STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Florence County
H. Steven DeBerry IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SEAN DEVON JAMES,

PETITIONER

Opinion No. 2024-UP-070 (S.C. Ct. App. Filed March 6, 2024)

APPELLATE CASE NO. 2022-001279

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

This Court should grant certiorari to correct the Court of Appeals erroneous affirmation of Petitioner's convictions regarding a substantial constitutional issue, in that trial court failed to suppress the identification of Petitioner as unduly suggestive and unreliable where the initial description given by the eyewitness was limited to race and gender, and where over a month elapsed before police sent one photo of each suspect to the eyewitness via text and included a statement under Petitioner's photograph regarding a tattoo on his face. 9

CONCLUSION 16

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 17, 2024. App. 10.

QUESTION PRESENTED

Whether this Court should grant certiorari to correct the Court of Appeals erroneous affirmation of Petitioner's convictions regarding a substantial constitutional issue, in that trial court failed to suppress the identification of Petitioner as unduly suggestive and unreliable where the initial description given by the eyewitness was limited to race and gender, and where over a month elapsed before police sent one photo of each suspect to the eyewitness via text and included a statement under Petitioner's photograph regarding a tattoo on his face?

STATEMENT OF THE CASE

On March 3, 2022, Petitioner Sean Devon James was indicted by the Florence County Grand Jury for armed robbery, grand larceny (more than $10,000), and conspiracy, arising from an incident occurring on November 17, 2019. R. 8, ll. 10-16; R. 298-301. His case proceeded to trial from September 6th through 7th, 2022, before the Honorable H. Steven DeBerry, IV, and a jury. John M. Ervin, III, represented Petitioner, while Jeremiah Freeman represented the State. R. 1.

On the night of November 17, 2019, Ms. Carla Eaddy (Eaddy) was sitting in her car by the side of the home of her sister and brother-in-law, Aggie Graham (Mrs. Graham) and Clifton Graham (Mr. Graham), on Walnut Street in Florence, South Carolina, and about to leave. R. 14, ll. 2-19; R. 126, ll. 6-17; R. 128, ll. 13-19. While counting money in her car, a black SUV stopped in front of the house and Ms. Mo Woods (Woods) exited. Woods came up to Eaddy and asked to use the bathroom, and Eaddy referred her to the front door to ask Ms. Graham. Ms. Graham came to the door when Woods knocked, allowed her inside to use the bathroom, and Woods left back to the SUV. R. 14, ln. 24–R. 16, ln. 20; R. 18, ln, 4—R. 19, ln. 25; R. 108, ln. 22—R. 109, ln. 7; R. 127, ll. 2-19. The only illumination outside came from the floodlight in the yard of the house. R. 43, ll. 18-21; R. 45, ll. 16-23; R. 109, ll. 21-22; R. 111, ll. 22-24.

Immediately after, three men—two black males, and one yellow or light-skinned male—armed with weapons jumped out of the SUV. One black male went to the driver's-side door of Eaddy's car, the light-skinned male went to the passenger side door, and the second black male went to the front porch door. R. 20, ln. 9—R. 21, ln. 25; R. 127, ln. 20—R. 128, ln. 2; R. 132, ll. 13-19.

Mrs. Graham opened the door again about five (5) to ten (10) minutes after Woods left to see why her dog was barking, only to see a man pointing a gun at her; he ordered her outside, and took her cell phone. R. 53, ll. 1-2; R. 108, ln. 18—R. 109, ln. 20. Mr. Graham was in bed watching television, but likewise came to the front door due to their dog barking. When he opened the door, the gunman pointed his weapon at Mr. Graham and pulled him through the screen door. Mr. Graham moved to the side of the porch with his wife and placed himself between the gunman and Mrs. Graham with his back to the gunman. R. 116, ll. 12-22; R. 118, ll. 1-19.

Meanwhile, the robber next to Eaddy had his handgun pointed at her. He took between $2000 to $2500 cash, her cell phone, and leaned in to take the keys from the ignition as well. R. 131, ll. 6-17; R. 132, ll. 6-10; R. 139, ln. 21—R. 140, ln. 3. The assailants retuned to the SUV and departed. The duration of the entire incident—from the moment Ms. Woods arrived till the moment the SUV left—lasted approximately ten (10) to twenty (20) minutes. R. 140, ln. 23—R. 141, ln. 11.

