STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2011-196667

THE STATE,

RESPONDENT,

v.

HENRY JERMAINE DUKES,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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I. Whether the trial judge properly refused to suppress the pretrial identification of Dukes by State's witness Cornelius Ford, based upon the unavailability of the detective who conducted the identification procedure, because the *United States v. Wade*, 388 U.S. 218, 235-36 (1967) hearing held in this case comported with both due process and the state law requirements for hearings where pretrial identification is at issue, despite the witness' absence?

II. Whether the trial judge properly denied Dukes' motion to suppress Cornelius Ford's pretrial identification of him because the record supports his findings that identification process was not unduly suggestive, and that the out-of-court identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed, despite any possible suggestiveness?

STATEMENT OF CASE

The Horry County Grand Jury indicted Appellant, Henry Jermaine Dukes (Dukes) at the August 2008 term of court for murder (2008-GS-26-2911), for the shooting death of Andrico Gowans. **R. pp. 387-89**. The Honorable Steven H. John held a motions hearing on July 20, 2011, at which Dukes was present and represented by counsel. Dukes then received a jury trial before Judge John on August 1-2, 2011. Horry County Assistant Public Defender Jonathan Eric Fox represented Dukes in the trial court. Assistant Solicitors Jimmy A. Richardson and Robert Paul Taylor, of the Fifteenth Circuit Solicitor's Office, prosecuted him.

Dukes did not testify at trial. The jury found him guilty of murder, and Judge John sentenced him to forty-seven years imprisonment. **R. p. 386**. A timely notice of appeal was served and filed.

ARGUMENTS

I. The trial judge properly refused to suppress the pretrial identification of Dukes by State's witness Cornelius Ford, based upon the unavailability of the detective who conducted the identification procedure , because the *Wade* hearing held in this case comported with both due process and the state law requirements for hearings where pretrial identification is at issue, despite the witness' absence.

Dukes maintains that the trial judge erred in finding that the hearing on the pretrial identification of him by State's witness Cornelius Ford failed to comport with due process requirements, in light of the unavailability of the detective who conducted the identification procedure, Det. Sean Addison, who was serving in the military in Afghanistan. Respondent submits that his argument is without merit, and that the trial judge properly refused to suppress the pretrial identification because the *Wade* hearing[1] held in this case comported with both due process and the state law requirements for hearings where pretrial identification is at issue, despite the witness' absence.

A. Proceedings in the trial court.

At the pretrial motions hearing, Dukes noted that the chief investigating officer, Det. Sean Addison, who was formerly employed by the Conway Police Department, was not expected back for trial because he was in Afghanistan. He then observed that Cornelius Ford had given a statement and then made an out-of-court identification of Dukes, after Det. Addison had shown photographs to Ford at the Conway Police Department. "There's an issue about how exactly that was done." Dukes claimed that, without Detective Addison, he could not properly conduct cross-examination and that the trial judge could not determine whether or not the procedure was unduly suggestive. **R. p. 10, line 25 - p. 12, line 24.**

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[1] *See United States v. Wade*, 388 U.S. 218, 235-36 (1967).

Dukes conceded that Ford was present to testify, but he argued that there were discrepancies between what Ford would say and what was in Det. Addison's report. Also, without Det. Addison, the State could not meet it's burden of showing that the identification procedure was not unduly suggestive. **R. p. 12, line 25 - p. 13, line 13**. In response to the trial judge's request for testimony on the matter, the State indicated that it was prepared to present Ford's testimony. **R. p. 13, lines 14-17.**

After the trial judge and the parties had addressed all other issues, Dukes noted that the motion to suppress Ford's identification was the only remaining matter. He again asserted that Ford had come into the police Department and had given a statement. "During the statement, they . . . offered to show [Ford] pictures and there's some discrepancy as to exactly what happened," which required testimony. However, Dukes asserted that this was "an unduly suggestive procedure" and that it "created a very substantial likelihood of misidentification." **R. p. 29, lines 4 - 15.**

The State then presented its witnesses on the issue of identification. Cornelius Alford Lavon Lafayette Ford testified that he had seen Dukes twice before the murder. The first time he saw Dukes, Dukes passed him as Ford was leaving and Dukes was entering "Deals," a store on Highway 701. The men were approximately a foot away from each other at that point. Ford did not know Dukes at that time. **R. p. 30, line 2 - p. 31, line 1.**

Ford then saw Dukes when Dukes accompanied another man to the victim's residence. Dukes and the other man were in the back yard of the residence for twenty or thirty minutes on that occasion. Ford was roughly five feet away from Dukes. Also, he could hear the two men talking to the victim but he did not have a conversation with the men. **R. p. 31, lines 2 - 25.**

The third time Ford saw Dukes was on the morning of the shooting. Sometime around 8:00

or 9:00 a.m., Ford and Andrico "Andy" Gowans, the victim, heard a knock at the door of the residence. Andy looked out of the window, opened the door, and Dukes entered the residence. Dukes pulled out a gun, following a brief conversation with the victim. Immediately, Ford stood up and walked to the hallway. As soon as Dukes aimed the weapon at Ford, the victim "jumped back." Dukes then aimed the gun at the victim and fired twice. **R. p. 32, line 1 - p. 33, line 10.**

Although Ford remained still, Dukes "came around to the kitchen and pointed the gun at me, and it like clicked. I don't know if it jammed or whatever. It clicked like twice. And then he took off out the door." Ford never took his eyes off of Dukes during the incident, and Ford was "a hundred percent [certain] that was him." **R. p. 33, line 19 - 21; p. 34, lines 9 - 12.**

