STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Horry County

Paul M. Burch, Circuit Court Judge

RECEIVED

APR 19 2017

S.C. SUPREME COURT

MICHAEL TOMPAI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001820

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

By failing to object to a police officer's testimony regarding his opinions drawn from watching a surveillance video that was not produced at trial, including his opinion that Petitioner looked like the individual in the video, did trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT

On September 9, 2012, Richard Corrado worked as an attendant at a Kangaroo gas station in Horry County. App. 71, ll. 3-7. While "preparing to start the cooler," he noticed a man enter the store and walk toward the restroom. App. 71, ll. 21-24. A minute later, the man walked out of the restroom and re-entered the store. App. 71, l. 25 – App. 72, l. 1; App. 76, ll. 19-25. The man was "toting" a gun. App. 72, l. 1. The man demanded money and cigarettes, which Corrado provided. App. 72, ll. 2-3; App. 73, ll. 21-23. After the man left, Corrado contacted the police. App. 73, ll. 16-17. When the police arrived, Corrado gave a description of the robber to the responding officer. App. 73, ll. 10-17.

Jodi Ridgeway was new to the Horry County Police Department in September 2012. App. 83, ll. 13-14. Ridgeway claimed that "[s]everal weeks prior to the armed robbery," she responded to a residence at a mobile home park "in reference to a civil dispute." App. 84, ll. 8-13.[1] She claimed the dispute was between Petitioner and his roommate over rent money. App. 84, ll. 13-16. According to Ridgeway, Petitioner and his roommate were "very upset" and were "arguing over who owed who money." App. 84, ll. 18-20. Petitioner then "pretty much threw his roommate under the bus and started talking about some armed robbery issues." App. 84, ll. 20-22.[2] When the solicitor asked for more information, Ridgeway stated Petitioner "mentioned

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[1] Ridgeway testified that her encounter with Petitioner may have been "[s]ix or seven weeks" prior to the armed robbery. App. 89, ll. 4-10.

[2] There was no objection to Ridgeway's testimony regarding a prior armed robbery. During the PCR hearing, trial counsel stated he did not realize Ridgeway had testified about the unrelated armed robbery. App. 203, ll. 9-11. Trial counsel stated that if he had heard the testimony, he "would have objected to that, ... would have been standing up screaming." App. 203, ll. 13-14. Ridgeway's testimony was objectionable under Rule 404(b), SCRE, and Rule 403, SCRE. App. 203, ll. 7-19; see also App. 214, l. 24 – App. 215, l. 10. Although the order denying relief summarized trial counsel's testimony thusly, in ruling on the allegations of ineffective assistance of counsel, the order inexplicably omitted this ground for relief. App. 224-226.

armed robbery about his roommate of some sort." App. 84, ll. 23-25. This piqued her interest. App. 85, ll. 1-2.

When the call for the armed robbery of the gas station went out to law enforcement, Ridgeway "got to talking with some of the other guys about it and some other issues that [the police] had been having, and [Ridgeway] felt like [Petitioner] may be a good candidate to interview or talk to." App. 85, ll. 3-10. Ridgeway was so new to the police force at the time, she did not know whom to contact regarding her suspicions. App. 85, ll. 15-20. One of the officers with whom she discussed her hunch was Bradley Boggs. App. 85, ll. 21-23; App. 90, ll. 8-21. Boggs sent an email to the investigator handling the robbery case to inform him of Ridgeway's inklings. App. 85, ll. 21-23.

Seventeen days after the gas station robbery, on September 27, 2012, Brian Wilson showed a photographic line-up to Corrado, which included a photograph of Petitioner based solely upon Ridgeway's hunch. App. 74, ll. 2-9; App. 76, ll. 5-9; App. 92, l. 22 – App. 93, l. 11; App. 106, l. 13 – App. 107, l. 22. Corrado selected the person in position #6 as the person who robbed him. App. 74, ll. 10-15; App. 107, ll. 15-24. Corrado also identified Petitioner in court as the person who robbed him. App. 74, ll. 16-22.

Shortly after the line-up procedure, the police obtained and executed a search warrant on Petitioner's home. The search revealed *no* evidence connecting Petitioner to the gas station robbery. App. 97, ll. 21-23. The police did not find plaid shorts, a red hoodie, or blue shoes, which had been described by Corrado as the ensemble worn by the robber. App. 97, ll. 7-19. Further, the police did not find a gun or ammunition during their search of Petitioner's home. App. 97, ll. 7-19. In fact, *not one thing* was even seized pursuant to the search warrant. App. 97, ll. 19-20.

