

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

THE STATE,

v.

SHAWN LEE WYATT,

RESPONDENT

APPELLANT

APPELLATE CASE NO. 2014-001556

Appeal from Lancaster County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2016-UP-162

PETITION FOR REHEARING

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SC Court of Appeals

Pursuant to Rule 221(a), SCACR, Shawn Lee Wyatt, respectfully petitions the Court for a rehearing of its Opinion No. 2016-UP-162 filed on April 6, 2016 based upon the following points overlooked or misapprehended by the Court:

The opinion cites to *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000), for the proposition that “[a]lthough one-on-one show-ups have been sharply criticized, and are inherently suggestive, the identification need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure.”

However in this case, Officers Schnettler and Lippe's identifications were so unreliable as to be inadmissible as a matter of law because of the very substantial risk of misidentification. *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App.2000); *Stovall v. Denno*, 388 U.S. 293 (1967); *see also Neil v. Biggers*, 409 U.S. 188 (1972).

In considering whether an identification is reliable, based on the totality of the circumstances and despite the use of an unduly suggestive process, the court should consider the following factors: (1) the opportunity of the witness to view the offender at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Moore*, 343 S.C. at 289, 540 S.E.2d at 448-449; *see also Biggers*, 409 U.S. 188.

In Appellant's case, the identifications were irredeemably tainted by highly suggestive single person show-ups and the coercive circumstances surrounding the identifications. For example, immediately prior to making his identification, Schnettler had been informed by Lippe that she had seen Appellant, whom she described as a light-skinned African American with a short haircut, walking down the road on her way to work. R. 26, ll. 3-5; R. 16, ll. 24-25. Appellant was the only person presented to Schnettler by his superior officer, Corporal Hunt, for identification. R. 27, ll. 5-19. Appellant was handcuffed and removed from the back of a patrol car at the time of the show-up with only law enforcement officers around him. R. 26, ll. 8-24.

The pressure on Schnettler to identify Appellant as the perpetrator was intense. Schnettler, who had never seen someone throw items over the prison fence before, failed to provide a detailed description of the suspect during the incident. Minutes later he was being interrogated by his

