

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

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**RECEIVED**

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**SC SUPREME COURT**

HOWARD LEE SIMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002302

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PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX.....1

ISSUE PRESENTED .....2

STATEMENT .....3

ARGUMENT .....4

CONCLUSION .....13

### ISSUE PRESENTED

Whether trial counsel was ineffective for failing to preserve for appeal with a contemporaneous objection her pre-trial motion in limine to exclude an inadmissible in-court identification where the lineup photograph was suggestive and the witness said he was only 50% certain of his identification?

## STATEMENT

On November 20, 2007, petitioner was indicted for murder. App. 562. On June 25, 2008, petitioner was indicted for first-degree burglary. App. 565. On June 19, 2008, the Honorable J. Derham Cole heard pre-trial motions. App. 1. Beginning July 15, 2008, petitioner was tried before Judge Cole and a jury. App. 1. Barry Barnette and Zack Ellis represented the State. App. 1. Kathleen J. Hodges represented petitioner. App. 1. The jury convicted petitioner. App. 460, ll. 1 – 15. Judge Cole sentenced petitioner to life imprisonment on both charges. App. 465, ll. 5 – 14. After review pursuant to Anders v. California, 386 U.S. 738 (1967), the Court of Appeals dismissed petitioner's appeal. State v. Sims, Op. No. 2012-UP-256 (S.C. Ct. App. May 2, 2012).

On October 2, 2012, petitioner filed a PCR application. App. 467. On March 23, 2015, a hearing was held before the Honorable Roger L. Couch. App. 493. J. Brandt Rucker represented petitioner. App. 493. Suzanne H. White represented the State. App. 493. On October 6, 2015, Judge Couch denied petitioner's PCR application. App. 553. This petition follows.

## ARGUMENT

Trial counsel was ineffective because she failed to preserve for appeal with a contemporaneous objection her pre-trial motion in limine to exclude an inadmissible in-court identification where the lineup photograph was suggestive and the witness said he was only 50% certain of his identification.

### *The Identification Issue at Trial*

Almost a month before trial, Judge Cole held a hearing on petitioner's motion to prohibit the in-court identification of petitioner pursuant to Neil v. Biggers, 409 U.S. 188 (1972). App. 1. App. 41. At the beginning of the hearing, trial counsel advised the court that the photo lineup used was "unduly suggestive" and that the identifications were "tainted." App. 41, ll. 11 – 17. Three witnesses were shown the same lineup photo: Ankit Basnet, Belinda Meadows, and the decedent's brother, David Lammers. App. 41, l. 18 – 48, l. 15. The decedent was murdered in the early morning hours of June 1, 2007. App. 81, ll. 17 – 19. Basnet and Meadows did not witness the crime and their identifications of petitioner both were a week before the crime, on May 26, 2007. App. 73, ll. 3 – 12 (Basnet). App. 58, l. 3 – 59, l. 12 (Meadows).

David Lammers ("David") was the last of these three witnesses to testify at the pre-trial hearing. App. 80, ll. 21 – 22. He lived with his brother, the decedent, John Lammers ("John"), in Spartanburg. App. 81, ll. 17 – 19. On June 1, 2007, David was on his way to bed and locking up the house when he noticed the back porch light was lit. App. 81, l. 20 – 82, l. 6. When David looked out of the back door, he noticed a stepladder on the back of the house. App. 82, ll. 2 – 6. He looked at the back bedroom and saw John using the computer. App. 82, ll. 7 – 10. David shut and locked his door and went to sleep. App. 82, ll. 11 – 14.

Later, David woke up hearing his brother frantically calling his name. App. 82, ll. 15 – 20. He grabbed a samurai sword and went to his brother’s room. App. 82, ll. 15 – 24. He saw his brother fighting with a man. App. 82, ll. 21 – 24. David dropped the sword and pulled the man off of his brother. App. 83, l. 25 – 83, l. 3. David told John to call 911. App. 83, ll. 1 – 2. David and the man struggled and the man told David that if he did not let him go, he would shoot him. App. 83, ll. 4 – 10.

