

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT  
Court of General Sessions

Roger M. Young, Circuit Court Judge

Case Nos. 2014-GS-10-00763  
2014-GS-10-00765 and 2014-GS-10-00767

Appellate Case No. 2018-000981  
Opinion No. 5537, Filed February 14, 2018

The State, ..... Respondent,

v.

Denzel Heyward ..... Petitioner

BRIEF OF PETITIONER

Donald Michael Mathison  
Bar # 101803  
721 Huntington Ave.  
Columbia, SC 29205  
T: (843) 384-3761  
Email: [dmichaelmathison@yahoo.com](mailto:dmichaelmathison@yahoo.com)

Robert Michael Dudek  
S.C. Office of Indigent Defense  
P.O. Box 11589  
Columbia, SC 29211  
T: (803) 734-1330  
[rdudek@sccid.sc.gov](mailto:rdudek@sccid.sc.gov)

Columbia, South Carolina.

October 29, 2018.

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the admission of identification evidence obtained through successive, unduly suggestive photo line-ups in which the Petitioner was the only repeated subject, where the trial court did not consider the Neil v. Biggers reliability factors bearing on the reliability of the identification, but instead relied on the “credibility” of an eyewitness’s testimony at trial?
2. Did the Court of Appeals err in holding that Petitioner’s counsel opened the door to previously-excluded testimony related to domestic violence by the Petitioner towards a testifying co-defendant, where the Petitioner’s counsel asked the co-defendant’s mother about an unrelated allegation of sexual assault made by the co-defendant against the co-defendant’s step-father?

STATEMENT OF THE CASE

Denzel Heyward (“Petitioner”) was charged with four counts arising out of an incident on John’s Island on May 16, 2012. The counts were for (1) the Murder of Kadeem Chambers; (2) the Attempted Murder of Jujuin Hemingway; (3) Armed Robbery; and (4) Possession of a

Firearm During the Commission of a Violent Crime. R. pp. 9-14. Mr. Heyward's co-defendant, Dashaun Simmons, was indicted on virtually identical counts. The matter was tried from November 10<sup>th</sup> through November 15, 2015.<sup>1</sup> The jury returned guilty verdicts on the counts for the attempted murder of Jujuaïn Hemingway, armed robbery and the weapons charge. R. pp. 631-636. The jury did not reach a verdict on the murder charge and the court declared a mistrial as to that count. R. p. 639. The trial court sentenced Petitioner to the maximum sentence on each conviction for a total of sixty-five (65) years of consecutive time. Petitioner filed post-trial motions, which were denied by Order dated March 17, 2015. R. p. 5-8.

The Notice of Appeal was filed on March 23, 2015. On Appeal, Petitioner argued that the trial court erred in (1) admitting the eyewitness identification testimony of the victim, JuJuain Hemingway; and (2) permitting the jury to hear evidence that Heyward physically abused the co-operating co-defendant, Quasantrina Rivers.<sup>2</sup> The matter was briefed and argued before the Court of Appeals on November 16, 2017. A decision was issued on February 14, 2018. App. pp. 67-74. On March 16, 2018, Petitioner filed a Petition for Rehearing. App. pp. 75-87. The Petition for Rehearing was denied by order dated April 26, 2018. App. p. 88.

Denzel M. Heyward filed Petition for a Writ of Certiorari to the Court of Appeals for Opinion No. 5537 (filed February 14, 2018), pursuant to Rule 242(a), SCACR. By order dated September 21, 2018, this court granted the writ.

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<sup>1</sup> No proceedings were held on November 11<sup>th</sup>, 2014, in observance of Veteran's Day.

<sup>2</sup> Petitioner also appealed the trial judge's decision to commence sentencing at 1:30 a.m., but has not raised that issue here.

## STATEMENT OF THE FACTS

This matter involves incidents occurring in Charleston County in the late hours of May 16, 2012. That evening, brothers Kadeem Chambers and Jujuan Hemingway drove from Longs, South Carolina, to a residence on Cynthia Drive, on John's Island near Charleston. When they arrived just before 11:30 p.m., there was an altercation with two individuals outside the house. During the altercation, one of the subjects, wearing a red shirt, kicked Hemingway in the head (R. 526), and the other subject fired a round at the ground near him. After that, Hemingway was instructed to open the trunk of the car and get back on the ground. R. pp. 410-411. The subject in a red shirt removed a suitcase from the car and placed it in a dark colored sedan. R. p. 413. Shortly thereafter, Chambers and the subject holding the weapon "tussled," and two shots were fired. R. pp. 414-416, 526-527. Chambers was hit with two bullets. Hemingway fled into a nearby construction site, dropping bags of marijuana on the way. R. pp. 418-419. The two assailants left in a dark colored sedan driven by the female.

Charleston County Sherriff's Officers responding to 911 reports of shots fired found Chambers behind the wheel of his Mercedes Benz, which he'd crashed into a white truck near the corner of Cynthia Drive. R. pp. 173-174, 176-177. He was taken to the Medical University of South Carolina, where he passed a few hours later.<sup>3</sup> Officers found Hemingway in a porta-potty at a nearby construction site on Constantine Thorpe Avenue. Hemingway provided a false name and date of birth to officers. R. p. 421.

On May 17<sup>th</sup>, investigators interviewed Hemingway about the incident in Longs, South Carolina. Hemingway gave investigators two separate statements because they did not feel his first written statement was credible. R. pp. 428-430. In his second statement, Hemingway told

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<sup>3</sup> He had \$648.27 in his pocket at the time. R. p. 391.

investigators that he could identify one of the participants who was wearing a red shirt. R. 431-432; R. p. 663. On the 18<sup>th</sup>, the officers returned with a “six-pack” line-up containing a photograph of the Appellant, Denzel Heyward. Hemingway failed to make an identification. R. p. 433-435. The following day, May 19<sup>th</sup>, officers returned to Longs and escorted Hemingway to the local police precinct, where they questioned him and showed him another six-pack line-up containing a photograph of Heyward. R. pp. 435-437. In the second line-up on May 19<sup>th</sup>, Hemingway identified Heyward. However, he failed to identify the Co-Defendants Dashaun Simmons or Quasantrina Rivers. R. p. 66.