After the shooting, Ford called 911and he called his father, who came to the scene. He drove home once his father arrived. **R. p. 37, line 22 - p. 40, line 4.**

Ford later gave a statement to police around 4:30 or 5:00 pm., on the day of the murder. During the course of giving this statement, Det. Addison said that he wanted Ford to look at some pictures, "like a photobook." As Det. Addison got up to get these photographs, between three and five photographs that had been in Det. Addison's file fell out onto the table. Ford saw these photos and he pointed out Dukes as the shooter. No one told him to select Dukes' photograph or promised him anything to do so. Also, he denied that Det. Addison had presented or shown the photos to him. **R. p. 34, line 13 - p. 37, line 21; p. 41, lines 3-7; p. 42, line 13 - p. 43, line 2.**

Ford further testified that he had given police a description of the shooter before he gave his statement. *In camera*, he testified that the shooter had a funny accent and "a big smile, like a big mouth." **R. p. 33, line 22 - p. 34, line 8.** In Ford's subsequent testimony before the jury, however, it became clear that he had given police an accurate and detailed description: the shooter not only

had a big smile and big mouth, the shooter was slightly taller that Ford; stocky; and dark skinned. Also, Ford told police that "if you show me a picture I'll tell you exactly who he is." **R. p. 175, line 20 - p. 176, line 7.**

Mr. Rasheed Salmet Karlin Muhammad testified that he is Ford's father, and that he was present when Ford made the identification at the Conway Police Department.[2] The police had called earlier because they wanted to speak to Ford. Mr. Muhammad then got in contact with Ford and both men went to the police substation in Conway, where they met with a detective. **R. p. 43, line 18 - p. 44, line 10; p. 49, lines 6 - 7.**

The three men went into a room with a long table. Mr. Muhammad sat at one end of the table, while Ford and the detective sat at the other end of it.[3] Mr. Muhammad was not questioned. At one point, the detective was going to show a book of photographs to Ford. However, the detective put some pictures put on the table and Ford identified Dukes' photograph as the shooter. The detective did not insinuate or suggest which photograph Ford should select. **R. p. 44, line 11 - p. 45, line 14; p. 48, line 15 - p. 49, line 5.**

The detective repeatedly asked Ford if he was sure and he repeatedly said yes. Because the detective was repeatedly questioning Ford's identification, Mr. Muhammad asked to see the picture. The detective slid it to him. After Mr. Muhammad saw the photograph, **he** repeatedly asked Ford if Ford was positive and Ford said, "yes, Daddy, I am." Mr. Muhammad stopped questioning his son when Ford said that he was positive and there was no question in Ford's mind about it. **R. p. 45,**

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[2] Although Mr. Muhammad had called 911 and reported the incident, he did not remember whether he told authorities that Ford had been present. **R. p. 46, line 13 - p. 47, line 10.**

[3] Mr. Muhammad was unaware that the interview was recorded. **R. p. 47, line 21 - p. 48, line 14.**

lines 14 - 21; p. 46, lines 2 - 8.

The detective then asked Mr. Muhammad if he recognized the person in the photograph, and he replied that he did. He explained that Dukes had visited the mosque and made prayer and studied with Mr. Muhammad. Dukes also told Mr. Muhammad that he was from out of town. **R. p. 45, line 22 - p. 46, line 2.**

In response to the trial judge's inquiry, Mr. Muhammad explained that he had not questioned his son immediately after Ford made an identification. Rather, the detective had repeatedly asked Ford if Ford was positive and Ford said that he was. "[J]ust by coincidence I . . . asked the detective if I could see the picture, and he slid the picture all the way down to the end of the table and I saw the picture." Because Mr. Muhammad recognized Dukes from the mosque, he repeatedly asked Ford if Ford was positive. Ford said that he was. **R. p. 49, line 12 - p. 50, line 2.**

When Dukes was asked if he had any witnesses, he replied that "the one witness that I would want to hear from is the one witness who is unavailable, being Detective Addison, who was the third person in the room." The trial judge rejected the suggestion that Addison would be the most neutral witness because he was a police officer, but the trial judge noted that Dukes would want to question Det. Addison about whether Addison had done anything improper. Dukes agreed, stating, "I would want to explore what the procedure was." **R. p. 50, line 11 - p. 51, line 1.**

Dukes observed that there was a discrepancy between the live testimony and Det. Addison's investigative report:

> Based on this information, several photos were obtained. They included Ronnie Atkinson, Jeremy Rush, Steve Wilson, and Henry Dukes. The photos were presented to Cornelius Ford one at a time, and then he, without hesitation, took the photograph of Mr. Dukes, but it describes a definite procedure.

