

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

ERIC S. WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000223

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
Appellate Defender

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ATTORNEY FOR PETITIONER

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The PCR court erred in denying petitioner a new trial based on the State’s failure to disclose the fact that the alleged victim claimed he could identify petitioner until the day of trial, therefore circumventing the constitutional protections of Neil v. Biggers, 409 U.S. 188 (1972) and coercing petitioner to plead guilty3

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ISSUE PRESENTED

Whether the PCR court erred in denying petitioner a new trial based on the State's failure to disclose the fact that the alleged victim claimed he could identify petitioner until the day of trial, therefore circumventing the constitutional protections of Neil v. Biggers, 409 U.S. 188 (1972) and coercing petitioner to plead guilty?

STATEMENT

On July 21, 2011, a Florence County grand jury indicted petitioner for armed robbery. App. 177. On July 30, 2012, petitioner's trial began before the Honorable Thomas A. Russo and a jury. App. 1. John C. Jepertinger represented the State. App. 1. Michael S. Bell represented petitioner. App. 1. After jury selection and pretrial motions, petitioner pled guilty. App. 63, ll. 3 – 22. Judge Russo sentenced petitioner to twenty years' imprisonment. App. 95, ll. 9 – 14.

On August 12, 2013, petitioner filed a PCR application. App. 97. On November 7, 2016, a hearing was held before the Honorable D. Craig Brown. App. 110. Tristan Shaffer represented petitioner. App. 110. Jessica Kinard represented the State. App. 110. Judge Brown denied petitioner's application. App. 165. This petition follows.

ARGUMENT

The PCR court erred in denying petitioner a new trial based on the State's failure to disclose the fact that the alleged victim claimed he could identify petitioner until the day of trial, therefore circumventing the constitutional protections of *Neil v. Biggers*, 409 U.S. 188 (1972) and coercing petitioner to plead guilty.

It was undisputed that the victim in this armed robbery case did not identify petitioner as his assailant until he saw petitioner appear as a criminal defendant in the courtroom on the day of trial. App. 59, l. 11 – 63, l. 4. Petitioner was ready for trial and the parties selected a jury. App. 32, ll. 17 – 22. After settling the record of the defendant and the witnesses, the solicitor added that he had “[o]ne further matter” and he did not “want to ambush” petitioner’s attorney. App. 59, ll. 11 – 18. The solicitor then stated that the victim identified the defendant for the first time “when he came into the courtroom about 11:00.” App. 62, ll. 2 – 3.

Citing *State v. Lewis*, 363 S.C. 37, 609 S.E.2d 515 (2005), the solicitor told the court that no *Biggers* hearing was required because no pretrial identification was made by the victim. App. 59, l. 20 – 60, l. 4. The State argued that petitioner’s only remedies were “cross-examination and argument.” App. 60, ll. 1 – 4.

Trial counsel stated, “What I’ve always been told is that there was no identification.” App. 60, ll. 13 – 16. He inquired whether the police ever attempted to have the victim identify petitioner through any means prior to seeing petitioner appear in court as the indicted defendant ready for trial. App. 61, ll. 14 – 17. Law enforcement replied that no attempt whatsoever had been made to secure an identification before the victim saw petitioner in court. App. 61, ll. 14 – 23. Trial counsel asked for a recess to discuss the impact of the identification with petitioner. App. 62, l. 8 – 63, l. 6. When court resumed, petitioner pled guilty. App. 63, l. 10 – 95, l. 14.

During sentencing, plea counsel asked Judge Russo to consider a ten-year sentence because the State previously made an offer for ten years, which was rejected before the identification was revealed. App. 87, ll. 15 – 22. Plea counsel stated, “Had we had this information here certainly that probably would have developed sooner.” App. 87, ll. 15 – 22. At the PCR hearing, plea counsel testified that the victim’s identification was the deciding factor in petitioner’s last-minute decision to plead guilty. App. 122, l. 6 – 123, l. 25. Plea counsel described the victim as someone “who was not going to be impeachable.” App. 125, ll. 2 – 12. He further testified that, “[I]f we had had that information about identification before, we probably could’ve got the 10-year sentence.” App. 123, ll. 16 – 18.

The PCR court reviewed petitioner’s claim that the late identification coerced his guilty plea as a claim of prosecutorial misconduct. App. 173-74. The PCR court denied relief in a conclusory fashion and no Rule 59(e) Motion was filed. App. 173-74. See Mangal v. State, ___ S.C. ___, ___ S.E.2d ___, 2017 WL 3045812 (July 19, 2017) (discussing requirements for presenting legal issues to the PCR court and preserving such issues for appeal). The PCR court erred.

Trial counsel acquiesced in the State’s circumvention of Biggers. App. 61, ll. 8 – 11. Immediately after the solicitor’s disclosure of the identification and citation of Lewis, trial counsel told the court he was “very aware of the case law.” App. 61, ll. 8 – 11. At the PCR hearing, trial counsel testified that he previously litigated the suggestiveness of a first-time in-court identification under Biggers and lost, so he assumed the outcome would be the same in petitioner’s trial. App. 122, ll. 15 – 19.

