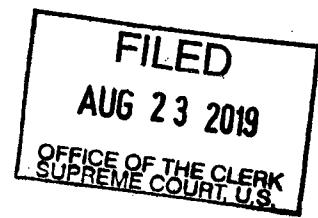


19-5802
No: _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Travis Wade Mathews
PETITIONER
VS.
Pennsylvania
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO
SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Travis Wade Mathews
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QUESTIONS PRESENTED

- I. In a case where the identity of the person who brandished a gun is central to the case, is the choice of whether to ask for DNA testing of the gun, one of the choices reserved to the Appellant under **McCoy v. Louisiana**, 138 S.Ct. 1500 (2018)
- II. Where the victim of a robbery identified the perpetrators of the robbery as two black men and Petitioner is a caucasian who was never identified by the victim as the perpetrator, has the Petitioner stated a claim under **Jackson v. Virginia**, 443 U.S. 307 (1979)

LISTS OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
OPINIONS BELOW	1
JURISDICTION.....	1
RELEVANT STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9

INDEX TO APPENDICES

APPENDIX A Order of Supreme Court of Pennsylvania, April, 2019

APPENDIX B Opinion of the Superior Court of Pennsylvania.

TABLE OF AUTHORITIES CITED

CASES

Cavazos v. Smith, 565 U.S. (2011).....	10
Garza v. Idaho, 139 S.Ct. 738 (2019)	10
Jackson v. Virginia, 443 U.S. 307 (1979).....	ii, 10
McCoy v. Louisiana, 138 S.Ct. 1500 (2018).....	ii, 9, 10

STATUTES AND RULES

OTHER AUTHORITIES

28 U.S.C. § 1257(a)	1
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix **B** to the petition and is reported at:

Commonwealth of Pennsylvania V. Travis Wade Matthews, Appellant

196 A.3d 242 (Pa.Super. 2018)

JURISDICTION

The date on which the highest state court decided my case was April 1, 2019. A copy of that decision appears at Appendix **A**.

An extension of time to file the petition for a writ of certiorari was granted to and including August 29, 2019, on June 18, 2019, in Application No. **18 A 1329**.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT 14

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At the pretrial status conference, held on October 23, 2017, Petitioner here objected to the failure of his attorney to request DNA testing of the gun brandished during the robbery. But the trial told Petitioner that was for counsel to decide.

THE PROCEUTION'S EVIDENCE PRESENTED AT TRIAL

At the trial, the delivery driver, Bruce Eckersley, testified that, on January 5, 2017, he was working during the night shift when the pizza store received a call at 10:23 p.m. for a delivery of two pizzas to a house on Elizabeth Street in Pittston. N.T., 10/30/17, at 32. Mr. Eckersley left the store with the two pizzas in a "heat bag" to keep them warm and noticed that it was a cash order. Id. at 37-38. The heat bag had a driver tag stuck on it indicating the delivery address, total, and time for delivery. Id. at 37. Mr. Eckersley intended to deliver the pizzas to Elizabeth Street and then travel to Wyoming for additional deliveries. Id. at 39-40.

When Mr. Eckersley arrived at the Elizabeth Street address, the house was dark, so Mr. Eckersley used his flashlight to look for the house number to confirm that he was at the correct location. Id. at 41. At this point, two men approached him. Id. Specifically, Mr. Eckersley testified that one of the men approached him from behind and started to pull on his arms while the other man grabbed the heat bag, threw it on the ground, and stuck a gun in Mr. Eckersley's ribs. Id. Mr. Eckersley testified he could not see the men's faces because they "had scarfs covering up to the nose or past the nose." Id. at 43. He also noted that one of the men was wearing an Atlanta Hawks ball cap while the other man had his hood up. Id. One of the men stated, "Don't move. . . . We want your money." Id. at 44. The man, who was standing behind Mr. Eckersley and holding his arms, began going through his pockets. Id. at 45. The man took Mr. Eckersley's wallet, which contained cash, as well as his driver's license, social security card, and ATM card. Id. He also took Mr. Eckersley's iPhone. Id. At this point, the men demanded that Mr. Eckersley walk down a nearby hill, and after he walked about twenty yards, he turned around in time to observe the men entering a silver SUV. Id. at 46. After the men left, Mr. Eckersley walked to a different home on Elizabeth Street, and the homeowner permitted him to use the telephone to call 911. Id. at 46-47. The police arrived at Elizabeth Street within five minutes, and Mr. Eckersley reported his account of the robbery. Id. at 47. Mr. Eckersley initially reported that he was robbed by two African American males. Id. at 48-49.

