STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions
Edgar Dickson, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 2013-UP-001 (S.C. Ct. App. filed January 2, 2013)

The State, Respondent,

vs.

Ralph Bernard Coleman, Petitioner.

Appellate Case No.: 2013-000616

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court's denial of Coleman's motion to sever his case from four co-defendants because the joint trial violated his right to due process and a fair trial because evidence not related to Coleman was entered against him when entered against other defendants; he lost right to present a defense that he was mistaken for his brother, Christian Coleman, who was also a co-defendant; he lost the right to present his closing argument last since another co-defendant admitted evidence; and he was unable to question co-defendant Harris about his interview with the police.

2. Whether the Court of Appeals erred in affirming the trial court's denial of Coleman's motion to suppress his identification by witness Ashley Parsley based on Rule 602, SCRE, because she lacked personal knowledge of his identity as she stated she did not really see him since she was lying face down on the floor and selected him from the photo line-up based on instinct.

3. Whether the Court of Appeals erred in affirming the trial court's denial of Coleman's motion to suppress the photo of a rifle, which was not one of the murder weapons but was similar to the type gun used because the actual rifle was not found, which the state introduced to incite the jury because the rifle had a bayonet.

(Petition, p. 3).

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in affirming the trial judge's denial of Petitioner's motion for severance where the five co-defendants were jointly tried for murder, armed robbery, and burglary first degree based on combined participation in one incident.

2.

Whether the Court of Appeals erred in affirming the trial judge's ruling admitting identification testimony over Petitioner's objection the witness lacked personal knowledge where the witness, who identified Petitioner from a photographic lineup, testified that she was present at the apartment when the crimes occurred, and sufficiently observed the Petitioner's entry into the apartment to make the identification.

3.

Whether the Court of Appeals erred in affirming the trial judge's ruling admitting a photograph of a rifle which a firearms identification expert identified as consistent with the type of weapon that fired several of the shells recovered from the murder scene, and was also consistent with a witness' description of one of the weapons used.

RESPONDENT'S STATEMENT OF THE CASE

An Orangeburg County Grand Jury indicted Petitioner, Ralph Bernard Coleman, in May 2010, for murder, armed robbery, burglary first degree, kidnapping, and possession of a weapon during the commission of a violent crime. (R. p. 419-426; Supp. App. p. 1). Petitioner, along with four co-defendants,[1] stood trial on the charges of murder, burglary first degree, and armed robbery on December 13-17, 2010, before a jury. (See R. p. 72, lines 12-19). The sixth participant in the crime, Patrick T****, testified at trial. (R. p. 127, line 21-p. 128, line 5). The Honorable Edgar Dickson presided. The jury convicted Petitioner as charged. (R. p. 388, lines 9-22). Judge Dickson sentenced Petitioner to thirty (30) years imprisonment for armed robbery and concurrent terms of forty-five (45) years imprisonment on both the murder conviction and the burglary conviction. (R. p. 400, line 22 - p. 401, line 8). Petitioner filed and served a timely notice of intent to appeal.

Petitioner filed a Final Brief of Appellant in the South Carolina Court of Appeals on May 2, 2012. Respondent filed the Final Brief of Respondent on April 5, 2012. The Court of Appeals heard oral argument on November 13, 2012. On January 2, 2013, the Court of Appeals issued a *per curiam* unpublished opinion affirming the rulings and conviction. (App. pp. 1-3). Petitioner filed a pro *se* petition for rehearing which was served on January 9, 2013. By letter dated January 15, 2013, the Court of Appeals directed a response be filed. Respondent filed a return to the petition on January 24, 2013. (App. pp. 21-24). Counsel filed a petition for rehearing on January 17, 2013. (App. pp. 5-20). The Court of Appeals did not

[1]Christian Coleman, Walter Lee Harris, Danny Ryant, Jr., and Mario Montez Shivers.

call for a response, and no response was filed to counsel's petition. The Court of Appeals, however, denied the petition on February 22, 2013. (App. p. 25).

On May 23, 2013, Petitioner filed a Petition for Writ of Certiorari in this Court. This return follows.

RESPONDENT'S STATEMENT OF FACTS

The jury found Petitioner, and his co-defendants at trial, guilty of the murder, burglary and armed robbery on March 12, 2010. Patrick T****, the sixth indicted co-defendant who was not tried with the others, testified at the joint trial. T**** testified that he was at Petitioner's house on March 12, 2010 to see the guns that Mario Shivers had. (R. p. 132, line 2 - p. 134, line 19). T**** testified that he, Shivers, and Petitioner began to plan the robbery together. (R. p. 137, line 3 - p. 138, line 7). "Chris" Coleman and a friend came to the house in a Ford Explorer to provide transportation. (R. p. 138, lines 8-21). T**** suggested Walter "Pete" Harris should join the enterprise, which he did. (R. p. 141, line 19 - p. 142, line 4; p. 314, lines 4-20). The plan was to use the ruse of purchasing marijuana to gain entry and rob the victim. (R. p. 144, lines 5-8). Harris offered to go first "to peak at the scene," however, he returned and attempted to disengage in the robbery "because he had known someone that was in there." (R. p. 144, lines 8-21). Thereafter, Shivers suggested Danny Ryant join the group. T**** testified he called Ryant and picked him up at a nearby club, the Corner Pocket. (R. p. 145, line 19- p. 146, line 10). Harris stayed with the group and together they explained the robbery plan to Ryant. (R. p.146, lines 16-24). The group agreed to rob victim "for his weed, marijuana and money." (R. p. 151, lines 14-21). T**** testified that Petitioner, armed with a pistol from Harris, went in with T**** under the ruse

