

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lancaster County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

ORIGINAL  
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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

SHAWN LEE WYATT,

PETITIONER

APPELLATE CASE NO 2016-001303

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BRIEF OF PETITIONER  
\_\_\_\_\_

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## **ISSUES PRESENTED**

### **I.**

Did the trial judge err by denying the motion to suppress the suggestive single person show-up identification of Appellant made by Correctional Officer Joe Schnettler because it was unduly suggestive and unreliable and the resulting in-court identification was tainted by the prior suggestive procedure?

### **II.**

Did the trial judge err by denying the motion to suppress the suggestive single person show-up identification of Appellant made by Correctional Officer Brenda Lippe because it was unduly suggestive and unreliable and the resulting in-court identification was tainted by the prior suggestive procedure?

## STATEMENT

### **Background**

At about five thirty in the morning on Friday, July 12, 2013, Correctional Officer Leslie Joe Schnettler, on duty at the east tower of Kershaw County Correctional Institution (KCI), observed what he believed to be **white male** running towards the perimeter fence. R. 19, ll. 2 – R. 21, ll. 25. Upon reaching the fence, the suspect sat down with his back to the fence and tossed a series of objects over the fence into the adjacent exercise yard. R. 22, ll. 3-24.

Schnettler was at the end of a twelve hour night shift and had never seen someone throw items over the fence before. R. 115, ll. 16-23; R. 201, ll. 1-12. He was excited and nervous. R. 115, ll. 16-19. Schnettler estimated that the east tower, where he was stationed, is approximately thirty-five feet tall and the suspect was seated about 80 to 90 yards away from him. R. 21, ll. 11-14.

The incident took place in the pre-dawn hours. The tower and the prison's exterior lighting are oriented towards the interior exercise yard and dormitories of the prison, so as to better observe inmates. R. 21, 1 – R. 22, ll. 21. Schnettler radioed that the individual was a **white male**, in long jean shorts, and a dark shirt. R. 22, ll. 18-21 (*emphasis added*). Schnettler also reported that the suspect had "shiny legs". R. 25, ll. 1-13; R. 30, ll. 18-23. **Petitioner is an African-American with heavily tattooed legs**. Schnettler was unable to provide a description of the suspect's haircut, facial hair, footwear, or whether the suspect had gloves on. R. 29, ll. 1-12.

After throwing the packages over the prison fence, the individual disappeared into the adjoining woods. R. 25, ll. 6-10. Schnettler estimated the entire incident lasted approximately thirty seconds. *Id.* at ll. 21-24. Schnettler reported the incident to Corporal Christopher Hunt, the

officer in charge of contraband at KCI. R. 25, ll. 2-10. Hunt requested assistance from the Lancaster County Sheriff's Department in searching for the suspect. R. 32, ll. 19 – R. 34, ll. 7.

#### Observation by Officer Brenda Lippe

At approximately six in the morning, Correctional Office Brenda Lippe was driving on US 601 to begin her shift at KCI when she notice an individual walking in the opposite direction on the far side of the road. R. 6, ll. 1-25. As it was still in the pre-dawn hours, only Lippe's day-time running lights briefly illuminated the man as she drove past. R. 6, ll. 5-21; R. 91, ll. 16-24. The speed limit on that portion of U.S. 601 is 55 mph. There are no street lights.

She described the individual as a light skinned African-American male, of medium build with a black colored shirt and charcoaled colored shorts. R. 7, ll. 15-24. She recalled that he had a short "nice neat haircut". R. 9, ll. 3-4. Lippe believed that she was able to observe the man for approximately one minute. *Id.* at ll. 16-18.

Once Lippe reached KCI, she spoke with Hunt about the individual walking down the road. R. 10, ll. 16-21. Hunt then informed her that there had been a contraband incident that morning. R. 11, ll. 2-9. Lippe was ordered to relieve Schnettler from the east tower. R. 29, ll. 13-22. While with Schnettler she told him that she saw "the suspect" walking down U.S. 601 and that "the suspect" had just been picked up by law enforcement. R. 26, ll. 2-10. Schnettler then left to make the identification. R. 11, ll. 7-24.