R. p. 51, lines 1 - 17.

Dukes then argued that he would want to further question Det. Addison about how the photographs were presented to Ford, and whether or not Ford was told that the suspect might not be in these photographs. Dukes further asserted that there was reason to question Ford's credibility on this issue, "one, because he's uncertain about some things; two, because he lied to the police, or at least hid his identity; three, because they are in direct contradiction to what we believe Detective . . . Addison observed." He claimed that the State could not "meet its burden of showing this was a proper procedure without having testimony from Detective Addison." **R. p. 51, line 17 - p. 52, line 10.**

However, the trial judge denied Dukes' motion to suppress, as follows:

> **THE COURT:** All right.
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> I do not find that it is necessary for the Court to hear the testimony of the detective who is unavailable. I mean, there is no argument, Mr. Fox, that that detective is unavailable. He is in the service of his country in Afghanistan. It's not possible for the Court to have him here to question him, nor will it be possible for him to be at the trial. I mean, that's clear, correct?
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> **MR. FOX:** Yes, Your Honor, no question.
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> **THE COURT:** All right, so with that circumstance, the Court does not find it to be obviously, number one, within the court's power to have him here. Secondly, I find it is not necessary for the Court to make the determination on your motion to suppress the identification to have the testimony of the officer in this particular case.
>
> The process or the previous rulings of our Supreme Court, Court of Appeals, and the U.S. Supreme Court indicate, and just in general first, the defendant may be deprived of due process of law by an identification process that is unnecessarily suggestive and conducive to irreparable mistaken identification. The U.S. Supreme Court developed a two-prong test or inquiry to determine the admissibility of out-of-court identification.
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> First, I think that was in Neil v. Biggers in 1972, and I think they've had subsequent

decisions about it since then, but first the Court must ascertain whether the identification process was unduly suggestive, and the Court must next decide whether the out-of-court identification was nevertheless so allowable that no substantial likelihood of misidentification exists.

In . . .determining whether an identification is reliable, the following factors have been set forth by the appellate courts, that is the opportunity of the witness to view the defendant at the time of the crime.

It's clear that this particular witness says he was present at the time the crime was committed, that he had seen the Defendant prior -- on prior occasions before the crime was committed, that he was certain of who the person was, that he subsequently identified them and gave a description to the police of the Defendant.

The witness's degree of attention, he says what occurred, that he was paying close attention. I think the Court can take into consideration that when a gun is present being pointed at certain individuals and then yourself, and then it is fired in your presence, that you will have your attention to those particular details.

The accuracy of the witness's prior description of the Defendant, the level of certainty demonstrated by the witness, he says it's a hundred percent. The amount of time between the crime and the confrontation, obviously his initial description is the same day. The communication with the police is shortly thereafter, and then the corrupting effect of any suggestive identification is to be weighed against these factors.

It does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was any intentional act, that there was any deliberate act, there was any act by the police of a suggestive manner. The witness had already identified the Defendant prior to . . . looking at the photographs.

The seeing of the photographs was either done accidentally through the looking at a file or in a process that the Court finds was not suggestive . . . in any manner, and therefore, based upon all that, the motion to suppress the identification is denied.

R. p. 52, line 11 - p. 55, line 1.

B. Discussion.

The State submits that Dukes' argument is without merit, and that the trial judge properly denied Dukes' motion because neither due process nor state law required Det. Addison's presence. An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken

identification may deprive a criminal defendant of due process of law. *Stovall v. Denno*, 388 U.S. 293 (1967). *See also*; *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004); *State v. Caldwell*, 378 S.C. 268, 280-81, 662 S.E.2d 474, 481 (Ct.App. 2008). Although due process does not require a state court "to conduct a hearing outside the presence of the jury whenever a defendant contends that a witness' identification of him was arrived at improperly," *Watkins v. Sowders*, 449 U.S. 341, 349 (1981); *Perry v. New Hampshire*, 132 S.Ct. 716, 723-30 (2012) (Due Process Clause does not require preliminary judicial inquiry into reliability of eyewitness identification that was not procured under unnecessarily suggestive circumstances arranged by law enforcement); *United States v. Ruggiero*, 824 F.Supp. 379, 396 (S.D.N.Y.1993) (quoting *Watkins*, 449 U.S. at 349), an *in camera* hearing should be held as a matter of state law, whenever the State offers eyewitness testimony identifying the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, improper identification or confrontation. *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012).

In *Neil v. Biggers*, 409 U.S. 188 (1972), the United States Supreme Court established a two-pronged test to determine the admissibility of an out-of-court identification. The trial judge must first determine whether the identification process was unduly suggestive. *Id* at 198. Even assuming an identification procedure was suggestive, suppression is not automatically required. *Id.* Rather, the court must then determine whether the out-of-court identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed. *Id*; *State v. Traylor*, 360 S.C. 74, 600 S.E.2d 523 (2004).

The relevant factors to be considered under the totality of circumstances include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy

of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. *See also Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. However, "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall*[4] confrontations." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (footnote added). Thus, an in-court identification of an accused is inadmissible only if, under the totality of the circumstances, a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. *Id.* "Short of that point, such evidence is for the jury to weigh." *Brathwaite*, 432 U.S. at 116.

In support of his argument, Dukes relies upon the following portion of the Supreme Court's opinion in *Liverman*:

> Here, the trial court went beyond the scope of a *McLeod* hearing[5] and required testimony related to Tyrone's ability to identify petitioner as the shooter, as well as the circumstances surrounding the show-up procedure arranged by the police petitioner maintains that he was denied a "full" *Neil v. Biggers* hearing. The State, having adamantly objected to a *Neil v. Biggers* hearing at trial, now suggest we treat the trial court's handling of the matter is the functional equivalent of a *Neil v. Biggers* hearing. While the trial court required the State to submit evidence that has many of the traditional features of a *Neil v. Biggers* hearing (and the trial court made behind commitment *Neil v. Biggers* findings), we decline to hold that the pretrial hearing fully comported with due process requirements.

Liverman, 398 S.C. at 141, 727 S.E.2d at 427. (Footnote added). The State submits that Dukes' reliance upon this portion of the *Liverman* decision is misplaced for several reasons.

First, Dukes clearly takes the language in *Liverman* out of context. In *Liverman*, the trial

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[4] *See Stovall v. Denno*, 388 U.S. 293 (1967).