Trial

On May 30, 2013, a Horry County grand jury indicted Petitioner for armed robbery. App. 229-230. The state, represented by Scott Hucks, called the case to trial before the Honorable Larry B. Hyman, Jr., and a jury on June 10-11, 2013. App. 1. W. Thomas Floyd represented Petitioner. App. 1.

Joseph Cusick

Joseph Cusick with the Horry Police Department was the first officer on the scene of the gas station robbery. App. 79, ll. 16-17; App. 80, ll. 5-7. Cusick and other officers searched the area for a person fitting the description provided from dispatch, which was originally provided by Corrado – "white male, red hoodie, and blue plaid shorts." App. 80, ll. 15-17. The officers were not able to locate anyone matching that description or anything suspicious. App. 80, ll. 17-18. After the failed search, Cusick went to the store to meet with Corrado. App. 80, ll. 18-19. While at the store, Cusick "observed a video of the incident." App. 80, l. 20; App. 81, ll. 5-8; App. 81, ll. 22-23. According to Cusick, the video showed a person matching the description he received – "a white male, could be short in stature, a very small frame, … wearing a red hoodie." App. 81, ll. 11-14. He believed the person had on a hat and dark colored shoes. App. 81, ll. 15-17. While the color of the pants was hard to determine, he thought "the design of the pants did seem to indicate plaid." App. 81, ll. 16-17.

Cusick told the jurors that the description he received of the suspect matched what he saw on the video. App. 82, ll. 17-21. He also told the jurors that as far as he could tell the description of the person on the video matched Petitioner. App. 82, ll. 22-23. Trial counsel did not object to Cusick's testimony and posed no questions on cross-examination. App. 82, l. 25.

The state did not present the video to the jury.[3] According to Cusick, the robbery happened on a Sunday and Cusick was off the following two days. App. 81, l. 24 – App. 82, l. 4. "[T]he arrangement was that the next shift would get the video from the manager in the morning or in the afternoon, whenever the video became available." App. 82, ll. 5-7. Essentially, according to Cusick, it was the responsibility of "the next shift" to pick up the video. App. 82, ll. 8-9. He did not know why the video was not picked up by law enforcement. App. 82, ll. 10-11. He later said, the video "could have been picked up," but that he did not know if law enforcement ever obtained the video from the gas station. App. 82, ll. 12-16.

Closing argument

At the conclusion of the trial, the solicitor relied heavily on Ridgeway's testimony regarding her conversation with Petitioner during which "armed robbery came up." App. 120, ll. 9-18. According to the solicitor, Ridgeway's interest was piqued by Petitioner's mention of an armed robbery such that she remembered the encounter weeks later when the robbery of the gas station was mentioned. App. 120, ll. 18-23. The solicitor used Ridgeway's account of her encounter to argue that Petitioner needed money, and therefore, had a motive to rob the store. App. 122, ll. 21-24.

Jury instructions

During the deliberations, the jury requested the judge "clarify reasonable doubt." App. 142, ll. 9-11. The judge then re-instructed the jury on reasonable doubt. After explaining the burden of proof in civil cases, the judge sought to distinguish the burden of proof in a criminal case. The judge instructed the jurors:

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[3] According to Corrado, the store was equipped with video surveillance cameras and a video recording was taken of the alleged armed robbery. App. 77, ll. 23-25. When asked about the whereabouts of the video, Corrado stated he was not in control of the video, but the manager was. App. 78, ll. 1-6.

> The Plaintiff has proved by a preponderance of the evidence or he has proved that something is just slightly more likely true than not true, and that's all they have to do.
>
> But in the criminal courts, the degree of proof is much greater than that, much heavier, as I told you earlier. **The state has the burden of proving the Defendant is guilty by a preponderance of the evidence.** Again, that is a much stronger burden. It's much more that they have to prove.

App. 143, ll. 6-14 (emphasis added). The judge also instructed the jurors "if you are firmly convinced in your mind, or if you are satisfied that you have reached a verdict that goes beyond any reasonable doubt that the Defendant may **not** be guilty, then you should return a verdict that says this Defendant is guilty." App. 144, ll. 5-9 (emphasis added).