of buying drugs. Petitioner then "pulled his gun out on the female, and when [T****] opened the door that's when everybody came in with the guns." (R. p. 147, line 22 - p. 148, line 2). "Everybody" constituted Christian Coleman, Mario Shivers, Danny Ryant, and Walter Harris, though Harris did not have a gun having given his gun to Petitioner. (R. p. 148, lines 3-22). Harris, though, taped the victim's mouth. (R. p. 149, lines 3-6). T**** testified that they were searching the home for "money and stuff," and T**** heard a gunshot and left. (R. p. 150, lines 3-10). Ultimately, T**** heard "nineteen, twenty" shots from the apartment. (R. p. 150, lines 14-15). The group fled to the Explorer, and agreed to say nothing. (R. p. 151, lines 2-9).

Ashley Parsley testified that she was living with the victim in his apartment on the night of March 12, 2010. She was also helping victim sell marijuana from the apartment. (R. p. 89, line 15 - p. 90, line 22; p. 96, line 14 - p. 97, line 2). She and victim's friend Shannon Mitchell were in the apartment when Walter Harris first entered. Victim was asleep in a back bedroom. (R. p. 92, line 1 - p. 93, line 17). Mitchell testified that he knew Harris from high school. (R. p. 195, lines 3-4). Both Parsley and Mitchell testified that Harris asked for a certain type of marijuana ("droe"); and, that victim came from the back bedroom, checked Harris' identification, then apparently told him that he did not have any "droe" to sell as Harris left shortly thereafter without a purchase. (R. p. 95, line 10 - p. 98, line 21; p. 196, line 4 - p. 197, line 13). Mitchell testified that he left "maybe ten minutes" after Harris did. (R. p. 198, lines 17-19).

Parsley testified that shortly after Harris and Mitchell left, she answered the door for another person asking to purchase marijuana. (R. p. 103, lines 3-23). Victim was in the

kitchen area of the apartment "making bags," i.e. packaging marijuana. (R. p. 101, line 6 - p. 102, line 2). As she was reaching for the drugs in the living area, the person "pulled a gun on her," told her "it was a stickup," instructed her to get face down on the floor, and she complied. (R. p. 104, line 13 - p. 105, line 20). After this first man pulled a gun on her, she also "noticed a chubby guy." She sensed other people coming into the apartment but did not see anyone else directly as her face was toward the floor. (R. p. 106, lines 3-22). The victim came out of the kitchen area and started talking to the group. (R. p. 106, lines 1-2). Parsley could hear "a lot of talking, a lot of yelling, a lot of ripping up stuff, asking where the money is, and I heard like tape being torn, and then after that, that's when I heard gun shots." (R. p. 106, line 23 - p. 107, line 3). She testified that after the shots, "[t]hey ran out" the front door. She called 911. Victim was on the floor. He had been shot multiple times, and his mouth had been taped. (R. p. 107, line 10 - p. 109, line 4). Three days later, on March 15, 2010, Parsley identified Harris as the individual who came in for "droe" from a photographic lineup. (R. p. 111, line 6 - p. 114, line 13). On March 19, 2010, Parsley identified Shivers and Petitioner from separate photographic lineups as the individuals she saw enter the apartment for the robbery. (R. p. 114, line 14-p. 118, line 22; p. 253, line 10 - p. 255, line 4).

Pathologist Dr. Janice Ross testified that victim was shot twenty-four times in his torso, arms and legs. (R. p. 204, lines 15-16). The cause of death was the "laceration of multiple organs due to multiple gun shot wounds of the chest and the abdomen." (R. p. 211, lines 8-10). She noted that the "entrance wounds had some variability in their size" which "suggests different calibers" of weapons. (R. p. 210, line 22 - p. 211, line 1). Dr. Ross was

able to retrieve several bullets and bullet fragments from the body at autopsy, introduced as State's 81-91. (R. p. 207, line 19 - p. 208, line 6).

Investigating officer Lt. Gerald Carter testified that he retrieved shell casings from three different caliber weapons from the crime scene – two pistols (.40 caliber and 9 mm), and an assault rifle. (R. p. 183, lines 15-19). In assessing the scene, Lt. Carter was able to determine that "most of the shots fired which hit the victim were fired after he was already on the floor." (R. p. 190, lines 5-17). Lt. Carter also collected several bullet fragments that were submitted for analysis. (R. p. 184, line 10 - p. 189, line 21).