[5] *State v. McLeod*, 260 S.C. 445, 196 S.E.2d 645 (1973), *overruled*, *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012).

judge only permitted limited inquiry with respect to the identification procedure employed in that case. Rather, the primary focal point of the examination by both parties was whether or not the eyewitness "knew the defendant," and the State repeatedly asserted that any inquiry into the identification procedure, itself, was not required in light of *McLeod*. On the other hand, the questioning by the parties in this case centered upon the identification procedure itself, and Dukes' efforts in that regard were unopposed by the State.

Second, the officer who conducted the show-up procedure in *Liverman* was available to testify but the State did not present him as a witness. Here, however, Det. Addison was an unavailable witness and his attendance could not be obtained. *See* Rule 804(a), SCRE.[6] In spite of

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[6] Rule 804(a), SCRE, provides as follows:

> **(a) Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant--
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) *is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance* (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(Italics added). *See also State v. Cooper*, 386 S.C. 210, 218-22, 687 S.E.2d 62, 67-69 (Ct. App. 2009) (trial judge did not abuse his discretion by finding that witness was unavailable under R rule 804(A)(5), SCRE, where state was unable to secure the presence of a witness incarcerated in a Texas penitentiary

Det. Addison's unavailability, Dukes had his report and he was able to argue that the report reflected that Det. Addison had shown individual photographs to Ford and that Ford had selected Dukes photograph from among those shown, whereas Ford testified that he had selected the photograph from a series of photographs that inadvertently fell out of a file onto the table. Dukes thus pointed out the discrepancy between the report and the testimony of the eyewitness, Ford.

Although Dukes did not introduce Det. Addison's report as an exhibit, the trial judge clearly considered this relevant discrepancy between the report and Ford's testimony before he ruled on the admissibility of the eyewitness identification under *Biggers*. Additionally, Dukes did not demonstrate what additional information he could have elicited on cross-examination of Det. Addison that was not already before the trial judge in the form of Det. Addison's report, other than to speculate what he might conceivably hope to prove as to how the photographs were presented to Ford, and whether or not Ford was told that the suspect might not be in these photographs. The State submits that his speculation does not show any abuse of discretion by the trial judge in rejecting Dukes' motion. *State v. Smith*, 307 S.C. 376, 381, 415 S.E.2d 409, 412 (Ct.App. 1992) ("At any rate, we are unable to determine whether Smith was actually prejudiced by the witness' unavailability because Smith made no proffer as to what this witness would have testified"); *State v. Chapman*, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) (the bare assertion of a witness' unavailability is insufficient to warrant the conclusion that the defendant suffered actual prejudice thereby).

Moreover, due process does not require that every possible witness testify at a suppression hearing where the accused contests a identification procedure under *Biggers*. To the contrary, the

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through a normal out of state witness subpoena although it had unsuccessfully attempted to do so); *State v. Steadman*, 216 S.C. 579, 59 S.E.2d 168 (1950), *cert. denied*, 340 U.S. 850, *reh'g denied*, 340 U.S. 894 (1950).

appellate courts in the State of New York and the federal courts in the Second Circuit have consistently and quite correctly recognized that a victim need not testify at a *Wade* hearing, and that the defendant is not entitled to compulsory process at a *Wade* hearing.

In *People v. Chipp*, 75 N.Y.2d 327, 553 N.Y.S.2d 72, 552 N.E.2d 608 (N.Y. 1990), the New York Court of Appeals limited a defendant's Sixth Amendment right to compulsory process at his *Wade* hearing. Specifically, the Court limited the right of the defendant to call the complaining witness. The Court reasoned that while a *Wade* hearing is "properly characterized as a criminal proceeding," it does not involve a determination of the accused's guilt or innocence. Instead, it is functions to determine whether a police-arranged pretrial identification procedure was unduly suggestive. *Id.* at 337, 553 N.Y.S.2d 72, 552 N.E.2d 608 (citing *Stovall v. Denno*, 388 U.S. 293 (1967)). Because Chip had not offered any persuasive authority in support of his argument that an absolute right to compulsory process attaches to a *Wade* hearing, the Court found that "any right of compulsory process at a *Wade* hearing may be outweighed by countervailing policy concerns, properly within the discretion and control of the hearing Judge." *Id.*

As a result, the Court rejected Chip's claim that he had an absolute right to call the complainant to testify at the *Wade* hearing and it held that, because there was no *indicia* of suggestiveness in the identification procedure, the trial judge did not abuse its discretion in declining to permit the defendant to call the complaining witness at the *Wade* hearing. *Id.* at 339, 553 N.Y.S.2d 72, 552 N.E.2d 608.

In light of the New York Court of Appeals' holding in *Chipp*, the federal habeas courts in the Second Circuit