Specifically, he testified that one of the individuals had on an Atlanta Hawks hat pulled down close to their eyes which was the one with the gun. Id. at 49-50. Mr. Eckersley acknowledged that it was possible that he mistakenly believed both assailants were African American and at least one of them could have been some other race. Id. at 51-52. He testified that, two days after the robbery, his iPhone was recovered from a lawn on Tomkin Street, which runs parallel to Elizabeth Street. Id. at 52. On cross-examination, he admitted that, on January 6, 2017, at 3:30 a.m., he gave a police statement wherein he identified his robbers as "two black males." Id. at 56, 61, and that the sneakers worn by the man in front were white Id. at 57. On redirect examination, Mr. Eckersley testified that, when he made the 911 call and statement to the police, he was scared and wanted the incident "to be over." Id. at 60. Police Officer Samuel DeSimone confirmed the police were dispatched to a house on Elizabeth Street for an armed robbery, and Mr. Eckersley informed the police that two men had robbed him at gunpoint as he was attempting to deliver two pizzas. Id. at 64-66.

Officer DeSimone testified that, since the robbers had apparently taken Mr. Eckersley's car keys, the officer drove Mr. Eckersley to the pizza store. Id. Upon arrival at the pizza store, Officer DeSimone obtained the telephone number that had been used to place the pizza order at issue. Id. at 67. He noted that two names were associated with the telephone number: Sara Snee and Terry Williamson. Id. Through investigative databases, Officer DeSimone discovered that Ms. Snee lived at an apartment on Winter Street, which is a federal housing apartment, and she had no history of living on or near Elizabeth Street. Id. Officer DeSimone, along with fellow officers, including Police Officers Joseph Galeski and Dion Fernandes, proceeded to the Winter Street apartment at approximately 11:45 p.m., but no one answered the door. Id. at 68, 71. The officers began checking the area, including the dumpsters, and discovered a Domino's heat bag in one of the dumpsters. Id. at 69. Officer DeSimone confirmed the heat bag had a sticker on it that identified the delivery address for the pizzas as the subject address on Elizabeth Street. Id. at 70.

Officer DeSimone returned to the police station, and he retrieved his undercover police vehicle to conduct surveillance at the Winter Street apartment in order to determine who may have made the phone call from that address. Id. at 71. Meanwhile, Police Officer Fernandes parked his vehicle on a side street so as to view any vehicles entering or exiting the area; however, no vehicle came into or out of the housing complex within the ten minutes it took

Officer DeSimone to leave and return with his undercover vehicle. Id. at 72. Officer DeSimone confirmed there was uninterrupted surveillance of the Winter Street apartment. Id. at 72-73. After Officer DeSimone returned with his undercover vehicle, he sat outside the apartment and conducted surveillance. Id. at 73. Soon thereafter, a vehicle containing four occupants arrived, parked near the dumpster, and remained parked for approximately five minutes. Id. at 73-74. One of the occupants exited the vehicle, and the vehicle left with three occupants still inside. Id. at 74. Officer DeSimone alerted Officer Fernandes to follow the vehicle. Id. Officer DeSimone approached the Winter Street apartment, and Sara Snee answered the door. Id. at 75. The officer informed Ms. Snee that he was investigating a robbery, and she granted him permission to enter the apartment. Id. Officer DeSimone observed two children in the living room eating pizza out of two boxes of Domino's pizza. Id. Officer DeSimone asked Ms. Snee if he could look at the pizza boxes, and after she indicated affirmatively, the officer observed that the sticker on the boxes indicated the pizzas were to be delivered to the Elizabeth Street address, where the robbery had occurred. Id. at 76. The sticker also indicated the telephone number from which the call for the pizzas originated. Id. at 78. Officer DeSimone testified he discovered and photographed the pizza boxes within about an hour of the initial 911 call pertaining to the robbery. Id. at 77-78.

