STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAPHAEL LAMAAR PONTOO,

APPELLANT

APPELLATE CASE NO. 2015-000323

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err when it required the appellant to prove his duress defense by a preponderance of the evidence, as contemplated by *Dixon v. United States*, 548 U.S. 1 (2006), despite the fact that the duress defense negates one of the statutory elements of the crime?

2. Did the trial court err when it allowed the State to use the appellant's silence after invoking the protections of *Miranda v. Arizona*, 384 U.S. 436 (1966), to impeach the appellant's testimony in his defense, in contravention of *Doyle v. Ohio*, 426 U.S. 10 (1976)?

3. Did the trial court err by allowing a victim who had 1) never identified the appellant as the suspect in an investigatory photo array, and 2) had in fact identified a person *other* than the appellant as the most likely suspect, to observe the appellant while seated at the defense table and then identify him as the suspect, despite the fact over one year had passed since he could have possibly viewed the appellant, creating a violation of the strictures of *Neil v. Biggers*, 409 U.S. 188 (1972)?

STATEMENT OF THE CASE

From January 26, 2015, through January 28, 2015, appellant Raphael Pontoo was tried in the Circuit Court of South Carolina, in the County of Lexington, on two felony counts. The first count alleged was Armed Robbery in violation of S.C. Code Ann. §16-11-330 (1976); the second was Failure to Stop for a Blue Light Resulting in

Death, in contravention of S.C. Code Ann. § 56-5-750 (1976). After jury selection, the court held two pretrial hearings outside the presence of the jury. The first hearing was conducted to determine voluntariness and permitted use of statements under the standards of *Jackson v. Denno*, 378 U.S. 368 (1964). The second was held to ascertain whether an in court identification of Pontoo by the alleged victim of the armed robbery would be permissible under the scheme adopted by *Neil v. Biggers*, 409 U.S. 188 (1972). The court made preliminary findings on both these evidentiary questions and the case proceeded to trial.

During the trial, as reflected in his pretrial hearing rulings, the trial court judge permitted the State to impeach Pontoo with his post-*Miranda* warning silence. Additionally, the court permitted the purported victim of the armed robbery to make an in-court identification of Pontoo as the perpetrator of the armed robbery, despite the fact that in the pretrial investigation, the purported victim was unable to identify Pontoo as the suspect. Pontoo took the stand in his own defense and claimed that he was not the person who committed the armed robbery. Though he admitted to driving the car that was involved in the failure to stop for a blue light resulting in death charge, Pontoo testified that he was driving the car under duress.

At the conclusion of the State's case-in chief, as well as at the conclusion of Pontoo's testimony, the defense attorney moved for a directed verdict on both counts. The trial judge denied those motions. At the conclusion of all testimony, the State and the defense attorney conferred with the trial court judge on the matter of, *inter alia*, jury instructions. The defense attorney requested a charge that the State had to prove beyond a reasonable doubt the absence of duress. The trial judge ruled,

at the urging of the State, that the proper standard for determining the burden of proof for a duress defense is controlled by *Dixon v. United States,* 548 U.S. 1 (2006). *Dixon* stands for the proposition that unless the affirmative defense negates an element of the crime, affirmative defenses such as duress must be proved by the defense by a preponderance of the evidence. Over the objection of the defense attorney, the trial judge instructed the jury under the *Dixon* standard.

After closing arguments, the trial judge charged the jury. Following approximately two hours of deliberation, the jury returned a verdict of guilty on each of Pontoo's indictments. The defense attorney moved for a new trial based on prior motions and objections lodged. The trial judge acknowledged the defense request for a new trial, but ruled that the verdict was consistent with the evidence that was presented and denied the motion. This appeal was timely filed to seek review of the trial court's rulings.

This appeal remained at the Office of Indigent Defense until being assigned to the Appellant Practice Project. After being assigned to the Appellant Practice Project attorney, there was one additional request for an extension to file this appeal, which was then due on January 11, 2016. The request for extension was unopposed by the State, and was granted with a new due date of February 10, 2016.