Andre Washington testified that he purchased a .40 caliber pistol from Harris several days after the shooting. When he determined the pistol was involved in a murder, he sold it to another individual, who was actually working with investigators and turned the weapon over to them. (R. p. 199, line 20 - p. 202, line 10; p. 240, lines 8-23). The gun was matched to eight of the .40 caliber shell casings at the scene, and was introduced at trial as State's Exhibit 73. (R. p. 191, line 17 - p. 193, line 6; p. 215, line 1 - p. 217, line 4).

Agent James Green of SLED testified as a firearms identification expert. (R. p. 213, line 23 - p. 214, line 8). In addition to having matched the .40 caliber shell casings to State's Exhibit 73, he was also able to tell that eleven other casings were fired by the same gun, but not State's Exhibit 73. (R. p. 215, lines 1 - p. 217, line 4). Five other casings recovered at the scene were consistent with two "seven point six two by thirty-nine caliber" weapons, "your SKS or AK Forty-seven variance." (R. p. 217, lines 14-24; p. 219, lines 6-22). Additionally, the various bullets and fragments recovered from the autopsy and from the scene were

consistent with the all three types of weapons, and several matched specifically to State's 73. (R. p. 220, line 23-p. 226, line 19; p. 228, lines 2-p. 229, line 9).

ARGUMENT

I.

The Court of Appeals did not err in affirming the trial judge's ruling denying Petitioner's motion for severance where the five co-defendants were jointly tried for murder, armed robbery, and burglary first degree based on combined participation in one incident.

Relevant Facts:

As referenced in Respondent's Statement of Facts, the charges at trial stemmed from one incident on March 12, 2010. Patrick T**** testified that he, Shivers, and Petitioner began to plan the robbery together. (R. p. 137, line 3 - p. 138, line 7). T**** testified they had no vehicle to drive to the robbery, so co-defendant "Chris" Coleman and a friend (unknown to T****) came to the house in a Ford Explorer. (R. p. 138, lines 8-24). All five came together in the vehicle and continued to plan the robbery. (R. p. 140, line 13- p. 141, line 7). Harris joined the group, bringing his own pistol, and joined in the plans to rob victim. (R. p. 143, lines 4-20). Harris offered to go first "to peak at the scene," however, he returned and attempted to disengage in the robbery "because he had known someone that was in there." (R. p. 144, lines 8-21). After Harris' initial entry, and refusal to continue, Shivers suggested Ryant, and Ryant joined the group. (R. p. 145, line 19- p. 146, line 10). T**** testified that Petitioner, armed with a pistol from Harris, went in with T****. Petitioner then "pulled his gun out on the female, and when [T****] opened the door that's when everybody came in with the guns." (R. p. 147, line 22 - p. 148, line 2). "Everybody" constituted Christian Coleman, Mario Shivers, Danny Ryant, and Walter Harris. (R. p. 148, lines 3-

22). T**** testified that they were searching the home for "money and stuff," when T**** heard a gunshot and left. (R. p. 150, lines 3-10).

Petitioner first moved for severance in a November 23, 2010, pre-trial hearing. Counsel argued that severance was required where Petitioner intended to introduce three statements from co-defendant Harris. (R. p. 35, line 23-p. 37, line 12). The trial judge asked counsel to confirm that "this whole case revolves around one incident" and she affirmatively replied, " I would say there's probably no question about that." (R. p. 37, lines 13-19). The assistant solicitor argued that even if tried separately, Petitioner would not be able to introduce the co-defendant's statement as the statement was hearsay without a viable exception. (R. p. 39, line 12 - p. 40, line 5). Defense counsel countered that she would not offer the statements for the truth of the matter asserted, but to show inconsistency with identification of participants by the two co-defendants that gave statements. (R. p. 41, line 19 - p. 42, line 13). Counsel also argued that even if she was allowed to offer the statements, that would present a confrontation problem "for everyone else sitting at this table." (R. p. 36, lines 2-5). The trial judge summarily denied the motion. (R. p. 43, lines 5-8).

Petitioner renewed the motion during pre-trial on December 10, 2010. Defense counsel again argued the defense was impaired by not having the ability to offer Harris' statements, which, counsel argued (differently than in the initial motion) are contrary to other non-participant witness statements.[2] (R. p. 57, line 23 - p. 59, line 14). Counsel additionally

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[2] One of Harris' statements would have indicated Petitioner had a rifle during the incident. Counsel admitted that statement would "certainly be against my client's defense."(R. 58, lines 19-23; p. 59, lines 20-23). The solicitor noted he would have no objection to Petitioner admitting a statement that he "had a rifle during the murder," but that evidentiary rules prevented the admission of the statement. (R. p. 62, lines 1-16).

argued that Petitioner and co-defendant Christian Coleman (Petitioner's brother) would have antagonistic defenses because Petitioner could have been identified by the witnesses "because he is Christian Coleman's brother" and "[t]hey look alike...." (R. p. 60, lines 1-13). Finally, she argued that she would lack standing to challenge the evidence from the search of co-defendant Harris' home. (R. p. 60, line 25 - p. 61, line 13). The trial judge again denied the motion. (R. p. 62, line 21 - p. 63, line 2).