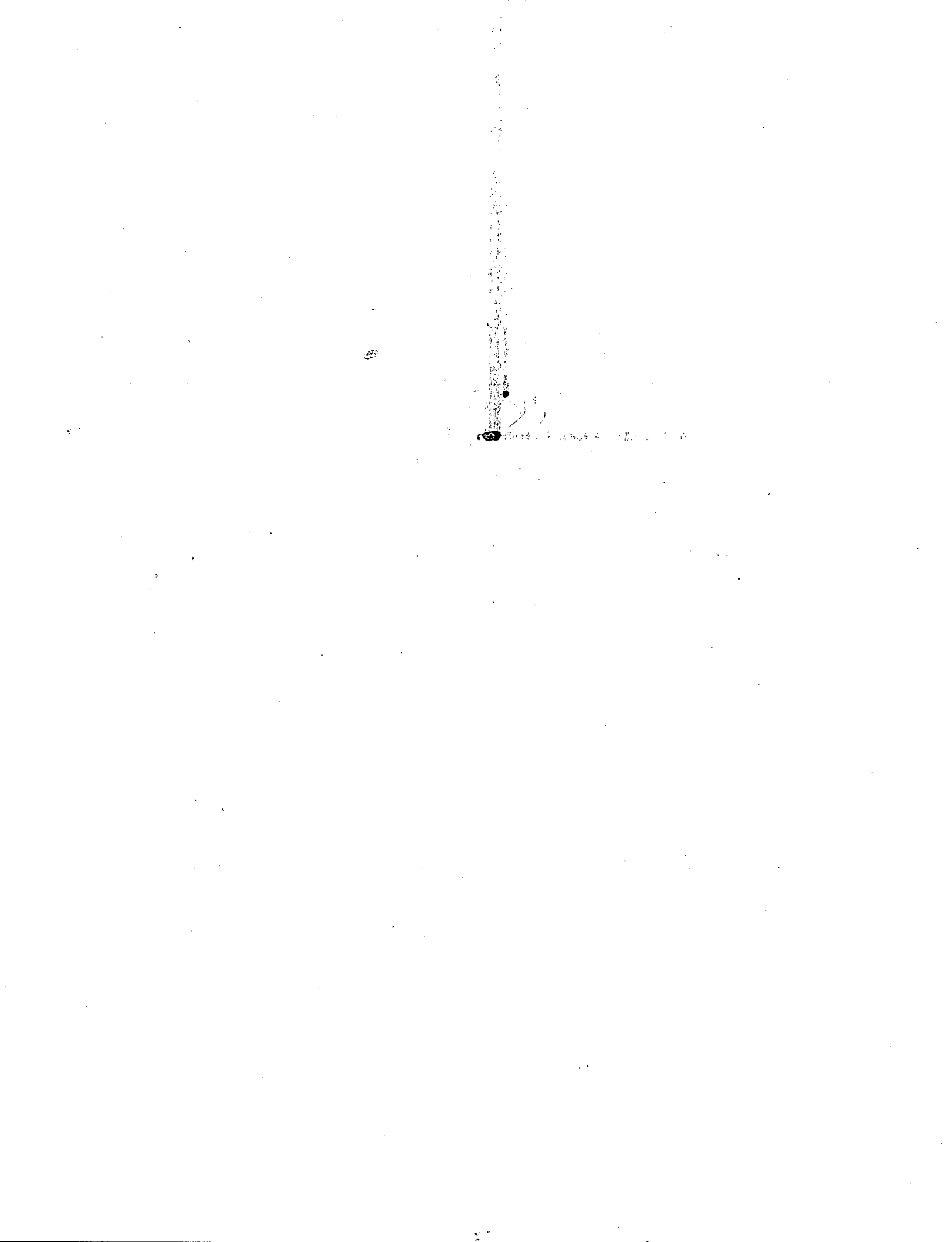
superior as to whether he could identify Appellant as the culprit. Absent a positive identification of Appellant as the culprit, law enforcement had no other leads or suspects.

Schnettler had approximately thirty seconds to view the suspect from about one hundred yards away when the incident occurred. R. 23, ll. 1-10. The watch tower and lighting for the prison are oriented towards the interior of the prison and the incident occurred in the pre-dawn hours. R. 21, 1 – R. 22, ll. 21. Schnettler's view of the incident was also partially obstructed by the razor wire and the outer fence. State's Exhibits No.: 2 and 3.

The incident occurred at the end of his twelve hour shift and R. 115, ll. 16-23. In sum, Schnettler had a very small window of time in which to observe the suspect from an obstructed vantage point at a considerable distance from the incident. Based on the *Moore* factors, both Schnettler's show-up identification and his in court identification should have been suppressed.

Likewise, the single person show-up identification of Appellant by Lippe was unduly suggestive and carried a very substantial likelihood of irreparable misidentification. *State v. Johnson*, 311 S.C. 132, 427 S.E.2d 718 (Ct. App. 1993). The show-up identification was done with Appellant handcuffed while exiting the back of a police car. R. 13, ll. 1-23. Hunt, Lippe's boss and from whom Lippe had initially learned about the contraband incident, was stationed next to Appellant.

Lippe had spoken with Schnettler before he left to make his identification and presumably knew that Schnettler had already identified Appellant as the suspect by the time she was asked to make her identification. R. 16, ll. 17 – R. 17, ll. 24. When applying the *Biggers* and *Moore* factors; Lippe's out-of-court identification was not so reliable that no substantial likelihood of misidentification existed.



In short neither Schnettler's identification nor Lippe's identification had sufficient indicia of reliability to overcome the irreparable risk of misidentification stemming from the patently suggestive single person show-ups conducted by law enforcement. *Moore*, 343 S.C. at 289, 540 S.E.2d at 448-449.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

John H. Strom  
Appellate Defender

This 20th day of April, 2016.