FACTS

On the evening of January 23, 2014, appellant Raphael Pontoo was at a nightclub known as The Rock, in Lexington County, South Carolina. Tr. p. 114, lines 6-8. Also at the club that night was Jonathan Ruple. Tr. p. 114, lines 12-16. Pontoo was with a group of four other people, among them, Alexander Kewon Clemmons.

Tr. p. 114, lines 5-17. At some point in the evening, Ruple and Pontoo met in the parking lot of the club. Each had a handgun, and each displayed their handgun to the other. Tr. p. 116, lines 1-13. Shortly afterwards they returned to the club. Ruple claims that when he left the club that night, Pontoo robbed him at gunpoint in the parking lot of the club, and took the bag containing the weapon Ruple had previously shown Pontoo. Tr. p. 117, lines 18-23. Ruple contends that after the robbery, Pontoo left in a vehicle along with the other four people that accompanied Pontoo that evening. Tr. p. 118, lines 6-8. As the car departed the parking lot of the club, Ruple got a partial tag number from the car, and called 911, telling them that he had been robbed in the parking lot of the club. Tr. p. 118, lines 9-17.

Pontoo denies having robbed Mr. Ruple. Tr. p. 414, lines 2-16. Instead he claims that two people who accompanied him that evening, Alexander Clemmons and Patrick Johnson, entered the car before it departed the parking lot, carrying a bag taken from Mr. Ruple. Tr. p. 370, lines 1-11. Pontoo testified that the bag contained the weapon that Ruple had displayed in the parking lot, a nine millimeter pistol. Tr. p. 370, lines 9-14.

On that evening, State Trooper Brandon Lee received a "be on the lookout," or BOLO, for the car described by Mr. Ruple in his call to 911. Tr. p. 126, lines 5-11. Lee eventually located the car, and after being joined by backup from a Lieutenant Bennett from the Swansea Police Department, initiated a traffic stop. Tr. p. 127 line 12-p. 131, line 24. The car pulled over immediately when Lee activated his blue lights. Tr. p. 131, lines 15-20. Lee drew his weapon and ordered the occupants out of the vehicle one at a time. Tr. p. 132, lines 2-11. The left rear door opened when

Lee commanded the driver's door to be opened. Lee had to tell the passenger seated by the left rear door to shut it so that he could concentrate on the driver. Tr. p. 132, lines 17-22. According to the testimony, Pontoo was seated in the rear seat behind the driver. Tr. p. 314, lines 7-10. Subsequently, Lee individually ordered the driver, the front seat passenger, and the person seated behind the front seat passenger, to exit the vehicle, to remove their outer garments, and to walk towards Lee so they could be handcuffed. Tr. 133, line 7- 134, line 6.

While the right rear door was still open from the exit of the passenger seated next to it, the car began to drive away. Tr. p. 134, lines 12-23. Lee had been joined by Trooper Jason Snider, who pulled to the rear of Lee's vehicle. Tr. p. 143, lines 2-17. Snider observed someone in the stopped vehicle jump into the driver's seat jump before it began to drive away. Snider began to pursue the departing vehicle with his blue lights on. Tr. p. 143, lines 16-24.

After a high speed pursuit, the fleeing vehicle departed the roadway and crashed into trees. Tr. p. 145, line 11-p. 146, line 15. When Snider reached the crashed vehicle, he saw the driver and one other passenger. He identified the driver as Pontoo. Tr. p. 147, line 11- p. 149, line 1. A weapon, a nine millimeter handgun, was retrieved from the front passenger seat of the vehicle. Tr. p. 168, line 4- p. 169, line 18. It appeared that the vehicle had flipped over during the collision. Tr. p. 152, line 18-19. The rear seat passenger was identified as Alexander Clemmons. Tr. p. 190, lines 5-10. Clemmons had been unrestrained at the time of the accident. Tr. p. 232, lines 17-18. As he was being prepared for transport by helicopter for medical treatment, EMS personnel found a handgun in Clemmons' possession. Tr. p. 192,

lines 2-9. On January 27, 2014, Clemmons died from injuries sustained in the accident. Tr. p. 232, lines 20-21.