Three Florence City Police Department (FPD) officers arrived shortly after. R. 99, ll. 2-14; R. 101, ll. 6-22. According to police, the only description of the robbers that Eaddy, Mrs. Graham, or Mr. Graham[1] could muster at the time was that there were two black males, and one light-skinned[2] male; no other physical description was given. R. 33, ll. 23—R. 34, ln. 2; R. 45, ll. 16-23; R. 103, ln. 22—R. 105, ln. 11. Items taken included cell phones, cash, and keys to Ms. Eaddy's car. R. 100, ll. 18-19.

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[1] While the incident report did not indicate the detail, Mr. Graham stated he told police that one of the black male assailants "had dreads in his head." R. 119, ln. 18—R. 120, ln. 6.

[2] During testimony, witnesses utilized the terms "high yellow" and "light bright" at times to describe the "light skinned" robber. R. 33, ll. 23—R. 34, ln. 2; R. 45, ll. 16-23; R. 127, ln. 23; R. 132, ll. 13-16; R. 138, ln. 17-22.

On December 20, 2019, Eaddy's daughter, Ashley Lynch (Lynch) noticed Eaddy's car was missing when she drove by. After calling her mother—who was in Baltimore, Maryland at the time—Lynch contacted both Pee Dee Auto Sales and the police to report the vehicle stolen. Pee Dee Auto Sales was able to work with police to locate Eaddy's 2015 Chevrolet Impala within one hour due to a tracking device put in place until the vehicle was fully paid-off by the owner. R. 145, ln.4 –R. 148, ln. 24; R. 151, ll. 5-15. The Impala was ultimately found behind a singlewide trailer off Kelly Bridge Road West in Bishopville, South Carolina. Lee County Deputy Sheriff Jack Corbett (Dep. Corbett) and his trainee were sent to investigate, and discovered three men by Eaddy's blue Impala: Justin Shope (Shope), Trevon Jarkyese Cooley (Cooley), and Petitioner. Shope, who was white, lived at the trailer. Cooley and Petitioner were under the hood of the vehicle with tools. R. 170, ln. 2—R. 171, ln. 8. Dep. Corbett detained all three men, mirandized them, and arrested them for possession of a stolen vehicle. R. 185, ll. 2-17. Although Dep. Corbett looked through the vehicle, including the floorboard area and the trunk, he did not process it for evidence. Rather, it was towed to a junkyard, and Lynch took possession of it the following day. R. 150, ll. 1-20; R. 186, ll. 15-25. Upon seeing a handgun on the floorboard, Ashley contacted police and the firearm was ultimately recovered by FPD. R. 151, ll. 5-25; R. 159, ll. 8-9.

When Lee County notified FPD on December 20, 2019, Officer Minors (Ofc. Minors) relayed the information to Investigator John Davis. At that time, Ofc. Minors also informed Inv. Davis of the armed previous robbery case from the same address on Walnut Street as the stolen vehicle. R. 61, ll. 8-15; R. 193, ll. 2-4; R. 200, ll. 13-15; R. 205, 10-25. Inv. Davis obtained the names and dates of birth for each of the three suspects; rather than obtaining a photographic lineup—which he later acknowledged was not a very difficult thing to do—he simply printed

their DMV photographs and left for Walnut Street. R. 56, ll. 3-9; R. 57, ll. 5-7; R. 197, ll. 5-10; R. 205, ll. 23—R. 206, ln. 17. After reaching Lynch, Mr. Graham, and Mrs. Graham, he showed them the three photographs, ostensibly to determine if they should or should not be driving the vehicle.[3] R. 57, ll. 6-11; R. 114, ll. 1-19; R. 120, ll. 13-22. In Inv. Davis' words, "oftentimes the best form of identifying someone who should *or shouldn't* be in possession of your car is through photographs." R. 198, ll. 23-25 (emphasis added). Inv. Davis indicated that Mr. and Mrs. Graham purportedly told him the three men in the pictures had robbed them the previous month. R. 58, ll. 2-15; R. 201, ll. 4-7. Inv. Davis then sent the same pictures to Eaddy in a text, along with a message beneath Petitioner's photograph stating, "This one has a cross tattoo between his eyes." According to Inv. Davis, he included the text regarding the tattoo because it was not visible in the photograph, and "it's important for proper identification." R. 27, ll. 10—R. 28, ln. 24; R. 28, ll. 16-23; R. 138, ll. 1-11; R. 207, ll. 12-17; (Defendant's Ex. #1). Eaddy called, and indicated that the three men in the photographs were not allowed to drive her car, and had robbed her the previous month. R. 82, ll. 20-24. In Eaddy's words, she recognized all three of them "because all three of them was together." R. 141, ll. 13-17. Moreover, although she acknowledged the cross tattoo could not be seen in the picture sent, Eaddy stated she recognized Petitioner's face "because he tattoos all over his face."[4] R. 22, ll. 13-20; R. 142, ll. 1-8.

