STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

James R. Barber, III, Circuit Court Judge

JARVIS GIBBS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000447

BRIEF OF PETITIONER

JOHN H. STROM
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 PETITIONER.

INDEX

ISSUE PRESENTED

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to claims of witness intimidation in testimony by the State's witness and in prosecutors' closing arguments when there was no evidence linking Petitioner to the alleged intimidation?

STATEMENT

Indictment

Petitioner Jarvis Gibbs was indicted by the Kershaw County Grand Jury on October 8, 2008 for the offenses of Kidnapping and Use of a Firearm during a Violent Crime. App. 719-721. On November 11, 2009, the Kershaw County Grand Jury indicted Petitioner for Entering a Bank with Intent to Steal. App. 723-724.

Trial

On November 17, 2009, Petitioner's case was called for trial before the Honorable G. Thomas Cooper, and a jury. App. 1. Samuel Ogburn represented Petitioner. Ronald W. Moak and Lir P. Derieg represented the State.

The jury found Petitioner guilty on all three charges. App. 4532, ll. 5-14. Judge Cooper sentenced Petitioner to eighteen years imprisonment for Kidnapping and Entering a Bank with Intent to Steal and to five years imprisonment for Use of a Firearm during a Violent Crime. App. 444, ll. 5-17. All sentences were order to be served concurrently. *Id.*

Direct Appeal

The South Carolina Court of Appeals dismissed his appeal in an unpublished opinion filed on November 28, 2011. *State v. Gibbs*, 2011-UP-511 (S.C. Ct. App. Filed November 28, 2011). App. 493.

PCR Application and Evidentiary Hearing

Petitioner filed an application for post-conviction relief (PCR) on March 26, 2012. App. 497. The State filed a return dated June 15, 2012. App. 505. Petitioner amended his application on June 3, 2013 to include allegations of counsel's ineffectiveness for failing to object to claims of

witness intimidation during testimony by State's witness, Arthur Macklin, when there was no evidence connecting Petitioner to the assault in question. App. 514 - App. 517.

An evidentiary hearing was held on June 6, 2013 before the Honorable James R. Barber, III. App. 519. Petitioner was represented by Tara D. Shurling, and Megan E. Harrigan, represented the State. *Id.* Judge Barber denied Petitioner relief by an order filed on January 17, 2014. App. 691.

On February 3, 2014, Petitioner filed a Rule 59(e) Motion to Alter or Amend the Order of Dismissal. App. 707. The State filed a Return on January 31, 2014. App. 712. Judge Barber denied the motion by an order filed February 11, 2014. App. 716.

ARGUMENT

Petitioner's Sixth Amendment rights were violated when counsel failed to object to claims of witness intimidation in testimony by the State's witness and in prosecutors' closing arguments when there was no evidence linking Petitioner to the alleged intimidation.

Relevant Facts

On July 25, 2008 at 10:55 A.M., the First Palmetto Bank branch in Camden was robbed. App. 109, ll. 17 – App. 110, ll. 10. Four tellers were working at the time of the robbery: Melissa Roberts, Leah Bailey, Brenda Fannin, and Keri Gainey. App. 103, ll. 11-22. The robbery lasted less than two minutes with the tellers being forced to put the bank's money in a large black sports bag carried by the robber. App. 115, ll. 1-4. The robber was wearing gloves, a short sleeve white tee-shirt, and a ski mask that completely covered his face. *Id.* at 14-15.

Video surveillance showed the robber was an African-American male, over six (6) feet tall, with no visible tattoos or scars on his exposed arms.[1] App. 117, ll. 19-25; App. 136, ll. 2-5. The robber was observed by Fannin, the drive-through window teller, fleeing the bank on a bicycle. App. 137, ll. 11-12.

By the time police arrived at the bank, a group of locals, including teller Melissa Roberts' husband, were searching the area around the bank for the robber. App. 209, ll. 10 - App. 211, ll. 16. These men located a bicycle lying on the side of a dirt road in the general direction the robber fled. App. 244, ll. 2-22. The bicycle was seized by police. App. 193, ll. 8-15.