Following the accident, Pontoo was transported to Palmetto Health Richland for treatment. Tr. p. 239, lines 13-16. Detective Todd Garrick was the lead investigator with the Lexington County Sheriff's Department and the person responsible for obtaining armed robbery arrest warrants in the case. Tr. p. 48, lines 6-20. He interviewed Pontoo in an emergency room on the morning of January 24, 2014. Tr. p. 51, lines 1-22. He claimed Pontoo was not under arrest at the time. Tr. p. 51, lines 23-25. Nonetheless, he claims he administered *Miranda* warnings to Pontoo. Tr. p. 52, line 19 - p. 53, line 10. Pontoo denies he was read his *Miranda* rights. Tr. p. 62, lines 12-23. Garrick admitted that he put a "hold" on Pontoo so that the Sheriff's Department would be notified before Pontoo was released from the hospital. Tr. p. 56, lines 7-13. When questioned, Pontoo refused to answer questions and repeatedly asked why he was being questioned. Pontoo eventually stated he was "through" talking to Garrick. Tr. p. 57, lines 3-12. Garrick obtained arrest warrants for Pontoo on January 28, 2014. Tr. p. 249, lines 8-9. On January 29, 2014, when the hospital discharged Pontoo, Garrick picked up Pontoo from the hospital and transported him to the detention center. Tr. p. 57, lines 13-17.

Garrick also interviewed the robbery victim in the matter, Jonathan Ruple, on January 27, 2014. He showed Ruple a photo array consisting of photos of various individuals to determine if Ruple could pick out the man who robbed him from the lineup. Tr. p. 84, lines 1-6. From the lineup, Mr. Ruple narrowed down the suspect to two people, but could not narrow it down to one. Tr. p. 84, lines 12-25. He was

shown two separate but identical photo arrays, and on each one, circled the suspect labelled number two and wrote "50%" beside the circle. Tr. p. 85, lines 16-22. When asked why he wrote "50%" by the circle, Ruple stated he could not decide whether the suspect was number two or number four. Tr. p. 85, line 23-p. 86, line 3. Ruple claimed that he would have been able to distinguish number two from number four if he had been shown a color photograph. Tr. p. 86, lines 4-6. Garrick never assembled a color lineup for Ruple to view. Tr. p. 95, lines 15-18. Ruple claimed that he had never seen a photo of the person arrested for the armed robbery, nor seen him in person. Tr. p. 86, lines 11-16.

The person that Ruple circled in the photo array was not Pontoo. Pontoo was number four in the photo array. Tr. p. 95, lines 7-13. Despite the fact that Ruple did not identify Pontoo as the robber on either photo array, the trial court permitted Ruple to identify Pontoo, who was seated at the defense table, to be identified as the one that robbed Ruple. Tr. p. 86, lines 17-22. Though he could not positively identify Pontoo three days after the event, Ruple testified that after the passage of over a year, he was one hundred percent certain that Pontoo was the person that robbed him. Tr. p. 86, lines 23-24. The defense attorney objected to permitting the identification, alleging the demonstration was suggestive. Tr. p. 99, lines 7-20. The State admitted that Ruple picked the wrong person in the photo array. Tr. p. 99, lines 22-25.

Pontoo took the stand in his own defense. He admitted that he was driving the car, but said that Clemmons forced him to do so at gunpoint. Tr. p. 371, line 25 - p. 372, line 21. He claims the last thing he remembers is that Clemmons reached up

and grabbed the wheel. Tr. p. 372, line 25 - p. 373, line 2. Over the defense attorney's objection, the State questioned Pontoo extensively regarding his unwillingness to tell this version of the story to Garrick on January 24, 2014. Tr. p. 411 line 14 - p. 412 line 17.

