

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI
Court of Common Pleas
Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2018-000145

Ricky Bowman Petitioner,

vs.

The State of South Carolina Respondent.

REPLY TO RETURN

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Statement of Facts

Ricky Bowman takes exception to the Statement of Facts set forth by the Respondent to the extent that the Statement of Facts states that, in fact, Mr. Bowman and three accomplices decided to rob the victims in this case and did, in fact, rob the victims. Mr. Bowman has always denied his involvement in this robbery and assault. Mr. Bowman does acknowledge that these are the allegations of the State against him.

Argument

Question I

Did the Post Conviction Relief Judge err in failing to grant the Application of Ricky Bowman when the facts below established that trial counsel was ineffective and Ricky Bowman was prejudiced when trial counsel failed to object the hearsay testimony of Officer William Pegram when Officer Pegram testified before the jury that Torrell Johnson told him Ricky Bowman and others had committed the crime?

The State asserts that the hearsay testimony was not prejudicial because Ricky Bowman was positively identified by the victim of the crime and the co-defendant. As to the victim of the crime, the only “positive” identification was through a photo line-up in which only the eyes were exposed. A search by this attorney has failed to uncover a single reported case in the United States involving such a photo line up, much less one that has held such a line up is admissible.¹ Granted, the admissibility of the “eyes only” photo line up is not before this Court. This does

¹ At trial, an apparent reference is made to *State v. Causey*, Op. No. 2005-UP-081 (S.C. Ct. App. filed Feb. 4, 2005), App. at 138, 139, 18. Mention is also made to another case which is apparently *State v. Causey*, Op. No. 2006-UP-143 (S.C. Ct. App. filed Mar. 13, 2006). Neither unpublished opinion makes any reference to an identification by eyes only. Both cases refer to “Jimmy Causey.” Only the first case was tried before Judge G. Thomas Cooper.

not change the fact that the reliability of such “eyes only” photo line up is highly suspect if not completely unreliable. Furthermore, at the trial, defense counsel pointed out to the jury that Mr. Bowman had an obvious spot on his eye that was not reported by the witness. App. at 478, ll 19; 489, l 4 to 490, l 2.

Our courts have long recognized that inadmissible hearsay is a basis for granting post conviction relief even when other witnesses also testified to the same evidence. *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018), reh'g denied (June 12, 2018); *Sanchez v. State*, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002) (“As to the prejudice prong of *Strickland v. Washington*, *supra*, Sanchez was prejudiced by counsel's deficient performance because improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless.”); *Ingle v. State*, 348 S.C. 467, 474, 560 S.E.2d 401, 404 (2002) (“Recently, this Court held that witnesses' repeated references regarding the victim's identification of the defendant as the perpetrator of multiple alleged acts of criminal sexual conduct was improper hearsay testimony which should have been objected to by trial counsel.”). In all the cases cited above the objectionable was cumulative to other testimony. Here, there is no forensic or physical evidence linking Mr. Bowman to the crime or the crime scene. The credibility of the witnesses is the sole basis for the conviction.

The co-defendant, Sean Torna, was impeached with numerous pending criminal charges. As noted in the opening brief, the jury had numerous reasons to discredit the testimony of Mr. Toran, including his giving a previous statement saying Mr. Bowman was not involved. As the Court of Appeals has said, “An accomplice's confession that inculcates the defendant is not admissible under a firmly rooted exception to the hearsay rule. Such statements are considered

inherently unreliable because an accomplice is motivated to lie in order to shift some, if not all, blame from himself to others.” *State v. Dinkins*, 339 S.C. 597, 601–02, 529 S.E.2d 557, 559 (Ct. App. 2000), *aff’d*, 345 S.C. 412, 548 S.E.2d 217 (2001)(internal citations omitted). The hearsay statements attributed to Mr. Johnson gave the jury a reason to believe the inherently unreliable testimony of Mr. Toran and a reason to believe the reliability of the “eyes only” photo lineup. The testimony was, in fact, prejudicial to Mr. Bowman. An “eyes only” identification is not as a matter of law sufficient to overcome the prejudice of a hearsay identification of a defendant.

