

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

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Appellate Case No. 2016-000413

DONALD ALTMAN,

**RECEIVED**

FEB 27 2017

Petitioner,  
S.C. SUPREME COURT

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

- I. Trial counsel erred in failing to enter a contemporaneous objection to the eyewitness' testimony regarding her identification of Petitioner as the perpetrator after police showed her a single photograph of Petitioner because this was the equivalent of an unduly suggestive show-up identification, which ultimately yielded a misidentification in the case, particularly since Petitioner's defense was that he was never at the crime scene on the day in question and more importantly, that he had a twin brother who looked like him and another brother who looked more like him than the twin brother.

## STATEMENT OF THE CASE

Donald Altman, ("Petitioner") was indicted at the July 2011 term of the York County Grand Jury for Altering or Possessing an Altered License Plate (2011-GS-46-1973), and four counts of Possession of Stolen Goods (2011-GS-46-1974, -1975, -1976, and -1977). Petitioner was subsequently indicted at the August 2010 term of the York County Grand Jury for Shoplifting, third or subsequent offense (2010-GS-46-2900). He was represented by Erik Delaney, Esquire. On July 26, 2011, Petitioner proceeded to a jury trial, pursuant to which he was convicted of all charges as indicted. The Honorable John C. Hayes, III sentenced Petitioner to confinement for concurrent terms of ten years for three counts of Possession of Stolen Goods; ten years for Shoplifting, and five years for Altering or Possessing an Altered License Plate. Judge Hayes also sentenced Petitioner to a consecutive term of ten years for the remaining count of Possession of Stolen Goods.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence by an unpublished opinion. State v. Altman, Op. No. 2013-UP-336 (filed August 7, 2013).

On August 22, 2013, Petitioner filed an application for post-conviction relief. Respondent made its return on December 3, 2013. An evidentiary hearing into the matter was convened on November 19, 2014, at the Moss Justice Center in York, South Carolina before the Honorable Alison Lee. Petitioner was present at the hearing and represented by Leah Moody, Esquire. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Petitioner's trial counsel, Erik Delaney, Esquire ("Counsel") also testified. By an Order of Dismissal signed

January 12, 2016 and filed January 21, 2016, the PCR Court denied and dismissed Petitioner's application with prejudice.

Petitioner filed a timely notice of appeal. The Petition for Writ of Certiorari was submitted October 10, 2016.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

Petitioner argues that the PCR Court erred in failing to find Petitioner's trial counsel ineffective where trial counsel failed to enter a contemporaneous objection to an eyewitness' testimony regarding her identification of Petitioner.

### Relevant Law

In a PCR action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the 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, 2064 (1984); Butler, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

- I. The PCR Court correctly ruled that Petitioner's counsel was not ineffective for failing to object to the eyewitness' testimony regarding her identification of Petitioner because the identification was reliable due to the eyewitness being very familiar with Petitioner based on prior experiences.**

How the Issue Was Raised

At trial, the State called Michelle Williams, the manager of the Family Dollar Store in Rock Hill, to testify regarding Petitioner's shoplifting on May 10, 2010. She testified that she saw a male conceal beef jerky in his pockets and leave the store without paying. App. 78, ll. 13-21. She testified that she had seen this person in her store in prior days before and recognized him. App. 78, l. 25 – 79, l. 3. Williams testified that she followed him outside and got his car's tag number. App. 79, ll. 6-8. She testified that she was as close as twelve to thirteen feet from Petitioner while she was near him. App. 79, ll. 23-25. She then identified Petitioner in the courtroom as the person who had shoplifting from her store. App. 80, l. 23 – 81, l. 4.

Earlier in the trial, Officer Ryan Thomas testified that he had never shown any type of photo lineup to Williams. App. 75, ll. 2-4. He also testified that Williams told him that she was "very familiar with [Petitioner] minus his name" and had seen him multiple times before. App. 72, ll. 3-4.

During Williams' cross-examination, Counsel asked Williams if police ever showed her a photo lineup of suspects. App. 84, ll. 2-3. In response to Counsel's question, Williams testified that Officer Thomas did not show her a multi-photo lineup but showed her one picture of Petitioner, and that she then identified Petitioner as the person who shoplifted her store. App. 84, l. 4 – 85, l. 4.

After the defense rested, Williams was recalled by the State in reply and testified that prior to the incident in question, she had seen Petitioner "probably twenty times or so" in her

store. App. 118, ll. 8-12. She testified that the reason she remembered Petitioner so well is because a week or two before the incident, Petitioner and his girlfriend (who usually came in the store separately) came in the store together. App. 118, ll. 17-19. Williams testified that the girlfriend asked to use the restroom, which was located in the stock room, and went out the back door which triggered the store's alarm. App. 118, l. 21 – 119, l. 1. Williams testified that she believed they were going to rob her, and approached Petitioner's girlfriend who said she was simply confused. App. 119, ll. 1-6. Williams testified, "So at that point on, I knew when they both came into the store I had to watch them 'cause nobody ever goes out my back door and sounds the alarm. That's why I distinctly remember who [Petitioner] is." App. 119, ll. 6-9. She further testified that she had no doubt that Petitioner was the shoplifter on May 10, 2010, because she "knew she had to watch [Petitioner]" when he came in her store. App. 119, ll. 12-13.