> have held that a state court's denial of a petitioner's request to call witnesses at a *Wade* hearing does not deprive a petitioner of a federal constitutional right or address

a matter of clearly established federal law as required for habeas review. *See Duran v. Miller*, 322 F.Supp.2d 251, 257 (E.D.N.Y.2004) (noting that petitioner did not have absolute right, under New York or federal law, to compulsory process at pretrial suppression hearing; holding that state trial court's discretionary exclusion of identifying witness at pre-trial hearing, under New York law, did not rise to level of constitutional error cognizable on petition for federal habeas relief) (citing *Mitchell v. Fischer*, No. 02-CV-6336 (JBW), 2003 WL 22952851, at *6 (E.D.N.Y. Oct.20, 2003) (holding that a defendant does not have an absolute right to have a complainant produced at a *Wade* hearing); *Heron v. People of the State of New York*, No. 98 Civ. 7941(SAS), 1999 WL 1125059, at *10 (S.D.N.Y. Dec.8, 1999) (rejecting habeas claim that petitioner was denied right to call witness at *Wade* hearing; under New York law, there exists no absolute rule requiring the identifying witness to appear at a *Wade* hearing when the suggestiveness of the identification procedure is called into question)); *Rivalta v. Artuz*, No. 96 CIV. 8043(SAS), 1997 WL 401819, at *3 (S.D.N.Y. July 16, 1997) (rejecting claim of habeas petitioner contends that because the trial judge prevented him from calling the complainants at the *Wade* hearing, he was denied his constitutional right to a fair trial where petitioner's objection was "predicated on the purely speculative assertion that the complainants' testimony at the *Wade* hearing might have revealed that something improper was said to them at the pretrial identification procedure"). Whether or not to exclude an identifying witness is generally a discretionary matter for the judge at a pre-trial hearing and therefore does not rise to the level of constitutional error. *Duran v. Miller*, 322 F.Supp.2d 251, 257 (E.D.N.Y.2004) (citing *Sorenson v. Superintendent*, No. 97 Civ. 3498(NG), 1998 WL 474149, at *4 (E.D.N.Y. Aug.7, 1998) ("Generally, the discretionary exclusion of an identifying witness by a trial judge at a pre-trial hearing does not rise to the level of constitutional error.")).

> FN7/ Under New York state law, a defendant challenging the admissibility of a witness' identification is presumptively entitled to a *Wade* hearing even if, on a motion to suppress the allegedly impermissibly suggestive procedures, the defendant fails to assert specific facts establishing the deficiency. *See People v. Rodriguez*, 79 N.Y.2d 445, 453, 583 N.Y.S.2d 814, 593 N.E.2d 268 (N.Y.1992); *accord Alvarez v. Fischer*, 170 F.Supp.2d 379 (S.D.N.Y.2001).

Mitchell v. Herbert, 01-CV-681, 2008 WL 342975, 7-8 (W.D.N.Y., Feb. 6, 2008). *See also Smith v. Smith*, 2003 WL 22290984, 6 -9 (S.D.N.Y., Sept. 29, 2003) (rejecting argument that the trial court deprived defendant of his right to present a defense, as guaranteed by the Sixth and Fourteenth Amendments, by refusing to allow defendant to call witnesses to testify at the *Wade* hearing). To the extent that there is no right to compulsory process at a *Wade* hearing, Dukes cannot show an abuse

of discretion by the trial's denial of his motion.

Finally, and as the trial judge found, neither Ford's recollection of the identification procedure nor that reflected in Detective Addison's report showed any suggestiveness in the procedure employed, regardless of which account is accepted.[7] Again, *Biggers* explained that the primary evil to be avoided is a very substantial likelihood of irreparable misidentification and that it is this likelihood which violates due process. *Biggers*, 409 U.S. at 198. The hearing held in this case was sufficient, both as a matter of due process and state law, for the trial judge to determine whether the identification process was unduly suggestive and whether the out-of-court identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed. *Id. Accord Liverman*, 398 S.C. at 138-41, 727 S.E.2d at 426-27. Moreover, at worst, the identification procedure employed was harmless beyond a reasonable doubt under *Liverman* for the reasons set forth in **Argument II**. Therefore, the trial judge's ruling must be affirmed.

[7] Mr. Ford's version of the identification procedure showed no police action, whatsoever, that would even require a hearing under *Biggers* and *Wade*. *See Perry*, *supra*.

II. The trial judge properly denied Dukes' motion to suppress Cornelius Ford's pretrial identification of him because the record supports his findings that identification process was not unduly suggestive, and that the out-of-court identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed, despite any possible suggestiveness.

The State submits that the trial judge properly denied Dukes's motion to suppress Cornelius Ford's pretrial identification of him because the record supports his findings that identification process was not unduly suggestive, and that the out-of-court identification was nevertheless so reliable under the totality of the circumstances - despite any possible suggestiveness - that no substantial likelihood of misidentification existed.

As discussed, the trial judge must first determine whether the identification process was unduly suggestive. *Biggers* 409 U.S. at 198. Even assuming an identification procedure was suggestive, suppression is not automatically required. *Id.* Rather, the court must then determine whether the out-of-court identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed. *Id.*

Here, the trial judge found that there was no unduly suggestive identification process. In making this determination, he blended the two-pronged test in *Biggers*. He found that Ford was present at the time the crime was committed; that Ford had seen Dukes on prior occasions before the crime was committed; that Ford was certain of who the shooter was; and that he subsequently identified Dukes and gave a description of Dukes to the police. The trial judge further found that Ford testified that he was paying close attention at the time of the offense, and the trial judge took into consideration the fact that Ford would be paying close attention since a gun was pointed at him during the commission of the offense. **R. pp. 53-54**.

The trial judge also considered other factors to be weighed against the corrupting effect of any suggestive identification procedure: the accuracy of Ford's prior description of the defendant; Ford's level of certainty demonstrated by at the time of the confrontation; and the amount of time between the crime and the confrontation. The trial judge found that Ford had testified that he was 100% certain about who the shooter was; and that for a given an initial description the same day. **R. p. 54**.