The solicitor and trial counsel are correct that Lewis stands for the proposition that Biggers only applies to out-of-court identifications done by the police. Lewis at 42, 609 S.E.2d

at 515. However, the modern trend of the law is changing and courts are recognizing there is no logical distinction between the police putting their index finger on the defendant's photograph in a lineup and the solicitor and the court pointing out the defendant in court. See Aliza B. Kaplan and Janis C. Puracal, Who Could it Be Now? Challenging the Reliability of First Time In-Court Identifications after State v. Henderson and State v. Lawson, 105 J. Crim L. & Criminology 947 (2016).

The Lewis Court reasoned that because the judge and jury are present, cross-examination provides "an adequate safeguard or remedy against suggestive identifications." Lewis at 43, 609 S.E.2d at 518. This reasoning ignores that an in-court identification is made under the most suggestive circumstances possible. The witness knows the defendant is who the State believes committed the crime by his mere presence at the defense table. "The witness is well aware that the individual seated at the defense table is not only *a* suspect, but is also *the* suspect and the only one on trial." Kaplan and Puracal at 954. An identification made during the trial is no different than show-up identifications, which are condemned by the courts. Id. at 955. Under the rule of Lewis, solicitors can circumvent Biggers by delaying the identification until the trial. Here, the solicitor offered no excuse for the failure to attempt to conduct a pre-trial identification.

Massachusetts requires good cause before a first time in-court identification is admissible. Commonwealth v. Crayton, 21 N.E.3d 157, 169-70 (Mass. 2014). Condemning in-court show-up identifications, the Crayton court reasoned:

There can be no doubt that, if the police, more than twenty-six months after the incident had brought [the victims] to any room other than a court room on the day of trial, identified one of the persons in the room as the defendant, and asked whether the person they had seen [commit the crime] was in the room, we would conclude that the showup identification was unnecessarily suggestive and therefore inadmissible in evidence, especially where this had been the first

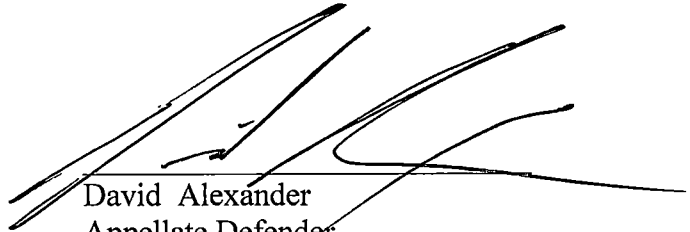
identification procedure the police had attempted. The question we must confront is whether such an otherwise inadmissible showup identification becomes admissible because the showup occurred in the court room.

Id. at 167. The court answered this seemingly obvious question in the negative.

The solicitor took advantage of the Lewis decision. Trial counsel acquiesced in the solicitor's conduct and deprived petitioner of his opportunity to challenge the reasoning of Lewis. This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, reverse petitioner's conviction, and grant him a new trial.

A handwritten signature in black ink, appearing to read 'DAVID ALEXANDER', is written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

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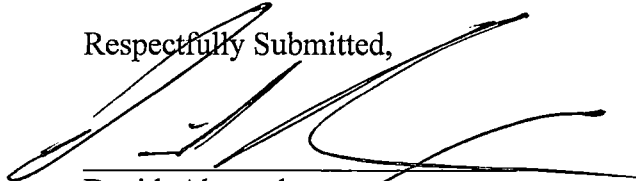
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eric Shanta Williams states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge D. Craig Brown, which was held on November 7, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Eric Shanta Williams.

Respectfully Submitted,

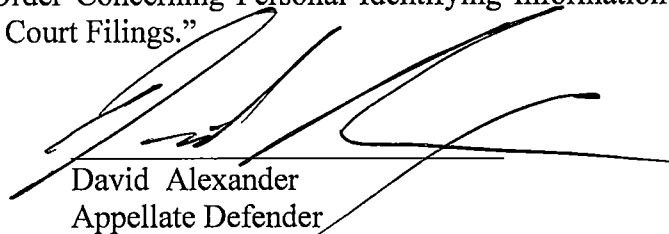


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

A handwritten signature in black ink, appearing to read "David Alexander", is written over a horizontal line. The signature is fluid and cursive.

David Alexander
Appellate Defender

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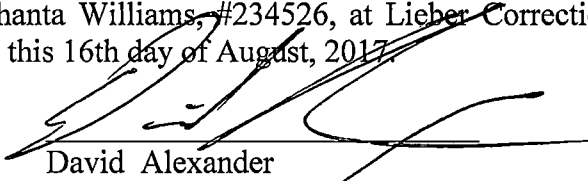
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CERTIFICATE OF SERVICE
—————

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Eric Shanta Williams, #234526, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of August, 2017.


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of August, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.