During the trial, co-defendant Shivers entered evidence in cross-examination of one of the State's witnesses, Ms. Parsley. (R. p. 125, line 17- p. 126, line 4). During a break in the cross-examination of the following witness, Mr. T****, defense counsel attempted to preserve the right to last argument. (R. p. 171, line 13 - p. 173, line 4). Counsel for co-defendant Shivers advised the court that he "didn't consult with any other of the other counsel at the table" in offering the evidence. (R. p. 173, lines 16-20). Petitioner's counsel admitted that this was not a ground included in the original motion for severance, (R. p. 177, lines 7-17), though the trial judge concluded, "I understand that even though you didn't make it as part of your severance motion, it should go along as another reason for severance." (R. p. 178, lines 14-17). The trial judge "rule[d] that the solicitor is going to get the final closing here." (R. p. 179, lines 9-10).

At the close of the State's case, Petitioner again renewed the motion to sever, both on antagonistic defense in that the jury is likely to find guilty of all by finding guilt of one, and because evidence was introduced that would not have been introduced but for the joint trial (Harris talking to investigator). (R. p. 267, line 1 - p. 270, line 11). Counsel for Petitioner also joined in a separate motion by co-defendant Ryant based on a violation of due

process including, the loss of last argument and the fact that "pointing fingers at everybody its not going to help anybody, so cross-examination has been affected," and added that they had been "forced to work as a group...." (R. p. 270, line 18- p. 272, line 4). Again, the trial judge stood by his decision on severance and denied the additional motions. (R. p. 270, lines 12-14; p. 275, lines 21-24).

The Court of Appeals, in the *per curiam* unpublished opinion, summarily found no abuse of discretion and that no unfair prejudice was shown. (App. p. 2). In the petition for rehearing, Petitioner suggested the Court of Appeals misapprehended the issue. (App. p. 13). Petitioner argued the Court of Appeals' focus on whether there was a serious risk of a specific right being infringed or whether there was a danger to the reliability of the judgment was incorrect. (App. p. 13). Instead, Petitioner argued his position was actually based on whether "his right to present a complete offense was compromised because he was not allowed to question co-defendant Harris about his statements, and [he] could not argue that he was mistaken for his brother who was a co-defendant." (App. p. 13).

Discussion:

The Court of Appeals ruling correctly reflects and relies upon the established law regarding joint trials and is well supported by the facts of this case. There is no error.

"In South Carolina, criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right." *State v. Kelsey*, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998); *State v. Halcomb*, 382 S.C. 432, 439, 676 S.E.2d 149, 152 (Ct. App. 2009) (same). "Motions for a severance and separate trial are addressed to the discretion of the trial court" and the judge's ruling will not be reversed on appeal unless Petitioner demonstrates

an abuse of discretion. *State v. Dennis*, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999). As the Court of Appeals found, nothing in this record supports an abuse of discretion.

A defendant may show severance is necessary by demonstrating that "there is a serious risk that a joint trial would compromise a specific trial right" or that failure to sever would "prevent the jury from making a reliable judgment about a co-defendant's guilt." *State v. Harris*, 351 S.C. 643, 652, 572 S.E.2d 267, 273 (2002), *quoting Hughes v. State,* 346 S.C. 554, 558–59, 552 S.E.2d 315, 317 (2001). On appeal, the convicted defendant must demonstrate prejudice to gain relief. *Dennis*, 337 S.C. at 281, 523 S.E.2d at 176. "The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime." *State v. Walker*, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005).

Petitioner makes four specific complaints from the lack of severance in his question presented : 1) evidence was entered against other defendants affecting his right to a fair trial; 2) he lost the ability to explain he was mistaken for his brother; 3) he lost the right to last argument; and 4) he was unable to question co-defendant Harris about his statements to investigators. (Petition, p. 5). However, his argument appears to be only that there were too many defendants to effectively and fairly prosecute. (Petition, p. 11 citing *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75 (1993)).[3] Regardless, even Petitioner admits "severance should be

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[3] The State acknowledges the language in *Gunn* "remind[ing] prosecutors of the pitfalls inherent in mass conspiracy trials." 313 S.C. at 138, 437 S.E.2d at 83. The instant case is far from the "mass conspiracy trials" envisioned in the caution, and cannot be equated with same. In *Gunn*, at issue was a drug conspiracy where thirty-three individuals were indicted for acts in two different counties and during a lengthy period of time (1982 to 1989). *See* 313 S.C. at 128, 437 S.E.2d at 77. Ten of the defendants were jointly tried and convicted, but six convictions were reversed on appeal. *Id.* This Court found that the evidence did not

granted only when there is a serious risk that a joint trial would compromise a specific right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." (Petition, p. 11). This is the exact test that the Court of Appeals applied. (See App. p. 2). Petitioner simply failed to demonstrate real error or prejudice.

