STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DONALD R. ALTMAN,

APPELLANT

Appellate Case No. 2011-196626

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in refusing to suppress the out-of-court identification of Appellant where the testimony of the State's key witness revealed that the State failed to disclose under *Brady v. Maryland*[1] an inherently suggestive single person photographic "lineup," which denied Appellant his due process right to require the trial court to conduct an *in camera* hearing prior to the witness's testimony pursuant to *Neil v. Biggers*[2]?

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *Neil v. Biggers*, 409 U.S. 188 (1972).

STATEMENT OF THE CASE

On August 19, 2010, Appellant Donald Ray Altman was indicted by York County Grand Jury for shoplifting, third or more property offense. R. 101 – 102. Appellant was again indicted by the York County Grand Jury on July 21, 2011, for four counts of possession of stolen goods and possession of an altered license plate. R. 91 – 100.

On July 25, 2011, Appellant proceeded to trial before the Honorable John C. Hayes, III, and a jury. R. 1. Appellant was represented by Erik Delaney, and the State was represented by E.B. Springs. R. 1. The jury ultimately found Appellant guilty as charged. R. 84, ll. 1-18. Pursuant to S.C. Code Ann. § 16-1-57 (2010),[3] Judge Hayes sentenced Appellant to: (1) ten years imprisonment on the shoplifting conviction; (2) 10 years imprisonment on all four possession of stolen goods convictions; and (3) five years imprisonment on the possession of an altered license plate conviction. R. 90, ll. 4-9. The shoplifting sentence was to run consecutively to one of the possession of stolen goods sentences, and the other sentences were to run concurrently for a total of twenty years imprisonment. R. 90, ll. 4-9.

This appeal follows.

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[3] Sentence Enhancement: (1) S.C. Code Ann. § 16-1-57 (2010) (Classification of third or subsequent conviction of certain property crimes: "A person convicted of an offense for which the term of imprisonment is contingent upon the value of the property involved must, upon conviction for a third or subsequent offense, be punished as prescribed for a Class E felony"); (2) S.C. Code Ann. § 16-1-20 (2010)(A)(5) ("A person convicted of classified offenses, must be imprisoned as follows: for a Class E felony, not more than ten years").

Property Crimes: (1) S.C. Code Ann. § 16-13-123 (2010) (Shoplifting); (2) S.C. Code Ann. § 16-13-180 (2010) (Receiving stolen goods).

STATEMENT OF FACTS

Officer Daniel Popov

At trial, Officer Daniel Popov of the Rock Hill police department recalled that on May 10, 2010, he responded to a shoplifting call at the Family Dollar store and that the vehicle and suspect description given was "a white Ford Taurus with a white male wearing a beige baseball cap." R. 2, l. 23 – 3, l. 11. Officer Popov stated that he was also given the license plate number of the vehicle. R. 3, ll. 12-14. Officer Popov maintained that while on his way to the Family Dollar store, "[he] passed a white Ford Taurus with a white male driver with a baseball cap, matching the description that was given to us[.]" R. 3, ll. 17-25. Officer Popov further noted that he "saw the vehicle pull into the BP gas station" and that "[he] had some cars in front of [him] so [he] wasn't able to pull in[to the gas station] right away." R. 4, ll. 2-7.

Furthermore, Officer Popov claimed that "the male driver of that vehicle was walking into the BP [gas station]" as he pulled "in behind the [suspect's] car[.]" R. 4, ll. 4-14. Officer Popov admitted, "*I never looked at him [the suspect] face to face,*" but claimed that he "got a passing glance" of the suspect's face. R. 4, ll. 15-17 (emphasis added). Officer Popov maintained, however, that he was able to later identify the suspect as the owner of the vehicle after accessing Department of Motor Vehicles (DMV) records. R. 4, ll. 18-24. Specifically, Officer Popov stated that "[t]he owner of the vehicle appeared to be the subject that I saw driving the vehicle.

Officer Popov noted that he followed the suspect into the gas station and that the suspect was nowhere to be found. R. 5, ll. 2-16. Officer Popov recalled that he then went to the suspect's vehicle, where he found Brenda Sims "pretty much asleep" in the back of the

car. R. 5, ll. 17-24. Officer Popov also recalled that Sims was wearing "a bracelet on her arm from Piedmont Medical Center and also [had] some discharge papers from Piedmont showing that she had been there sometime that day." R. 6, ll. 6-10. Officer Popov claimed that Sims "was able to understand our questions and communicate with us[,]" but that "[s]he appeared . . . to be in a drowsy kind of a way, almost like when you just wake up[.]" R. 6, ll. 13-21. Officer Popov also noted that Officer Ryan Thomas arrived at the gas station approximately five minutes later. R. 7, ll. 1-5.