Trial counsel noted the error in the instruction regarding a preponderance of the evidence. App. 146, ll. 3-8. However, trial counsel failed to notice the second error in the instruction regarding finding a defendant guilty even if the jury is convinced beyond a reasonable doubt that the defendant may not be guilty. App. 206, ll. 11-17. In response to trial counsel's objection, the judge instructed the jurors yet again. The judge stated he wanted to be "very, very clear" this was a criminal case and the state was required to prove the offense beyond a reasonable doubt. App. 146, l. 24 – App. 147, l. 4.

Verdict & sentencing

Ultimately, the jury found Petitioner guilty as charged. App. 147, l. 25 – App. 148, l. 6. Judge Hyman sentenced Petitioner to imprisonment for seventeen years. App. 157, ll. 11-13; App. 231.

Direct appeal

Petitioner filed a notice of appeal, which was perfected by Robert M. Pachak. App. 159-170. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 159-170. The issue raised on appeal – whether the trial court erred in permitting a detention

center officer to testify regarding how he put together the photographic line-up because the testimony placed Petitioner's character into issue by suggesting there was a mugshot of Petitioner – was not preserved. App. 159-170. On June 30, 2014, the Court of Appeals dismissed the appeal. App. 171-172. Remittitur was issued on July 16, 2014. App. 173.

Post-conviction relief proceedings

On May 11, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 174-183. On May 11, 2016, the matter proceeded to an evidentiary hearing before the Honorable Paul M. Burch. App. 190. Jessica E. Kinard represented the state, and James K. Falk represented Petitioner. App. 190.

Error from Cusick's testimony

Trial counsel testified that he should have objected to Cusick's testimony regarding his interpretation of the video from the gas station, which included Cusick's opinion that Petitioner looked like the person in the video committing the armed robbery. App. 200, l. 4 – App. 202, l. 1. His failure to object was not a trial strategy. App. 200, ll. 20-21. Prior to trial, defense counsel was aware the video would not be offered into evidence. App. 200, ll. 14-16. Permitting Cusick to give his interpretation regarding what the video contained and his opinion regarding the resemblance between the person on the video and Petitioner was "in effect … another eye witness identification." App. 200, ll. 22-24. In light of the state's failure to produce the best evidence – the video, trial counsel had no opportunity to challenge Cusick's testimony. App. 200, l. 25 – App. 201, 6.

Cusick, unchallenged, was permitted to testify to his "impression of what the video" contained, and the state never provided proof that the video was lost to explain why Cusick's testimony was offered in lieu of the video. App. 201, ll. 7-23. Thus, the jury was permitted to

hear testimony corroborating the eyewitness identification made by Corrado, who had provided the only evidence against Petitioner as no other evidence existed to connect him to the robbery. App. 201, l. 24 – App. 202, l. 5; App. 207, ll. 4-10. Defense counsel's understanding was the video was "supposed to be picked up and just got lost in the shuffle or something to that effect." App. 208, ll. 12-15.

Erroneous jury instructions

Additionally, trial counsel testified that he failed to object to the judge's instruction that if the jury determined Petitioner was not guilty, then the jury should return a verdict of guilty. App. 206, ll. 11-17. Trial counsel candidly admitted he "did not pick up" on this erroneous instruction during the trial. App. 210, l. 20 – App. 211, l. 2.

Argument

At the conclusion of the presentation of evidence, PCR counsel argued "the biggest problem" in the case was "the admission of Officer Cusick's testimony by what he saw in the video." App. 213, ll. 5-7. PCR counsel explained the state had failed to present the "best evidence" of what the video contained – the actual video. App. 213, ll. 7-11. Further, the state had not provided any testimony to establish the necessity of presenting the evidence in a form other than the original. App. 213, ll. 12-20. PCR counsel explained Cusick was permitted to give a lay opinion as to identity based, not upon his presence at the scene, but upon his watching a video after the alleged incident, which was prohibited by law. App. 214, ll. 11-13; App. 218, l. 19 – App. 219, l. 4.[4] PCR counsel challenged Cusick's lay opinion, explaining that "some type of expert opinion" would be required to identify someone from a video when the person making

[4] During the PCR hearing, the state characterized Cusick's testimony as "a second eyewitness statement" because he "was able to view the video and see who was within it." App. 216, l. 20 – App. 217, l. 4.

the identification has no prior experience with the person allegedly identified. App. 214, ll. 11-16.