The decision to try the co-defendants together is similar to the one recently upheld in *State v. Spears*, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The Court of Appeals set out the relevant facts in *Spears* as follows:

> The evidence against Spears and Bantan was interconnected. Both defendants were charged with an armed robbery that occurred at the Wagon Wheel on the morning of November 6, 2006. Both defendants were charged with kidnapping the same victims during the robbery. Both defendants were charged with possession of a firearm during the commission of these crimes. Finally, Spears's ex-girlfriend, Tanesha Adams, and Adams's brother led police to Bantan's mobile home, which contained evidence corresponding to the items victims testified were stolen from the Wagon Wheel.

393 S.C. at 476, 713 S.E.2d at 329.

Likewise, here, at issue was the murder, burglary and armed robbery of victim in his apartment on March 12, 2010. The evidence was concise and admissible against all five of the co-defendants to prove the one incident and participation in that one incident. Petitioner has argued no particular piece of evidence that was admissible against a co-defendant that could not be admitted if he was tried alone. Indeed, this would be almost impossible to show where the evidence went to guilt of all parties who acted together. *See State v. Crowe*, 258 S.C. 258, 267-68, 188 S.E.2d 379, 383 (1972) ("Regardless of the jury's assessment of the

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prove one single conspiracy, but multiple conspiracies – a fact intensive inquiry showing multiple crimes. 313 S.C. at 130-31, 437 S.E.2d at 79. Here, the focus was much more narrow. This was one incident where six people acted together.

evidence against the codefendant, the guilt of Wright depended upon a determination by the jury of whether he was present aiding and abetting in the commission of the crime. The jury was clearly and plainly so instructed and a determination of that issue did not require a separate trial."). *See also State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999) ("one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose"). As to availability of cross-examination, that could be limited at any time by the assertion of the co-defendant's right to remain silent and does not necessarily show unfair prejudice. *See State v. Prince*, 316 S.C. 57, 68, 447 S.E.2d 177, 184 (1993) (rejecting severance issue based on denial of right to cross-examine co-defendant where "there is no showing that co-defendant ... would have testified favorably ... had a severance been granted").

Additionally, it is well settled that the loss of the right to closing argument is not a ground upon which to grant severance. *State v. Crowe,* 258 S.C. at 268, 188 S.E.2d 379 at 384; *State v. Smith*, 387 S.C. 619, 625-26, 693 S.E.2d 415, 418-19 (Ct. App. 2010). Petitioner attempts to distinguish the instant case from *Crowe* and *Smith* by the number of defendants, (Petition p. 12); however, Respondent submits that is a distinction without consequence. The number of defendants – whether two or five – is inconsequential as the resolution of the question of error is based on the fairness to the co-defendant who does not offer evidence – an individual right. *See Crowe*, 258 S.C. at 268, 188 S.E.2d at 384 ("The right of defendants to argue to the jury can be adequately protected in a joint trial. No prejudice to Petitioner's rights in this regard has been shown.").

As for Petitioner's remaining point – an inability to plead mistaken identification – no argument is made other than a generic argument of inability. Nothing prevent Petitioner from arguing mistaken identity – he did so in his closing. (R. p. 308, lines 1-23). Nothing prevented Petitioner from suggesting his brother was the guilty party, save perhaps the desire not to incriminate his brother.[4] That would, presumably, be present whether tried separately or alone.

Lastly, it is well settled that "[a] proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." *Dennis*, 337 S.C. at 282, 523 S.E.2d at 176. Here, the trial judge repeatedly and clearly instructed the jurors to consider guilt of the defendants as individuals. ((R. p. 348, line 24 - p. 350, line 1). Further still, the trial judge underscored that each defendant was innocent until the jury determined that the State had proven guilt beyond a reasonable doubt, (R. p. 350, line 18 - p. 351, line 3), and also that the jury could not convicted upon "suspicion, conjecture or speculation, no mater how strong," but that a conviction must be "based upon proof of guilt beyond a reasonable doubt," (R. p. 351, lines 10-14). In reviewing the individual verdict forms with the jury the trial judge cautioned, "each one of these is for each separate defendant. You have got to determine each defendant's guilt as to each charge

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[4] Respondent notes that there was not just one identification by the surviving witness, but that T**** identified both Petitioner and his brother. (See R. p. 162, line 4- p. 163, line 21). Given T****'s testimony, a defense that Petitioner was only identified because he looked like his brother is of less value on the whole. At any rate, the defense was not unavailable.

separately."(R. p. 370, lines 9-12).[5]

In sum, Petitioner failed to show error in the trial judge's decision to deny severance. Petitioner also failed to show unfair prejudice in that he failed to identify any substantial right that was impaired by the ruling. Further, Petitioner failed to show unfair prejudice in light of the clear instructions that each defendant be considered separately. There is no error in the Court of Appeals' decision. Petitioner is not entitled to any relief.

II.

The Court of Appeals did not err in affirming the trial judge's ruling admitting identification testimony over Petitioner's objection the witness lacked personal knowledge where the witness, who identified Petitioner from a photographic lineup, testified that she was present at the apartment when the crimes occurred, and sufficiently observed Petitioner's entry into the apartment to make the identification.