On May 18<sup>th</sup>, Quasantrina Rivers, the mother of Denzel Heyward’s daughter, and an alleged accomplice in the incident on May 16<sup>th</sup>, disclosed her involvement to family members who then contacted police. R. p. 232. Police subsequently contacted Rivers mother, Sidearis Singleton, who gave a statement implicating her daughter. R. p. 233. Rivers turned herself in and was charged with accessory to murder, accessory to attempted murder and accessory to robbery. R. pp. 229-234. Rivers provided two statements to investigators on May 19, 2012. On July 12, 2012, she entered a proffer agreement with the state, and subsequently gave a greatly revised account of the events on July 17, 2012. R. pp. 317-319; R. pp. 320-321; R. p. 330. She was able to get out of jail as a result of signing the proffer and providing the second statement. R. p. 331. In 2014, within a week of the originally scheduled trial date, Rivers changed her statement to add that she drove Denzel Heyward and Dashaun Simmons to the home of a man named “Skrill” in Ridgeville, South Carolina, before and after the incident on Cynthia Drive. R. p. 322-323.

At trial, Rivers testified about taking Heyward and Simmons to Ridgeville to pick up a gun from a man named Skrill. R. p. 261-264. She testified about viewing the altercation at

Cynthia Drive largely through the rear view mirror of her car. R. p. 280. She also testified about going back to Ridgeville with Heyward and Simmons after the incident, including the defendants' efforts to conceal the weapon. R. pp. 287-293; pp. 305-306.

### ARGUMENT

I. The Court of Appeals did not address Petitioner's argument that the trial court failed to conduct the mandatory analysis required by Neil v. Biggers, which was an abuse of discretion by the trial court pursuant to State v. Moore.

1. The Court of Appeals did not address whether the trial court exercised its discretion by failing to conduct a Biggers analysis.

The Court of Appeals overlooked Petitioner's principal argument that the trial court failed to conduct any analysis of the reliability factors and evidence bearing on those factors presented during the pre-trial Biggers hearing, which was an abuse of discretion. State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626, (Ct. App. 1999), (finding failure to conduct Biggers factor analysis to be an abuse of discretion) *affirmed in part, reversed in part on other grounds*, 343 S.C. 282, 288, 540 S.E.2d 445 (2000).

Prior to the trial of this case, the Petitioner moved to suppress the out-of-court and in-court identification of Petitioner by Jujuan Hemingway pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). R. p. 18-133. To ensure due process, Neil v. Biggers requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "Under the totality of the circumstances, the factors to be considered is assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to

review the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Id.*

During the *in camera* hearing, the testimony indicated that (1) the incident occurred at 11:30 p.m. at night; (2) Hemingway had smoked hallucinogenic drugs a short time before the initial contact with his assailants; (R. p. 102); (3) the witness was face down on the ground for the majority of the interaction (R. pp. 86-87; R. p. 666)<sup>4</sup>; (4) the witness claimed that he had an equally good look at *both* of the assailants (App. p. 74; R. p. 85), but was never able to identify the co-defendant, (*see, State v. Moore*, 540 S.E.2d 445, 343 S.C. 282, 249 (2000) (noting concern that witness was unable to identify co-defendant at time of confrontation despite claim that witness had seen the co-defendant's face)); (5) Hemingway initially demonstrated no ability to make an identification, despite expressing a willingness to do so. R. p. 663.

Hemingway failed to identify the Petitioner during the first photo line-up conducted at his mother's house on May 18<sup>th</sup>. During that interview, Hemingway's brother indicated to Hemingway that a person named "Fat" was involved in the crime. R. pp. 42, 49, 50, 57, 94-95. The following day, Hemingway was taken to the local precinct and shown another line-up. Hemingway testified that when the police picked him up, he feared they were going to lock him up for not making an identification. R. p. 94. During the second photo line-up conducted at the police station, Hemingway identified the Petitioner, circled his picture and wrote, "I know him as fatt" on the identification form. R. pp. 671-677. Petitioner was the only person that appeared in both line-ups. Hemingway never identified the other co-defendants, who were only presented in

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<sup>4</sup> During trial, Hemingway explicitly admitted that he did not get a good look at the man in the red shirt while he was on the ground. R. p. 407-408.

a single line-up, rather than successive, suggestive line-ups. Hemingway also testified about the effect of seeing the Petitioner in both line-ups:

Q. So they came in, they said, hey, we want to take you and have you look at another lineup?

A. Yes.

Q. Did you find it odd that they would have the same person in the lineup that you recognized from the 18th and now he's in the lineup on the 19th?

A. Yeah.

Q. You did find that odd?

A. They had to know something that I didn't know. They had to know something that I didn't. They keep showing me the same picture.

Q. I'm sorry, could you say that again?

A. They had to know something that I didn't know. They kept showing me the same picture.

Q. They had to know something you didn't know if they were showing you the same picture?

A. Yes.

R. pp. 115-116.

During status conferences between counsel for the Defendants and the state, photographic line-ups of the Petitioner were discussed. On the Friday preceding trial (and the Biggers Hearing) the solicitor's office disclosed for the first time that Hemingway could have identified the Petitioner in the initial line-up but declined to do so.<sup>5</sup> Hemingway never told Charleston County Sherriff's personnel that he could have identified the Petitioner during the first line-up, nor did the solicitor disclose this fact to defense counsel until the Friday evening before trial. Defense counsel brought this delayed disclosure to the attention of the trial court before the hearing. There was a thorough on the record discussion of the failure to disclose. R. pp. 18-34.

The trial court made the following finding after the Biggers hearing:

“Well, I find that the lineup was unduly suggestive because they showed up with a lineup with the Defendant in it, and then 24 hours later showed up with a different lineup but there was one picture that was the same and that was the Defendant. And as the one witness said, well, that suggested to me they knew

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<sup>5</sup> Despite a thousand page production, the claim that Hemingway lied to investigators during the first line-up appeared for the first time in a footnote to the State's Pretrial Brief. R. p. 20.

something. And then I think it taints that lineup and makes it unduly suggestive; however, that's just the first prong of the analysis.

The second prong is, even though it was unduly suggestive, it was nevertheless reliable. And considering Mr. Jujuan Hemingway's testimony that he, in fact, was able to identify Mr. Heyward on the first day, but just chose to just not verbalize that because he was angry *suggests to me that he was not, in fact, influenced by the second lineup*. He stated, 'yeah, that suggested to me that they knew something that I didn't know, but at the same time he states that he had already made the identification. So the second one didn't influence his first – it couldn't have influenced his first lineup, so – or his first identification.