Officer Galeski confirmed that, on the night in question, he was dispatched to the Elizabeth Street address for an armed robbery. Id. at 87. The description of the suspects provided to him was: "two males, one with a scarf-[] one with a ball cap covering their face; and the other one with the scarf running up Elizabeth Street." Id. He clarified the "ball cap" was reported to be an "Atlanta Hawks ball cap." Id. He indicated that, after arriving on scene and speaking to Mr. Eckersley, he went to the Domino's pizza store and confirmed that the delivery was for the Elizabeth Street house. Id. at 90. Officer Galeski testified he left the pizza store and went to the house on Elizabeth Street where the pizza was to be delivered. Id. The elderly homeowner informed Officer Galeski that she was not Ms. Snee, she did not know Ms. Snee, and she had not placed an order for pizza. Id. Officer Galeski further testified that he took a statement from Mr. Eckersley at approximately 3:30 a.m. on January 6, 2017. Id. at 92.

Officer Galeski admitted on cross-examination that his report reflects that Mr. Eckersley reported that he believed two black males had robbed him. Id. at 94. Officer Fernandes confirmed the police received a 911 call of an armed robbery and, while other officers responded to the Elizabeth Street address, which Officer Fernandes indicated was in a poorly lit area, he

patrolled the southern end of Pittston where the suspects might "pop out" of a side street. Id. at 101, 110. While patrolling, he received a dispatch that the order for the pizza originated from a phone registered to Ms. Snee, who lived at the Winter Street apartment, and thus he proceeded to join his fellow officers at the apartment complex. Id. Officer Fernandes confirmed that, after the police seized the heat bag from the dumpster, he conducted surveillance near the apartment complex while Officer DeSimone retrieved his unmarked police vehicle. Id. at 101-02. He observed no vehicle enter or exit the complex during this time. Id. He testified that, after Officer DeSimone returned, a Ford Focus containing four occupants arrived at the Winter Street complex, and when the vehicle exited, he "got just right up behind the bumper of [the vehicle] at Winter and South Main Street." Id. at 103. Officer Fernandes testified he was driving a fully marked patrol car; however, he did not initially activate his lights or sirens. Id. Rather, noticing the Ford Focus now contained three occupants, he ran the license plate and discovered the license plate belonged to a Jeep. Id. at 104. Officer Fernandes activated his lights, and the vehicle stopped. Id. at 105. Inside of the vehicle, the officer discovered a female driver (later identified as Robin Hurtt), a black male (later identified as Terry Williamson) seated in the front passenger seat, and a white male (later identified as Appellant) seated in the back seat directly behind the driver's seat. Id. Appellant was wearing a dark-colored scarf and an Atlanta Hawks ball cap, while Mr. Williamson was eating a slice of pizza. Id. at 110-11. Officer Fernandes requested that all of the occupants exit the vehicle and, when they did so, he noticed the butt of a firearm sticking out of the back of the front passenger's seat into the back seat area. Id. at 106, 115. The officer seized the firearm, which appeared to be a handgun; however, upon further inspection, the officer realized it was an air pellet gun. Id. at 108-09.

On cross-examination, Officer Fernandes noted that Appellant was wearing red shoes and had no money Id. at 118 Appellant was the only occupant of the vehicle who was "in hands' reach of [it]." Id. at 122. Fernandes testified that no DNA testing of the gun or hat had taken place and in his experience it was not done Id. at 119-120.

THE EVIDENCE PRESENTED AT TRIAL BY THE PETITIONER/APPELLANT

Appellant offered the testimony of Terry Williamson, who testified that, at the time in question, he lived at the Winter Street apartment with his fiancée (Ms. Snee) and Appellant. Id. at 133-34. He testified that, at around 9:30 p.m., on January 5, 2017, he was in the vehicle with Ms. Hurtt and her boyfriend, "Miracle," who is an African American male. Id. at 133. Although they had

just met, Mr. Williamson and Miracle decided to rob Domino's. Id. He testified he used a cell phone registered to his Winter Street address to place an order for pizza to lure the delivery person to a house on Elizabeth Street. Id. at 134-35. Mr. Williamson testified he chose the location because it was poorly lit. Id. at 135. Mr. Williamson indicated that, after the deliveryman arrived, he and Miracle "jumped him," with Miracle grabbing him from behind while Mr. Williamson confronted him from the front. Id. Mr. Williamson testified they told the deliveryman to empty his pockets and they then ran back to the vehicle, which was parked nearby. Id. at 136.

