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**Mar 12 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL LINDSAY FAILE,

APPELLANT

APPELLATE CASE NO. 2023-001055

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ANDERS BRIEF OF APPELLANT

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JESSICA M. SAXON  
Appellate Defender

South Carolina Commission on Indigent Defense  
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PO Box 11589  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in admitting the out of court identification of Appellant where the identification procedure used was impermissibly suggestive and conducive to a substantial likelihood of misidentification?

## STATEMENT OF THE CASE

Appellant was indicted during the August 2022 term of the York County grand jury for shoplifting, value less than \$2000, enhancement. R. 369. The State, represented by William Anderson and Dan Porter, called the case to trial on June 20, 2023, before the Honorable William A. McKinnon and a jury. Appellant was represented by Roger Stevens. R. 1. After a two-day trial Appellant was found guilty as indicted. R. 346, ll. 2-6. Judge McKinnon sentenced Appellant to fifty-four months incarceration. R. 362, ll.1 9-25; R. 371.

### STANDARD OF REVIEW

“[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact.” State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); see also State v. Traylor, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (citing Moore and holding that photographic line-up procedure was “patently suggestive”). “Generally, the decision to admit an eyewitness identification is at the trial judge’s discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error.” Moore at 288, 540 S.E.2d at 448. “In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court.” Id. Questions of law are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

## ARGUMENT

The trial court erred in admitting the out-of-court identification of Appellant where the identification procedure used was impermissibly suggestive and conducive to a substantial likelihood of misidentification.

### **Relevant Facts**

On May 17, 2022, Monica Dotson, the asset protection manager at the Belk in Rock Hill, South Carolina, called 911 to report a shoplifting in progress. R. 112, ll. 7-20; R. 132, ll. 5-6. Dotson informed dispatch that the suspect was someone she recognized from previous incidents and described him as a white male in his fifties, average build, approximately five-seven with salt and pepper hair that was longer on the top. She noted he was wearing a medical mask and that he had bushy eyebrows and a prominent browbone. R. 114, ll. 17-24; R. 132, ll. 8-19.

The shoplifter cut the security tethers off of two designer handbags and left the store without paying for them. Once outside he entered the driver side of a white Chevrolet pickup truck. Dotson was able to provide police with the first two letters of the plate as V M, but the rest of the plate number was obscured by what appeared to be black tape. R. 115, l. 2-R. 116, l. 19. Utilizing license plates readers and law enforcement databases, officers developed a suspect vehicle and license plate number. R. 190, ll. 11-18; R. 194, l. 20-R. 195, l. 15; R. 223, ll. 16-21. The vehicle in question was determined to be registered to Appellant. R. 255, ll. 6-21.

Detective Darin Swiger requested that SLED place Appellant's DMV photograph in a six-pack photographic line-up. R. 367. Swiger present the line-up to Dotson who picked picture number two as the shoplifting suspect. Picture two was Appellant's DMV photograph. R. 256, l. 7-R. 258, l. 15. Prior to the start of trial, the parties held a hearing pursuant to Neil v. Biggers,

409 U.S. 188, 198 (1972), to determine the admissibility of Dotson's out-of-court identification of Appellant.

Dotson testified that she observed the shoplifter on the store cameras for approximately fifteen minutes during the May 17 shoplifting incident. She testified she was alert, that the store was well lit, and that she was familiar with the shoplifter from prior incidents. R. 37, ll. 15-19; R. 39, l. 10-R. 40, l. 8. A few days after the incident Swiger brought the lineup for her to review at Belk. She testified he advised her not to guess because the line-up may or may not contain the suspect. Once handed the lineup she testified she considered it and identified picture two as the suspect within fifteen to twenty seconds. She testified she was 100% sure about her identification. R. 41, l. 6-R. 42, l. 19. She noted that Appellant was heavier in the photograph than he was at the time of the incident. When asked why she identified number two as a heavier photograph of the suspect she stated "Because it looked like him. I mean, it wasn't - there wasn't really any other photos on the page that looked even similar." R. 44, ll. 2-6.