The absence of the video prevented trial counsel from challenging Cusick's ability to see what he claimed he saw as there was no evidence to the size of the picture, the color of the picture, or the clarity of the picture. App. 214, ll. 13-16. According to PCR counsel, "trial counsel ... would have had no opportunity to look at the video, see if it was grainy, see how good the images were, how - - whether Officer Cusick was reasonable in saying that, yeah, that was the person who identified." App. 214, ll. 5-10.

Cusick's testimony was "extremely prejudicial" because it placed the authority of the police department behind the identification. App. 214, ll. 17-23.

Order denying relief

By an order dated August 11, 2016, Judge Burch denied Petitioner relief from his conviction and sentence. App. 221-228. The order noted that "[t]rial counsel admitted that he should have objected to testimony from Officer Cusick who viewed the surveillance video, as it effectively served as another eyewitness statement." App. 223. The order also acknowledged "trial counsel admitted to not hearing the trial judge get caught in a double negative during charges." App. 224.

After reciting the legal standard for the effective assistance of counsel, Judge Burch held Petitioner "failed to show [trial] counsel's performance fell below an objective standard of reasonableness." App. 225. Concerning Cusick's testimony, the PCR judge found "[t]hough the failure of trial counsel to object to Officer Cusick's testimony regarding the surveillance video could be interpreted as deficient performance as it allowed in some information that may not have been otherwise introduced," the PCR court did "not find this was ultimately prejudicial."

App. 226. Concerning the jury instructions, according to Judge Burch, trial counsel "refuted the allegations" that Petitioner "made in his application, including" "any potential prejudice or confusion that arose out of the jury instructions." App. 225-226. Judge Burch concluded by finding that Petitioner "failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel's actions." App. 226. Therefore, he denied Petitioner relief. App. 226.

On August 31, 2016, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

By failing to object to a police officer's testimony regarding his opinions drawn from watching a surveillance video that was not produced at trial, including his opinion that Petitioner looked like the individual in the video, trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688.

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the fact finding would have had a reasonable doubt respecting guilt." Id. (emphasis added). The United States Supreme Court

specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court held that:

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

Petitioner does not contest the PCR court's determination that trial counsel's failure to object to Cusick's testimony was deficient performance as "it allowed in some information that may not have been otherwise introduced." App. 226. Noteworthy, the state did not seek to alter or amend the order pertaining to the finding of deficient performance. South Carolina permits lay witnesses to offer opinions; however, the opinion offered by Cusick exceeded the permissible bounds.

Pursuant to the South Carolina Rules of Evidence, a non-expert witness may offer opinion testimony in very limited circumstances.

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training.

Rule 701, SCRE.

In State v. Fripp, 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012), the Court of Appeals examined the admissibility of lay witnesses offering opinions regarding whether an individual captured on a store's surveillance video was the defendant. Two of the store's employees testified at the trial. Id. at 437-438, 721 S.E.2d at 466. Specifically, the store manager stated "she reviewed the videotape and, in her opinion, the suspect depicted on the tape was Fripp." Id. She noted that the person in the video was wearing a blue shirt, which she claimed Fripp frequently wore. Id. at 438, 721 S.E.2d at 466. The store manager "stated she knew Fripp 'very well' and 'saw him all the time.'" Id. Another employee "testified that Fripp was the man on the videotape" and that "the burglar was wearing the same clothes in the videotape as Fripp had worn when she saw him the previous day." Id. This employee knew Fripp "because she lived in the area and knew him through his family." Id.

Addressing Fripp's claim on appeal that the lay witnesses' opinion testimony exceeded that ordinarily permitted by the evidentiary rules, the Court of Appeals held "the record demonstrate[d] the criteria set forth in Rule 701 [were] met." Id. at 439, 721 S.E.2d at 467. Importantly, the Court explained the employees' testimonies "were based on their perceptions of Fripp, not only on the videotape, but during the time they had known and observed him in the store." Id. The store manager indicated she knew Fripp well and saw him all the time because he was a daily customer of the store. Id. She also stated the video showed a "'good shot of his face' 'on one of the angles of the tape.'" Id. Similarly, the other store employee said she knew Fripp through his family. Id. Accordingly, the Court of Appeals concluded "the witnesses' testimonies were rationally based on their perceptions of Fripp's appearance including his physical appearance, mannerisms, and clothing." Id.

