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**SC SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Barnwell County

Tanya A. Gee, Circuit Court Judge  
\_\_\_\_\_

KEVIN BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001659  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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### **ISSUE PRESENTED**

Petitioner's Sixth Amendment rights to the effective assistance of counsel were violated where the PCR court erroneously ruled that defense counsel had no basis for requesting a mistrial because of the improper testimony of School Resource Officer Brenda O'Berry, whom the solicitor repeatedly tried to have identify Petitioner in surveillance video of an armed robbery, when counsel's first objection came after O'Berry had already stated that she knew Petitioner, had reviewed the video surveillance, and was able to identify one person in the video; and where trial counsel failed to request that the foundation for O'Berry's identification be established outside the presence of the jury.

## STATEMENT

In the early morning hours of July 21, 2011, the Jim Bo's gas station in Barnwell, South Carolina, was robbed by four masked and gloved men of unknown race, age, and size. App. 119, l. 19 - 121, l. 16. The robbery lasted only a few seconds. Store clerk Dona Corell was unable to provide a description of the robbers to law enforcement and could not recall which way the group fled once they completed the robbery. *Id.* Corell remembered that one of the group had pointed a revolver at her during the robbery. App. 118, l. 6 - 119, l. 7.

The money was never recovered and the police initially had no investigative leads. Four days after the robbery, Rodney Jenkins, a cousin of one of Petitioner's co-defendants, claimed to police that he "like, four" were people walking the vicinity of Jim Bo's sometime before eleven on the night before the robbery. App. 129, l. 17 - 133, l. 14. Jenkins identified three of them: Petitioner, Jamaal Riley, and his cousin, Roosevelt Workman. *Id.*

Jenkins alleged at trial that the group did not tell him anything about the robbery, but that Workman was carrying a revolver. *Id.* Based on rumors in the community, Jermaine Priester was picked-up by law enforcement and interrogated about a series of unrelated robberies in the area. Priester denied any involvement. However, after being arrested for burglary a few weeks after the robbery, he provided police information on the Jim Bo's robbery and others, but maintained that he was not involved. App. 223, ll. 3-19.

Police continued to interrogate Priester, who, after retaining counsel, eventually alleged that he served as the look-out in the Jim Bo's robbery. App. 209, l. 4 - 212, l. 24. He identified Petitioner, Riley and Workman as the other participants in the robbery. *Id.*

## **Indictment**

On January 3, 2012, Petitioner was indicted by the Barnwell County Grand Jury for armed robbery, kidnapping, and conspiracy. App. 445 - 452. Charlie J. Johnson (“defense counsel”) represented him. Assistant Solicitors Susanna M. Ringler and Jeffery A. Slocum, Jr. represented the State.

## **Trial**

Petitioner, Workman, and Riley proceeded to a joint trial on September 4-6, 2012 before the Honorable Clifton Newman and a jury. Martha M. Rivers represented Workman and Robert J. Harte represented Riley.

Defense counsel did not move for a severance of Petitioner’s trial. There was no physical evidence linking Petitioner or any of his co-defendants to the robbery and the store clerk was unable to identify the robbers. App. 106, ll. 6-18; App. 120, l. 3 - 125, l. 23. The State’s key witnesses were Priester, Jenkins, and School Resource Officer Brenda O’Berry, whose identification of Petitioner on the video surveillance the State hoped would significantly strengthen their case as both Jenkins and Priester had serious credibility problems.

### *Trial Testimony of Rodney Jenkins*

Jenkins testified on direct examination that he was walking in the vicinity of Jim Bo’s after leaving his friend’s house. He was on the way to the nursing home across town where his mother worked. App. 129, ll. 3-24. As he did not have a car he was supposed to meet his mother for a ride back to their house when her shift ended. *Id.*

Jenkins claimed that he saw Petitioner, Workman, and two others walking “on the road by Jim Bo’s.” App. 129, l. 23 - 133, l. 15. Despite being a life-long Barnwell resident and having

walked that road many times while on the way to his mother's work, Jenkins did not know the name of the road he supposedly saw the group walking down. App. 134, ll. 10-20.

Jenkins claimed that he briefly spoke with his cousin and saw that the group had two guns with them. App. 131, ll. 1 -25. On cross-examination, Jenkins testified that he did not like his cousin. App. 133, l. 20 - 134, l. 23. He also stated that he must have met them sometime before eleven and he was still on the opposite side of town from her work when he passed the group. App. 134, l. 10 - 136, l. 8.