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[3] According to Inv. Davis, it is "very standard" for FPD officers to show individual photographs of people found in possession of a vehicle reported stolen to the victim "to eliminate them as being persons who should *or shouldn't* be in possession of that vehicle." R. 62, ll. 3-5 (emphasis added). His rationale for this procedure was as follows: "So in a way *to unburden law enforcement with going through all the photo lineups and things like that for a [sic] automobile reported stolen,* more often than not, the people are said to, 'Oh yeah, it was john smith with the vehicle? Okay, yeah, they drive it to the grocery store sometimes, they're a friend of a friend.'" R. 62, ll. 9-16 (emphasis added).

[4] Although Eaddy claimed at the suppression hearing that her assailant had facial tattoos, this detail was never reported to police on the night of the incident, or over the following month.

Petitioner's case proceeded to trial from September 6th through 7th, 2022. R. 1. Petitioner's trial counsel (Counsel) moved to suppress out-of-court and in-court identifications of Petitioner due to the unduly suggestive nature of the identification, and its unreliability. R. 10, ln. 1–R. 11, ln. 21; R. 302-303. Specifically, Counsel argued that no eyewitness could provide any details or identification of the robbers beyond gender and race; yet, over a month later Inv. Davis showed them three photographs of three suspects—two black males, and one white male, one of which (Petitioner's) included a message regarding a facial tattoo. As such, the entire identification was tainted from its inception. R. 67, ln. 4—R. 69, ln. 9; R. 78, ln. 14–R. 80, ln. 19; R. 81, ln.1—R. 83, ln. 11.

After taking testimony from Eaddy, Mr. and Mrs. Graham, and Inv. Davis, and hearing arguments from both Counsel and the State, the trial court took note that the detective was aware of the armed robbery, and suppressed identification by Mr. and Mrs. Graham as unreliable. R. 87, ll. 12-14. However, the court reasoned that Eaddy had ample time to view Petitioner from approximately two feet away, and determined the accuracy of Eaddy's prior description of "two black males and one that was light skinned male, certainly is consistent, at least." R. 87, ll. 15-22; R. 88, ll. 4-7. It further determined that her level of certainty "seem[ed] credible to me." R. 88, ll. 7-10. Finally, regarding the time period of over one month between the initial incident and confrontation, the trial court determined it was "reliable and certainly credible to believe that you wouldn't forget such an event within just 32 days, or the details of that event during that time period." R. 88, ll. 11-18. Accordingly, the court allowed the identification of Petitioner by Eaddy. R. 88, ll. 20-22; R. 131, ll. 20-23; R. 135, ll. 5-11.

Rather, she claimed that the included text message regarding a facial tattoo "kind of refreshed my memories." R. 22, ll. 13-20; R. 33, ln. 20—R. 34, ln. 15.

The trial court directed a verdict of acquittal for the charge of conspiracy, but the jury found Petitioner guilty of armed robbery and grand larceny. R. 217, ll. 23-24; R. 256, ll. 14-24. Petitioner was sentenced as follows: twenty (20) years for armed robbery, and time served for grand larceny. R. 264, ll. 10-16; R. 302-303.

Petitioner appealed, and the Court of Appeals affirmed his convictions and sentences on March 6, 2024, in an unpublished *per curiam* opinion. State v. James, Op. No. 2024-UP-070 (S.C. Ct. App. filed March 6, 2024). Petitioner filed a Petition for Rehearing on March 21, 2024, which was denied.

This petition for writ of certiorari follows.

ARGUMENT

This Court should grant certiorari to correct the Court of Appeals erroneous affirmation of Petitioner's convictions regarding a substantial constitutional issue, in that trial court failed to suppress the identification of Petitioner as unduly suggestive and unreliable where the initial description given by the eyewitness was limited to race and gender, and where over a month elapsed before police sent one photo of each suspect to the eyewitness via text and included a statement under Petitioner's photograph regarding a tattoo on his face.

Petitioner respectfully submits that the Court of Appeals overlooked or misapprehended the fact that, after the trial court correctly held that the out-of-court identification procedure was unduly suggestive, the eyewitness's generic description of the assailants as two black males and a light skinned male, coupled with her self-admitted unfocused mind at the time of the robbery, was so impacted by the overtly suggestive identification procedure that it created a very substantial likelihood of irreparable misidentification.