Next, the Court determined the store employees' opinions were "helpful in determining a key fact in issue – whether Fripp was the person depicted on the videotape." Id. The Court turned to federal authority construing the corresponding rule. Id. The Court found instructive the Fourth Circuit's decision in United States v. Allen, 787 F.2d 933 (4th Cir. 1986). Fripp, 396 S.C. at 439-440, 721 S.E.2d at 467. According to the Court, the Fourth Circuit permitted identification testimony based on surveillance photographs, explaining that "testimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants." Id. (quoting Allen, 787 F.2d at 936). "Human features develop in the mind's eye over time" and the witnesses "had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance." Id. (quoting Allen, 787 F.2d at 936). The opinion testimony of the witnesses who knew the defendants well "provided the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting." Id. (quoting Allen, 787 F.2d at 936). The testimony was "especially helpful" because the photographs used for identification were "less than clear." Id. at 440, 721 S.E.2d at 468 (quoting Allen, 787 F.2d at 936).

The Court of Appeals explained the "surveillance video" capturing the burglary "was not crystal clear" and the burglar "sought, in some measure, to obscure his identity by wearing the hood of his jacket up." Id. at 441, 721 S.E.2d at 468. Thus, the Court concluded the employees' "testimonies, based on their perceptions of him over time, aided the jury in making an ultimate determination as to the burglar's identity." Id.

Finally, the Court of Appeals concluded "the identification of a familiar person does not require any specialized knowledge, skill, experience, or training contemplated by subpart (3) of Rule 701." Id. Therefore, the Court affirmed the admission of the lay opinion testimony. Id. See

also State v. Mitchell, 399 S.C. 410, 416-419, 731 S.E.2d 889, 893-895 (Ct. App. 2012)(allowing a police officer to testify to his opinion that the person in the photographs taken from a deer camera was Mitchell where the officer testified that he knew Mitchell "through his twenty years of living in the Newberry area").

In general, courts permit lay opinion testimony regarding the identity of an individual in videos or photographs *only* when the person offering the opinion has some prior knowledge of the individual in order to form the opinion. See e.g., United States v. Robinson, 804 F.2d 280, 281-282 (4th Cir. 1986)(permitting lay testimony of the defendant's brother that the person depicted in the bank surveillance photographs was the defendant where (1) the brother's testimony "was based upon his perceptions from viewing the photographs and from his perceptions of and close association with his brother over the years," and (2) the brother's testimony was helpful to the jury because the individual in the photograph was wearing a hat and dark glasses; thus, there was "some basis for concluding the witness [was] more likely to correctly identify the defendant from the photograph than [was] the jury"); United States v. Farnsworth, 729 F.2d 1158, 1160 (8th Cir. 1984)(permitting a "witness's opinion concerning the identity of a person depicted in a surveillance photograph" "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury" and stating "[t]his criteria is fulfilled where the witness is familiar with the defendant's appearance around the time the surveillance photograph was taken and the defendant's appearance has changed prior to trial"); United States v. Barrett, 703 F.2d 1076, 1086 (9th Cir. 1983)(permitting the defendant's girlfriend to testify at trial as to her identification of the defendant as the person in the bank surveillance photograph where the defendant's appearance had changed); United States v. Borrelli, 621 F.2d 1092, 1095 (10th Cir. 1980)(permitting the defendant's stepfather to testify to his opinion that the defendant resembled the

subject of the bank surveillance photograph because (1) the defendant lived with his stepfather for five years and had moved only a few days prior to the robbery giving the stepfather independent knowledge of the defendant's appearance both before and at the time of the robbery and (2) the defendant's appearance had changed significantly between the robbery and the trial);

Cusick lacked any prior knowledge of or familiarity with Petitioner. His opinion testimony in June 2013 that the person depicted in the video was Petitioner was based purely upon his memory of watching the video on September 9, 2012, and comparing his memory with the person on trial. He had never met Petitioner or spent any time with Petitioner. There was no basis for concluding he was more likely to correctly identify Petitioner than the jury. Thus, Cusick's opinion was not rationally based on his perceptions in light of his utter lack of prior connection with Petitioner. In light of the absence of the video, which will be discussed in greater detail infra, Cusick's opinion was not helpful to the jury in making a determination of the ultimate fact in issue. The state failed to produce the video so the jury was not faced with the possibility of a changed appearance and needing assistance from someone more knowledgeable of Petitioner's appearance.