David heard John talking on the phone in the kitchen. App. 83, ll. 19 – 21. Fearing that his brother needed his help, he let the man go, briefly chased him, and then ran to his brother. App. 84, ll. 1 – 9. David took the phone from his brother who was covered in blood. App. 84, l. 13 – 85, l. 18. John eventually died from stab wounds. App. 337, l. 25 – 338, l. 13.

After the police arrived, David gave Investigator John Burgess (“Burgess”) a description of his brother’s attacker. App. 48, ll. 18 – 25. David described a “black male 6’1”, 6’2”, 200 to 215 pounds, short haircut, bulging eyes, wearing a blue or light-pocked t-shirt.” App. 48, ll. 21 – 25. Later, at approximately 3:00 PM that day, Investigator Burgess showed David a lineup photo. App. 48, ll. 9 – 10. App. 49, ll. 2 – 12. State’s Ex. 91. David circled petitioner’s photo. App. 49, ll. 6 – 15. David told Investigator Burgess that he was “50 percent sure” of his identification. App. 49, ll. 23 – 24. Upon further questioning, David told the officer that “it’s not the top three” and that it was “not five or six” and pointed to number four. App. 50, ll. 2 – 7.

Officer Burgess admitted that petitioner was the only one in the photo lineup wearing a different colored t-shirt. App. 51, ll. 4 – 7. Petitioner’s shirt was grey and the others wore white t-shirts. App. 51, ll. 8 – 11. State’s Ex. 91. David identified petitioner as the attacker during the pre-trial hearing. App. 83, ll. 11 – 17. David admitted telling the police that he was fifty percent sure of his identification. App. 86, ll. 23 – 25. He testified that by the time he was shown the photo lineup,

“details of what happened was, you know, needless to say, starting to slip.” App. 87, ll. 1 – 6. David denied that the clothing influenced his decision to pick petitioner and that it “was the faces.” App. 87, ll. 12 – 15.

After David’s testimony, trial counsel did not ask any questions regarding the lighting or his ability to observe John’s attacker. App. 88, l. 3 – 89, l. 16. Her cross-examination of David during the hearing consists of one-and-a-half pages in the trial transcript. App. 88, l. 3 – 89, l. 16. When given the opportunity to present witnesses or make an argument, trial counsel declined to offer either. App. 89, ll. 24 – 25. Without hearing any argument, Judge Cole ruled that the lineups were not suggestive and that David would be permitted to make an in-court identification. App. 90, ll. 1 – 9.

Almost one month later, on July 15, 2008, petitioner’s trial began. App. 108, l. 1. After jury selection, Judge Cole heard argument on other legal issues in the case, but not regarding David’s identification of petitioner. App. 133, l. 21 – 158, l. 7. The court gave trial counsel the opportunity to address any “other matters” before bringing in the jury and she declined. App. 158, ll. 2 – 5.

David was the State’s first witness after opening statements. App. 172, ll. 2 – 3. He testified that he was “face to face” with John’s attacker. App. 176, ll. 5 – 11. He testified the light sources in the room were a television and a computer monitor. App. 176, ll. 14 – 16. The solicitor then asked:

Q. And could you see this individual?

A. Yes, I could.

Q. Do you see him here today?

A. Yes, I do.

Q. Where do you see him, sir?

A. He's sitting over there next to his attorneys wearing the khaki pants and the blue shirt.

MR. BARNETTE: Your Honor, let the record reflect he's identified the defendant.

THE COURT: It shall.

Q. This is the man that attacked your brother that night?

A. Yes. He is.

Q. And he's the man that you were wrestling with that night.

A. Yes, he is.

App. 176, l. 17 – 177, l. 6. Trial counsel did not object. App. 176, l. 17 – 177, l. 6. Only at the end of David's direct-examination when the solicitor asked him to reiterate his identification of petitioner did trial counsel state, "we renew our objection." App. 189, ll. 11 – 17. Judge Cole overruled the objection. App. 189, l. 18.