So even though the lineup procedure combined – combining the two was unduly suggestive, *I don't think it was unreliable because of the unique – very unique circumstances of Mr. Hemingway stating that he had, in fact, already identified it, but because of his anger and his youth had decided not to share that identification with police.*

All right. So your motion to suppress that will be denied.” (emphasis added)

R. pp. 193-195. The trial court did not address any of evidentiary facts bearing on the Biggers factors. Nor did the trial court consider the evidence discussed by the State in its brief or discussed by the Court of Appeals to support a finding of reliability. *See*, App. p. 45; App. p. 70. This was error.

By failing to consider the factors set forth in Biggers the trial court abused its discretion. In State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626 (Ct. App. 1999) the Court of Appeals held a trial court's failure to conduct a review of the reliability factors set forth in Biggers is an abuse of discretion. This court affirmed the holding in Moore. *See State v. Moore*, 343 S.C. 282, 540 S.E.2d 445 (2000). Even the Respondent agreed that these objective factors bearing on a witness's perception are a mandatory part of the trial court's analysis writing, “[C]ourts *must* evaluate the totality of the circumstances using the [Biggers] factors . . .” App. p. 44 (emphasis added). It is indisputable that the trial court never passed on the evidence bearing on the objective factors set forth in Biggers relating to the reliability of Hemingway's perception before making a final ruling. Instead, the trial court only made a determination based on the credibility

of the witness's claim that he had lied during the first line-up – a fact that was not disclosed to law enforcement or the defense for years after the line-ups occurred.

The Court of Appeals avoided answering whether or not the trial court had an obligation to make regular findings in accordance with state and federal constitutional law. Although the Court of Appeals understood Petitioner's argument,<sup>6</sup> it did not address whether the trial court engaged in the analysis. Instead of addressing whether the trial court exercised its discretion, the Court of Appeals engaged in its own fact-finding. In doing so, the Court of Appeals did not consider the totality of the circumstances, but rather applied a deferential standard that only considered the sufficiency of the record to support findings that were never made at the trial court below. (See discussion below.)

Because the trial court did not evaluate the reliability of Hemingway's identification in light of the Biggers factors, no identification evidence should have been admitted. See, State v. Moore, 334 S.C. 411, 415, 513 S.E.2d 626.

2. Making a reliability determination based on the credibility of an after-the-fact explanation subverts the purpose of the Biggers factors, which is to assess the objective ability of a witness to view the Defendant during the crime, before any suggestive procedures plant the possibility of irreparable misidentification.

Instead of considering the Biggers factors, the trial court only made a determination based on the credibility of the witness's very belated disclosure that he had lied during the initial line-up. This determination is in direct conflict with Biggers and the related cases which create objective factors that assess what a witness could have seen and the reliability of their perception before any suggestive procedures occurred. As the Fourth Circuit wrote:

“Positive identification testimony is the most dangerous evidence known to the law. That is true because it is easier to deceive ourselves than others: pressured to help solve a heinous crime, often conscious of a duty to do so, and eager to be

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<sup>6</sup> “On appeal, Heyward argues the trial court erred in (1) failing to consider the Neil v. Biggers reliability factors after finding the photo lineup was unduly suggestive.” App. p. 71.

of assistance, a potential witness may be readily receptive to subtle, even circumstantial, insinuation that the person viewed is the culprit. Unless such a witness is far more introspective than most, and something of a natural-born psychologist, he is usually totally unaware of all of the influences that result in his say, "That is the man."

United States v. Greene, 704 F.3d 298, 306 (4th Cir. 2013), *quoting* Smith v. Paderick, 519 F.2d 70, 75, n. 6 (4th Cir. 1975). Because suggestive identification procedures, by their very nature, tend to create a false belief in the mind of the witness, the witness's beliefs and certainty in those beliefs do not control the analysis. That is why Biggers directs courts to assess the "level of certainty demonstrated at the time of the confrontation," but otherwise focuses on environmental facts. In this case, the witness outwardly demonstrated *no certainty* at the time of the initial confrontation. Then, the next day, after being taken into a police station where he feared for his liberty, and shown a highly-suggestive follow-up line-up, the witness demonstrated absolute certainty and even identified the Petitioner by the nickname given to him by his brother the day before. To refuse to consider the objective evidence for an after the fact explanation subverts the purpose of entire Biggers analysis, because it replaces the objective review of the totality of the circumstances with a subjective credibility test that has no place in the reliability determination.

3. The Court of Appeals exceeded the scope of review and erred by engaging in fact-finding where the conflicting evidence did not admit but one inference. Because of conflicting testimony, the issue of reliability should have been remanded to the trial court.

The Court of Appeals should not have undertaken its own analysis of the factors because there was conflicting testimony on many of the Biggers factors. Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 334 S.C. at 418, 513 S.E.2d at 629. Only in those cases where the evidence supports but one reasonable inference, does a mixed question of law and fact become a matter of law for the court. State v. Moore, 343 S.C. at 288, 540 S.E.2d at \_\_. In this case, the objective evidence does not

admit of just one possible inference. The evidence bearing on the witness's perception and recollection cut both ways on many of the Biggers factors. As a result, the Court of Appeals exceeded the scope of review by conducting its own analysis. See, State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, \_\_\_, (2001) (holding the Court of Appeals erred in taking a *de novo* approach to admissibility of evidence).

The Court of Appeals engaged in constitutional fact-finding without addressing whether or not the trial court had undertaken the necessary Biggers analysis. In conducting its own *de novo* review of the evidence, the Court of Appeals only considered evidence supporting admission of the evidence, rather than considering the totality of the circumstances. Even if the Court of Appeals could review the findings *de novo*, it would be required to apply the same totality of the circumstances standard that the trial court should have applied. Failing to do so was a failure to exercise the proper standard on appeal.

For example, in State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000), this court properly applied a totality of the circumstances test by reviewing the evidence bearing on each of the factors, including acknowledging evidence that weighed against the Court's ultimate conclusion. While noting the confrontation was close in time to the event, the court observed that the evidence bearing on other factors (including an inability to identify a co-defendant) did not support a finding that the identification was reliable. 343 S.C. at 289-290, 540 S.E.2d at \_\_\_. The same pattern is evident in other recent identification cases where the adequacy of a reliability determination is reviewed. See, e.g., State v. Davis, 420 S.C. 50, \_\_\_, 800 S.E.2d 138, 144-145 (Ct. App. 2017) (acknowledging factors weighing against reliability of identification, but deferring to circuit court finding of reliability).