Jenkins had difficulty explaining how he had happened to run into his cousin and the others on his way to meet his mother given that the Jim Bo's was not on the most direct route her work. *Id.* Curiously, he then admitted that he first heard of the robbery via a police scanner that he was listening to later that morning. App. 137, l. 16 - 138, l. 10.

*Trial Testimony of Brenda O'Berry*

School Resource Officer Brenda O'Berry testified that, while she was not otherwise involved in the investigation, she had reviewed the video surveillance footage of the robbery. App. 181, ll. 3-20. Without objection from counsel, O'Berry stated that she recognized one person on the video. *Id.*

Counsel finally objected arguing that the State had failed to lay an adequate foundation for her testimony. App. 182, ll. 2-4. The State responded that they were in the process of laying that foundation. Counsel did not request that the jury be excused until the court ruled her identification was admissible.

O'Berry then stated that she had known Petitioner for most of his life and identified Petitioner sitting in court. App. 182, l. 17 - 183, l. 13. Counsel again objected arguing that an

adequate foundation had not been laid for her identification. *Id.* Counsel stated that the jury should make their own determination as to whether Petitioner was in the video. App. 184, l. 2 - 186; l. 14.

The court sustained the objection. Nevertheless, the State continued to press O’Berry on how she knew Petitioner. O’Berry answered that she had seen him for years in her capacity as a police officer imbedded in local schools. *Id.* Counsel continued to object unsuccessfully to this testimony.

The State then asked O’Berry if she was able to identify someone on the video. In explicably, counsel failed to object until after O’Berry stated that she could. *Id.* Counsel belatedly objected to the testimony and the jury was finally excused so that the admissibility of her identification could be ruled upon. *Id.*

Following additional arguments outside the presence of the jury, the court sustained counsel’s objection because O’Berry’s testimony usurped the role of the jury in determining whether the robber who’s mask briefly fell below his nose was Petitioner. App. 193, ll. 11-19.

Despite O’Berry having already testified that she knew Petitioner and recognized only one person the video footage, counsel did not request that the court strike her testimony. Nor did counsel move for a mistrial or even request a curative instruction. O’Berry was excused shortly thereafter.

*Trial Testimony of Jermaine Priester*

Priester claimed that Workman had approached him about participating in a robbery. App. 202, l. 1 - 203, l. 18. Minimizing his own role, Priester alleged that he had acted as the look-out and had never handled the gun used in the robbery. App. 204, l. 7 - 205, l. 22.

Contrary to Jenkins’ testimony, Priester stated that, while they were waiting for the traffic to clear, the group watched a unknown person pass by them. Priester claimed that the person saw them, but did not stop to talk. App. 206, l. 16 - 207, l. 11. Trying to harmonize his timeline with

Jenkins, Priester averred that the group hid on the roof of an adjacent building for at least two to three hours before walking towards Jim Bo's. App. 208, ll. 12-21.

On cross-examination, Priester equivocated on the number of times that he spoke with law enforcement. App. 219, l. 13 - 229, l. 23. He also seemed unwilling or unable to remember how many different versions of events he had told police. *Id.* Priester admitted that he had first told the version of events he testified to at trial after he had been arrested for an unrelated burglary and retained counsel. *Id.*

He recalled that he had lied about his involvement in the Jim Bo's robbery at least once, but appeared to confuse his lies to police about the Jim Bo's robbery with other area robberies that he was questioned about and denied involvement in. *Id.* Priester claimed that he simply did not remember many of his earlier interviews with law enforcement. App. 224, ll. 2-23.

Priester eventually resorted to simply repeating that he had not been promised any benefits or special treatment for his testimony and that he was telling the truth on this one occasion because he felt guilty about his participation. App. 228, l. 24 - 241, l. 14.

Following just under six hours of deliberations, the jury found Petitioner and his co-defendants guilty on all counts. App. 328, l. 2 - 332, l. 10. Judge Manning sentenced Petitioner to fifteen years imprisonment for armed robbery, five years imprisonment for possession of a weapon during the commission of a violent crime, and ten years for kidnapping, and five years for conspiracy. All sentences were ordered to be served concurrent. App. 355, ll. 3-11.

### **PCR Application**

On April 4, 2014, Petitioner filed an application for post-conviction relief alleging that counsel was ineffective for failing to make a motion for mistrial after Brenda O'Berry's testimony. App. 375 - 382. The State filed a Return on August 22, 2014. App. 383 - 389.

On May 18, 2015, an evidentiary hearing was held before the Honorable Tanya A. Gee. Lance S. Boozer represented Petitioner and Assistant Attorney General Daniel F. Gourley represented the State. Petitioner and defense counsel both testified.