#### Identification by Schnettler

Hunt took Schnettler by car to where Lancaster County Sheriff's Deputy Charles Kirkley had stopped Petitioner on the side of U.S. 601 about a mile and half from KCI. R. 26, ll. 8-10. Petitioner was seated in the back of Kirkley's patrol car. *Id.* at ll. 22-24. Interestingly, Deputy Kirkley would testify at trial that Hunt, not Schnettler, identified Petitioner as the suspect. R. 38, ll. 9 – R. 39, ll. 6.

Petitioner was taken out of the car, handcuffed, and Schnettler, in the presence of his supervising officer and the Sheriff's deputy, allegedly identified Petitioner as the individual at the fence. R. 27, ll. 5-19. Schnettler was only a few feet away from Petitioner when he made the identification. Petitioner was the only non-law enforcement officer present. R. 27, ll. 20 – R. 28, ll. 12.

#### Identification by Lippe

Petitioner was taken into custody and driven to KCI for Lippe to identify. R. 12, ll. 23 – R. 13, ll. 15. Once back at KCI, Petitioner was taken out of the patrol car, handcuffed, and flanked by Hunt and Deputy Kirkley. R. 13, ll. 1-23. Petitioner was about fifty yards away from Lippe, who was in the guard tower when she made the identification. R. 15, ll. 19-23. Her identification occurred about an hour or an hour and fifteen minutes after she passed him on the road. *Id.* Again, Petitioner was the only non-law enforcement at the identification. R. 17, ll. 20-23.

A search of the exercise yard found eight duct taped packages. R. 140, ll. 7 – R. 141, ll. 5. The packages contained crack cocaine, cocaine, marijuana, tobacco, and cell phones. R. 144, ll. 2-19; R. 149, ll. 1-25. No fingerprints were recovered from the packages. R. 160, ll. 24 – R. 161, ll. 6. Petitioner was not wearing gloves when he was arrested and no gloves were recovered.

#### **Trial**

On July 14-16, 2014, Appellant proceeded to trial before the Honorable DeAndrea Benjamin and a jury. R. 1. Brandon Steen represented Appellant, and Solicitor Douglas Barfield represented the State.

Biggers<sup>1</sup> Hearing

Defense counsel motioned the court to conduct a *Biggers* hearing to determine if the identifications of Petitioner by Lippe and Schnettler should be suppressed because they were conducted using an unduly suggestive identification procedure and presented a substantial risk of irreparable misidentification. R. 47, ll. 21-25.

Defense counsel argued that the identifications were coercive single person show-ups. Petitioner was surrounded by law enforcement under circumstances where the identifying officers were under pressure to identify Petitioner as the suspect, but had either no opportunity or a very limited opportunity to view the suspect at the time of the incident. R. 48, ll. 1 – R. 49, ll. 17.

Counsel highlighted Schnettler's initial description of the suspect as a white male with "shiny legs" and his total inability to describe the suspect's haircut, appearance, footwear, or age. *Id.* The defense also emphasized that Schnettler only had, "a 30 second viewing from approximately a football field away in the pre-dawn hours, that's what we're identifying here where he gave no description, was taken to the officer and then picked him out." R. 48, ll. 16-20.

Snettler never relayed a physical description of the suspect when he was contemporaneously reporting the incident. R. 53, ll. 14 – R. 54, ll. 4. Instead Schnettler reported the number of packages that the suspect was throwing into the prison. He only provided his white-male description after the incident occurred. R. 54, ll. 1-4.

The defense observed that Schnettler's failure to provide a description of the suspect during the incident did not reflect Schnettler's claimed training and expertise, which stressed the

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<sup>1</sup> *Neil v. Biggers*, 409 U.S. 188 (1972).

importance of providing the responding officers with a detailed description of the suspect. R. 53, ll. 14-25.

With respect to Lippe's identification, defense counsel noted that despite testimony from Schnettler, Hunt and Kirkley, only Lippe recalled the officers taking Petitioner back to the prison to be identified. R. 48, ll. 22 – R. 61, ll. 2. As with Schnettler, the defense argued that Lippe had only a short observation window as she was driving past Petitioner in the pre-dawn hours. R. 49, ll. 2-13. Moreover, the risk of a misidentification leading the jury to convict Petitioner was even greater as Lippe did not see the actual incident, but could provide a more detailed identification of Petitioner.

