

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

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**RECEIVED**

JUN 29 2015

Opinion No. 5302 (S.C. Ct. App. filed March 11, 2015)

S.C. Supreme Court

11-GS-10-2338-2339

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THE STATE,

RESPONDENT,

v.

MARVIN BOWENS GREEN,

PETITIONER

APPELLATE CASE NO. 2015-001103

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REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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## ARGUMENT

### **Introduction**

Petitioner filed a petition for writ of certiorari asking this Court to review an opinion issued by the Court of Appeals. The state filed its return. Petitioner now files this reply to address the first issue presented concerning the trial judge's refusal to provide the jury with specific instructions regarding how to analyze the identification evidence presented. In general, Petitioner's request to provide the jury with specific instructions that conformed with the evidence presented, included how the jury should consider testimony regarding how memory works and other scientifically accepted principles concerning eyewitness identification. A recent decision by another jurisdiction on this very issue motivates Petitioner to file this reply.

Further, one of the requests to charge submitted by Petitioner offered the jury guidance with respect to considering issues of cross-racial identifications. This issue was of significant importance because Petitioner was of a different race than the individuals who identified him as the robber and because Petitioner's expert witness testified regarding social science studies and research indicating the lack of reliability of eyewitness identifications when the eyewitness and the suspect are of different races. Further, this issue bore significantly on the accuracy of the jury's verdict in light of the jury's instruction that it "may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense," which "will be affected by things like how long or short at time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past." R. 330, lines 5-22. The instruction left the jury without the ability to consider Petitioner's expert witness's testimony, which included the unreliability of cross-racial identifications. In light of recent case law in other jurisdictions, Petitioner now files this reply.

## Discussion

Recently, the Massachusetts Supreme Court held that a “cross-racial instruction **should always** be included when giving the model eyewitness identification instruction, unless the parties agree that there was no cross-racial identification.” Commonwealth v. Bastaldo, \_\_\_ N.E.3d \_\_\_, 2015 WL 3885652 at \*1 (Mass. June 25, 2015)(emphasis added). Additionally, the Court “authorize[d] judges in their discretion to include a cross-ethnic eyewitness identification instruction in appropriate circumstances.” Id.<sup>1</sup> The Court explained at that the time of Bastaldo’s trial “a judge was not precluded ‘in the exercise of discretion from instructing a jury that, in determining the weight to be given eyewitness identification testimony, they may consider the fact of any cross-racial identification and whether the identification by a person of different race from the defendant may be less reliable than identification by a person of the same race.’” Id. at \*4 (quoting Commonwealth v. Hyatt, 647 N.E.2d 1168 (Mass. 1995)). However, at the time, a defendant was not entitled to such an instruction. Id.

Requiring judges to give a cross-racial identification instruction, the Court explained “[t]he existence of the ‘cross-race effect’ (CRE) – that people are generally less accurate at identifying members of other races than they are at identifying members of their own race – has reached a near consensus in the relevant scientific community and has been recognized by courts and scholars alike.” Id. Thus, the Court concluded that jurors asked to evaluate the accuracy of an identification should be informed of the CRE. Id. In arriving at the conclusion that the cross-racial identification instruction should be given in all cases, except those where the parties agree otherwise, the

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<sup>1</sup> The court left the decision to add ethnicity to the cross-racial instruction in the trial judge’s sound discretion because no clear consensus in the relevant scientific community existed yet on the subject. Commonwealth v. Bastaldo, \_\_\_ N.E.3d \_\_\_, 2015 WL 3885652 at \*7 (Mass. filed June 25, 2015).

Massachusetts Court noted that social science research establishing CRE “often does not define race” and that in the facial recognition studies, the researchers permit the study participants to self-identify their race. Id. at \*5. “In short, when we speak of cross-racial identification in the context of eyewitness identification, we mean that based on facial appearance, the person who made the identification is likely to have perceived the person identified to be of a different race.” Id. Thus, the Court concluded that judges would not be asked to determine whether a reasonable juror would perceive the identification to be cross-racial and required the cross-racial instruction to be given unless all parties agreed there was no cross-racial identification. Id. at \*6. Thereafter, the Court reaffirmed its model eyewitness identification instruction: “If the witness and the person identified appear to be of different races, you should consider that people may have greater difficulty in accurately identifying someone of a different race than someone of their own race.” Id.