Applying these factors, the trial judge found that "[i]t it does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was any intentional act, if there was any deliberate act, there was any act by the police of the suggestive nature. The witness had already identified the defendant prior to the – – looking at the photographs." The trial judge further found that Ford's viewing of "the photographs was either done quote accidentally through the looking at a file or in a process that the Court finds was not suggestive... in any manner, and therefore, based on all of that, the motion to suppress is denied." **R. pp. 54 – 55**.

On direct appeal, this Court may only review errors of law. "Whether an eyewitness to the identification is sufficiently reliable is a mixed question of law and fact... generally, the decision to admit an eyewitness of the notification is that the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion." *Liverman*, 298 S.C. at 137-38, 727 S.E.2d at 425 (citations omitted).

Applying this standard to the present case, it is clear that the trial judge's ruling must be affirmed because the record, and in particular Ford's testimony, supports his findings and conclusions of law. In particular, the out-of-court identification was so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed, even assuming

suggestiveness in the identification procedure.[8] *Biggers*, 409 U.S. at 198. Again, the relevant factors to be considered under the totality of circumstances include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (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* at 199-200. *See also Liverman*, 398 S.C. at 138, 727 S.E.2d at 426.

Ford clearly testified that he had previously seen Dukes on two separate occasions prior to the morning of the shooting. On the first occasion, the men had passed within close proximity to each other. On the second occasion, at the residence where the shooting occurred, Ford had the opportunity to observe Dukes for a longer period of time.

While the Court in *Liverman* overruled *McLeod*, it is clear that the trial judge properly relied upon Ford's opportunity to view Dukes on the occasions before the shooting because this was a "significant factor in determining the reliability." *State v. Liverman*, 398 S.C. at 142, 727S.E. 2d at 427-28. Additionally, Ford had an ample opportunity to view Dukes at the time of the shooting within the relatively small confines of his residence, and he had a heightened sense of awareness since Dukes also attempted to shoot him as well. Additionally, Ford gave a police description of Dukes later that day; he accurately described Dukes, as his subsequent testimony before the jury makes clear; he then selected Dukes's photograph from those he viewed – whether the photographs

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[8] The State does not concede this point because Ford's testimony supports the conclusion that there was no suggestiveness involved in the indemnification procedure, whatsoever, that would require a hearing, even as a matter of state law. *See Perry*, 132 S.Ct. at 736-38. Likewise, there is nothing in Det. Addison's report to support the conclusion that the photographs was were displayed to Ford in a manner suggesting the identification of Dukes as the shooter, or that Ford was otherwise prompted to select Dukes as the person whom he had seen murder his friend and roommate.

fell out of the folder onto the desk inadvertently or they were shown to him, individually, by Det. Addison; he did not hesitate in making the identification; and he was 100% certain in his identification of Dukes as the shooter. Furthermore, Ford's father, Mr. Muhammad, corroborated Ford's testimony concerning the identification of Dukes as the shooter. Likewise, Mr. Muhammad had previously met with Dukes several times at the mosque, where Mr. Muhammad was Iman.

Also and as in *Liverman*, many of the procedural safeguards discussed by the Supreme Court and present in *Perry* were at work in Dukes' trial. The reliability of the Ford's testimony was fully "vetted. . . at the pretrial hearing,"as well as before the jury. *Liverman*, 398 S.C. at 142-43, 727 S.E.2d at 428.

Although counsel's attack on the credibility of Ford's identification in this case was not as direct as that in *Liverman*, *id*, it was every bit as thorough and scathing. In his opening statement, Dukes' counsel cautioned the jury about the importance of Ford's testimony to the State's case; Ford's lack of credibility; and that Ford had, himself, fled the scene after the shooting. **R. pp. 65-66**.

On cross-examination of Ford **R. pp. 149-74**), defense counsel repeatedly pointed out perceived weaknesses of Ford's identification and his credibility, generally, including: his fleeing the scene and failure to discuss the shooting with police until six or eight hours after the shooting; that he did not check the victim's pulse before leaving the scene and that the victim's cousin informed him of the victim's death; that Dukes fired two gunshots; that he had gone home once his father arrived on the scene; that he only went to see the police because his father told him that his father was taking him there; that he told police he had been at the residence for fifteen minutes, whereas he testified that he had awakened, in the residence, fifteen minutes before the murder; that he failed to tell police that he had previously seen Dukes on two occasions because the second time

that he saw Dukes was during a drug deal; he had a prior drug conviction and he did not want to face enhanced penalties for another drug conviction; that he failed to tell Det. Addison about this other encounter with Dukes, even though Det. Addison told him that police were not interested in "what was going on in the house;" and that Ford supposedly did not know where the victim's money and drugs were kept, despite the fact both men were dealing drugs out of the residence. Defense counsel also established that Ford did not tell police, in his statement, that he had lifted the mattress after the shooting, to make Dukes think that he had a gun; and that he told police he had retreated to a closet when the shooting began. Finally, counsel fully reviewed Ford's version of how he supposedly identified Dukes from the photographs that fell out onto the table.