In a recent decision, the Court of Appeals engaged in a thorough review of *all* evidence weighing in favor and against a reliability determination made by a lower court, and came to the conclusion that “[u]nder the totality of the circumstances, the circuit court erred in assessing the reliability of an unnecessarily suggestive identification procedure.” State v. Hardin, Opinion No. 5589 (S.C. Ct. App.) filed August 15, 2018, pp. 8-10, (Shearhouse Adv. Sh. No. 33, at 20-22) rehearing pending. In that robbery case, the Court of Appeals analyzed each witness’s opportunity to review the defendant based on his or her individual position during the events. It considered each description provided and analyzed whether the witnesses described individual features of a person or just their clothing and race. The Court of Appeals also considered inconsistencies between the statements of the witnesses in overturning the circuit court’s findings. *Id.*

In this case, the Court of Appeals conducted a selective review and assigned credibility and weight to evidence on several matters (App. p. 71), which the circuit court never addressed. The Court of Appeals made findings that lacked conclusive support in the record. Specifically, the Court of Appeals stated that “Hemingway had ample opportunity to view Heyward . . . for between five and ten minutes.” App. p. 71.<sup>7</sup> The Court of Appeals did not consider the time of day; the intoxication of the witness (R. 101-102); the witness’s excessive facial trauma (R. 87-88) or the position of the witness face down on the ground during the majority of the interaction (R. pp. 86-87; R. p. 666). Thereafter, the Court of Appeals cites Hemingway’s claim that he got a “good look” to support a finding of certainty by the witness. App. p. 71. Of course, Hemingway actually claimed to get a “good look” at both defendants ( R. p. 85), but failed to identify Simmons in a non-suggestive line-up. Furthermore, Hemingway did not demonstrate

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<sup>7</sup> Hemingway testified that he was in Heyward’s “presence” for five to ten minutes *not* that he observed him during that time. The Court of Appeals lifted this characterization directly from the State’s Brief. App. p. 45. In fact, Hemingway actually contradicted this assumed fact in his later testimony. R. p. 406.

any certainty at the initial confrontation. Instead, he failed to identify Heyward at all. When asked about his “secret” identification, Hemingway stated it “took him a minute.” R. p. 107. The Court of Appeals did not acknowledge the highly suggestive and coercive actions of law enforcement in obtaining the ultimate identification.<sup>8</sup> Finally, the Court of Appeals points to a generic description to support reliability, stating that “Hemingway was able to describe Heyward’s height, facial hair, and clothing.” App. p. 71. Hemingway’s actual description merely stated “gots facial hair,” (R. p. 662), without describing any particular type of facial hair or identifying facial feature. None of his prior descriptions included mention of “goatee” or the “fat jowels” that he noted on the line-up. Hemingway’s prior descriptions were general descriptions about clothing and race rather than specific descriptions that would support a conclusive finding of reliability.

The decision of the Court of Appeals expands the power of appellate courts to evaluate qualities of the evidence that should be made by the trial court in the first instance. Additionally, if the Court of Appeals endeavors to conduct an analysis in the first instance, it must conduct the analysis called for by the law. The court did not apply the appropriate procedural or substantive standard in this case. The findings by the Court of Appeals are not supported by a settled record, and the material facts are clearly in dispute. Accordingly, the decision of Court of Appeals should be reversed.

4. The Court of Appeals misapplied this court’s decision in State v. Liverman in a way that reduces the procedural safeguards afforded defendants.

Finally, Petitioner submits that the Court of Appeals has misapprehended or misstated the rule in State v. Liverman, 398 S.C. at 143-44, 727 S.E.2d at 428-429, in finding the admission of the identification evidence to be harmless. The opinion states that the ability to vet identification

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<sup>8</sup> [Solicitor]: Did you feel like you were in trouble? [Hemingway]: Yeah . . . I didn’t point out the identification so I thought they was coming to lock me up.” R. p. 94.

evidence at trial will always cure the erroneous admission of identification evidence that would otherwise violate a defendant's due process rights. App. p. 71. The Court of Appeals suggests that Liverman holds that "any error in the admission of identification evidence to be harmless where the reliability of the identification evidence was fully vetted at trial, the weaknesses in the evidence were exposed on cross-examination, and defense counsel reminded the jury of those weaknesses during closing arguments." Id.

Of course, such a broad reading of Liverman would make pre-trial misidentification safeguards a meaningless exercise. That was not what this Court intended.

In Liverman, the court concluded that the error of not having a full *in camera* Biggers hearing was harmless, because the identification *based largely on the witness's prior knowledge of the defendant* was nevertheless reliable. 398 S.C. 141, 727 S.E.2d 427.<sup>9</sup> Only in "reinforcing" this primary conclusion, did the court state that the vetting of evidence at trial provided *additional* support for their conclusion. Liverman, 398 S.C. 142-144, 398 S.E.2d at 143-144. In short, cross-examination and trial rights are *not* a standalone cure for improperly admitted identification evidence under Liverman. The Court of Appeals's statement of the law on this point is a dangerous erosion of defendants' due process rights and may undermine fair proceedings in the future.

5. The Prejudice to the Petitioner was significant and the error was not harmless, because the identification evidence was a major component of the State's case.

The harmless error doctrine should be used guardedly and on a case-by-case basis. State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479. No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined

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<sup>9</sup> Prior to the United State's Supreme Court's decision in Perry v. New Hampshire, 132 S.Ct. 716 (2012), South Carolina law did not consider a Biggers hearing mandatory in cases where the eyewitness already knows the defendant. State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973), overruled by Liverman, *supra*.

from its relationship to the entire case. State v. Gillian, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct.App.2004) (citing State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990)). Whether an error is harmless depends on the particular facts of each case. Two factors bearing on the harm of an error are (1) the importance of the witness's testimony in the prosecution's case and (2) the overall strength of the prosecution's case. State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986)). As noted above, positive identification evidence is extremely dangerous, and a jury is likely to accept it uncritically. United States v. Greene, 704 F.3d 298, 306 (4th Cir. 2013), quoting Smith v. Paderick, 519 F.2d 70, 75 (4th Cir. 1975).