Hearing Testimony of Petitioner

Petitioner testified that the State used O’Berry to identify him on the video footage from the robbery. App. 406, l. 1 - 408, l. 23. He recalled that, by the time counsel had objected, O’Berry had already stated that she knew Petitioner and that she could only identify one person in the video. *Id.*

The obvious inference from her testimony was that she had identified Petitioner as one of the robbers. *Id.* Petitioner lamented that his attorney’s successful objections were worthless as O’Berry had “already testified in front of the jury. The jury already heard” her identification. App. 413, ll. 13-14.

Hearing Testimony of Defense Counsel

In contrast, counsel boasted that “I had objected almost to every question that was asked of [O’Berry] and I won my objections. At the end of that, she really wasn’t able to get anything in. And I think I kind of made the solicitor’s office look a little silly . . .” App. 417, ll. 21-25.

Oddly, given he had just boasted that he had successfully blocked O’Berry from testifying, counsel stated that he believed a curative instruction would have drawn additional attention to her testimony. App. 418, ll. 2-25. On cross-examination, counsel claimed that he had prevented O’Berry from stating who she recognized on the video. App. 426, l. 20 - 427, l. 18.

Counsel then reluctantly conceded that O’Berry had been able to testify before the jury that she knew Petitioner and recognized one person on the video. *Id.* Counsel admitted that the jury, despite his tremendously successful objections, was likely able to “put those pieces together” and conclude that O’Berry identified Petitioner as one of the robbers. *Id.* Counsel bemusedly repeated

that he never considered moving for a mistrial or a corrective instruction because he had won all of his objections. *Id.*

Counsel reiterated that any instructions from the bench would have drawn attention to O’Berry’s testimony, which he now conceded had identified Petitioner as a participant. App. 428, ll. 3-23. Counsel claimed that he believed that Petitioner received a good jury, but noted, “I found that over all those years and experience that I’ve had, you never know what a jury is going to do.” App. 430, ll. 11-15.

### **Order of Dismissal**

The PCR court denied Petitioner’s application in a written order filed June 30, 2015. In denying Petitioner relief, the court concluded that counsel was not ineffective for failing to request a mistrial regarding O’Berry’s testimony. App. 440 - 441.

The court noted that counsel had “continuously objected to the State’s attempt to have Brenda O’Berry identify [Petitioner] in the surveillance video, and these objections were sustained.” *Id.* Contrary to O’Berry’s testimony at trial, the court ruled that since O’Berry had never identified Petitioner to the jury, defense counsel had no grounds for requesting a mistrial. *Id.*

Accordingly, the PCR court found that Petitioner had not presented sufficient evidence to prove that counsel was ineffective. App. 441.

## ARGUMENT

**Petitioner's Sixth Amendment rights to the effective assistance of counsel were violated where the PCR court erroneously ruled that defense counsel had no basis for requesting a mistrial because of the improper testimony of School Resource Officer Brenda O'Berry, whom the solicitor repeatedly tried to have identify Petitioner in surveillance video of an armed robbery, when counsel's first objection came after O'Berry had already stated that she knew Petitioner, had reviewed the video surveillance, and was able to identify one person in the video; and where trial counsel failed to request that the foundation for O'Berry's identification be established outside the presence of the jury**

The State's case against Petitioner was a credibility battle. There was no physical evidence supporting the allegations against Petitioner. The State totally reliant on the testimony of alleged co-conspirator Jermaine Priester, who had admittedly lied to law enforcement on at least four previous occasions about his involvement in this and other robberies, and low quality video surveillance footage from the gas station three masked men, which for a few brief seconds, showed one of the robber's masks dropping below his nose. App. 189, l. 4 - 190, l. 14.

The State attempted to use School Resource Officer O'Berry to identify that robber as Petitioner. *Id.* While defense counsel objected to O'Berry's identification, she was nonetheless able to testify in front of the jury that: (1) she knew Petitioner, (2) she had reviewed the video surveillance footage from the robbery, and (3) she recognized one of the robbers. App. 181, l. 13 - 186, l. 15. The obvious implication from O'Berry's testimony was that she had identified Petitioner as the robber.

Counsel may have won a battle with his objections, but he lost the war by failing to request that the foundation for O'Berry's identification be established outside of the presence of the jury and by failing to move for a mistrial or corrective instruction after the Court ruled her identification inadmissible.

At the PCR hearing, counsel erroneously believed that he had prevented O'Berry from identifying Petitioner. In reality, the State had been able to present the key portions of her

testimony to the jury. If any party had drawn the jury's attention to O'Berry's testimony defense counsel did with his incessant objections. As counsel unreasonably believed that he had "won" his objections, counsel did not think that there was a basis for requesting a mistrial or even a curative instruction. App. 416, l. 16 - 418, l. 7.

