHN UPSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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 Writ of Certiorari and Appendix to Mark Farthing at:

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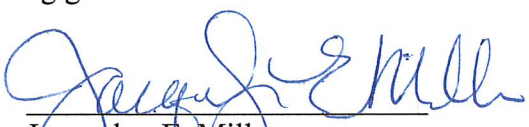

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April 1, 2024

THOMAS LAW

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

Dear Sir or Madam:

Enclosed please find for filing a Petition for Writ of Certiorari, Appendix and Certificate of Service.

Kindly email a clocked copy to my office at jackie@paroleme.com. Feel free to contact me should you have any questions. Thank you.

Yours truly,

Tommy A. Thomas,
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