ARGUMENT

I. The Trial Judge's Jury Instructions Improperly Placed the Burden of Proof for the Duress Defense on the Appellant

a. In a Criminal Case, the Burden of Proof is on the State to Prove Every Element of the Crime Beyond a Reasonable Doubt

While this proposition is fundamental, it is critical. "A basic principle of criminal law is that the State has the burden of proof as to all of the essential elements of the crime." *State v. Attardo*, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975). Additionally, there must be credible evidence for each element of the crime charged. *State v. Smith*, 274 S.C. 622, 623, 266 S.E.2d 422, 423 (1980). This evidence must be provided by salient and admissible facts. The facts required to prove a statutory crime are delineated in the text of the enacted law. "[I]n determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive . . . ." *McMillan v. Pennsylvania*, 477 U.S. 79, 85, 106 S. Ct. 2411, 2415, 91 L. Ed. 2d 67 (1986)(internal citations omitted). In sum, the State must prove beyond a reasonable doubt every fact that the legislature has chosen to include as an element of the statute. *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970). Each element of a crime is of equal

weight, and no element is more important than another. *United States v. Jordan*, 509 F.3d 191, 198 (4th Cir. 2007).

b. Normally the State Need Not Carry the Burden of Proof for Affirmative Defenses

The exception to the rule that the State must carry the burden of proof in criminal cases lies in the proof of affirmative defenses. Traditionally, the burden is on the **defendant** to prove an affirmative defense by a preponderance of the evidence. "[A]t common law, the burden of proving affirmative defenses—indeed, all circumstances of justification, excuse or alleviation, rested on the defendant." *Dixon v. United States*, 548 U.S. 1, 8, 126 S. Ct. 2437, 2443, 165 L. Ed. 2d 299 (2006). The South Carolina Supreme Court has determined that normally, the defendant must prove the affirmative defense of duress by a preponderance of the evidence, adopting the rationale of *Dixon. See State v. New*, 371 S.C. 523, 527, 640 S.E.2d 871, 873 (2007).

c. There is an Exception to the Requirement for the Defendant to Prove Affirmative Defense

If the affirmative defense negates an element of the crime, the burden rests with the State to disprove the existence of the affirmative defense. The reason for this is because, "[I]t would be an extreme inconsistency to consider an element of the crime as an affirmative defense, for where the crime is not proven there is no need for defenses." *Attardo*, 263 S.C. 551-52, 211 S.E.2d 868, 870 (1975)(citation omitted). Therefore, if a statutory element of the crime is implicated by the

affirmative defense, it is the burden of the State to disprove the existence of the affirmative defense beyond a reasonable doubt.

d. The Trial Judge's Jury Instruction Erroneously Allocated the Burden of Proof

Pontoo was convicted of Failure to Stop for a Blue Light Resulting in Death, in contravention of S.C. Code Ann. § 56-5-750 (1976). Subsection (a) of this statute contains the elements of the crime as enacted by the legislature.[1] The statute includes as elements, 1) in the absence of mitigating circumstances; 2) defendant drove a motor vehicle on a road, street or highway; 3) defendant was signaled to stop by law enforcement; and 4) defendant did not stop. The jury instruction given by the trial judge did not list the absence of mitigating circumstances as an element of the crime, and neither the State nor the defense attorney took exception to this instruction. Tr. p. 452, lines 17-24.

Pontoo took the stand and asserted the affirmative defense of duress, because of his allegation that Clemmons forced him to drive car at gunpoint. Subsequently, at the jury charge conference, Pontoo's counsel suggested a jury instruction that, though not in the record, apparently placed the burden of proof on the State to disprove the defense of duress. Tr. p. 426, line 23- p. 428, line 13. The

[1] (A) In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

S.C. Code Ann. § 56-5-750 (1976)

State objected and suggested that under the auspices of *Dixon v. United States*, 548 U.S. 1 (2006), the proper instruction would place the burden on Pontoo to prove his affirmative defense by a preponderance of the evidence. Tr. p. 428, lines 2-4. The defense attorney lodged a timely objection to the instruction. Tr. p. 428, line 22-429, line 3; p. 457, line 23 - p. 458, line 3. The trial court agreed with the State and gave the following instruction, over the defense counsel's objection: "The defendant must prove the affirmative defense of duress by a preponderance or greater weight of the evidence." Tr. p. 455, lines 17-19.