On cross-examination, David admitted that he told investigators that his brother's room was dark. App. 194, l. 25 – 195, l. 4. On re-direct, the solicitor showed David State's Exhibit 91, the lineup photo. App. 196, ll. 9 – 15. Trial counsel's objection "to this line of questioning" was overruled. App. 196, ll. 18 – 22. The solicitor asked David if he identified petitioner from the lineup, David agreed, and for a third time pointed out petitioner in the courtroom. App. 196, l. 23 – 197, l. 21. Judge Cole overruled trial counsel's objection when the solicitor moved the lineup photo into evidence. App. 197, ll. 19 – 25. On re-cross, trial counsel did not ask any questions about petitioner being the only person in the photo array not wearing a white t-shirt. App. 198, l. 23 – 199, l. 15.

### The Identification Issue at PCR

At the PCR hearing, petitioner testified that trial counsel failed to renew her objection to the identification. App. 501, ll. 14 – 23. Petitioner testified the identification should have been excluded because of the different colored shirt and David’s “50 percent” level of certainty. App. 502, l. 6 – 503, l. 21. On direct-examination, trial counsel claimed that she renewed her objections to the identification. App. 524, l. 8 – 525, l. 4. However, on cross-examination, trial counsel admitted that she did not object until after David identified petitioner. App. 533, ll. 8 – 10. She admitted the Biggers hearing was held a month before trial. App. 533, ll. 18 – 20. The PCR court questioned petitioner’s attorney regarding whether the identification issue was raised in the Anders brief and he said it was not briefed. App. 537, ll. 8 – 20. After testimony, petitioner argued that trial counsel failed to preserve the identification issue with a contemporaneous objection. App. 543, ll. 5 – 15.

The PCR court denied petitioner’s PCR application, finding that petitioner “failed to demonstrate what other argument trial counsel could have made to have the photographic lineup excluded.” App. 557. The PCR judge also found that “contrary to the Applicant’s assertions, trial counsel did renew her objection to the admission of the lineup” and that the admission of the lineup was not prejudicial “in light of the in-court identification.” App. 557.

### Discussion

The PCR court erred because trial counsel was deficient in failing to preserve the identification issue for appeal. Had trial counsel preserved the issue, petitioner’s conviction would have been reversed on appeal. Petitioner therefore was deprived of his Sixth Amendment right to the effective assistance of counsel. U.S. Const. amend. VI, XIV. Strickland v. Washington, 466 U.S. 668 (1984).

Trial counsel did not object to David's identification of petitioner. App. 176, l. 17 – 177, l. 6. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an issue for appellate review." State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995).

A contemporaneous objection was required because Judge Cole ruled on the Biggers motion **one month before trial**. "Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced." State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009). Because the motion hearing was made one month before trial, the exception for rulings on motions in limine that occur immediately before the evidence is introduced cannot apply. Id.

Trial counsel's failure to make a contemporaneous objection and preserve the identification issue for appellate review satisfies Strickland's deficient performance prong. McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). In McHam, trial counsel failed to make a contemporaneous objection after losing a motion in limine. Id. Appellate counsel filed an Anders brief. Id. The State attempted to argue that no prejudice existed because of the Anders review. Id. This Court rejected that argument, stating that under the Anders procedure, the court reviews the entire record "for any *preserved* issues with potential merit." Id. (emphasis in original). The McHam Court held that trial counsel's performance was deficient. Id. Just as in McHam, trial counsel's failure to preserve this issue for appeal constitutes deficient performance. Also, like McHam, the filing of an Anders brief and the dismissal of petitioner's appeal shows that the identification issue was not preserved.

Petitioner also satisfied Strickland's prejudice prong. Had an appellate court been able to review the identification issue, it would have reversed petitioner's conviction. Both the suggestive lineup photograph and the complete lack of certainty by David rendered David's in-court identification inadmissible.

Unnecessarily suggestive identification procedures that create irreparable mistaken identifications violate due process. Biggers, 409 U.S. at 196. "[T]he primary evil to be avoided is a very substantial likelihood of irreparable misidentification." Id. at 198 (internal quotations omitted). "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Id.

The two-prong inquiry used to determine the admissibility of an out-of-court identification is as follows: (1) whether the identification process was unduly suggestive; and if so, (2) whether the out-of-court identification was so nevertheless so reliable that no substantial likelihood of misidentification existed. See State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000).