Despite multiple vehicles having driven on the dirt road during the posse's search for the robber and despite not having a description of the bicycle involved in the robbery, police concluded that tire tracks around the bicycle indicated that the robber and an accomplice must have abandon the bicycle and fled on a four-wheeler. App. 249, ll. 24 - App. 250, ll. 9.

Later in the afternoon of July 25th, Arthur Macklin, a local resident and drug addict, saw the bicycle in the trunk of a passing police car. Through an attorney, William Tetterton, he contacted police because he believed the bicycle was his. App. 164, ll. 6-10. Macklin told law enforcement that Petitioner had borrowed his bicycle earlier that day. App. 163, ll. 6-18. Macklin also identified a local resident named James Drakeford as having driven by his house on a four-wheeler at an unspecified date and time. App. 177, ll.6-24; App. 181, ll. 20-24.

At trial, Macklin testified that he never saw Petitioner or Drakeford together. *Id.* Around five in the afternoon on the day of the robbery, Petitioner was found sitting on a park bench several miles from the bank and taken into custody by Detective Lee Boan of the Camden Police Department. App. 314, ll. 24 – App. 317, ll. 18. Later, Drakeford was also taken into police custody and, ultimately, charged with conspiracy to commit kidnapping and entering a bank with intent to steal. App. 6, ll. 9-17.

The money was never found. App. 294, ll. 9-14. The mask, the gloves, the duffle bag, and the gun used in the robbery were also never found. App. 293, ll. 23 – App. 294, ll. 25. There were no fingerprints or DNA evidence recovered from the scene. App. 97, ll. 19-24. Four days after the robbery, on July 28, 2008, a local farmer pulled a stolen four-wheeler from a rural pond located on the other side of Camden from the bank. App. 280, ll. 15-21.

Testimony of Arthur Macklin

At trial, Macklin claimed that Petitioner borrowed his bicycle on the day of the robbery. App. 163, ll. 6-18. However, when the State produced the bicycle they had in evidence, Macklin was unable to definitively say that it was his bicycle. App. 169, ll. 5-14; App. 183, ll. 13-24. Macklin further claimed, without objection from defense counsel, that he was assaulted by a group

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[1] Petitioner's arms are heavily tattooed. App. 345, ll. 9-18.

of unknown individuals and seriously injured after being identified by police in a local newspaper article. App. 169, ll. 15 – App. 121, ll. 13.

Specifically, the State asked: "[n]ow when you talked to the police, were you concerned about something . . . . [w]ere you worried about something?" App. 169, ll. 15-16. Macklin, in a rambling response, replied: "[w]hat I'm worried about is my life, is my safety. Something happened . . . I got hurt behind that [*sic*]. After I talked to the detectives, I was knocked out . . . . I was supposed to be killed." App. 170, ll. 1-9.Macklin continued, "some guys jumped on me and knocked me out and they were supposed to shoot and kill me," finally he declared, "[the police] put [my name and the robbery] in the paper and I got hurt behind [*sic*] that." *Id.* at ll. 11 – App. 171, ll. 11.

The prosecution pushed Macklin on a possible link between the assault and the robbery inquiring, "***And you got assaulted because of that***?" App. 171, ll. 12-13. (*emphasis added*). Macklin replied affirmatively. *Id.* Macklin then backtracked, stating that he did not know the identity of his assailants. *Id.* at ll. 22-24. Moreover, the unknown assailants did not say anything to him or otherwise provide a motive for their attack. App. 171, ll. 19 – App. 172, ll. 7.

Macklin then attempted to erroneously invoke the Fifth Amendment in an effort to avoid testifying. App. 173, ll. 18-19. Following a brief examination outside the presence of the jury, Macklin testified that he saw Drakeford, who received a pre-trial continuance, on a four wheeler the day of robbery, but denied that there was anyone with Drakeford. App. 177, ll. 13 – App. 181, ll. 24. In an effort to more closely link Petitioner with the appearance of the robber, who used a large black sports bag to carry the stolen money, the State asked Macklin if he told police "anything about the black bag?" Macklin responded he did not. *Id.*

Stymied in its desired line of questioning, the State resorted to generating more testimony on Macklin's fear, eliciting from him that, "I don't live in my neighborhood around my house because I don't know what might happen." App. 181, ll. 24 – App. 182, ll. 13. The State then immediately pivoted asking Macklin if he knew and recognized Petitioner. *Id.* Having reemphasized his fear, the State then led a shaken Macklin into a positive identification of the bicycle, contradicting his prior uncertainty, and ended its examination. App. 182, ll. 16-25.