The state repeatedly used the identification evidence in multiple contexts to bolster its case, which rested exclusively on the testimony of Jujuan Hemingway and a cooperating conspirator. The solicitor presented the identification as *two affirmative identifications*. R. pp. 415-441. Additionally, the state introduced recorded telephone calls of the a co-defendant stating that Hemingway's identification underscored Petitioner's guilt.<sup>10</sup> The solicitor repeatedly came back to the identifications in her closing arguments (R. 615, 617, 619-20) and the jury repeatedly requested copies of the telephone conversations and the solicitor's arguments. R. p. 689, 691, R. 693.

6. The Error is not excused under the Cumulative Evidence Doctrine, because the identification dangerously bolstered critical testimony and the judge's repeated rulings would have precluded Hemingway's subsequent in-court identification, which also does not have the same probative value as the out of court identification.

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<sup>10</sup> "That's why you really need to be keeping up with this case. Dog ain't going nowhere. Too much shit points towards him. He's saying he ain't even been there and the victim picked him out of a lineup, the victim. The victim, the victim. . . . everything points towards him . . ." Transcript of Dashaun Simmons Telephone Call, R. p. 615.

The out-of-court identifications were not merely cumulative to the testimony of Quasitrina Rivers and the in-court identification by Hemingway, as suggested by the Court of Appeals. [App. p. 71]. This court has noted that erroneously admitted corroboration testimony is dangerous precisely because it buttresses otherwise suspect testimony. State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 246 (2001).

As a cooperating conspirator, the testimony of Rivers was inherently suspect and discounted as a matter of law. *See, Lee v. Illinois*, 476 U.S. 530, 541 (1986) (noting accomplice confessions are “presumptively unreliable”), *see also, Bruton v. U.S.*, 391 U.S. 123, 136 (1968) (noting that juries are instructed to weigh evidence from a co-defendant in light of motivation to shift blame.) Corroborating testimony from a different witness had a bolstering effect to sure up Rivers’s shaky, shifting and slow-developing explanation of events on the night in question.

Nor were the out-of-court identifications merely cumulative to Hemingway’s in-court identification. As the Respondent has pointed out [App. p. 42-43], the State would not have been permitted to offer a subsequent in-court identification without the trial court’s prior ruling on the reliability of the out-of-court identification. [App. p. 42-43, *citing State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2006), *citing State v. Moore*, 343 S.C. 282, 540 S.E.2d 445 (2000)(“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”)]. Accordingly, this evidence was made possible by the same rulings that allowed the line-ups into evidence.<sup>11</sup> Because the court had already admitted the out-of-court identifications and reaffirmed its ruling, defense counsel did not have a good faith basis for continuing to object.

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<sup>11</sup> Counsel renewed his objection to the identifications at R. p. 434. The court put the matter to bed stating definitively “[your objections] were overruled.” *Id.*

Moreover, courts have long recognized that in-court identifications where the witness points out a defendant seated at the counsel table have little, independent probative value. *See, e.g., Braithwaite v. Manson*, 527 F.2d 363 (2nd Cir., 1976), (noting the in-court identification has “little meaning” because the defendant was seated at the counsel table) *rev’d by Manson v. Braithwaite*, 432 U.S. 98 (1977). In some states, courts are eliminating altogether the practice of allowing in-court identifications, largely because the trial setting is so grossly suggestive. *See, e.g., State v. Dickson*, 322 Conn. 410, \_\_\_, 141 A.3d 810, 822-823, (2016) (“[W]e are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime.”). Despite the limited probative value, the theatrical display can have a significant and prejudicial impact on the jury.

The in-court identification was made possible only by the court’s prior ruling on the out-of-court identifications. Additionally, it was highly prejudicial while having “little meaning” as independent, standalone evidence. As a result, the in-court identification can hardly be considered cumulative, when it was simply the repetition and augmentation of the same error.

II. The trial court erred in allowing evidence that the Petitioner abused the cooperating co-defendant, Quasantrina Rivers, because defense counsel did not “open the door” to the subject matter. Additionally, the issue was preserved because the basis of Petitioner’s objections were obvious from the context in accordance with Rule 103, SCRE.

Before trial, the Petitioner moved to exclude any testimony about allegations of domestic violence by the Petitioner against Quasantrina Rivers (“Rivers”), an alleged co-conspirator and prosecution witness. Petitioner moved to exclude her testimony on the bases of relevancy and undue prejudice. R. 138. Petitioner specifically remarked on the number of female jurors and

the likelihood that testimony would unfairly paint the Petitioner in “an ugly light.” *Id.* The state sought to introduce numerous incidents of domestic violence, including video of the Petitioner hitting Rivers months before May 16, 2012. The state argued the violent incidents during the course of the relationship showed the violent nature of the relationship, and specifically the Petitioner’s violent temperament toward Rivers. R. pp. 138-151. They further argued that the incidents showed that Petitioner used violence to bend Rivers to his will. The solicitor specifically told the judge she wanted the jury to “understand that when she does not conform to what he wants, he smacks her.” R. p. 146. The court properly rejected these persistent arguments, noting the state’s efforts to depict Petitioner as a violent abuser, directly contravened the purpose of Rule 404(b), which is to exclude character evidence offered to prove a character trait of the defendant consistent with the crime charged.<sup>12</sup> The court did not totally foreclose the possibility that the state *might* be able to introduce the domestic violence incidents if it was necessary to rehabilitate Rivers following the defense’s cross-examination of Rivers or if it was relevant to the night in question. R. pp. 150-151.

Before Rivers ever testified, her mother, Sidearis Singleton took the stand. During her cross-examination, Defense Counsel inquired whether Singleton knew if Rivers had accused Singleton’s husband of sexual assault:

- Q. Do you know if [Rivers has] had some mental health issues?  
A. I am unsure about that.  
Q. Do you know whether she’s accused anyone in your family of sexually assaulting her?  
A. I’m not sure about that, sir.  
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<sup>12</sup> “[Y]our [sic] trying to say he’s a really bad guy and, therefore, he’s convicted -- he should be convicted of this, look at all these other things that he did. And that’s exactly what character evidence is usually not allowed to do.” R. p. 144.