Additionally, defense counsel devoted over one half of his closing argument to pointing out every perceived deficiency in the testimony of Cornelius Ford and Ford's supposed lack of credibility. Specifically, counsel argued that:

> The Judge will tell you [that] you can believe everything a witness tells you from the witness stand; you can reject every single thing they tell you, or you can believe some and not others. This case is all about the witnesses, because there is not one shred of physical evidence that connects the death of Andy Gowans to Henry Jermaine Dukes, not the first thing. The only piece of physical evidence ... that you've heard talked about ... is a shell casing that was found ... where Andy Gowans was. Officer Mishoe testified yesterday. He said he was one of the first ones on the scene, he walked in, saw the body, and he found a shell casing, and he seemed to be able to identify it here yesterday; this looks like the same one. So, one shell casing, that is it.
>
> Now, might as well stay with that. One shell casing. Just any physical evidence in this case support the eyewitnesses were the witnesses in this case? Now, the judge will tell you, if you believe everything a witness,... and we are talking about Cornelius Ford, right, this whole case is Cornelius Ford. If you choose to believe Cornelius Ford, his version of events, that is your providence. You're the jury. You are the finders of fact. You can do that. I [will] go through with you many, many, many reasons why C-4 should not be believed, other than maybe saying that this was Conway, South Carolina. Other than that I am not sure I would trust him to tell me the sum was coming up in the morning. But, is there anything, independent of C-4, the admitted drug dealer, that can verify what he's been telling you? Well, you sure

haven't been given anything. The only thing you have been given is one shell casing, and that itself contradicts what C-4 told to do. C-4 was adamant, said it over and over again, two gunshots. He told the police, and he testified here yesterday, two gunshots. The officer testified he found one shell casing. Nobody else told to any different. Dr. Proctor, just a little while ago, told you I found one wound on Mr. Gowan's and in checking that wound I found one bullet, right off the bat. And that's the only physical evidence you got. No weapon was ever recovered....

We've heard this guy talk a little bit about the jacket, the white jacket. No one brought shall white jacket. There is not one piece of physical evidence to Henry Jermaine Dukes to the death of [the victim].

Now, Cornelius Ford. In deciding whether someone is telling you the truth, I think the place to start first is, how consistent – – now, perfect consistency – – if you are trying to recall in that three and a half years before, and him come and explain it, I would agree, perfect consistency over every little thing is not to be expected, but you also don't expect fact after fact after fact to be different, to be wrong, to be contradicted directly by other people or other evidence.

We talked about the shell casing. As to Ford wants you to believe that one reason he can identify the shooter is that he had seen Mr. Dukes to times before, once briefly coming out of the Food Lion, but that got his attention because he was with this Ronnie Atkinson, this Stank, that had been involved in this whole viewed that doesn't seem to have anything to do with Henry Dukes or Cornelius Ford, but having you Stank and when he saw Jermaine Dukes with Stank that got his attention.

Now, when he talked to the police eventually, on November 2nd, 2007, he did not mention that he saw Henry Dukes with Stank. He simply said, one time before I saw Henry Dukes at the Food Lion, just while I was going in he was coming out, or may be vice-versa, but just in passing. He was asked three different times by that the Detective, so you've only seen him once before; you saw him one time before; have you ever seen him before, three different opportunities, and seven different times is to ford answered, when he talked to the police, I've only seen him once; only saw him once; I only seen him once before; I never saw him but the wants. Seven times he said that.

He wasn't afraid of the officers. They gave him [every] chance. The Officer told him, you are not in trouble; you've got nothing to worry about. I'm sure he didn't enjoy being in their talking to the police, but it's not like he was being interrogated, it's not like he was a suspect. Thought about that also. It's not like he was threatened, coerced, pressured in any way; he was given a free opportunity to tell what he knew. Once he decided to drag his sorry butt down there, and after he talked to the police, after he left his friend, supposedly his best friend, lying dead on the ground, that he had different chances – – he had the whole time he was talking to the police, but

specifically three times, have you ever seen Henry Dukes before; one time, and he said that seven different times, and not once did he mention that [other] time he had seen Henry Dukes he saw him with Stank, that yesterday seemed to be so important and got [him] on his" P' s" and "Q' s." He never mentioned that.

Yesterday he testified, I actually saw Henry Dukes two times. I saw him at Food Lion with Stank- - that's New - - and I Saw him over at [the victim's residence] before; he came with some other guy; I didn't know him, and they stayed around for awhile. He made no mention of that when he talked to the Detective at Conway Police Department back on November 2nd, 2007. [Not] one word about that, and the explanation, apparently, is, well, he was protective of every body. He didn't want to implicate them, so he said that himself, I don't want to implicate myself. There was stuff going on at bracket [the victim's residence]; and I didn't [want] to connect that with the police.

Now, self-preservation is a mighty strong instinct in every body, and I certainly understand if you've been busted for selling drugs before and been to prison for selling drugs before, that you did not want to go back for an even longer period of time for selling drugs; however, when the police looking at you and say, we know what is going on at [your residence], and frankly we don't care cause now there's a dead body, and they tell you that face to face, and they don't ask you thing one about your drug dealing activities; they don't bring it up; they don't mention it; they don't say a thing, and you still don't tell them everything you know, I think that justification, that rationale goes right out the window. I don't think it is at all plausible that he's withholding information from the police -- well, it is plausible, he probably is afraid to deal with the police; however, he's been basically told, we ain't worried about your drug activity there.

There's been testimony ... about Mr. Dukes leaving Conway, and leaving South Carolina, about his flight, so to speak. Well, there's another person that absolutely took flight, and that's Cornelius Ford. He hung up on 911, he called his daddy, and he left. He didn't check on Andy Gowans, his best friend, he didn't talk to the police, he didn't talk to EMS and let them know how this happened; he took off in his car and went home, and he didn't call the police at any time and let them know what was going on. His best friend has been shot, for all he knows, is dead, and he can't be bothered to take the time to pick up the phone and call the police and say, I saw who did it. He took off. And amazingly, no one ever bothered to check his car or to check his residence to see if maybe there's a reason he took off, but we've got no testimony about that, but ... no question that by ten o'clock in the morning the police and EMS are on the scene, and that by Mr. Ford's own testimony it is -- and he can't tell you if it's three, four or five o'clock before he talked to the police. His daddy said it was 7:30. At the minimum it was five hours, and it might have been as much as - what is that, eight, nine and a half hours, depending on who you want to believe, between Cornelius Ford and his daddy. That's not much of a choice right there.