On cross-examination, Macklin regained his composure, reasserting that he was unsure that the bicycle presented at trial was the one that Petitioner borrowed. App. 183, ll. 14 – App. 185, ll. 6. Macklin reflected that he has had many different bicycles over the years, that his residence frequently had many different bicycles stored there, and that Petitioner had in fact originally asked to borrow his brother's bicycle. *Id.*

Macklin further conceded that he was never contacted or threatened by Petitioner. App. 184, ll. 13-24. In a brief redirect examination, Macklin waffled again, stating that he thought the bicycle might be his. App. 185, ll. 9 – App. 186, ll. 10. In an equally brief re-cross, Macklin admitted that he had seen Petitioner since the robbery and Petitioner had not said anything to him. App. 186, ll. 11-18.

Testimony of Melissa Roberts

All of the bank tellers were questioned immediately after the robbery. None of them recognized the masked robber. None of the tellers were able to provide a description of the bicycle the robber escaped on. App. 137, ll. 13-17; App. 218, ll. 21-24; App. 224, ll. 16-19.

On the Monday following the robbery, Detective Boan returned to the bank and told the tellers that Petitioner had been arrested. App. 290, ll. 6-20. Teller Melissa Roberts ,who is white, then claimed to remember Petitioner from them having briefly attended the same joint high school-

middle school; over fifteen years before the robbery. App. 133 ll. 21 – App. 134, ll. 15. Roberts also averred that she knew Petitioner because her family owned a restaurant/store that Petitioner's family patronized. App. 134, ll. 15-23. Peculiarly, given her apparent certainty, Roberts' statement to police on the day of the robbery does not mention Petitioner. App. 139, ll. 13-14.

Roberts claimed her identification of the masked robber was based on her personal knowledge of the shape of Petitioner's head and his "mannerisms." App. 126, ll. 22-25; App. 132, ll. 15-20. In contrast to Boan's testimony, Roberts asserted that she identified Petitioner before speaking with Boan on Monday. App. 132, ll. 1-20. However, under cross-examination, she conceded she knew by Monday, that Petitioner had been arrested for the robbery.[2] App. 138, ll. 15-25.

Roberts believed that she had last seen Petitioner at the restaurant/store approximately five years before the robbery. App. 135, ll. 2. At the PCR hearing, Petitioner's sister testified that her family never went to the store because it was full of racist decorations and still advertised that it was for "whites only." App. 630, ll. 10-24.

Finally, Roberts testified that she believed that at an unspecified time prior to the robbery, Petitioner briefly visited the bank. App. 120, ll. 16 – App. 122, ll. 15.[3] She did not give a date for his

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[2] Boan testified at trial that he did not show Roberts a line-up because Roberts' told him she knew Petitioner, suggesting that Boan told Roberts about Petitioner's arrest before Roberts made her identification. App. 296, ll. 9-22. Petitioner testified that he had never visited the store. App. 315, ll. 14-19.

[3] The State put into evidence the video surveillance footage of the robbery. App. 120, ll. 20-24. Roberts testified that the robber looked in the direction of the branch manager's office and that during Petitioner's alleged earlier visit, she believed he stood in roughly the same area; this contributed to her belief that Petitioner was the bank robber. App. 129, ll. 5 – App. 131, ll. 4. No video surveillance of this alleged earlier visit was produced.

alleged visit or a provided timeframe for how many days, weeks, months or years the visit occurred before the robbery.

Other Evidence

The State also called Roberts' husband, Chad. Mr. Roberts claimed that while driving to the bank he passed a man sitting on a four-wheeler. App. 210, ll. 1-18. He arrived at the bank as the masked robber was leaving. App. 209, ll. 10-19. Mr. Roberts gave chase, unsuccessfully. Confusingly, Mr. Roberts first stated that he did not see the four-wheeler after the robbery; only to later testify while still on direct examination, that he in fact did see the four wheeler after the robbery. App. 211, ll. 13-25. This contradiction was left unaddressed by the State and unchallenged by the defense.