The State conceded that the one person show-up procedure was suggestive, but countered that both Schnettler and Lippe were trained law enforcement officers. R. 49, ll.19 – R. 50, ll. 4. Despite Schnettler's testimony strongly suggesting that he did not apply any training that he may have received, the State alleged that the officers are trained to "observe and record information mentally and then report the information." *Id.*

The State argued that the guard tower was designed to provide officers with a comprehensive view of the interior and exterior of KCI. R. 50, ll. 7-19. The prison also had extensive lighting. R. 50, ll. 19-25. The State downplayed Schnettler's description of the suspect as a white male, arguing that under the conditions at the time of the incident, Petitioner could have been confused for a white male. R. 50, ll. 24 – R. 51, ll. 21.

In arguing for the admissibility of Lippe's identification, the State emphasized Lippe had the opportunity to observe the suspect while driving past him. R. 52, ll. 1-16. The State also posited that Lippe's identification was somehow more reliable because she did not witness the

incident. R. 52, ll. 17 – R. 53, ll. 10. The State concluded by reminding the Court that both officers were absolutely certain that Petitioner was the suspect. R. 51, ll. 14-18; R. 53, ll. 5-10.

The trial court ruled that the identifications were sufficiently reliable to overcome the highly suggestive single person show-ups. R. 54, ll. 5-13. When assessing each officer's opportunity to view the crime, the court determined that Lippe "although she did not view the crime, [Lippe] testified that she passed by the [Petitioner]," in close proximity and "got a new view of the [Petitioner]." *Id.* at 13-19.

The court concluded that Schnettler, while not close to the incident or able to provide a detailed description of the suspect beyond stating that it was a white male, credibly testified that he was – nevertheless – completely certain that the Petitioner was the suspect once his supervisor presented Petitioner for identification. *Id.* at ll. 19-25. The court then took judicial notice of the fact that Petitioner is an African-American male of "lighter complexion." R. 55, ll. 1-6.

As to the witnesses' degree of attention, the court determined that Schnettler observed the incident as a part of his job and that Lippe had paid close attention to the Petitioner because she found it odd that a person was walking down the road. *Id.* at ll. 6-12. With respect to the certainty of the witnesses, the court reiterated that the officers were adamant, "100 percent certain" that Petitioner was the suspect. *Id.* at ll.22-25. The court held that the identifications were admissible despite the suggestiveness of the identification procedure. R. 57, ll. 1-4.

#### Trial and Jury Deliberation

At trial, defense counsel renewed his motion to suppress Lippe and Schnettler's identifications prior to each testifying. R. 96, ll.5-9; R. 117, ll. 15-18. Both motions were denied. *Id.*

During their deliberations, the jurors sent the court two questions. First, the jurors asked for clarification regarding direct versus circumstantial evidence; which the trial court answered by repeating its instructions from the jury charge. R. 207, ll. 10- R. 208, ll. 18. Second, the jurors asked, “how far in distance was the [Petitioner] from the contraband area . . . when Lippe noticed him on the side of the road?” R. 212, ll.

The trial court then brought the jury in and asked the foreman to write down what testimony they would like to hear again. R. 212, ll. 10-15. The juror’s indicated they wished to rehear Kirkley’s and Lippe’s testimony. *Id.* at ll. 17-23. The juror’s deliberations continued into the next morning, where they reached a verdict of guilty on all counts. R. 214, ll. 4-24. This appeal followed.

#### Court of Appeals

The Court of Appeals (Huff, A.C.J., Williams, and Thomas, JJ.) affirmed Petitioner’s conviction in a summary opinion. *State v. Wyatt*, 2016-UP-162 (Ct. App. Filed April 6, 2016). In concluding that the trial court did not err in refusing to suppress either of the identifications, the Court relied on *State v. Moore*, 343 S.C. 282, 540 S.E. 2d. 445 (2000), holding that, while single person show-ups are “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.”

#### Petition for Rehearing

On April 20, 2016, Petitioner filed a petition for rehearing arguing that 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. Petitioner was the only person presented for identification

by either officer. Both identifications were made in the presence and at the behest of Lippe and Schnettler's superior officer.

Petitioner advanced that Schnettler in particular was under immense pressure to identify Petitioner as the perpetrator because the attempted contraband smuggling had occurred on his watch and he had utterly failed to provide a detailed description of the suspect.

The Court of Appeals denied Petitioner's petition on May 20, 2016. On July 11, 2016, a petition for writ of certiorari was filed with this Court. On February 10, 2017, this Court granted the writ and ordered briefing.