- Q. Do you have a husband at the present time?  
 A. Yes, sir.  
 Q. And what is his name?  
 A. His name is Phillip.  
 Q. Do you know whether [Rivers] has ever accused Phillip of sexually assaulting her?  
 A. No sir.  
 Q. You do not know whether that's true or not?  
 A. No sir.  
 Q. You're still presently married to Phillip?  
 A. Yes, sir.  
 Q. All right. And if [Rivers] had accused him of sexually molesting her, then you would not be married to him if you believed those were correct; is that true?  
 A. Correct.  
 Q. You're uncertain whether [Rivers] has ever accused Phillip of sexually assaulting her?

R. pp. 239-240. The obvious intent of defense counsel was to elicit testimony regarding a specific instance of fabrication by Rivers. The only suggestion made was that Rivers' mother did not believe the specific allegation of sexual assault made against her husband.

On redirect, the State then proceeded to ask Ms. Singleton "Who did you know that abused [Rivers]." R. p. 248. Defense counsel immediately objected. The court immediately stated that Petitioner's counsel had "raised the issue." R. 248. Subsequently, the solicitor was permitted to ask the following line of questions:

- Q: Who are you aware of that harmed Trina?  
 A. In what way?  
 Q: In any way. In a physical way?  
 A: In a physical way, that I know of, is domestic violence.  
 Q: And who was that on the part of? Who harmed her?  
 A. Her baby's father.  
 Q: That man? Fat? Denzel?  
 A: Yes, ma'am.  
 Q: And it wasn't just on the night in question, was it?  
 A: No, ma'am.  
 Q: There had been a history of that?  
 A: Yes, ma'am.  
 Q: Had you ever seen her after he hurt her?  
 A: Yes, ma'am.

Q: Did you ever see any physical signs of it yourself?

A: Yes, ma'am.

Q: What did you see?

A: Her hair was taken out of here, the side. She had some braids but the hair was gone. And her lip was busted or swelled up.

R. pp. 248-249. At this point Petitioner's counsel objected again, this time on the additional grounds that the witness did not have first-hand knowledge of how the injuries occurred. This objection was also overruled. R. p. 249. The solicitor was allowed to continue:

Q: Ms. Singleton, other than the time when he ripped her hair and busted her mouth, were you aware of other occasions that he had behaved in a similar fashion towards her?

A: Yes, ma'am.

Q: And how did that affect your level of comfort with her having a relationship with him?

A: I did not have a relationship with him, really.

Q: Were you happy that she did?

A: I wasn't happy.

Q: And, again, that happened on more than just one occasion; is that correct?

A: Yes, ma'am.

Q: And you are aware of whether it happened in other cities other than in Charleston?

Q: Yes, ma'am.

Q: So other cities and other times?

A: Yes ma'am.

R. pp. 249-250.

1. The Court of Appeals erred in affirming the trial court's ruling that Petitioner's counsel opened the door. Nothing in the record or the opinion supports upholding the trial court's decision, because the character evidence did not explain or rebut anything presented in the Petitioner's cross-examination.

The Court of Appeals declined to address the Petitioner's argument related to the impermissible character evidence, and did not provide any support for its conclusion that defense counsel opened the door to the testimony of Sidearis Singleton. The Court of Appeals provided one conclusory statement writing, "[W]e find defense counsel opened the door to the *issue of abuse* during the cross-examination of Singleton." App. p. 73. However, neither the Court of Appeals, nor the State, has offered any explanation for how Singleton's testimony explained,

rebutted or even related to the subject matter of defense counsel's questioning. As a result, the state succeeded in its "thinly-veiled" effort to skirt the fundamental safeguards provided by Rule 404(b), SCRE.

To "open the door" a party has to invite the disputed evidence by raising a fact or creating an inference that, out of fairness, calls for a response from the other party. "Where one party introduces evidence as to a *particular fact or transaction*, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." State v. Young, 364 S.C. 476, 613 S.E.2d 386 (2005); quoting State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) (alterations in original) (emphasis added) (citing State v. Albert, 303 N.C. 173, 277 S.E.2d 439, 441 (1981)). However, there must be a logical, subject-matter nexus between the door opening evidence and the "rebuttal" or "explanation" that enters because of the newly opened door. Evidence that does not explain or rebut what the defendant put forward is not properly admitted under the doctrine of "opening the door." See, State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 431, (2003). Furthermore, this court has reversed the Court of Appeals for employing the "opened door" doctrine to permit a "thinly-veiled attempt to show propensity" rather than a sincere attempt at addressing credibility. See, State v. Young, 378 S.C. 101, 106, 661 S.E.2d 387, 390 (2008).

Petitioner's main argument on this issue was that there was no logical basis or subject matter relationship between defense counsel's questions and the evidence introduced by Sidearis Singleton. App. p. 20-23. Singleton's testimony about domestic violence by Heyward did not, in any way, explain, rebut or illuminate any suggestion or inference about River's totally unrelated allegations of sexual assault against her step-father. See State v. Foster, 354 S.C. 614, 623, 582 S.E.2d 426, 431, (2003) (rejecting argument that evidence which did not rebut or

explain defense counsel's cross-examination questions was properly admitted through the open door doctrine). The record from the Lyle hearing indicated the State's reasons for offering this testimony. It was clear that this was an abuse of the open door doctrine or "a thinly-veiled attempt to show propensity." State v. Young: 378 S.C. 101, 106, 661 S.E.2d 387, 390 (2008).

Evidently, the Court of Appeals could not bridge logical gap in its opinion either. The Court of Appeals's conclusory statement that the Petitioner "opened the door to the issue of abuse," does not meet the requirements of Rule 220(b), SCACR, which requires that the reasons for the court's decision must be stated in writing. By failing to provide a justification for its decision, the Court of Appeals reduces the doctrine to a mere word game, where a defendant can stumble into treacherous grounds based on tangential associations of completely unrelated subjects.

Reviewing the authorities cited in the Court of Appeals' decision emphasizes the logical disconnect in the Court of Appeals reasoning. In each of the cases cited by the Court of Appeals, the decision explains *why* or *how* the "door was opened" to a particular piece of evidence. In each, there is a specific transaction or subject matter nexus between the evidence or questions which opened a "door." In State v. Robertson, 305 S.C. 469, 409 S.E.2d 404, the South Carolina Supreme Court explained that a defendant could not complain of evidence linking a group to drug dealing, when the defendant's own attorney had previously solicited evidence of the same group's involvement in drug dealing. In State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999), defense counsel questioned a state's expert about a certain type of test that had not been performed on some evidence, then complained of prejudice when *the same test* was performed during the trial and the results were admitted as evidence against the defendant. In State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008), this Court went to extensive lengths to explain

how the cross-examination by defense counsel created specific inferences about the state's investigation, but ultimately found that the questioning did not justify the admission of excluded evidence to rehabilitate an investigator. No such explanation is offered in this case.