Relevant Facts:

Petitioner objected to the admission of Ashley Parsley's identification testimony[6] arguing she did not have personal knowledge to identify Petitioner given her testimony that she was ordered to the floor and faced the floor during the murder. (R. p. 26, line 3 - p. 29, line 22). Parsley's pre-trial motions testimony regarding identification indicated she was close to the attackers, in the same room, the room had sufficient lighting, and she was wearing her glasses. (See R. p. 3, line 20 - p. 4, line 11; p. 11, line 17 - p. 12, line 3; p. 13,

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[5] Respondent notes the jury returned to request a re-charge on the hand of one, hand of all instruction, and the trial judge again instructed on hand of one, hand of all. (R. p. 377, line 22 - p. 381, line 24). This is some evidence of the preciseness of the jury deliberations, focusing on whether the evidence supported that each individual defendant was assisting another and joining in the crime – an individual determination of guilt.

[6] The State advised in pre-trial that they would not ask Parsley to make an in court identification, so the only issue dealt with the photographic lineup identification. (See R. p. 30, lines 5-17; p. 34, lines 4-8).

line 5 - p. 17, line 19). She testified that as she was reaching for the marijuana the stranger asked for, she was told "it was a stick up" and told to get on the ground, which she did. (R. p. 6, lines 7-15). She saw the one individual who held the gun on her and a "stocky person," though she "didn't really see their face." (R. p. 6, line 16-p. 7, line 19). She identified Petitioner as the "stocky person," but even in her affidavit attached to the lineup she expressed she was not totally sure of the identification. (R. p. 8, line 22 - p. 9, line 24; p. 20, line 5 - p. 21, line 7; p. 22, line 21 - p. 23, line 19). No one suggested which photo she should select; rather, she testified that her choice was based on her recollection of the person. (R. p. 9, line 7 - p. 10, line 9; p. 20, line 5- p. 21, line 7). She testified she selected the photograph "like an instinct, I just pointed straight at it." (R. p. 18, lines 10-12). The trial judge ruled the photographic lineup identification was admissible, finding how "sure" the witness was in her identification went to the weight of the evidence not the admissibility. (R. p. 32, lines 1-15).

At trial, Parsley testified consistently, and admitted that she was not sure of the identification of Petitioner as the chubby guy in the green shirt and confirmed she "didn't get a real good look at this face." (R. p. 106, lines 3-12; p. 116, line 12 - p. 117, line 16). Additionally, investigating officer Lt. Shumpert, testified that at the time of the identification, Parsley independently wrote in her affidavit that "he is possible to be one of the guys that entered the house. I didn't completely see his face." (R. p. 254, line 17 - p. 255, line 4; State's 5 (photographic lineup and witness affidavit)).

The Court of Appeals summarily found in the *per curiam* unpublished opinion that the trial judge did not abuse his discretion and no unfair prejudice was shown. (App. p. 2).

In the petition for rehearing, Petitioner suggested the Court of Appeals erred because Parsley lacked personal knowledge to make the identification, and Petitioner was prejudiced as only her testimony and "that of the biased co-defendant" connected Petitioner to the crime. (App. p. 17).

Discussion:

The Court of Appeals ruling correctly reflects and relies upon established law and is supported by the facts of this case. There is no error.

Rule 602, SCRE provides: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." "In general, a witness can be shown to have personal knowledge if he or she had the opportunity and was able to perceive otherwise obtain knowledge through the senses." Danny R. Collins, South Carolina Evidence 48 (2d ed. 2000). The rule does not require a concrete level of certainty in identifications before those identifications are made or before the witness may testify. *See M. B. A. F. B. Fed. Credit Union v. Cumis Ins. Soc., Inc.*, 681 F.2d 930, 932 (4th Cir. 1982) (discussing similar federal rule: "Rule 602, however, does not require that the witness' knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible under this rule only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to."). *See also United States v. Owens*, 699 F. Supp. 815, 818 (C.D. Cal. 1988) (citing the majority interpretation of similar federal rule "it would be error to admit evidence over Rule 602 objection only when no reasonable trier of fact could find that the witness was testifying on the basis of his or her personal knowledge."). Credibility remains a matter for

the jury, and the jury should be afforded the opportunity to assess the witness' testimony. *See State v. Ranieri*, 586 A.2d 1094, 1098 (R.I. 1991) ("In a situation in which the question of a witness's Rule 602 competency is close (that is, the jury could find that the witness perceived the matter testified to), the judge should admit the testimony since the matter then becomes one of credibility and is properly for the jury."); *State v. Poag*, 583 S.E.2d 661, 669 (N.C.Ct.App. 2003) (quoting from commentary of their similar state rule: "Personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception."). *Accord State v. Singleton*, 395 S.C. 6, 10-14, 716 S.E.2d 332, 334-336 (Ct. App. 2011) (upholding ruling admitting in court identification where "there were inconsistencies" in prior identification statements, finding "[b]ecause Victim had prior personal knowledge of Singleton ... the identification process was not unduly suggestive.").