## ARGUMENT

### I.

**The Court of Appeals erred in affirming the trial judge's refusal to suppress the suggestive single person show-up identification of Petitioner made by Correctional Officer Joe Schnettler because it was unduly suggestive and unreliable and the resulting in-court identification was tainted by the prior suggestive procedure.**

The Court of Appeals erred by affirming the trial court's admission of the suggestive single person show-up identification of Petitioner made by Schnettler as his identification was so unreliable as to be inadmissible as a matter of law due to the very substantial risk of misidentification.

Snettler was the only witness to the incident. He had utterly failed to provide his fellow guards with a description of the suspect, who he had observed from a football field away in the pre-dawn hours for approximately thirty seconds. He identified Petitioner as the suspect only after being summoned to do so by his superior officer and after being told by Lippe that the suspect had been caught.

When Schnettler arrived to make the identification, Petitioner was paraded before by a Sheriff's deputy while his superior officer demanded to know if Petitioner was the suspect. R. 27, l. 5 - 28, l. 12. At the time of his identification, law enforcement had no other suspects or leads. Under such grossly suggestive - even coercive - circumstances, Schnettler's identification of Petitioner was, for all intents and purposes, a *fait accompli*.

Generally, the decision to admit eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error. *State v. Moore*, 343 S.C. 282, 540 S.E.2d 445 (2000). However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. *Caver v. Alabama*, 537 F.2d 1333, 1335 (5th

Cir.1976), *cert. denied*, 430 U.S. 910, (1977), *citing Foster v. California*, 394 U.S. 440, 442-43, n. 2 (1969).

Reliability is the linchpin in determining the admissibility of identification testimony. *Id.* at 504, 589 S.E.2d at 785, *citing Manson v. Brathwaite*, 432 U.S. 98, 114, (1977); *State v. Blassingame*, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App.1999). A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. *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). 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. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Simmons v. United States*, 390 U.S. 377, (1968); *State v. Stewart*, 275 S.C. 447, 272 S.E.2d 628 (1980).

The burden is on the state to show by clear and convincing evidence that an in-court identification of a defendant was not tainted by suggestive action on the part of police, or, presumably, other state officials. *State v. LaRue*, 271 S.C. 256, 246 S.E.2d 890 (1978). “The central question is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.” *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 527 (2004).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. *Biggers*, 409 U.S. 188. First, “[a] court must first determine whether the identification process was unduly suggestive.” *Id.*, 409 U.S. at 198; *Moore* 343 S.C. at 286-287, 540 S.E.2d at 447. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification

existed ... only if [the procedure] was suggestive need the court consider the second question- whether there was a substantial likelihood of irreparable misidentification. *Id.*; *State v. Brown*, 356 S.C. 496, 589 S.E.2d 781, 784 (Ct. App. 2003); *See Biggers, supra*.

Single person show-ups are particularly disfavored in the law. *Stovall v. Denno*, 388 U.S. 293 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also *State v. Johnson*, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law); *In the Interest of Jamal Rashee A.*, 308 S.C. 392, 418 S.E.2d 326 (Ct.App.1992) (taking witness to location where suspects, but no other individuals, are being detained is suggestive).

The identification procedure in the present case was an unduly suggestive single-person show-up. Immediately prior to his identification, Lippe told Schnettler that she had seen the suspect walking down U.S. 601 on her way to work and that he had been caught and was ready for Schnettler to identify. R. 26, ll. 3-5; R. 16, ll. 24-25. Petitioner was the only suspect presented to Schnettler by his superior officer, Corporal Hunt. R. 27, ll. 5-19. Petitioner was handcuffed at the time of the show-up with only law enforcement officers around him. R. 26, ll. 8-24.

Moreover, the fact that Schnettler failed to provide a detailed description of the suspect at the time of the incident and that this was the first time he had experienced such an incident, added to the pressure Schnettler must have been feeling to insure that someone was apprehended for the breach of prison security. Therefore, the trial court was correct in holding that the line-up was suggestive; however the court committed a reversible error in applying the second prong of the *Biggers* analysis because the procedure used created a substantial likelihood of irreparable misidentification.

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.