"A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). Thus, the general rule concerning identification "is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (citing State v. Cash, 257 S.C. 249 185 S.E.2d 525 (1971)).

A two-prong inquiry is used to determine the admissibility of an out-of-court identification: (1) whether the identification process was unduly suggestive; and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.

See Moore, 343 S.C. at 287, 540 S.E.2d at 447; see also Neil v. Biggers, 409 U.S. 188, 198-200, 93 S.Ct. 375, 382 (1972).

First, the out-of-court identification procedure utilized by Investigator Davis (Inv. Davis) was overtly suggestive. See, e.g., State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000); Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). "A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (citing State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000)). Here, Inv. Davis not only sent individual photographs of the suspects to Ms. Carla Eaddy (Eaddy), but also included the text message, "This one has a cross tattoo between his eyes" beneath Petitioner's photograph when he sent it. According to Inv. Davis, he included the text regarding the tattoo because it was not visible in the photograph, and "it's important for proper identification." R. 27, ll. 10—R. 28, ln. 24; R. 58, ll. 16-23; R. 138, ll. 1-11; R. 207, ll. 12-17; (Defendant's Ex. #1). Thus, the procedure utilized by Inv. Davis was somewhat akin to a single-person "show-up," except that it occurred over a month after the incident. As in Moore, "it is patent the show-up procedure used was unduly suggestive." Moore, 343 S.C. at 287, 540 S.E.2d at 248. Further, not only did he send the individual pictures, but he also specifically called attention to an identifiable feature of one suspect—Petitioner—that was not even visible in the photograph. Accordingly, the procedure used here was unquestionably suggestive.

As such, the issue turns upon the reliability of Eaddy's identification of Petitioner. See Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977) (citing Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382 (1972)) (listing factors to consider when

evaluating the totality of the circumstances to determine the likelihood of misidentification); see also Traylor, 360 S.C. at 82, 600 S.E.2d at 527. "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Traylor, 360 S.C. at 81, 600 S.E.2d at 526. Here, the circumstances taken as a whole militate toward suppression. First, even though Eaddy was close to the assailant for approximately ten to twenty minutes, she was under circumstances of emotional and mental stress; rather than sharpen her focus and memory, the situation caused her focus and recollection to become frantic and impaired. According to her own testimony, "[w]hen you go through something that traumatic, sometimes your mind is, you know, not there." R. 136, ll. 12-13. Under such highly stressful and traumatic circumstances, Eaddy's attention to detail and mind were admittedly "all over the place." R. 136, ln. 10. This admission cuts at the root of reliability in Eaddy's later out-of-court identification.

Next, the accuracy of Eaddy's prior description of the perpetrator highlights not only the lack of reliability of her memory, but also the likelihood of misidentification due directly to the highly suggestive out-of-court identification procedure used. The only description Eaddy mustered on November 17, 2019 of the person standing next to her with a gun was that he was a black male. Further, although Eaddy later claimed during the suppression hearing that her assailant had facial tattoos, this detail was never reported to police on the night of the incident, or over the following month. Rather, she claimed that the included text message regarding a facial tattoo "kind of refreshed my memories." R. 22, ll. 13-20; R. 33, ln. 20—R. 34, ln. 15. In other words, Eaddy's ardent belief that she remembered and identified Petitioner was likely the product of the extremely suggestive photograph sent to her with the concomitant text message beneath it.

This also goes to the next factor: certainty. Although Eaddy indicated a high level of certainty at the time, as indicated above, this certainty was likely born of the totality of circumstances under which Petitioner's likeness was presented. Eaddy was sent the photographs of three suspects—two black males, and one white male—to identify them and determine whether or not they had permission to drive her stolen vehicle after the key to that vehicle was stolen one month prior by three robbers—two black males, and one light skinned male. Under such circumstances, it was both highly suggestive and highly predictable that Eaddy would identify them—especially Petitioner—as one of the robbers. In fact, Eaddy acknowledged the photos of them because "all three of them was together." As such, Eaddy's certainty is both unsurprising, and an example of why the identification procedure used by Inv. Davis—effectively a show-up coupled with overtly suggestive language beneath Petitioner's photograph—is disfavored in the law.