Here, there can be no question that the witness testified she was present, and saw two men enter. While she frankly testified she concentrated her attention on the first man, she testified she saw both men. The trial judge properly left the determination of credibility to the jury. Further, he gave ample guidance to the jury in his instructions:

> An issue in this case is the identification of the defendants as a person who committed the crime charge. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant. Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification by the defendant. You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like, how long or short a time was available; how far or close the witness was; the lighting condition, and whether the witness had the chance to see or know the person in the past. ...

(R. p. 360, line 12-p. 361, line 4).

In sum, the record supports that the witness, who was on the scene and actually involved, clearly stated that she was not fully sure of her identification, making the identification testimony a matter to submit to the jury for its consideration. The level of certainty goes to credibility – it is not a bar to admissibility. Further, the jury was adequately charged that it was a matter to carefully consider. Petitioner failed to show the trial judge abuse his discretion in admitting the testimony, or that he suffered any unfair prejudice. The Court of Appeals did not err in its decision. Petitioner is not entitled to any relief.

III.

The Court of Appeals did not err in affirming the trial judge's ruling admitting a photograph of a rifle which a firearms identification expert identified as consistent with the type of weapon that fired several of the shells recovered from the murder scene, and was also consistent with a witness' description of one of the weapons used.

Relevant Facts:

In pre-trial, Petitioner lodged an objection to the solicitor's use of a photograph of a rifle that merely looked like the one that was used in the robbery. The trial judge deferred a ruling until he heard what, if any, testimony would support admission of the photograph. (R. p. 67, line 4 - p. 71, line 20).

Patrick T**** testified that Shivers had "two rifles and a pistol" at Petitioner's home and showed the guns to T****. T**** further testified that the guns were SKS rifles and "one had a knife on it." (R. p. 136, lines 2-5). T**** testified that these guns were used in the burglary, robbery and murder. (R. p. 141, line 8-18; p. 148, lines 12-19). Specifically, he testified that Ryant and Shivers used the SKS rifles. (R. p. 148, lines 14-19). The

solicitor showed T**** State's Exhibit 75, a photograph of a rifle and asked if T**** previously identified the rifle in the photograph as "looking like one of the rifles ... used," to which T**** responded "Yes, sir." (R. p. 167, line 23 - p. 168, line 3). At that time, the exhibit was marked for identification only. (R. p. 168, lines 5-8).

Firearms identification expert Agent James Green of SLED testified that the five of the cartridges recovered from the murder scene matched either a SKS or AK forty-seven. (R. p. 217, lines 14-24). Mr. Green testified that he provided the prosecution with a photograph of the kind of rifle that could have fired the bullets, State's Exhibit 75. (R. p. 217, line 25- p. 218, line 6). The State thereafter offered the photograph into evidence, and Petitioner objected. (R. p. 218, line 9). The trial judge admitted the photograph over Petitioner's objection, and noted he would place the full ruling on the record later. (R. p. 218, lines 10-18). After completion of the witness' testimony, the trial judge made his ruling on the record:

> ... Mr. T****, when he testified, testified that they had – SKS type weapons were used. That is one of the types of firearms that agent Green testified could have fired that bullet, and I thought it could assist the jury in determining what type of weapon was used because, in fact, I'm not familiar with that kind of weapon. So, it helped me to visualize what type weapon was used. That was the basis for it. I am noting your objection on the record....

(R. p. 230, lines 12-21).

After the ruling, defense counsel noted that the State did not introduce a picture of a nine millimeter weapon – another weapon used but not recovered – and that the State treated the need for demonstrative evidence differently from weapon to weapon. (R. p. 230, line 24 - p. 231, line 6).

The Court of Appeals summarily found in the *per curiam* unpublished opinion that the trial judge did not abuse his discretion and unfair prejudice was not shown. (App. p. 3). Petitioner argued in the petition for rehearing that the Court of Appeals overlooked that the actual rifle was not found, and the rifle with a bayonet "was inflammatory," and introduced simply to inflame the passion of the jury. (App. p. 19).

Discussion:

The Court of Appeals ruling correctly reflects and relies upon established law and is supported by the facts of this case. There is no error.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). The Court of Appeals properly and reasonably found no abuse of discretion.

Petitioner argues the trial judge abused his discretion in allowing the photograph to be admitted as the rifle actually used was not recovered and the photograph unfairly "bolster[ed]" the case. (Petition, p. 19). Further, Petitioner argues the difference in treatment weapon to weapon created an inference that the rifle photograph "was introduced to incite the jury to decide an issue on an emotional basis." (Petition, p. 19). Neither argument shows an abuse of discretion by the trial judge in admitting the evidence.

First, the argument the rifle in the photograph is not the rifle actually used is a point of distinction made by Petitioner below, (R. p. 67, lines 8-10); however, he also conceded that a witness to the crime could "describe the weapon, was it big, was it little, was it a rifle,

was it a hand gun" and even "use [their] hands" to show "how big" the rifle was in the witness's recollection, (R. p. 67, lines 21-25). Therefore, Petitioner complains only of the manner of receipt of information. There is no real contest to the receipt of the information. This places admission of the photograph even more squarely in the discretion of the judge.