Further, the State relied on the testimony of a jailhouse informer, Chad Moore. According to Moore, Petitioner confessed the entire crime to him. App. 231, ll. 8 – App. 232, ll. 10. Moore recollected that Petitioner was apparently concerned about being identified video surveillance by his distinctively tattooed arms. App. 232, ll. 8-25.

On cross-examination, Moore – without acknowledging that he had been an informer before – denied that he had already informed on several other defendants alleging, "no, not several." App. 237, ll. 2. Moore also denied being offered a deal on his pending bank robbery charges despite police reports indicating that he asked to be put in Petitioner's cell. *Id.* at ll. 3-17. Moore's past criminal record, in addition the pending burglary charge, included convictions for criminal sexual conduct, strong armed robbery, and first degree burglary. App. 236, ll. 4-14.

Closing Argument

The State used Macklin's fear and the prior assault in its final closing argument to allege that Macklin's testimony was evidence of Petitioner's guilty mindset and should be afforded significant weight despite its inconsistencies. Assistant Solicitor Moak stated.

> You know, [Macklin] actually tried to take the Fifth up here on a couple of questions. You know, he did not want to be here. Once we got done with him, you know, he essentially told the same thing to you that he told to [the detective] back on July 25, 2008. ***And what happened because he talked to [the detective] and told him the story? He got beat up. He got knocked out. He said his whole face was swole [sic] up. He didn't want to be here. He didn't wanted [sic] to get hurt. He didn't [want] to get killed.***
>
> ***But guess what? He was here. He told the same story.*** He even said -- if you remember, I asked him, if he wanted to be here, do remember what he said the Sheriff's Department finally caught up with him to serve him that subpoena to be here? 1:30 Monday morning. ***You know, he was trying not to get up there.***
>
> But what did he do? He told the truth. He told the same story, you know. Is the statement consistent? It is the same thing that he told Lee Boan back on July 25th, 2008. That is consistent.... The truth is the truth. And I submit Arthur Macklin was telling the truth.

App. 403, ll. 18 – App. 404, ll. 20 (*emphasis added*). As with Macklin's testimony, the solicitor's argument passed without objection from counsel.

PCR and Evidentiary Hearing

At the evidentiary hearing, counsel was unable recall if he considered objecting to Macklin's testimony or the prosecutor's use of that testimony in closing argument. App. 542, ll. 19 – App. 548, ll. 8. Counsel conceded that the testimony and comments in closing arguments invited the jury to conclude, without any supporting evidence, that Petitioner had beaten Macklin to keep him from cooperating with law enforcement. *Id.*

Counsel testified that his strategy was to highlight Macklin's drug abuse and the inconsistencies in his testimony on cross-examination. App. 543, ll. 3-5. However, counsel admitted that he did not know if the jurors were aware of Macklin's reputation as a crack-head and conceded that he never considered objecting to Macklin's testimony about the assault because he believed "everybody thought [Macklin] was not in his right mind." *Id.* at 3-16. Further, counsel claimed that he believed Macklin's testimony did not harm Petitioner because Macklin struggled to identify the bicycle as his. *Id.* at 18-19.

When asked what relevance Macklin's assault and continued fear of bodily injury had on the case, counsel responded, "[y]ou'd have to ask the solicitor on that." App.543, ll. 18-24. Counsel also believed that he adequately discredited Macklin's fears by getting him to admit that he did not know his assailants and that Petitioner had not threatened him. App. 609, ll. 7-14.

Order of Dismissal

In denying Petitioner's application, the PCR court concluded that defense counsel was not ineffective in failing to object to Macklin's testimony regarding the assault. App. 701 – App. 702. Without citing to any pertinent case law, the PCR court summarily accepted defense counsel's contention that because Macklin could not identify Petitioner as an assailant, any testimony on the assault was "innocuous". *Id.*

Discussion

Where ineffective assistance of counsel is alleged as a ground for relief, Petitioner 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 (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set. *Id.* First, Petitioner must show that counsel's performance was deficient.

Under this prong, the proper measure of counsel's performance is whether the attorney provided representation within the range of competence required in criminal cases; courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989).