Williams testified he was wearing the Atlanta Hawks ball cap but not a scarf during the robbery. Id. Mr. Williamson testified that, on the way back to the Winter Street apartment, Miracle threw the deliveryman's iPhone out of the window. Id. at 137. He further testified that, upon arrival at the apartment, they took the pizza inside to Ms. Snee and Appellant, at which time Appellant asked if he could wear the Atlanta Hawks ball cap because it matched his outfit. Id. at 139. Mr. Williamson indicated he gave Appellant permission to borrow the hat, and then the five adults (including Ms. Hurt, Ms. Snee, Miracle, Appellant, and Mr. Williamson) drove in one car to Old Forge, where they dropped off Miracle. Id. at 138-39. They then returned to the Winter Street apartment and dropped off Ms. Snee. Id. Mr. Williamson testified he, Ms. Hurt, and Appellant were traveling towards Appellant's girlfriend's house when the police stopped the vehicle. Id. He testified the pellet gun, which was seized by the police, belonged to Miracle but he was the one who held it during the robbery. Id. at 139. He denied that Appellant was present during the robbery and, in fact, he testified Appellant was home the entire time. Id. at 140. On cross-examination, Mr. Williamson admitted he gave a statement to Officer Fernandes during the early morning hours of January 6, 2017. Id. at 142. With regard to the statement, the following exchange occurred at trial: A: I still [didn't] even admit to the robbery. Id. at 143-45. Mr. Williamson admitted he has prior convictions for unsworn falsification to authorities, receiving stolen property, and attempt to commit theft by unlawful taking. Id. at 141.

THE PROCECUTION'S REBUTAL

The Commonwealth called Officer Fernandes as a rebuttal witness. Officer Fernandes testified that, when he interviewed Mr. Williamson after the robbery, Mr. Williamson reported Ms. Hurt picked him up in Avoca at around 8:00 p.m. Id. at 153-54. He told the officer they then

went to Winter Street to pick up Ms. Snee and Appellant, and then they travelled to a Burger King and back to Scranton. Id. at 154. Mr. Williamson told the officer he knew nothing about the robbery and he does not "roll with a gun." Id. at 155. However, he told Officer Fernandes that Appellant "is the one that rolls with a gun." Id. Officer Fernandes testified that, during the interview, Mr. Williamson continued to deny his involvement in the robbery, and he never mentioned a person named "Miracle." Id. at 156.

Even though the victim never identified Petition as the perpetrator in this robbery the jury found Appellant guilty of robbery and other crimes.

After considering Appellant's statement of errors, the trial court entered the following opinion.

[Appellant] notes in his Statement that the evidence of record reflects that, although [Appellant] is Caucasian, the crime was committed by two black males. Williamson, the co-[conspirator] in this case, is African American. Although [Appellant] is Caucasian, Eckersley's initial report and written statement to police made five hours after the incident indicated that both of his assailants were black. The Commonwealth addressed this issue through the testimony of Officer Fernandes and Eckersley himself. Officer Fernandes testified that the area of Elizabeth Street where the robbery took place is not well illuminated, and that the lighting in that vicinity is poor. Eckersley also said that the street was dark, having no streetlights where the robbery took place. Eckersley testified that at the time of the incident, he was only able to see the eyes of both assailants. Both men had scarves obscuring much of their faces, and the man behind Eckersley had his head covered with a hoodie. He testified that the man holding the gun was wearing an Atlanta Hawks baseball hat. Eckersley explained that he had described his assailants as African American in part because of the "sounds of the voice, the inflection, the tone, [and] the accent" with which they spoke. He testified [at trial] that it was conceivable that he could have mistaken the two individuals as both being African American, and it was possible that they could have been another race or ethnicity. Trial Court Opinion, filed 3/19/18, at 6-7 (citations to record omitted).