2. The Petitioner's Objection to the Domestic violence Testimony was obvious from the Context of the entire proceedings under Rule 103, SCRE.

The Court of Appeals erred in ruling that Petitioner's objection to testimony about domestic violence against Qusantrina Rivers was not preserved because the objection was "not specific." App. p. 73. Stating the specific grounds for an objection is only necessary where the grounds are not clear from the context. Rule 103(a)(1), SCRE. Petitioner's arguments were clearly articulated and presented to the court in a pre-trial motion and the basis of Petitioner's contemporaneous, renewed objection was clear from the context. Prior to trial, defense counsel moved to exclude any testimony regarding alleged domestic violence between Petitioner and his co-defendant Quasantrina Rivers. An extensive pre-trial Lyle hearing took place based on counsel's Rule 404(b) and 403 arguments. Defense counsel argued undue prejudice and relevance in the motion. At the conclusion of the pre-trial hearing, the trial court expressly ruled that the evidence the solicitor sought to introduce was directly excluded under Rule 404(b). The trial judge summarized the hearing as follows:

"[Y]our [sic] trying to say he's a really bad guy and, therefore, he's convicted – he should be convicted of this, look at all these other things that he did. And that's exactly what character evidence is usually not allowed to do."

R. p. 144. When the solicitor sought to introduce the exact same evidence through Sidearis Singleton at trial, the basis for defense counsel's objection was immediately apparent from the context. Despite its prior ruling to exclude testimony related to alleged domestic violence, the court permitted Mrs. Singleton to testify extensively regarding the abusive relationship between Petitioner and Rivers without conducted any Rule 403 analysis. R. pp. 248-250.

3. The testimony related to abuse was highly prejudicial, both in bolstering the credibility of a key witness and in unfairly tarnishing the Petitioner. The evidence was not merely cumulative, because it corroborated and bolstered a critical witness, whose testimony was inherently suspect. Additionally, Rivers credibility was central to the State's case, so any error affecting her testimony was not harmless beyond a reasonable doubt.

The prejudice from Singleton's testimony was substantial. Having a second witness shoe-horning forbidden propensity evidence to tarnish the Petitioner and bolster Rivers's credibility had a major impact on the outcome of the case. As the Supreme Court has explained: "[e]rroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 246 (2001).

Contrary to the suggestion of the Court of Appeals, Singleton's testimony was not the same evidence offered by Rivers herself. As a co-operating co-defendant, Rivers's testimony by itself was "presumptively unreliable" as matter of law. *See, Lee v. Illinois*, 476 U.S. 530, 541 (1986) (noting accomplice confessions are "presumptively unreliable"), *see also, Bruton v. U.S.*, 391 U.S. 123, 136 (1968) (noting that juries are instructed to weigh evidence from a co-defendant in light of motivation to shift blame.)

Rivers's testimony was of paramount importance to the state's case in chief. Where the credibility of a witness is of paramount importance to a claim or a defense, an error bearing on that witness's credibility is not harmless. *See State v. Morris*, 289 S.C. at 298, 345 S.E.2d at 479. Rivers was the exclusive, unverified source of much of the State's case, including all of the State's evidence about (1) the source of the weapon (Skrill's house); (2) the defendants' activities and whereabouts prior to the event on Cynthia Drive; and (3) the defendants' activities following the incidents on Cynthia Drive. Rivers was the primary witness quoted by the Court

of Appeals in its decision. Accordingly, the error was neither harmless nor excusable under the cumulative evidence theory.

- III. The errors were not harmless because the testimony and credibility of Hemingway and Rivers was central to the State's case and no other overwhelming evidence of guilt was presented.

The Petitioner identifies two critical and prejudicial errors. The first was the improper admission of JuJuain Hemingway's identification of Mr. Heyward following highly suggestive, repetitive line-ups used by law enforcement.<sup>13</sup> The second was the admission of testimony regarding the physical abuse of Quasantrina Rivers by Mr. Heyward.<sup>14</sup> As noted above, the State repeatedly used the specious identification in multiple contexts to undergird the shaky and contradictory testimony of Hemingway. *See also*, App. pp. 17-18. The State also repeatedly referenced physical abuse, which depicted the Appellant as the type of person who uses physical violence to coerce others to bend to his will. These errors were not harmless in view of the pivotal nature of the testimony.

The harmless error doctrine should be used guardedly and on a case-by-case basis. State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479. No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Gillian, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct.App.2004) (citing State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990)). Whether an error is harmless depends on the particular facts of each case. Two factors bearing on the harm of an error are (1) the importance of the witness's testimony in the prosecution's case and (2) the overall strength of the prosecution's case. State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315,

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<sup>13</sup> See Brief of Appellant at p.4-13.

<sup>14</sup> See Brief of Appellant at p. 13-22.

318-19 (2002) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986)).

Here, the prosecution and the jury relied almost exclusively on the testimony of JuJuain Hemingway and Quasantrina Rivers. Where the credibility of a witness is of paramount importance to a claim or a defense, an error bearing on that witness's credibility is not harmless. *See State v. Morris*, 289 S.C. at 298, 345 S.E.2d at 479 ("Error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense"). The credibility of these two witnesses was the single most important factor in the outcome of this closely-decided case. The jury deliberated for over eight hours, and during that time, reviewed the testimony of these two witnesses. R. pp. 689 and 693. After a deadlock on four counts and an Allen charge, the jury returned a mixed verdict, failing to come to a conclusion on two charges. The deliberation was so lengthy, it was unprecedented in the trial court's experience. R. p. 639. Given the closeness of this case, the Court cannot say that the admission of the identification and physical abuse did not have a bearing on the outcome.

B. No Other Overwhelming Evidence of Guilt.

Additionally, the state did not present any other overwhelming evidence of guilt, such that the verdict is free from doubt despite the errors bearing on this testimony. *See, State v. Singleton*, 303 S.C. 313, 400 S.E.2d 487 (1991) (finding that in the absence of overwhelming guilt, the error was not harmless). Overwhelming evidence is evidence which tends to show guilt to such an extent that no other reasonable conclusion can be reached. *State v. Bailey*, 298 S.C. 5, 1, 377 S.E.2d 581, 584 (1989).