Applying these factors, Schnettler's out-of-court identification was not reliable and a substantial risk of misidentification existed. *See State v. Lawson*, 291 P.3d 673, 697-698 (Or. 2012) (reversing murder and attempted murder convictions because key eye witness identification that raised serious reliability concerns). As noted, Schnettler had approximately thirty seconds to view the suspect and was about one hundred yards away from where the incident occurred. R. 23, ll. 1-10. The watch tower and lighting for the prison are oriented towards the interior of the prison. 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. *Id.* The incident happened at the end of his twelve hour shift and was the first time that Schnettler had witnessed someone attempting to throw contraband into the prison. R. 115, ll. 16-23. In sum, Schnettler had a very small window of time in which to observe the suspect at a considerable distance and from an obstructed vantage point.

As to his degree of attention, while Schnettler was trained to observe the suspect and report a description; he failed to provide a detailed description of the suspect while the incident occurred. Schnettler could not describe the suspect's, haircut, facial features, or any other

identifying characteristics. And again, Schnettler reported the suspect was a white male. R. 22, ll. 18-21. As his testimony makes clear, most of Schnettler's reporting the time of the incident was focused on the number of packages being thrown into the prison yard and not the identifying characteristics of the individual throwing them. R. 24, ll. 4-9.

Like his degree of attention, Schnettler's accuracy is suspect. Schnettler reported that he observed a white male running towards the prison's outer fence. It was only after speaking with Lippe that Schnettler discovered that the suspect had been seized by law enforcement and was actually black. R. 26, ll. 3-10; *see State v. Smith*, 180 S.E.2d 7, 11 (N.C. 1971) (holding victim's identification was inadmissible where attempted robbery victim was informed by officers that the accused had been caught and that he was in jail and victim went to jail to view accused who was in the cell with two others of dissimilar appearance.). Schnettler also described the suspect as having shiny legs. Petitioner's legs are heavily tattooed. R. 30, ll. 18-23. The vagueness of Schnettler's initial description militates against the court's finding that his initial description was accurate.

Snettler made his identification of Petitioner within an hour or an hour and a half of the suspect fleeing into the woods and expressed great confidence in his identification. R. 16, ll. 19-23. Nevertheless, its reliability is highly dubious as this identification was made at the behest of his superior officer. *Id.*; *see State v. Smith*, 95 A.3d 769, 776 (N.J. Super. Ct. App. Div. 2014) (holding that victim's identification of defendant from a single person show-up was inadmissible where victim was told in advance that police had someone "fitting the description of the suspect" and where defendant was displayed alone, flanked by police officers); *see also* 92 Am. Jur. *Proof of Facts* 3d 379 (2006) (discussing reliability of eyewitness and current psychological research

regarding eye-witness identifications). In fact, Hunt was so assertive that Deputy Kirkley believed Hunt had actually made the identification. R. 38, ll. 13-14.

Further, Petitioner was handcuffed and was the only suspect presented. R. 39, ll. 1-10. As Schnettler's description is too vague to create a workable suspect description, his early identification of Petitioner was crucial to the State's efforts. Critically, Schnettler had already been told by Lippe that a suspect had been caught immediately before meeting with his superior officer to identify the suspect. R. 26, ll. 2-15.

The show-up identification used to have Schnettler identify Petitioner created a very substantial likelihood of irreparable misidentification. Accordingly, both Schnettler's show-up identification and his in court identification should have been suppressed and the Court of Appeals erred in affirming its admission. Schnettler's identification was the only evidence linking the contraband to the Petitioner and, as such, a new trial is necessary.

## II.

**The Court of Appeals erred in affirming the trial judge's refusal to suppress the suggestive single person show-up identification of Petitioner made by Correctional Officer Brenda Lippe because it was unduly suggestive and unreliable and the resulting in-court identification was tainted by the prior suggestive procedure**

### Discussion

The single person show-up identification of Petitioner by Lippe was unduly suggestive and the Court of Appeals erred in affirming the trial court's admission of the identification as there was a very substantial likelihood of irreparable misidentification. *Johnson*, 311 S.C. at 134, 427 S.E.2d at 719. Therefore, Lippe's show-up identification and her in-court identification should have been suppressed. *Stewart*, 275 S.C. at 447, 272 S.E.2d at 628.