The Bastaldo opinion was a clarification and extension of the Massachusetts Supreme Court’s opinion in Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015) decided on January 12, 2015. Using the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence, the Court concluded “that there are scientific principles regarding eyewitness identification that are ‘so generally accepted’ that it is appropriate in the future to instruct juries regarding these principles so that they may apply the principles in their evaluation of eyewitness identification evidence.” Id. at 900. Thus, the Court provided a provisional jury instruction for future cases involving eyewitness identifications. Id. at 901. The Massachusetts Supreme Court had “long recognized that a principle concerning eyewitness identifications may become so generally accepted that, rather than have expert testimony on the point, a standard jury instruction stating that principle would be appropriate.” Id. at 904 (internal quotation omitted). However, Gomes failed to provide the judge with any expert testimony, scholarly articles, or treatises that

would have enabled the judge to determine whether the principles in the proposed instruction were so generally accepted that a jury instruction would be appropriate. *Id.* Thus, the Massachusetts Supreme Court concluded the trial judge did not abuse his discretion by failing to give the proposed instruction. *Id.* at 904-905.

Nevertheless, the Court took the “opportunity to revisit [its] jurisprudence regarding eyewitness identification jury instructions.” *Id.* at 905. In 2011, the Court “recognized that ‘eyewitness identification is the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions.’” *Id.* at 905 (quoting Commonwealth v. Walker, 953 N.E.2d 195 (2011)). Thus, the Court convened a study group to consider whether existing model jury instructions provided adequate guidance to juries. *Id.* At the time of the Gomes decision, the report was completed and the court implemented the findings of the report. *Id.*

Previous to the Gomes decision, the model instruction for trial judges greatly resembled the instruction often used in South Carolina, and the instruction used by the trial judge in Petitioner’s case. *Id.* at 906-907. As explained by the Massachusetts Supreme Court, “[i]t focuses the jury on factors they ‘should consider’ that may affect the accuracy of an eyewitness’s positive identification of the defendant and poses questions the jury should ask themselves. It generally does not instruct the jury as to *how* those factors may affect the accuracy of the identification.” *Id.* (emphasis in original). The Court was compelled to alter the instruction because “research makes clear that common sense is not enough to accurately discern the reliable eyewitness identification from the unreliable because many of the results of the research are not commonly known and some are counterintuitive.” *Id.* at 909. The Court concluded that jury instructions would be comprised of only those principles where there is a near consensus in the relevant scientific community adopting that principle. *Id.*

Relying upon the comprehensive jury instructions adopted by the New Jersey Supreme Court in State v. Henderson, 27 A.3d 872 (N.J. 2011) and the report from its study group, the Massachusetts Supreme Court undertook the task of developing model jury instructions as well. Id. at 909. The Court adopted five principles at issue in Gomes that had achieved near consensus in the relevant scientific community and were to be included in model jury instructions regarding eyewitness identification. Id. at 912. Those five included:

1. Human memory does not function like a video recording but is a complex process that consists of three stages: acquisition, retention, and retrieval.
2. An eyewitness's expressed certainty in an identification, standing alone, may not indicate the accuracy of the identification, especially where the witness did not describe the level of certainty when the witness first made the identification.
3. High levels of stress can reduce an eyewitness's ability to make an accurate identification.
4. Information that is unrelated to the initial viewing of the event, which an eyewitness receives before or after making an identification, can influence the witness's later recollection of the memory or of the identification.
5. A prior viewing of a suspect at an identification procedure may reduce the reliability of a subsequent identification procedure in which the same suspect is shown.

Id. at 911-916. Thereafter, the Court proposed model jury instructions incorporating the five principles. Id. at 916-917. The Court explained the model jury instructions would "provide juries with more comprehensive guidance to evaluate and weigh eyewitness identifications." Id. at 917.

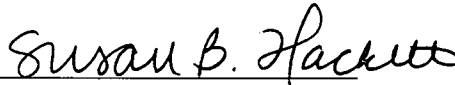
The model instructions adopted in Gomes and the cross-racial identification instruction made mandatory in Bastaldo offer guidance to this Court regarding the need to update the "standard" jury instructions used by South Carolina's trial judges where eyewitness identification evidence is used by the state. Petitioner respectfully requests consideration by this Court of the

model instructions in this area being used in other jurisdictions, such as Massachusetts, Utah, North Carolina, and New Jersey. These instructions more accurately reflect the status of the social science research in the area of eyewitness identifications and provide the jury with needed guidance to analyze the evidence provided during the trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issues presented in the petition.

Respectfully submitted,

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 29th day of June, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

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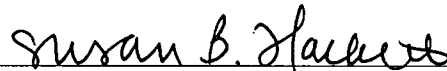
PETITIONER

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CERTIFICATE OF SERVICE

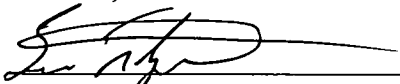
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I certify that a true copy of the reply to the return to petition for writ of certiorari to the Court of Appeals, in this case has been served on Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Marvin Bowens Green #346650, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, and the S.C. Court of Appeals this 29<sup>th</sup> day of June, 2015.

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29<sup>th</sup> day  
of June, 2015.

  
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(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022