Finally, the length of time between the offense and show-up confrontation strongly militates against reliability. Unlike a typical "show-up" occurring within minutes or hours of an incident, the highly suggestive photographs here were shown to Eaddy over a full month after the incident. Eaddy had time to finish talking with police at the incident location on November 17, 2019, leave, go to her own home in Florence, and then leave again for Baltimore to attend a funeral. Then, after over a full month had passed since the incident, she received a text message from Florence Police Department—the same department investigating the robbery—on December 20, 2019, asking her to identify the three photographs sent to her. As she told the court, nothing occurred during that time period that would improve her memory or ability to recall the three robbers. R. 30, ll. 9-12. To the contrary, she was subjected to more stress, including the unrelated death of her family member, traveling to Baltimore for a funeral, and learning that her car was stolen the same morning that she was sent three pictures of suspects. In other words, the incident was far from "fresh" in her memory

when asked to identify three individual photographs of three individual suspects sent to her on December 20, 2019, as was any description beyond the generic statement of two black males and one light skinned male.

In light of all circumstances involved, Eaddy's identification of Petitioner was unreliable. She was unable to provide anything more than a generic description—gender and race—of the three robbers on the night of the incident, as both her mind and focus were "all over the place." R. 136, ln. 10. Over a full month later, she was sent three photographs of three suspects—two black males, and one white male—with one including a message describing details not seen in Petitioner's photograph. Eaddy indicated she did not previously recall tattoos, but the included text message regarding a facial tattoo "kind of refreshed my memories." Under such circumstances, it cannot be said that the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. See Moore, 343 S.C. at 287, 540 S.E.2d at 447; see also Neil v. Biggers, 409 U.S. at 198-200, 93 S.Ct. at 382 (1972). To the contrary, the totality of the circumstances show that Eaddy's recollection and identification of Petitioner was likely the product of the highly suggestive identification procedure used in this case. Therefore, Eaddy's identification of Petitioner as one of the robbers was inadmissible, as it violated Petitioner's fundamental due process rights, and the Court of Appeals erroneously affirmed. See, e.g., Moore, 343 S.C. at 288, 540 S.E.2d at 448 (citing Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir.1976) ("[A]n eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law.").

Further, Petitioner was prejudiced by admission of testimony regarding Eaddy's identification. A constitutional error may be harmless only where the reviewing court is able to declare a belief "*beyond a reasonable doubt* that the error complained of did not contribute to the

verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) (emphasis added); see also Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).[5] "No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990).

In the case at bar, the State extensively relied upon Eaddy's identification of Petitioner as the perpetrator in order to obtain convictions against him. Without such identification, the State had no other direct or substantial circumstantial evidence to place Petitioner with a gun in his hands at Walnut Street in Florence on the night of November 17, 2019. The State provided no fingerprints or DNA from the driver's door or ignition area of Eaddy's Impala where the assailant stood and leaned when he reached into Eaddy's car to take the keys out of the ignition, nor did the State submit fingerprints or DNA from the key recovered out of the Impala in Shope's backyard. The only fingerprint of Petitioner was on the outside of the rear door when he, Cooley, and Shope were with the vehicle in the back of Shope's residence. In fact, the State even failed to produce fingerprints or DNA evidence from the handgun later found inside Eaddy's Impala. Further, no other witnesses place Petitioner at the scene of the crime either: neither Mr. or Mrs. Graham even saw the face of the third robber by the driver's door of Eaddy's car.

Additionally, the State repeatedly relied upon Eaddy's identification of Petitioner in its closing argument to answer the critical question in the case: "It seems to me, and I submit to you that the only issue that we have in this matter is who did it." R. 231, ll. 24-25. R. 228, ln. 20–R. 229, ln. 18; R. 230, ln. 1—R. 235, ln. 21. The State made this abundantly clear when it answered its

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[5] Additionally, it is the burden of the party benefitting from the trial error to prove it was harmless beyond a reasonable doubt. See, e.g., Chapman, 386 U.S. at 24, 87 S.Ct. at 828.

own question shortly after, asking: "What evidence do we have to prove the who? Carla Eaddy. That's who." R. 233, ll. 9-10. Thus, Eaddy's testimony placing Petitioner as the man robbing her at the side of her car was the only direct evidence the State had to meet a material element of identity. See, e.g., State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) ("By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act.") (citing State v. Mayfield, 235 S.C. 11, 25, 109 S.E.2d 716, 724 (1959)). Simply stated, Eaddy's identification of Petitioner was critical to the State's case against Petitioner. Accordingly, Petitioner was prejudiced as the error was not harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Petitioner Sean James respectfully requests that this Court grant certiorari, reverse the decision of the Court of Appeals, as well as Petitioner's convictions and sentences, and remand his case for a new trial.

Respectfully Submitted,

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This 20th day of May, 2024.