The second prong of the *Strickland* test requires a showing that the deficient performance of counsel prejudiced Petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[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*, 466 U.S. at 694); see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficient Performance

Counsel's representation was deficient because his failure to object to Macklin's testimony regarding the prior assault and his fear of testifying allowed the State to improperly imply, without any supporting evidence, that Petitioner had intimidated Macklin in an effort to prevent his testimony. *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510 (1994)(failure of defense counsel to object to prejudicial statements by prosecutor suggesting defendant threatened witnesses to testify in his favor constituted ineffective assistance of counsel); *see also Strickland*, 466 U.S. at 694; *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

To be admissible, allegations of witness intimidation must be connected to the defendant. *State v. Rogers*, 96 S.C. 350, 80 S.E. 620 (1914) (unsigned letter sent to witness with a coffin drawn on it was meant to intimidate but was inadmissible because state could not meet its burden of establishing the defendant as the source of the letter). The reasonable inference drawn from witness intimidation is that the testimony sought to be silenced would be damaging to the defendant. *State v. Edwards*, 383 S.C. 66, 70, 678 S.E.2d 405, 407 (2009) (courts should adopt a cautious approach for the admissibility of witness intimidation evidence).

Intimidation evidence is so impactful on a jury because it corroborates the allegation that the defendant is the perpetrator and shows consciousness of guilt. *Id.*, 383 S.C. at 72, 678 S.E.2d 405, 408 (*citing United States v. Hayden*, 85 F.3d 153, 159 (4th Cir. 1996)). Establishing that the defendant is the source of the intimidation is essential as it provides the necessary reliability for admissibility. *Edwards*, 383 S.C. at 73, 678 S.E.2d 405, 408.

In the context of a PCR action, this Court's decision in *Mincey v. State*, provides a framework for granting Petitioner's relief. 314 S.C. 355, 444 S.E.2d 510. In *Mincey*, this Court held that counsel's failure to object to prosecutor's comments in closing argument suggesting that a

defense witness testified falsely because of intimidation by the defendant constituted ineffective assistance of counsel. *Id.* 314 S.C. 355, 357-358, 444 S.E.2d 510, 511.

The *Mincey* court found that the testimony of the two witnesses was crucial to the defense and the State presented no evidence that defendant intimidated the witnesses. *Id.* Thus, the prosecution's unsupported statement regarding intimidation exceeded the evidence presented at trial and improperly undercut the defense. *Id.* The failure of counsel to object constituted deficient performance and prejudiced the defendant necessitating a new trial. *Id.*

In the present case, counsel's failure to object to Macklin's testimony regarding his fears and the prior assault constituted admittedly deficient performance as does counsel's failure to object solicitor's comments in closing argument referencing the same. As in *Rogers, Edwards,* and *Mincey*, the State presented no evidence linking Petitioner to Macklin's fears or to the assault. Nevertheless, the State argued in its closing that, as a result of speaking with the police and identifying Petitioner, Macklin was beaten. App. 403, ll. 18 – App. 404, ll. 20.

The State's desired inference was that Macklin's testimony should be given significant weight because Petitioner tried to stop him from testifying. *Id.* An additional and especially important inference for the State was, that any inconsistencies in Macklin's testimony were the result of the alleged intimidation and were unrelated to Macklin's drug use, faulty memory, or police manipulation. *Id.* Counsel candidly admitted that the State never produced any evidence linking Petitioner to the assault on Macklin. App. 609, ll. 8-20.

Counsel believed that Macklin was not a credible witness because of his past drug use and his inconsistent testimony. *Id.* While counsel believed Macklin was a flawed witness, he was unable to articulate a valid trial strategy behind failing to object to the poisonous and clearly inadmissible testimony on Macklin's fears and the assault. App. 543, ll. 20 – App. 544, ll. 4; App. 546, ll. 23 –

App. 547, ll. 11-16; *see Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness); *see also Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (finding PCR Petitioner showed uncalled witness would have made a difference in trial because it would have cast doubt on victim's identification of Petitioner).

Accordingly, the PCR court erred in finding that counsel was not deficient for failing to object to inadmissible testimony, and prosecution's related closing argument, regarding allegations of witness intimidation by Petitioner as they were unsupported by any evidence produced at trial.