This is not a case of physical evidence. In fact, there is no physical evidence at all linking either defendant to the crime. The state points to circumstantial evidence to buttress the

testimony of Rivers and Hemingway. In support of its contention that the record contained overwhelming evidence of guilt, the state relies on (1) consistency in the testimony of Hemingway and Rivers; (2) evidence from Verna Lockhart-Carter, placing Petitioner at the scene two and a half hours before the incident; (3) an analysis of Petitioner's phone and (4) the dying declaration by Kadeem Chambers. Return to Petition for Writ of Certiorari, at 18. The evidence was circumstantial, inconsistent, and incompatible with the state's theory of the case.

First of all, Hemingway and Rivers both gave multiple, contradictory accounts of the events. Both witnesses contradicted themselves and each other on a number of points. The differences between their accounts are so numerous that they can't be easily listed, but they are as plain as black and white. For example, Hemingway testified that the shooter wore white (R. p. 405-406, 408), whereas Rivers testified that he wore black (R. p. 274). Hemingway testified that Heyward punched Chambers in the car (R. p. 404-405), whereas Rivers stated Chambers was out of the car before any altercation started (R. p. 276-277). Hemingway testified that he was still in the car when Simmons emerged and ordered him out (R. p. 405-406), whereas Rivers testified that Hemingway had exited the car and gone to his brother's side of the vehicle before Simmons "ran up on both of them" (R. p. 277). Hemingway testified that Rivers attempted to open the trunk of Chambers's car (R. p. 413-414), whereas Rivers testified that the trunk was open before she got out of her own car (R. p. 283). Hemingway did not testify about being shot at from Rivers car.<sup>15</sup> On top of that, there are numerous instances where these two witnesses dramatically altered their accounts to include new or different information.

Kadeem Chambers' identification of the Petitioner referred to by the State was not clear, reliable or consistent with the State's case. First responder, Matthew Colburn testified that he

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<sup>15</sup> This is a major discrepancy in the testimony. Without Rivers's testimony, the conviction for the attempted murder of JuJuain Hemingway hangs entirely on a warning shot at the ground and being kicked in the head.

spoke to a barely audible Chambers on the scene and asked who shot him. R. p. 179. His actual testimony was, “It was hard to understand him, but from what I got was either Fat or Fet, just the way that he was breathing. The way that he pronounced it, it was hard to understand. But it was clearly either Fat or Fet.” R. p. 179. However, the investigators that interviewed Jujua Hemingway actually reported to his brother that Kadeem identified “Fat Chuck” as his shooter. R. p. 455. Not only are the statements vague and inconsistent, but both statements are, in fact, totally irreconcilable with the remainder of the State’s evidence and theory of the case, which identified Dashaun Simmons as the shooter.

Verna Lockhart-Carter is the mother of Lorenzo Mehciz and resides in the home on Cynthia Avenue near the incident location.<sup>16</sup> Ms. Lockhart-Carter testified that when she returned from work around 9:00 p.m., a few hours before the incident, she saw her son and another person in front of her house. R. p. 194-195. Her son, Lorenzo, told her that “Fat” was one of the people outside her home. R. p. 196. Defense counsel objected to the hearsay identification, and after an on the record argument, the objection was sustained. R. pp. 196-210, 213. The court ordered the jury to disregard Ms. Lockhart-Carter’s identification of “Fat.” R. p. 212-213.

The State’s treatment of Ms. Lockhart-Carter on the stand shows that her testimony was not compelling evidence of guilt. Although Ms. Lockhart-Carter’s testimony was consistent with her prior statements to the police, the State moved to have Ms. Lockhart-Carter declared a hostile witness in an off the record bench conference. R. p. 217. The motion was granted over defense counsel’s objection, and Ms. Lockhart-Carter’s prior statements were essentially read into the record, without an opportunity to respond to questions. R. p. 222. Ms. Lockhart-Carter stated

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<sup>16</sup> Lorenzo Mehciz was called as a witness, but invoked his Fifth Amendment right against self-incrimination. Tr. Vol. 3, p. 125.

that she believed “Fat” was implicated in the activities outside her home. R. p. 222.<sup>17</sup> She again qualified this information as being premised on her son’s remarks. Ms. Lockhart-Carter consistently stated that she only thought “Fat” was there because her son had told her so. Additionally, she had no knowledge of what actually occurred out on the street as she was in her home during the events. R. p. 223-224. The record reflects that the jury was confused by the testimony of Ms. Lockhart-Carter and her treatment as a hostile witness. During its marathon deliberation, the jury requested clarification of the term “hostile witness” in a note to the trial court. R. p. 690.

Finally, the Respondent cites cell tower data indicating Mr. Heyward’s phone was in the John’s Island area on May 16, 2018. Of course, Mr. Heyward grew up right around the corner from Cynthia Drive, R. p. 224, and he had childhood friends and family in the neighborhood. R. 220-221. Accordingly, his presence in a very general area could hardly be considered overwhelming evidence of his guilt. Moreover, the same cellular data failed to corroborate the otherwise unique testimony of Quasintrina Rivers. Rivers testified that the defendants made trips that day to Ridgeville, in Dorchester County. However, cell tower mapping completed by the State’s witness never placed the defendants in Ridgeville or Dorchester County at any point during May 16, 2018. R. pp. 323-324.

Taken together or separately, the other evidence in this case beyond the testimony of Rivers and Hemingway fails to establish “overwhelmingly” that the Petitioner committed these crimes. As a result, the Court cannot find that the errors complained of were harmless when viewed in the context of the entire proceedings.

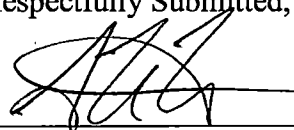
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<sup>17</sup> Ms. Lockhart-Carter’s testimony also included a helpful alibi for her son, who was inside the house during the incident. R. p. 216.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the decisions of the Court of Appeals and the Circuit Court be reversed.

Respectfully Submitted,



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D. Michael Mathison  
S.C. Bar No. 101803  
721 Huntington Ave.  
Columbia, SC 29205  
T: (843) 384-3761  
[dmichaelmathison@yahoo.com](mailto:dmichaelmathison@yahoo.com)  
Attorney for the Petitioner

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Columbia, South Carolina.