Now, so for many, many hours he is gone. It's lots of these little things that don't add up. All right. Mr. Ford - how did Mr. Ford tell you he learned that Andy was actually dead, no question he's dead? Now he could have found out if he had stuck around, talked to the police, but he didn't. How did he find out? He testified that his former girlfriend, Andy's cousin, told him. He's calling everybody cause he's so concerned. He's talking to family. Not talking to the police, but he's talking to family. And he tells you, I heard it from my ex-girlfriend, all right, from Andy's cousin. What does Rasheed Muhammad tell you? Rasheed Muhammad said, I told him. All right. He testified and said, I didn't want to; he didn't seem to know yet; he had asked me about him and finally I had to tell him. Remember that. Both those things ain't true Both those things, I think, should make you say, I wonder what else they are not giving me completely right, may be inaccurate, maybe they are outright lies, but at least inaccurate. C-4's credibility, his ability to remember and be truthful about some of these little things directly impacts if he's telling you the truth about the big things, how many times he saw Henry Dukes, where he saw Henry Dukes, who he saw Henry Dukes with, where he went, why he went, who told him what happened to Andy Gowans. All these things by themselves may not be significant, but together they are very significant.

What else from Mr. Ford? He says the person came in, and Mr. Ford says, I'm sitting back a little ways from the it up, two shots, right, two shots, one bullet, and the person couldn't quite hear what was said, at one point he heard give front door, actually he said he couldn't see Andy at this point; he saw the fellow that fired the gun, but actually Andy and this fellow, but anyway, in court Cornelius Ford didn't see Andy, so he doesn't know what was going on between said, I went in this other room and I grabbed the mattress and pulled it up like I had a gun or something, like I was hiding that, and he was very specific, and he went through his a gun, but I got a mattress and I pulled it up on me. All right. Well, when he talked to the Detective six, seven, eight, nine hours after the shooting he made no mention of statement on the stand. He was very specific with the Detective, I went in, I got in the closet; if you check the room you will see the closet door; I was in the closet. He said that over and over and over again. It's important because the closet ain't the mattress, right; it's another little thing. Well, did you go in the closet or did you get the mattress. Was the mattress In the closet? No, the mattress was in the middle of the room. Well, which was it? It ain't both of those things. Another little detail. C-4 is misleading, or doesn't remember, or is lying to you about.

There's a photograph that he claims to have identified Mr. Dukes with when he finally did go see the police, right. Mr. Ford said, I spontaneously saw this person right here. The Detective stood up as he went to into the other -- going to go in the other room to look at, I guess mug [shots] folks, whatever; we got up the leave, the photograph fell out, there it was. Well, okay, you all can choose whether or not that was critical; however, the police officer that interviewed him said, I showed him four photographs, one at a time, and that's in the stipulation. That little small snippet, little

> video we showed yesterday afternoon, clearly that was the end of the interview. In fact, they do stand up and everyone leaves, and you can watch them leave. You can see the Detective, his arm, step out of the door, and you can see very well Mr. Ford and his father get up and walk right out the door, and nobody stops to pick anything up, no one says anything; that's the end of the tape. There wasn't anything dropped; he didn't see anything.
>
> Six and a half hours, at least, is a long time to think about what you are going to tell the police when you are gone. That is a long time to think about what you want to tell the police or not to tell the police, and that's how long, at least by his own admission, Mr. Ford stayed gone.

R. pp. 330-39. Defense counsel then launched a brief but scathing attack on Mr. Muhammad's credibility. **R. pp. 339-41**. Counsel's attack on Ford concluded as follows:

> Cornelius Ford, I submit to you, is not to be believed because of all those things that he either lied, or wanted to add to his testimony or change about his testimony, and there were many, and again, there is no physical evidence, not one iota of physical evidence that corroborates support what Cornelius Ford told you happened.

R. p. 341.

The trial judge not only gave a standard jury instruction on the credibility of witnesses, **R. pp. 370-71**, he also charged jurors on eyewitness identification, as follows:

> An issue in this case is identification of the Defendant as the person who committed the crime charged. The State, as with everything, has the burden of proving to you the identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may convict the Defendant of the crime charged. Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the Defendant. You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting condition, whether the witness had the chance to see or know the person in the past. You may also look at the strength of the identification and the circumstances under which the identification was made. The burden of proof extends to the State on every element of a crime charged, and this specifically includes the burden of proving, beyond a reasonable doubt, the identity of the Defendant as the person who committed the crime.

R. pp. 375-76. *Accord Liverman*, 398 S.C. at 144 & n. 7, 727 S.E.2d at 429 & n. 7.

Based upon this record, any error in admitting Ford's identification testimony must be viewed as harmless beyond a reasonable doubt because it " did not contribute to the verdict obtained." *Id* at 144, 727 S.E.2d at 429. Therefore, the trial judge's ruling must be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the lower court and Dukes' murder conviction should be affirmed.

Respectfully submitted,

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IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2011-196667

THE STATE,

RESPONDENT,

v.

HENRY JERMAINE DUKES,

APPELLANT.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Katherine H. Hudgins, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, South Carolina 29201.

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

This 2nd day of January, 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 2nd day of January, 2013.

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