The show-up identification was done with Petitioner handcuffed while stepping out of the back seat of a police car. R. 13, ll. 1-23. Hunt, from whom Lippe had initially learned about the contraband incident, was stationed next to Petitioner. Lippe had spoken with Schnettler before he left to make his identification and presumably knew that Schnettler had already identified Petitioner as the suspect by the time she was asked to make her identification. R. 16, ll. 17 – R. 17, ll. 24. As with Schnettler's identification, the trial court correctly determined the procedure used when Lippe made her identification was suggestive. R. 54, ll. 5-13.

When applying the previously-detailed factors regarding reliability of an identification arising out of a suggestive police procedure; Lippe's out-of-court identification was not so reliable that no substantial likelihood of misidentification existed. *Moore*, 343 S.C. at 289, 540 S.E.2d at 448-449. First, unlike, Schnettler's identification, Lippe's identification was not made a result of her having witnessed the suspect at the time of the crime. R. 54, ll. 13-19. Her identification stems from passing Petitioner while on her way to work. *Id.* As she did not observe the offense happening, the probative value of her identification is questionable while

being highly prejudicial to Petitioner as the central issue in the case is who threw contraband into the prison, not who was walking down U.S. 601.

Even if the identification has marginal, circumstantial probative value, the risk of misidentification was substantial. By her own account, Lippe had less than one minute to observe the individual walking down the road. R. 9, ll. 616-18. Moreover, she observed him during pre-dawn hours and with only the illumination of her day-time running lights. R. 91, ll. 16-24. The portion of U.S. 601 that she was traveling on has a speed limit of 55 mph and no street lighting.

Her degree of attention is dubious given that she was presumably focused on driving safely and had no reason to believe Petitioner had committed a crime at the time she passed him. Finally, Lippe's identification was made from the guard tower at a distance of approximately fifty yards while Petitioner was standing next to Hunt and with the knowledge that Schnettler had almost certainly already identified Petitioner as the suspect. R. 17, ll. 8-24.

As with Schnettler, the trial court committed a reversible error in holding that, while the police-procedure was suggestive, the officers' identifications were reliable. Under the totality of the circumstances, Lippe's show-up identification used in the present case created a very substantial likelihood of irreparable misidentification. While her identification was of little relevance to the State's case; it was highly prejudicial to the defense because it implied that Petitioner was guilty for simply walking down U.S. 601.

Further, the trial court's error was not harmless because Lippe's detailed description of the man on the side of the road and her identifying that man as Petitioner reinforced Schnettler's suspect identification and mitigated the damage to the State's case caused by his initial description of the suspect as a white male. However, unlike Schnettler, Lippe never witnessed the incident.

Neither Schnettler's identification nor Lippe's 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. To wit, Schnettler initially reported that the suspect was a white male and could provide no description of his haircut or facial features beyond the suspect having shiny legs. R. 19, ll. 2 – R. 21, ll. 25; R. 25, ll. 1-13; R. 30, ll. 18-23.

Petitioner is an African American with heavily tattooed legs. R. 30, ll. 18-23. Moreover, Schnettler's identification was made at the behest of his superior officer and after being told by Lippe that the suspect had been caught. R. 26, ll. 2-10. Lippe did not witness the incident. R. 54, ll. 13-19. She passed the individual on the road in the pre-dawn hours with only her daytime running lights on. R. 91, ll. 16-24. Her identification of Petitioner as the man she saw on the side of the road came only after she knew that Schnettler had already made his identification. R. 17, ll. 8-24.

Accordingly, both show-up identifications and the in court identifications by Schnettler and Lippe should have been suppressed and a new trial is necessary.

**CONCLUSION**

For the foregoing reasons, Appellant Shawn Wyatt respectfully requests that this Court reverse his convictions and remand this case to the Lancaster County Court of General Sessions for a new trial.

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

ATTORNEY FOR PETITIONER

This 13th day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Lancaster County

Honorable DeAndrea G. Benjamin, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

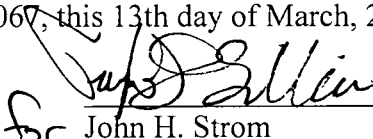
V.

SHAWN LEE WYATT,

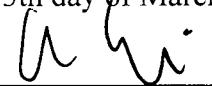
PETITIONER

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon William M. Blicht, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Shawn Lee Wyatt, #295696, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067, this 13th day of March, 2017.

  
\_\_\_\_\_  
John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 13th day of March, 2017.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025