On cross examination she stated that she was not completely confident with her initial choice at the time because she was unsure if there would be another page to review. R. 47, l. 8-R. 48, l. 19. However, she maintained that after she made the selection there was no doubt in her mind that picture two was the shoplifter. R. 52, ll. 8-11.

Swiger testified that there was not formal training on how to conduct a photographic lineup but that he had read the department's policy on conducting lineups and talked with other officers about the topic. R. 54, l. 11-R. 55, l. 9. Swiger testified that he was familiar with the best practices for conducting photographic lineups but was unfamiliar with the double-blind administration of photographic lineups or sequential presentation of suspect photographs for identification. R. 65, l. 9-R. 67, l. 18. Swiger conceded that Dotson was not 100 percent

confident with her identification but by the end of their conversation she was “much more confident.” R. 68, ll. 18-24. He maintained that he in no way influenced the identification process. R. 69, ll. 12-14.

Counsel Stevens argued that Swiger was unfamiliar with modern policing standards and best practices regarding photographic lineups and that he had not received any formal training on the topic. He also argued that the lineup was inaccurate because the pictures show the suspects full faces when they should have been altered to have the lower portion of their faces covered with a surgical mask. He stated that the lineup was “not necessarily suggestive, but its problematic.” R. 71, l. 13-R. 73, l. 9.

The State argued that the lineup procedure was not suggestive and even if the court were to find it suggestive it was “so reliable that no substantial likelihood of misidentification existed.” R. 73, l. 22-R. 74, l. 1. The trial court ruled that there had been no evidence presented that the lineup procedure was a suggestive identification procedure and denied the motion to exclude the out-of-court identification of Appellant. R. 75, ll. 2-20.

## **Discussion**

“An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification.” State v. Dukes, 404 S.C. 553, 557, 745 S.E.2d 137, 139 (Ct. App. 2013) *citing* State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). “A witness's subsequent in-court identification is inadmissible ‘if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.’” Id. *citing* State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added); *see also* Neil v. Biggers, 409 U.S. 188, 198 (1972) (“While the phrase [‘a very

substantial likelihood of irreparable misidentification’] was coined as a standard for determining whether an in-court identification would be admissible ..., with the deletion of ‘irreparable’ it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.”).

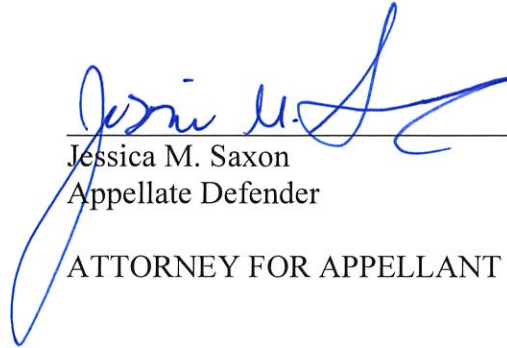
“Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification.” *Id. citing Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. “First, the court must determine whether the identification resulted from “unnecessarily suggestive” police procedures.” *Id. citing Biggers*, 409 U.S. at 198–99. “If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there, and the court does not need to consider the second prong.” *Id.* at 557-558, S.E.2d at 139 (internal citation removed). “If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless ‘so reliable that no substantial likelihood of misidentification existed.’” *Id. citing Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 199). “The following factors should be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.” *Traylor* at 82, 600 S.E.2d at 527 *citing State v. Cheeseboro*, 346 S.C. 526, 541, 552 S.E.2d 300, 308 (2001), cert. denied 535 U.S. 933 (2002).