"In general, the trial judge is required to charge only the current and correct law of South Carolina, and the law to be charged to the jury is determined by the evidence at trial. To warrant reversal, a trial judge's charge must be both erroneous and prejudicial. "State *v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003)(internal citations omitted). In this matter, the judge failed to charge the current and correct law. He failed to properly charge the violation of Failure to Stop for a Blue Light, because he failed to charge the first element of the crime. There were no objections raised to this error. He also erroneously placed the burden on the defendant to prove duress by a preponderance of the evidence, to which the defense attorney lodged a timely and proper objection. "The State is foreclosed from shifting the burden of proof to the defendant . . . when an affirmative defense *does* negate an element of the crime." *Smith v. United States*, 133 S. Ct. 714, 719, 184 L. Ed. 2d 570 (2013)(internal citations omitted). Though not charged, the "absence of mitigating circumstances" is still an element of the crime, and placing the burden on Pontoo instead of the State regarding the duress defense was impermissible and prejudicial.

Therefore, Pontoo's conviction should be overturned, and the case remanded for a new trial.

II. The Trial Judge Erroneously Allowed the State to Impeach the Appellant with Post Miranda Silence

a. *Miranda* Warnings Protect a Defendant's Silence

The right of a defendant accused of a crime to remain silent is enshrined in the seminal case of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). As a corollary to the protections offered by *Miranda,* it is impermissible to impeach a testifying defendant with post-*Miranda* silence. This is because silence induced pursuant to *Miranda* creates an expectation of reliance on the defendant's part that silence will not be used as a weapon against him. "[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Doyle v. Ohio,* 426 U.S. 610, 618, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91 (1976).

b. Custodial Status is Irrelevant Once Miranda Warnings are Given and Invoked.

Miranda protections generally attach when a defendant is in custody. "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Miranda,* 384 U.S. at 468, fn 37.

More broadly, even for a suspect that is **not** in custody, once the warnings are given by the police and invoked by the suspect (pre-arrest but post-Miranda

statements), many courts have held that the same protections apply. "When an accused receives the *Miranda* warnings' implicit promise that any silence will not be used against her, it is fundamentally unfair and a violation of due process to then use that silence against her. We believe this is true even where the *Miranda* warnings are given unnecessarily." *Bartley v. Com.*, 445 S.W.3d 1, 9 (Ky. 2014). Likewise,

> It must be noted that, unlike the instant case, *Doyle* dealt with post arrest silence. This distinction is, however, immaterial. The *Doyle* decision was based upon the fact that governmental action (i.e., giving the *Miranda* warning) encouraged or induced silence by assuring the defendant that such silence is protected. Receipt of the *Miranda* warning is the important factor in the *Doyle* analysis, not whether the defendant has been arrested. Therefore, the *Doyle* rationale protects post-*Miranda* silence whether occurring before or after arrest.

State v. Fencl, 109 Wis. 2d 224, 234, 325 N.W.2d 703, 709-10 (1982). "The unfairness of using a defendant's silence following *Miranda* warnings is not mitigated by the absence of custody. . . . Custody is therefore not a prerequisite to a *Doyle* violation." *State v. Plourde*, 208 Conn. 455, 467, 545 A.2d 1071, 1077-78 (1988)(internal citations omitted); *but cf. State v. Robinson*, 496 A.2d 1067, 1068 (Me. 1985)(holding that pre-arrest, post-Miranda silence is due no protections). Thus, the majority of authority holds that the reliance induced by *Miranda* warnings applies with equal force whether or not the defendant is in custody when warned.[2]

[2] For an interesting discussion of trends in this evolving area of law, *see* Andrea M. Harper, *You Have the Right to Remain Silent, But Anything You Don't Say May Be Used Against You: The Admissibility of Silence as Evidence After Salinas v. Texas*, 66 Fla. L. Rev. 1763 (2015).