At the close of the State's case, Counsel moved for a directed verdict and argued that the testimony of Williams revealed an overly suggestive one photo identification. App. 96, ll. 9-22. The Trial Court agreed that a single photo is suggestive but found that it "would not affect the reliability in this case because the witness had observed the individual in the past." App. 97, ll. 14-16. During his closing argument, Counsel pointed out the inconsistency between Williams' and Officer Thomas' testimonies regarding the photo lineup.

At the PCR hearing, Counsel testified regarding Williams' identification. He testified that he did not have a reason to request a Neil v. Biggers<sup>1</sup> hearing because he was not aware of any photo identification prior to trial. App. 254, ll. 20-22. Counsel testified that the State was adamant that there was no photo shown, no photo lineup, and no show up identification done by law enforcement. App. 261, l. 23 – 262, l. 5. He testified that without this kind of action by the State, it was difficult to make a good faith objection based on Biggers.

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<sup>1</sup> 409 U.S. 188 (1972).

The PCR Court found that Counsel was not ineffective for failing to simultaneously object to Williams' testimony concerning her photo identification of Petitioner. App. 281.<sup>2</sup> The PCR Court found that Counsel made a directed verdict motion that focused on the suggestiveness of the single-photo procedure once he was aware of Williams' testimony. App. 281. The PCR Court further found that even assuming *arguendo* that Counsel was deficient for not objecting to Williams' testimony, Petitioner cannot show that the result of the trial would have been different. App. 281. The PCR Court found that Williams' testimony regarding the photograph was only a part of her testimony and the State had "produced ample testimony concerning the identification of [Petitioner] outside of Williams' testimony about the alleged photograph." App. 282. The PCR Court concluded that the trial record contained sufficient direct and indirect evidence for the jury to conclude that Petitioner committed the underlying offense. App. 282.

#### Analysis

Petitioner's argument is without merit. There is certainly probative evidence to support the PCR Court's finding that Counsel was not ineffective for failing to make a contemporaneous objection to Williams' testimony concerning her identification of Petitioner. Most notably, there is more than ample evidence to support the PCR Court's ruling that Petitioner was not prejudiced by Counsel's actions because of the other factors of reliability including Williams' familiarity with Petitioner.

"In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification." State v. Liverman, 39.8 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). Under Biggers, courts are required to assess, under the totality of the circumstances, whether an eyewitness identification "resulted

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<sup>2</sup> Although not challenged at this stage, the PCR Court also found that Counsel was not ineffective for failing to request a Neil v. Biggers hearing, as he was not provided with or aware of any photograph. App. 281.

from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Id. In determining the reliability of an identification obtained through an unduly suggestive procedure, the Court considers the following factors: (1) the witness's opportunity to view the defendant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the defendant; (4) the level of certainty exhibited by the witness during the identification procedure; and (5) the length of time between the alleged criminal action and the identification procedure. See Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

In this case the PCR Court correctly held, as did the trial court, that there were many factors of reliability that made Williams' identification reliable. Williams had a good opportunity to view Petitioner at the time of the incident as she testified that she saw him put beef jerky in his pockets and leave the store, followed him out the store to his car, and was as close as twelve to thirteen feet from him. App. 78-79. There is evidence that her degree of attention was high because she testified that she distinctly remembered who Petitioner was because she knew she had to watch him when he came in her store based on an incident that occurred a week or two before the shoplifting. App. 119. Williams testified that she had no doubt that Petitioner was the person who shoplifted because she knew she had to watch him. App. 119. There was also ample evidence that Williams was very familiar with Petitioner. She testified that she had seen him "twenty times or so" including the recent incident with Petitioner's girlfriend setting off the store's alarm. App. 118. Officer Thomas also testified that Williams told him that she had seen Petitioner multiple times and was "very familiar" with him. App. 72. Thus, there is a multitude

of probative evidence to support the PCR Court's conclusion that the identification was reliable based on the numerous factors of reliability.

Petitioner argues that Williams' identification was not harmless error because he has a twin brother and another brother who also looks like him. First, Petitioner presented no evidence at the PCR hearing concerning this issue and the only evidence in the record on the issue is Petitioner's own self-serving uncorroborated testimony that his brothers look like him and that the perpetrator "could have been my twin brother." App. 103, ll. 14-16. Additionally, the fact that other individuals may look similar to Petitioner does not change the fact that Williams was adamant in her identification of Petitioner as the shoplifter based on closely viewing him during the incident and her extensive familiarity with Petitioner based on past experiences.

Accordingly, there are many pieces of probative evidence to support the PCR Court's findings that Counsel was not ineffective.

## CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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February 27, 2017

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County  
The Honorable Roger M. Young, Circuit Court Judge

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DONALD ALTMAN,

PETITIONER,

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire  
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This 27<sup>th</sup> day of February, 2017.

  
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