The State’s reliance upon *State v. Townsend*, 321 S.C. 55, 467 S.E.2d 138 (Ct. App. 1996) is misplaced. The hearsay statement as to Mr. Townsend being the driver of the automobile was obviously not prejudicial because, as the Court said, “At trial, Townsend again admitted he had been driving the wrecked vehicle.” *Id.* at 55, 57, 467 S.E.2d at 140. Nor is *State v. Chisholm*, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011) applicable. In *Chisholm*, a fleeting reference was made to a nickname by which the defendant could be known. In addition, the semen from the defendant was found in the victim’s underwear at the scene. The mother of the minor child had actually caught the defendant and the minor child in the bed. The fleeting comment easily could be found to be harmless. *Dinkins* does not support the proposition that the hearsay in this case was harmless. The Court said, “Because the State introduced evidence at trial that each victim identified Dinkins and that Dinkins made a voluntary admission to police, we find the admission of the challenged statement was harmless.” *Dinkins*, at 604, 529 S.E.2d at 560. *Dinkins* did not involve an “eyes only” photo line up and this case does not involve a confession. The State, in its response, also ignores the fact that Mr. Johnson, as stated in the opening brief, testified at a pre-trial hearing that Mr. Bowman was not involved in this crime.

Br. of Pet. at 9. The hearsay testimony in this case was prejudicial to Mr. Bowman.

Question II

Did the Post Conviction Relief judge err in ruling that trial counsel was not ineffective in that Ricky Bowman was not prejudiced by the failure of trial counsel to properly preserve for appellate review the decision of the trial judge to close the courtroom during parts of the testimony of certain witnesses?

Based upon a reading of the brief of the State in this case, a principle is established upon which Petitioner agrees. Had trial counsel raised the proper constitutional issue, a reversal in this case would have been automatic as there was a structural error. Brief of Respondent at 15. In an attempt to avoid the reversal that would have been required because of this proposition, the State argues, "Although it might have been a better strategy to make the constitutional argument, the objection raised by trial counsel was reasonable under the circumstances and clearly falls within the range of competent assistance." Brief of Resp. at 14. Raising the right to a public trial under Article I, § 9 of the Constitution of the State of South Carolina or the Sixth Amendment to the Constitution of the United States of America, is not a "better strategy." It is the only strategy by which the issue can be preserved for appellate review. When trial counsel fails to preserve for appellate review a constitutional issue that would have required a mandatory reversal, counsel is in fact ineffective. The right to a public trial is not some obscure principle of constitutional law the knowledge of which may be excused. The public trial is one of our core constitutional principles as is a jury trial, the right to confront witnesses, and the right to a lawyer. No court would, or should, ever hold an objection not based on constitutional grounds to any of those rights, "clearly falls within the range of competent assistance."

As noted in the opening brief, trial counsel did raise a constitutional objection. Had he said the words “Sixth Amendment” or “Article I, § 9,” the judge would have ruled the same, but had the proper objection been made, the South Carolina Court of Appeals would have been required to reverse the case. Mr. Bowman would have been awarded a new and public trial. The record clearly establishes prejudice.

The State argues that the trial judge was correct in closing the courtroom. Br. of Resp. at 16. This is simply not correct. As noted in the Petition filed in this matter, “As both federal and state law evolved, we clarified that a judge's decision to close any proceeding must be supported by specific findings explaining the balancing of the interests at stake and the need for closure.” *Ex parte Hearst-Argyle Television, Inc.*, 369 S.C. 69, 75–76, 631 S.E.2d 86, 89–90 (2006). The State has not pointed to any portion of the transcript by which the trial judge made a specific finding by which he explained the need for closure. As to the concern for the protection of the witnesses, the “finding” by the trial judge does not support closure. As noted in the Petition, at page 12, there were no findings of real threats.

In the opening Petition at pages 16-17, Mr. Bowman noted no finding was made by the trial judge which would justify closing the courtroom. A reading of the Reply by the State to the Petition finds no clear justification for closing the courtroom. The attempt by the State falls short of the mandate of this Court as to what must be put on the record to justify a closing of the courtroom. “[W]e clarified that a judge’s decision to close any proceeding must be supported by specific findings explaining the balancing of the interests at stake and the need for closure.” *Ex parte Hearst-Argyle Television, Inc.*, 369 S.C. 69, 75–76, 631 S.E.2d 86, 89–90 (2006)(internal citations omitted). The State has not made reference to any specific findings. If the facts of this

case justify a closing of the courtroom, then virtually any criminal trial could be closed.

To hold, as the State suggests in its brief, that trial counsel was effective on this issue and Mr. Bowman was not prejudiced, is to simply pay lip service to the meaning of public trial and effective assistance of counsel. As this Court said almost 100 years ago, such a ruling “is but to ‘keep the promise to the ear and break it to the hope.’” *State v. Prescott*, 125 S.C. 22, 117 S.E. 637, 638 (1923)

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief, this Court should grant the Petition for Writ of Certiorari, reverse the decision of the lower court, and grant Ricky Bowman a new and public trial.

March 28th, 2019



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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on March 28, 2019, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Reply to Return in the above case addressed to Lindsey A. McCallister, Assistant Attorney General, Attorney General's Office, P.O. Box 11549, Columbia, SC 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 28th day

of March, 2019.

[Signature] (L.S.)