Prejudice

Petitioner was prejudiced by counsel's deficient performance because Macklin was a crucial, but weak link between Petitioner and the bank robbery and his testimony on his fears and the earlier assault bolstered his credibility. *Butler, 286 S.C. at 442, 334 S.E.2d at 814.* Macklin was unable to conclusively identify the bicycle seized by the police as his, but the State was able to rationalize his equivocation as being the result of intimidation and violence by Petitioner. App. 403, ll. 18 – App. 404, ll. 20.

Connecting the bicycle in police custody to Macklin and then by extension to Petitioner was central to the State's case. Petitioner borrowed a bicycle from Macklin on the day of the bank robbery and the bank robber fled the bank on a bicycle. App. 196, ll. 21-23. A bicycle was found on a dirt road some distance from the bank. App. 247, ll. 1-20. Despite multiple cars having been driven over the dirt road in the time between the robbery and the bicycle's discovery, police claimed that four-wheeler tracks and a matching sneaker pattern were found next to the bicycle. App. 250, ll. 24 – App. 251, ll. 9.

The State obviously anticipated that Macklin's testimony would link Petitioner, the bicycle in police custody, and the four-wheeler. Macklin initially believed the bicycle in the police case was his, but later doubted this identification. App. 167, ll. 16-20. Macklin also denied seeing anyone else on the four wheeler with Drakeford, denied ever seeing Petitioner and Drakeford together on the day of the robbery, and denied seeing Petitioner with a black sports bag. App. 204, ll. 20-25.

Looking at Macklin's testimony as a whole; whenever he gave an answer that the State did not expect or that was unhelpful to their theory of the case, the assistant solicitor circled back to the assault and Macklin's fear of testifying. This is the poisonous inference at work. This is why this Court's decisions rightly require that the State have evidence linking the defendant to the intimidation. App. 404, ll. 14-20; *Edwards*, 383 S.C. at 70, 678 S.E.2d at 407.

For this reason, counsel's cross-examination of Macklin on the unknown identity of the assailants and Macklin's lack of contact with Petitioner failed to adequately protect Petitioner from the prejudice of Macklin's statements. Testimony that a crucial, but unreliable, state's witness was beaten after talking with police cannot be "unheard" by the jury. *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510. Only a contemporaneous objection could have prevented the unfairly prejudicial witness intimidation testimony - never linked to Petitioner - from being heard by the jury in the first instance.

Had defense counsel objected, evidence of the assault would not have been admissible because the State had no evidence of Petitioner's involvement. *Rogers*, 96 S.C. 350, 80 S.E. 620. As the PCR court noted in its Order of Dismissal, Macklin stated that he had no idea who assaulted him and the assailants provided no hint as to a motive, but Macklin nevertheless clearly associated the assault with the bank robbery. App. 701. To the extent that Macklin denied Petitioner threatened him, the State's closing argument was even more unfairly prejudicial as it went beyond the evidence

presented at trial and drove home to the jury the insinuation that Petitioner had arranged the assault. App. 403, ll. 18 – App. 404, ll. 20.

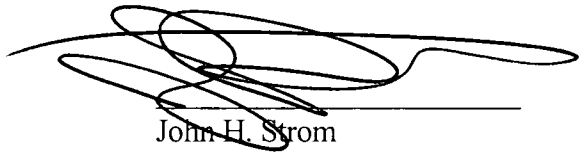
Counsel's failure to object to Macklin's clearly inadmissible testimony and the related statements in closing argument, prejudiced Petitioner and "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "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 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

CONCLUSION

For the reason set forth herein, Petitioner Jarvis Gibbs respectfully requests this Court to grant post-conviction relief and hold that Petitioner's Sixth Amendment rights were violated when defense counsel failed to object to claims of witness intimidation in testimony by the State's witness and in prosecutors' closing arguments when there was no evidence linking Petitioner to the alleged intimidation.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of September, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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JARVIS GIBBS,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000447

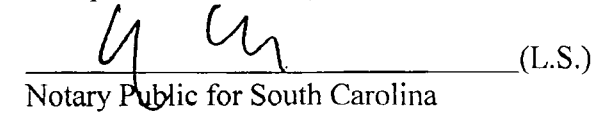
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Megan Harrigan, Esquire, this 4th day of September, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of September, 2015.



Notary Public for South Carolina
My Commission Expires: May 12, 2025