Dotson testified that there were no other photographs in the lineup that were even similar to the one of Appellant. That important testimony was ignored by the court when it ruled that

there was no evidence of a suggestive procedure. The fact that Appellant's photograph was not similar to the others in the lineup meant that he would stand out and he would likely be the person that was selected as the suspect. Further, as Counsel Stevens argued, the pictures used were full face photographs despite the fact that Dotson had never seen the shoplifters entire face, only his eyes, forehead, and hair. Additionally, Detective Swiger did not use modern policing best practices, such as double-blind administration or sequential photograph presentation. The standard six-pack lineup used here was inherently suggestive because Appellant's photograph stood out from the others and was his entire face instead of just the portion of his face that was visible to Dotson. The trial court erred in admitting the out-of-court, and subsequent, in-court, identifications. This Court should find the out-of-court and in-court identifications inadmissible and reverse the case for a new trial.

**CONCLUSION**

Based on the foregoing argument, Appellant respectfully requests that this court remand the matter back to the Court of General Sessions of York County for a new trial.

  
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Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 12<sup>th</sup> day of March, 2024.

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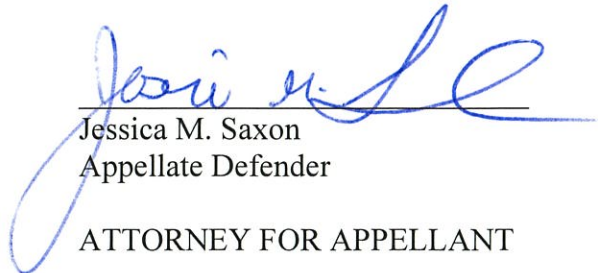
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Lindsay Faile states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge William A. McKinnon, which was held on June 20 - 22, 2023, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, she asks the Court to relieve her as counsel for Michael Lindsay Faile.

Respectfully Submitted,



Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 12<sup>th</sup> day of March, 2024.

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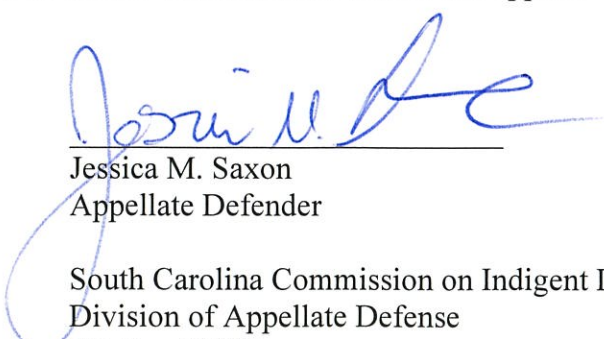
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment No. 2022-GS-46-03416, sentencing sheet, and Arrest Warrant No. 2022A4620301274
- (2) Trial transcript dated: June 20, 2023; June 21, 2023; June 22, 2023
- (3) State's Exhibit 10 A and B – Lineup instructions and photographic lineup\*

I certify that this designation contains no matter which is irrelevant to this appeal.



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ATTORNEY FOR APPELLANT

This 12<sup>th</sup> day of March, 2024.

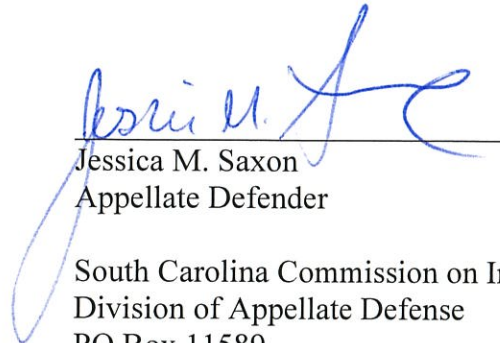
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**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."



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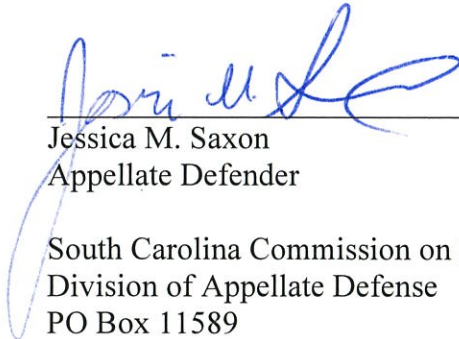
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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Michael Lindsay Faile, #382387, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 12<sup>th</sup> day of March, 2024.



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