Notary Public for South Carolina

My Commission expires: 12/7/2019

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March 28, 2019

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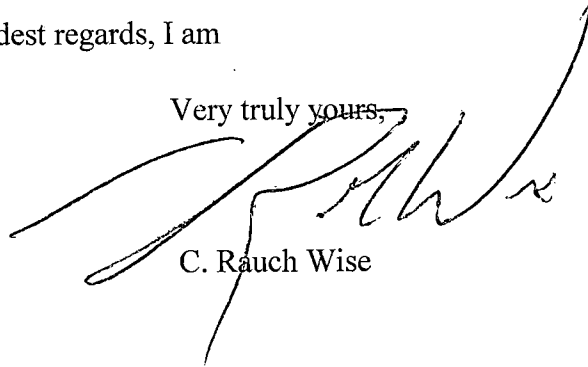
Re: Ricky Bowman vs. State of South Carolina, Appellate Case No. 2018-000145

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Petitioner's Reply to Return together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

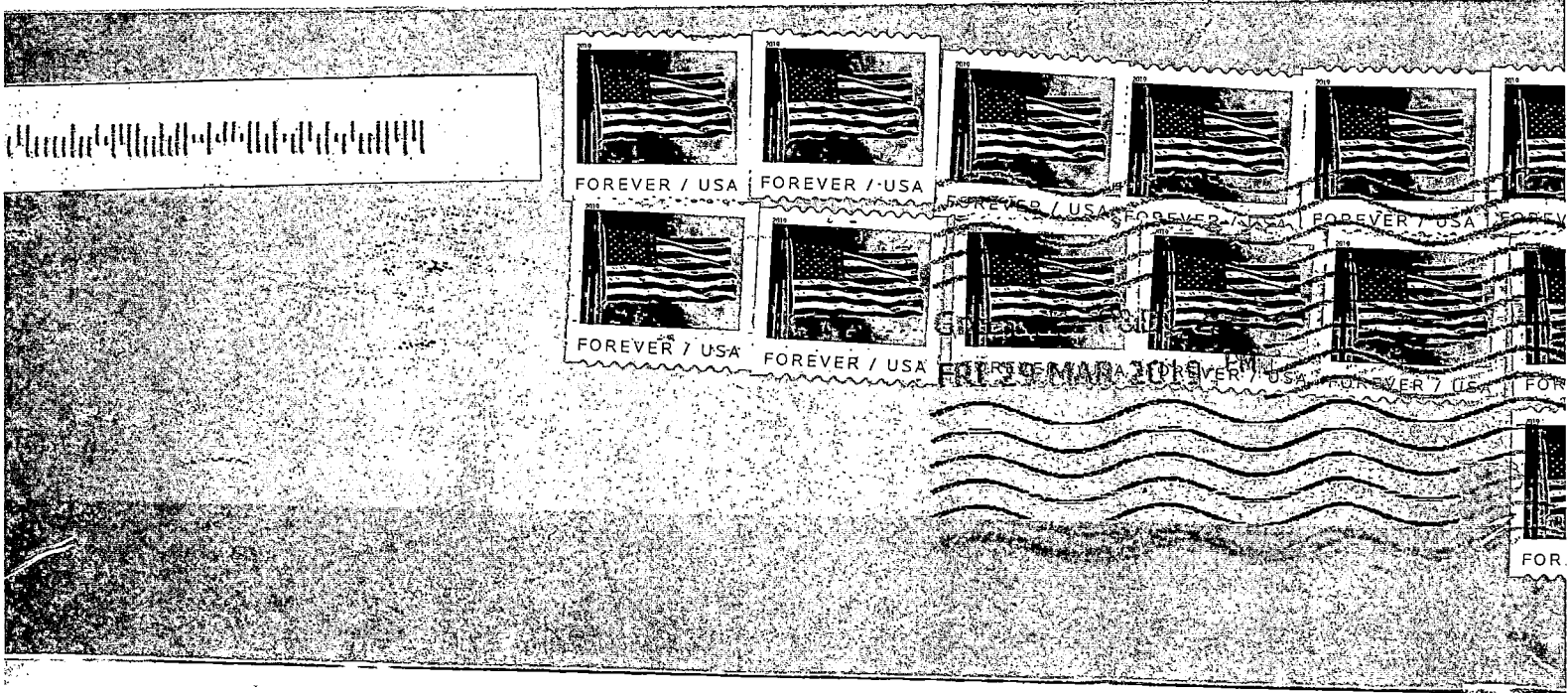
Very truly yours,

A handwritten signature in black ink, appearing to read 'C. Rauch Wise', is written over the typed name. The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

C. Rauch Wise

CRW/slt
Enclosure

cc Lindsey A. McCallister



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