On cross-examination, Officer Popov admitted that Officer Thomas wrote both the incident report and the case summary because "[i]t was his zone of responsibility the call came out to (sic)." R. 7, l. 21 – 9, l. 25. Defense counsel then inquired:

> DEFENSE COUNSEL: [It is] your testimony here today fourteen and a half months later, that you checked a [DMV] picture, and that picture appeared to match this individual; is that correct?
>
> OFFICER POPOV: Yes, sir.
>
> DEFENSE COUNSEL: Okay. Why is that not anywhere in the General Sessions case file summary that you reviewed in preparation today?
>
> OFFICER POPOV: I don't know, sir.
>
> DEFENSE COUNSEL: Don't you think that's something ... kind of important to this case?
>
> OFFICER POPOV: Maybe.

R. 11, l. 24 – 12, l. 11. Defense counsel further inquired as to Officer Papov's identification of the suspect:

> DEFENSE COUNSEL: That's all you saw was a white male with a tan cap. Correct?
>
> OFFICER POPOV: That's what [the case summary] says.

Yes, sir.

DEFENSE COUNSEL: But now fourteen and a half months later, you're coming into court saying that you believe it's my client. Correct?

OFFICER POPOV: Sir, at the time, like I said, I checked through DMV and it appeared to be the subject that was driving the car. Yes, sir.

R. 12, l. 24 – 13, l. 7.

Officer Ryan Thomas

Officer Ryan Thomas, formerly of the Rock Hill police department, stated at trial that he also responded to the shoplifting call at the Family Dollar store on May 10, 2010. R. 15, ll. 8-16. Officer Thomas recalled that he spoke to the manager of the Family Dollar store, Michelle Williams, about the shoplifting incident. R. 15, l. 21 – 16, l. 11. Officer Thomas stated that Williams described the shoplifter as a while male with a tan hat and described the "getaway vehicle" as a white Ford Taurus with a South Carolina license plate, number EXU585. R. 16, ll. 12-24.

Officer Thomas claimed that Williams told him she had seen Appellant prior the shoplifting incident. R. 35, ll. 12-16. Defense counsel then asked Officer Thomas why he neglected to note that in the incident report or case summary. R. 35, ll. 17-21. Officer Thomas replied, "*That would be on her word that she had seen [Appellant] before. It's not part of the cause as to what we were looking for.*" R. 35, ll. 22-24 (emphasis added).

Notably, Officer Thomas admitted that he "*never had training on photo lineups*" and *denied* that he conducted a "photo lineup" with Williams. R. 37, l. 10 – 38, l. 4 (emphasis added). Officer Thomas also admitted that, although the Family Dollar store has four surveillance cameras, he *never* viewed the surveillance video or took a copy of the video as

evidence. R. 38, ll. 9-20. Officer Thomas further admitted that there never any attempt to obtain forensic evidence. R. 39, ll. 3-23.

Furthermore, Officer Thomas maintained that Officer Popov had located a white Ford Taurus at a gas station, but that Officer Popov was unable to find the suspect by the time he arrived at the gas station. R. 17, ll. 8-25. Officer Thomas also maintained that the vehicle left by the suspect had an altered license plate and that a white female, Brenda Sims, was in the back seat of the car. R. 18, ll. 1-25. Officer Thomas noted that he subsequently found out Appellant was the owner of the vehicle after checking the registration of the correct license plate number. R. 20, ll. 11-24.

Additionally, Officer Thomas stated that he found packages of beef jerky, flashlights, various tools, and other small items in the vehicle. R. 21, l. 13 – 24, l. 20. Officer Thomas also stated that he suspected the items were stolen because "nearly all of these items had the store's original stickers on them." R. 24, l. 14 – 25, l. 3. Officer Thomas then explained how he verified the items were stolen by going to the stores and checking with their inventory systems. R. 25, l. 18 – 32, l. 14. Despite that Officer Thomas admitted he *never* saw the shoplifting suspect, *the State had Officer Thomas identify Appellant to the jury.* R. 32, ll. 15-21 (emphasis added).