Several factors should be considered when evaluating the totality of the circumstances to determine the likelihood of misidentification, including the following: (1) the witness's opportunity to view the perpetrator at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the incident and confrontation. See Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977); State v. Traylor, 360 S.C. 74, 82, 600 S.E.2d 523, 527. "Only after a determination as to the reliability of a witness' identification has been made by the trial court may the witness testify before the jury." Moore, 343 S.C. at 289, 540 S.E.2d at 449 (citing State v. Patterson, 337 S.C. 215, 522 S.E.2d 845

(Ct. App. 1999). “An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.” Traylor, 360 S.C. at 81, 600 S.E.2d at 526.

This lineup was suggestive. State’s Ex. 91. Petitioner is the only person in the lineup wearing a grey shirt. State’s Ex. 91. Petitioner’s photograph is significantly darker and more menacing than the other photographs. State’s Ex. 91. His head is tilted at a different angle. State’s Ex. 91. After the attack, David told the police that the attacker had “bulging eyes.” App. 48, ll. 21 – 25. In the lineup photograph, petitioner’s eyes are clearly the most visible. State’s Ex. 91. The darkness of petitioner’s photograph emphasize the whiteness of his eyes in a way that the other photographs do not. State’s Ex. 91.

David’s identification was not reliable. David testified that he was only “50 percent” sure of his identification. This alone renders the identification inadmissible. Because the room was dark and illuminated only by a television and a computer monitor, David had little opportunity to view the attacker. David was also confronted with an immediately violent and shocking situation that further hampered his ability to observe the attacker.

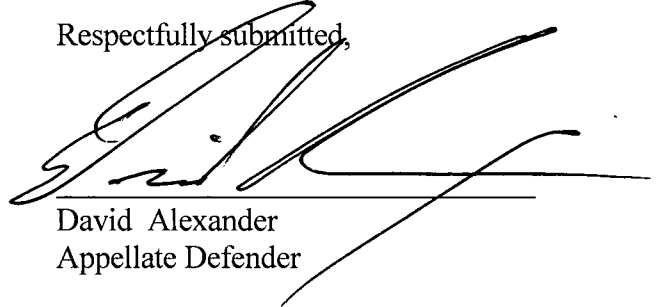
“Where one witness has emphasized a particular characteristic of the perpetrator in giving a description to the police, a lineup in which only the defendant has that characteristic may well taint the identification of the defendant only by that viewer.” Raheem v. Kelly, 257 F.3d 122, 134 (2<sup>nd</sup> Cir. 2001). “The defendant’s protection against suggestive identification procedures encompasses not only the right to avoid methods that suggest the initial identification, but as well the right to avoid having suggestive methods transform a selection that was only tentative into one that is positively certain.” Id. at 135. In Raheem, the court described the witnesses’ level of certainty as “mixed” and that one witness had doubts. Id. at 139.

In this case, David's indication that he was "50 percent" sure also meant that he was fifty percent not sure. Few moments in a trial are more dramatic and capture a jury's attention like an in-court identification. David should not have been allowed to identify petitioner before the jury after making an uncertain identification that was suggested by petitioner's emphasized photograph in the lineup. Without the identification, petitioner would not have been convicted. Therefore, had trial counsel not performed deficiently, petitioner's conviction would have been reversed on appeal. This Court should grant certiorari and grant petitioner a new trial prohibiting an in-court identification by David.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's conviction and granting him a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and extends above and below the line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of April, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
Roger L. Couch, Circuit Court Judge

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HOWARD LEE SIMS,

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STATE OF SOUTH CAROLINA,

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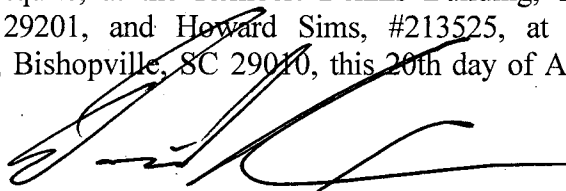
APPELLATE CASE NO. 2015-002302

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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 Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Howard Sims, #213525, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 20th day of April, 2016.



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David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day  
of April, 2016.

Christian Ford (L.S.)  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026.