APPEAL TO THE SUPERIOR COURT

On direct appeal to the Superior Court of PA, a three judge panel writing a published opinion wrote:

Here, viewing the evidence in the light most favorable to the Commonwealth, as verdict winner, we conclude the evidence sufficiently establishes that Appellant was a perpetrator of the crimes. For instance, the evidence reveals two men lured a pizza deliveryman to a poorly lit area on Elizabeth Street by placing an order with a phone registered to a specific Winter Street apartment. Appellant, Mr. Williamson, and Ms. Snee were the adults residing at the Winter Street apartment. The deliveryman arrived at the Elizabeth Street address at 11:00 p.m., but the house was dark. Suddenly, two men approached him. The men had their faces covered with dark-colored scarves, with one man wearing a hood and the other an Atlanta Hawks ball cap. While one of the men placed a firearm against the deliveryman's ribs, the other man held him from behind. After removing

the deliveryman's possessions, the two men fled in a vehicle. The police responded to the location within five minutes of the robbery, and they transported the deliveryman to the Domino's pizza store where they discovered the order had been placed using the number registered to Ms. Snee. At 11:45 p.m., the police responded to the Winter Street apartment but discovered no one was home. However, they found the deliveryman's heat bag inside of a dumpster just outside of the apartment. A short time later, after Officer DeSimone left and returned with his unmarked police vehicle, he observed a vehicle with four occupants (Ms. Snee, Ms. Hurt, Mr. Williamson, and Appellant) stop outside of the Winter Street apartment. One of the occupants (Ms. Snee) went inside, while the other three drove away. Ms. Snee granted Officer DeSimone entry into the apartment, and he discovered children eating the stolen pizza. Meanwhile, Officer Fernandes followed the vehicle and pulled it over. Inside, he discovered Ms. Snee, Appellant, who was wearing a dark-colored scarf and an Atlanta Hawks ball cap, and Mr. Williamson, who was eating a slice of pizza. Further, Officer Fernandes observed the butt of a gun sticking out behind the front passenger seat; the gun was within hands' reach of Appellant only. At the police station, Mr. Williamson denied any involvement in the robbery. When the police confronted him with the idea that Appellant had implicated him, Mr. Williamson informed the police that Appellant "is the one who rolls with a gun." N.T., 10/30/17, at 155. At trial, Mr. Williamson admitted he was involved in the robbery, but he denied Appellant's involvement. Based on the aforementioned, and applying our standard of review, we conclude the evidence was sufficient to establish Appellant perpetrated the crimes of which he was convicted.

This order was appealed to the Supreme Court of Pennsylvania, which denied discretionary review on April 1, 2019.

Petitioner has filed a motion for DNA testing which has not been ruled on as of the date of this petition for certiorari.

REASONS FOR GRANTING THE WRIT

Some decisions are now reserved for the client – notably whether to plead guilty, waive the right to a jury trial, testify on one's behalf and forgo an appeal **McCoy v. Louisiana**, 138 S.Ct. 1500, 1509 (2018), Autonomy to decide that the objective of the defense is to assert innocence belongs in this category, *Id.* these are not strategic choices about how best to achieve a client's objectives, they are choices about what the client's objectives in fact are. *Id.* A Petitioner has the right to have his attorney file an appeal, even if he has waived his right to appeal, **Garza v. Idaho**, 139 S.Ct. 738, 746 (2019).

Here, the question is whether the client's decision to request DNA testing is the type of decision that the client has a right to make.

When the Petitioner brought his demand for DNA testing to the trial court's attention, the trial court told Petitioner that was the trial counsel's decision to make. This is before *McCoy v. Louisiana* was decided, but before Petitioner's conviction became final.

II

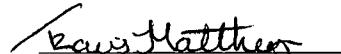
This Court made clear in **Jackson v. Virginia**, 443 U.S. 307 (1979), that it is the responsibility of the jury not the court to decide what conclusions should be drawn from the evidence admitted at trial. A reviewing court may set aside the jury's verdict on the grounds of insufficient evidence only if no rational trier of fact could have agreed with the jury. **Cavazos v. Smith**, 565 U.S. 1, 2 (2011) (per curiam)

Evidence is sufficient to support a conviction so long as after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 443 U.S. at 319. Where the victim never identified Petitioner either as brandishing the gun used in the robbery, or in any other way, and identified the robbers as two black men and Petitioner is caucasian, a guilty verdict is not a rational verdict.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of sentence vacated and the matter remanded to the Pennsylvania court's so that they can apply **McCoy v. Louisiana**.

Respectfully Submitted,



Date: August 23, 2019