Generally, it is accepted in the law that identification of a person with whom a witness is familiar does not require any special knowledge, skill, experience, or training. However, as has been expressed, Cusick had no familiarity with Petitioner when he made his identification; therefore, at a minimum, a witness testifying to an identification made by watching a video a single time and comparing the memory of watching the video with the person on trial over a year later would require some sort of special knowledge, skill, experience, or training. As the Sixth Circuit Court of Appeals explained, permitting a lay witness to testify to an opinion that a person depicted in a photograph or video, even when that witness had familiarity with the person allegedly depicted, "tease[d] the outer limits" of the lay witness opinion rule. United States v. Calhoun, 544 F.2d 291,

295 (6th Cir. 1976). Surely, permitting a witness with no familiarity with the individual identified exceeded the limits of the lay witness opinion rule.

Further complicating this matter was the state's inability to produce the video during the trial. In essence, the state used the opinion testimony of Cusick as a substitute for the "best evidence" – the video. "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required" unless a rule-based or statutory exception applies. Rule 1002, SCRE. "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if" "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith" or "[n]o original can be obtained by an available judicial process or procedure" or "[t]he writing, recording, or photograph is not closely related to a controlling issue." Rule 1004, SCRE.

Without question, the video was closely related to a controlling issue as it allegedly depicted the robbery of the store. Therefore, the state was required to present the original video unless one of the exceptions applied. During the trial, the state failed to prove the original video was lost or destroyed or that the original could not be obtained by judicial process or procedure. Cusick testified that he left instructions for the next shift to obtain the video. He was unaware if the police had obtained the video or if the matter had been neglected. Therefore, the state failed to prove the original had been lost or destroyed. Further, the state failed to present any evidence that the original video could not have been obtained through judicial process.

The lack of the original video, or even a copy, eliminated trial counsel's ability to cross-examine Cusick regarding the reliability of his lay witness opinion – identification – because there was no video to use for comparison. Trial counsel could not point to quality of the video as impacting the believability of Cusick's opinion.

As the PCR court determined, trial counsel's failure to object to Cusick's testimony was deficient performance. Not only was Cusick unfamiliar with Petitioner, and therefore, unable to give the lay identification opinion offered, but the state's failure to produce the video, the best evidence of what was contained on the video, and no foundation for why evidence in lieu of the video was permissible, inhibited trial counsel's ability to cross-examine Cusick on the reliability of his identification.

Trial counsel's deficient performance prejudiced Petitioner. The *only* evidence against Petitioner was the store clerk's identification. The state produced *no* physical evidence linking Petitioner to the crime – no fingerprints, no DNA, no footprints, no recovered stolen items, and no articles of clothing in Petitioner's home matching those worn by the robber. The state produced no other witnesses linking Petitioner to the crime – no witnesses placing Petitioner in the vicinity of the crime scene around the time of the crime, no witnesses claiming Petitioner bragged about the robbery, no witnesses claiming Petitioner had a substantial sum of cash following the robbery, and no officers claiming Petitioner confessed to the robbery. Cusick's testimony vouched for the store clerk's identification and provided, what the counsel for the state at the PCR hearing aptly called, a "second eye witness" identification. See App. 216, l. 20 – App. 217, l. 4. Permitting Cusick to testify as a second eyewitness placed the imprimatur of law enforcement on the identification.

The jury struggled with the case as evidenced by their question for clarification regarding reasonable doubt. In providing the clarifying instruction, the judge made two errors – telling the jury the burden of proof was a preponderance of the evidence and telling the jury that if the jurors determined Petitioner was not guilty, the jury must find him guilty. Trial counsel realized only one of the errors, of which he apprised the judge, requiring yet additional instructions. Confronted with the store clerk's identification of Petitioner as the robber, which was bolstered by

Cusick's opinion testimony, the jury voted to convict. Had Cusick's testimony been excluded, there is a reasonable probability that the outcome of the trial would have been different in light of the state's weak case against Petitioner. See App. 206, l. 25 – App. 207, l. 10.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order briefing on the issue presented. In the event this Court grants the petition but dispenses with briefing, Petitioner respectfully requests this Court reverse the PCR court's ruling, find trial counsel ineffective, and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of April, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Paul M. Burch, Circuit Court Judge

MICHAEL TOMPAI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Michael Tompai, #355763, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 19th day of April, 2017.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 19th day of April, 2017.

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