"Demonstrative evidence often is admitted only for use in the courtroom to explain and illustrate a witness's testimony, but it also may be admissible as an exhibit for the jury to examine and consider during deliberations." *Clark v. Cantrell*, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000). By definition, "[d]emonstrative evidence is not the thing itself; it only demonstrates or illustrates the facts given by other evidence." Danny R. Collins, South Carolina Evidence 400 (2d ed.2000). Petitioner has already conceded the admissibility of the description. Given that T**** identified the photograph as representing a rifle that was similar to the one he observed, the circle is complete, and the photograph simply aided in the witnesses description of the rifle. The photograph was properly admitted as demonstrative evidence in light of T****'s testimony. *Compare State v. McConnell*, 290 S.C. 278, 280, 350 S.E.2d 179, 180 (1986) ("Based upon the record in this case, we conclude that these items should not have been admitted because they were not properly connected with the incident, irrelevant, incompetent, and raised spurious inferences of prior bad acts."). Moreover, the gun in question was not an average hunting rifle but a distinctive Soviet or Russian weapon. (See R. p. 217, lines 14-24). This would logically take the rifle out of common context for most jurors – a point that appears to be a fair inference from the judge's ruling. (See R. p. 230, lines 12-21). While a juror is likely to comprehend and envision another pistol (recalling State's Exhibit 73, the .40 caliber pistol was before the jury), or a standard rifle, such a

distinctive rifle would not be readily called to the mind's eye. Thus, the photograph of this weapon aided the jury in placing the witness' description of the weapon in context. In fact, the description placed emphasis on the "knife" on the end of the rifle, (see R. p. 136, lines 2-5), but, as Petitioner readily conceded, the bayonet was folded on the rifle in the photograph – arguably less likely to "incite." (See R. p. 70, lines 12-25). At any rate, he has failed to show an abuse of discretion in admission of the photograph simply because the rifle depicted was not the actual rifle used in the incident.

As to Petitioner's remaining argument that photograph was simply used to "incite" the jury, that argument was not clearly made at trial and should be considered procedurally barred from review on appeal. *See, e.g., State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003) ("[i]ssues not raised and ruled upon in the trial court will not be considered on appeal."). Even so, the argument lacks merit. "To warrant reversal based on the admission or exclusion of evidence, the Petitioner must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *State v. Singleton*, 395 S.C. 6, 13, 716 S.E.2d 332, 335-36 (Ct. App. 2011), *quoting Fields v. Reg'l Med. Ctr. Orangeburg,* 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). There could be no "reasonable probability" that the verdict was affected by a simple photograph of a type of weapon that was consistent with a weapon that fired one set of the shell casings collected at the scene, especially where the gun was described and the photograph identified by a participant to the crimes. Moreover, as argued above, the .40 caliber pistol was already in evidence, and was sufficient to demonstrate the average size of a pistol in general – the photograph was an adequate

demonstrative aid for the jury to visualize the missing weapon. There is nothing unfairly prejudicial readily discernible in admitting this photograph. Again, Petitioner fails to prove an abuse of discretion.

Lastly, any conceivable error could only be harmless. This is so for two reasons. First, the photograph is cumulative to the description given by T****– a description Petitioner raised no objection to and conceded was admissible. *See State v. Haselden,* 353 S.C. 190, 196-97, 577 S.E.2d 445, 449 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 378 S.C. 296, 300, 662 S.E.2d 489, 491 (Ct. App. 2008) (evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless). Second, there is overwhelming evidence of guilt. "Where a review of the whole record establishes that an error is harmless beyond a reasonable doubt, the conviction should not be reversed." *State v. Elders*, 386 S.C. 474, 480-81, 688 S.E.2d 857, 860-61 (Ct. App. 2010), *citing State v. Thompson,* 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Here, there are two independent identifications of Petitioner as the individual who entered the apartment with a gun – one by T****, and one by surviving witness, Parsley. Further, forensic evidence identified that multiple guns were used in the crime, confirming Parsley's testimony that multiple individuals entered the apartment, which in turn, supports T****'s testimony of the events. Yet, a harmless error analysis need not be made as Petitioner failed to demonstrate an abuse of discretion in the admission of the photograph.

In sum, the Court of Appeals correctly found no abuse of discretion and no unfair prejudice in the ruling. Petitioner is not entitled to any relief.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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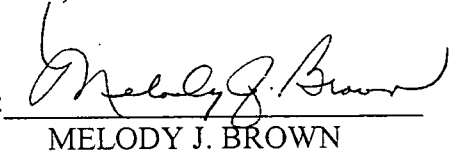
BY: 
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July 22, 2013.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions
Edgar Dickson, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 2013-UP-001 (S.C. Ct. App. filed January 2, 2013)

The State, Respondent,

vs.

Ralph Bernard Coleman, Petitioner.

Appellate Case No.: 2013-000616

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the State's *Return to Petition for Writ of Certiorari* on Petitioner by depositing two copies of same in the United States mail, postage prepaid, addressed to his attorney of record, addressed as follows:

LaNelle Cantey Durant, Appellate Defender
South Carolina Commission on Indigent Defense
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This 22nd day of July, 2013.

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