c. Miranda Rights attached to Pontoo in the Hospital

According to the testimony of Detective Todd Garrett, he read Pontoo his Miranda rights when he interviewed him in the hospital on January 24, 2014. Tr. p. 423, line 19- p. 424, p. 10. Also according to Garrett, Pontoo said he did not want to talk any more. Tr. p. 57, lines 8-12. Garrett testified Pontoo was not under arrest at the time of questioning. Tr. p. 61, lines 23-25. However, Pontoo was told he could not leave the hospital. Tr. p. 65, lines 7-14. Garrick further testified that there was a "hold" on Pontoo so that he could not leave the hospital without approval of the Sheriff's office. Tr. p. 56, lines 7-13. On the other hand, Pontoo testified that he had not been read his Miranda rights before the questioning. Tr. p. 60, line 6- 20.

Whether Garrick or Pontoo's account is correct, the *Miranda* rights should have attached to Pontoo. If Garrick is believed, Pontoo was read his rights and said he did not want to talk. If Pontoo is believed, he was in custody (not free to leave because of the hold by the Sheriff's office) and told Garrick he did not want to speak to him. Even if, as the State contends and the trial judge ruled, Pontoo was not in custody, the prosecution team's testimony is that Pontoo was read his rights, he understood them, and he elected not to give a statement.

d. The Trial Judge Erroneously Permitted Pontoo's Silence to be Used for Impeachment

During the trial, Pontoo took the stand to explain his affirmative defense of duress. Over the defense attorney's timely objection, the trial judge permitted the State to question Pontoo repeatedly why he did not tell Garrick about the

circumstances surrounding his duress defense when he was interrogated in the hospital. Tr. p. 424, line 19-p. 425, line 17.

This is a *Doyle* violation recognized by South Carolina courts. Questioning Pontoo about his alibi defense after he invoked his Miranda rights is a prohibited tactic. *State v. McIntosh,* 358 S.C. 432, 444, 595 S.E.2d 484, 490 (2004). Further, this is not harmless error - it requires reversal, because the nature and object of the questioning exceeded all bounds set by law. "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming. *State v. Pickens,* 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996). None of these factors exist under these facts. Therefore, Pontoo's conviction should be overturned, and the case remanded for a new trial.

III. The In-Court Identification of Pontoo was Unduly Suggestive

a. Constitutional Strictures Require Safeguards in Pre-Trial Identifications

Proper identification of potential suspects in a criminal case implicates due process concerns. The Supreme Court has scribed the considerations relevant to determining whether an identification process is unduly suggestive. Emphasizing that a "totality of the circumstances" must indicate that an identification is reliable, the Court has concluded that, "the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the

criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers,* 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972).

Biggers involved a rape victim that identified a suspect in a show up that occurred seven months after the crime occurred. *Id.* at 195. *Biggers* requires a two-fold inquiry designed to determine if the identification was unduly suggestive, and if so, whether the identification was nevertheless reliable. *State v. Liverman,* 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)The Court noted that few victims of crime have a better opportunity to view their accosters than rape victims. Therefore, despite the lapse of time, the Court found it dispositive that the victim had made no prior identification of the suspect at any show ups, in lineups, or in photo arrays. Thus, they gave great weight to the fact that the victim's record for reliability was good. *Biggers,* 409 U.S. at 201.

When identification is in question, South Carolina requires a hearing outside of the jury's presence. "Where identification is concerned, the general rule 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, illegal identification or confrontation." *State v. Ramsey,* 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001). This approach pre-supposes that the victim made a previous

identification of the suspect that was procured or obtained in a suggestive or otherwise questionable manner.

b. The *Neil v. Biggers* Hearing Itself was Unduly Suggestive

During the pre-trial hearing to validate the victim's out-of-court identification of Pontoo in a photo lineup, it was revealed that the victim had not identified Pontoo as the suspect. On the contrary, three days after the robbery, the victim was shown not one, but two, identical photo arrays. One each one he circled the photo he thought was the suspect. That photo was not of Pontoo, but of a different man. Tr. p. 84, lines 1-24. The victim stated that he thought the suspect was one of two people (the other possibility being Pontoo) but he could not pick between them. He therefore circled one of them (not Pontoo) and wrote "50%" next to the photo. Tr. p. 85, lines 16-24. He said he could not pick between the two because they were not color photos, and asserted that if he had seen color photos, he could have made the correct choice. Tr. p. 85, line 23 - p. 86, line 16.