Accordingly, Counsel failed to articulate an objectively reasonable trial strategy supporting his decision not to move for a mistrial. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness").

Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 440 - 441; *See Strickland v. Washington*, 466 U.S. 668 (1984) (the standard for ineffective assistance of counsel claims requires an applicant to show that counsel's performance was deficient and that the deficiency prejudiced the outcome of the proceedings).

## **Discussion**

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant 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. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted).

Thus, where ineffective assistance of counsel is alleged as a ground for PCR 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.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

### **Deficient Performance**

In this case, trial counsel’s performance was deficient, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. Specifically, although trial counsel has the authority to make certain tactical decisions involving trial strategy without the defendant’s consent, trial counsel’s professed strategy was invalid under an objective standard of reasonableness. *See Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313.

The solicitor was able to present the only important portion of O’Berry’s testimony to the jury because counsel failed to request that the State establish the foundation and admissibility of her identification outside the presence of the jury. App. 181, l. 13 - 194, l. 10. Thus, under the guise of laying a foundation, the State was able to convey to the jury that O’Berry had identified Petitioner as one of the robbers.

By the time the trial court ruled for the defense, it was too late. It was readily apparent that the solicitor knew that O’Berry’s identification was unlikely to be admissible and that she made a tactical decision to expand foundational questions to such an extent that O’Berry’s actual identification would have been simply conclusory. *Id.* Thus, contrary to the factual findings of the PCR court, the State was able to convey O’Berry’s identification to the jury. App. 140- 141; *Cf: Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000) (*objectively reasonable trial strategy not seek a curative instruction when counsel has successfully kept out the objectionable evidence*) (*emphasis added*).

Counsel, secure in the erroneous belief that he had “won” the issue, never even considered moving for a mistrial or seeking a curative instruction, which would have provided the jury with a valuable corrective from the court. App. 181, l. 13 - 194, l. 10. Counsel was totally unaware of the problem and, thus, could not have had a strategic reason for failing to move for a mistrial. *See Strickland*, 466 U.S. at 687-688.

### **Prejudice**

Petitioner was prejudiced because trial counsel’s deficient performance “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). Petitioner’s case was a credibility battle over whether jurors would believe Petitioner’s former co-defendant despite his multiple versions of events and obvious motivation to lie. *Roberts v. State*, 361 S.C. 1, 602 S.E.2d 768 (2004) (counsel’s failure to impeach a key witness prejudiced applicant in a close case where the State was reliant on a jailhouse snitch).

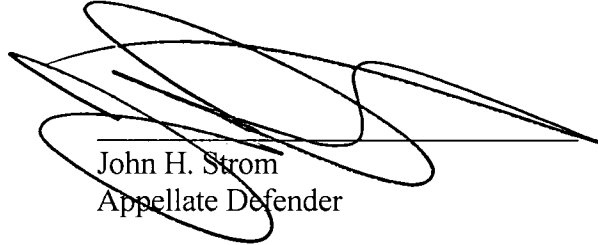
O’Berry’s identification was designed to capitalize on her credibility as a longtime school resource officer. Among the important state witnesses, she was the only one without any obvious motive to lie. Her clearly inadmissible testimony bolstered Priester’s story and greatly strengthened the State’s case against Petitioner. *Holman v. State*, 381 S.C. 491, 674 S.E.2d 171 (2009) (failure to object to the admission of a handgun which was irrelevant to the charged offenses was ineffective and undermined the outcome of applicant’s trial).

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” App. 440 - 441; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

**CONCLUSION**

Based on the foregoing reason, Petitioner Kevin Brown respectfully requests that this Court grant his Petition for Writ of Certiorari to allow a full briefing on this issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line. The signature is stylized and somewhat illegible due to the cursive nature of the handwriting.

John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of March, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Barnwell County  
Tanya A. Gee, Circuit Court Judge

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KEVIN BROWN,

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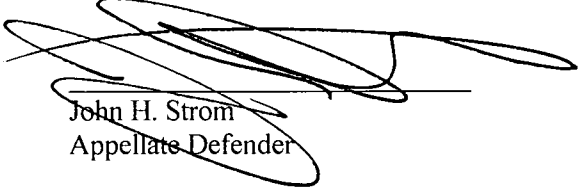
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CERTIFICATE OF SERVICE

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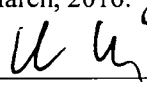
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire this 25th day of March, 2016.



John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day  
of March, 2016.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: May 12, 2025.