The victim claimed he had not seen Pontoo, or a picture of him, since the robbery. Tr. p. 86, lines 7-16. Nonetheless, despite the fact he could not identify Pontoo three days after the robbery, one year later he claimed that he was "one hundred percent" certain that Pontoo was the robber because, "his face is burned into my brain." Tr. p. 86, line 23 - p. 87, 13. Not surprisingly, when asked if he saw Pontoo in the court, the victim said yes. Incredulously, the first time the victim positively identified Pontoo was when he was in court at the *Neil v. Biggers* hearing. Presumably, he was sitting at the defense table, because when the State asked him,

"You're pointing at the defendant?" The victim responded, "Yes, sir." Tr. p. 86, lines 17-22.

This bears repeating - the first time the victim was able to positively identify Pontoo, Pontoo was sitting at the defense table. This is infinitely more prejudicial than an unduly suggestive pre-trial photo array. In fact, the State turned the identity hearing into a one person show-up in the courtroom, with Pontoo sitting at defense counsel table.

Because the victim had previously made an inaccurate identification in the photo array, he was not cloaked with the aura of reliability afforded to the victim in *Biggers*. "There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup." *Biggers* at 201.

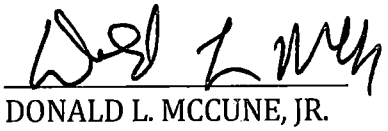
The defense counsel objected to the showing of two separate lineups. Tr. p. 99, lines 7-20. The State contended that the photo arrays were not unduly suggestive, citing the fact the victim picked the wrong person. Tr. p. 99 lines 22-23. The trial judge overruled the objection to the photo array. Tr. p. 99 lines 21-22. During trial, the defense counsel renewed his objection to the introduction to the line-up, which the trial judge noted on the record. Tr. p. 245, lines 7-12.

The identification process was so tainted as to be constitutionally infirm. Therefore, Pontoo's convictions should be reversed and the case remanded for a new trial.

CONCLUSION

The trial judge erred by giving incorrect jury instructions that impermissibly shifted the burden of proof, by allowing the State to impeach Pontoo with his silence after invoking Miranda protections, and by permitting an in-court identification process that did not comport with the fundamental right of due process. Thus, Pontoo respectfully requests that this court vacate the convictions of Pontoo and remand the case to the Circuit Court for a new trial.

Respectfully submitted,



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This 10th day of February, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAPHAEL LAMAAR PONTOO,

APPELLANT

APPELLATE CASE NO. 2015-000323

CERTIFICATE OF SERVICE

I, Donald L. McCune, Jr., certify that I have served the Initial Brief of Appellant and Designation of Matter on respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to the State's attorney of record:

Salley W. Elliott, Esquire
Assistant Deputy Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

DONALD L. MCCUNE, JR.
Associate Attorney

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of February,2016.

Bernadette McCune (L.S.)
Notary Public for South Carolina
My Commission Expires: 1-29-17.

Bernadette Mc Cune
Notary Public
My Commission Expires
January 29th, 2017
South Carolina

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SC Court of Appeals

February 10, 2016

VIA U.S. MAIL
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE:STATE v. RAPHAEL LAMAAR PONTO Appellate Case No. 2015-000323

Dear Ms. Kitchings:

Enclosed please find the Certificate of Service, Initial Brief of Appellant and Designation of Matter in the above case.

Sincerely,

Donald L. McCune, Jr.
Associate Attorney, Savage Law Firm
Bar No: 76626

DM/
Enclosures

L. McCUE, JR.
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