Michelle Williams (Family Dollar Store Manager)

Williams recalled at trial that on May 10, 2010, she "[saw] someone [a white man] conceal beef jerky in their (sic) pocket" and then leave the store without paying for it. R. 41, ll. 5-21. The State inquired as to whether Williams was able to identify the shoplifter:

> THE STATE: And had you ever seen that man before . . . ?
>
> WILLIAMS: *I had not seen him that day*, but I had seen him in prior days before that.

41, l. 22 – 42, l. 1 (emphasis added). Williams then admitted that she did not provide the police with any other description of the shoplifter, except that the shoplifter was a white male wearing a tan hat. R. 45, l. 22 – 46, l. 24. Williams identified Appellant as the shoplifter to the jury. R. 44, ll. 1-4.

Notably, in *direct contradiction* to Officer Thomas's testimony, Williams testified that Officer Thomas brought her one photo of Appellant the day after the shoplifting incident occurred and that Officer Thomas told her Appellant was the man in the photo. R. 47, l. 2 – 48, l. 4. Williams also testified that the Family Dollar had *four* surveillance cameras in the store and that the police *never* viewed the surveillance footage of the incident. R. 48, ll. 5-18.

Motion for a Directed Verdict & Objection to Out-of-Court Identification

After the close of the State's case, defense counsel moved for a directed verdict. R. 59, ll. 9-11. Defense counsel argued that Williams's out-of-court identification of Appellant was unreliable because it was procured by Officer Thomas through an unduly suggestive procedure (i.e., showing a single photograph of Appellant and informing Williams that Appellant is the person in the photograph). R. 59, ll. 9-22. Defense counsel further argued, "[W]ithout [Williams's] testimony, without that identification, the State doesn't have any identification." R. 59, ll. 19-21.

The trial court subsequently found:

> *[A] single photo is suggestive, but that would not affect the reliability in this case because the witness had observed the individual in the past.* And therefore that even though the showing of the one photograph as suggested on its face that that does not affect in this case [the] reliability of the identification of [Appellant] as the individual who was involved in the act. And I will certainly charge the jury regarding eyewitness identification.

R. 60, ll. 13-21 (emphasis added). The trial court then denied defense counsel's motion for a directed verdict. R. 61, ll. 6-9. Defense counsel explained to the trial court:

> *I did not request to do a Biggers hearing regarding identification before the trial[because] . . . [a]t that point, the discovery that had been provided to me by the State indicated that there was no identification made by Ms. Williams in this case*, either her being able to an out of court identification or that she would use any type of photographs in this case. Obviously we've heard some testimony that would say she did view a photograph the day after the day of the incident.

R. 61, l. 24 – 62, l. 7 (emphasis added). Defense counsel then "renew[ed] [his] objection to the admissibility of that testimony at this time." R. 62, ll. 8-10. The Assistant Solicitor admitted that the State *did not* provide defense counsel with a copy of the photograph because the Assistant Solicitor *does not* have a copy of the photograph. R. 62, ll. 18-23.

Despite defense counsel's argument, the trial court reiterated, "*I did put on the record that I believe[d] that the showing of one photograph lineup, so to speak, is suggestive on it's (sic) face. . . . But I found that in spite of that because the witness knew [Appellant] from previous encounters, that he testimony still feels liable (sic) and, of course, that will be up to the jury to determine.*" R. 63, ll. 2-7 (emphasis added).

Donald Altman (Appellant)

Appellant testified at trial that he is not guilty of shoplifting or receiving stolen goods from the Family Dollar store on May 10, 2010, because he was working as a painter in Myrtle Beach, South Carolina. R. 66, ll. 5-16; R. 73, l. 21 – 74, l. 9. Appellant also testified that both his *twin brother* and his younger brother "*look just like [him]*" and that either brother could have done it because "they're all on crack . . . now." R. 66, ll. 12-16 (emphasis added). Appellant further testified that he was not the person driving his car on

May 10, 2010, because he had parked the car at his mother's house when his driver's license was suspended. R. 66, l. 20 – 67, l. 7; R. 70, l. 22 – 72, l. 9.

Furthermore, Appellant testified that he as well as both of his brothers has previously been in a relationship with Brenda Sims. R. 69, ll. 11 – 70, l. 21. Appellant *denied* that he picked Brenda Sims up from the hospital or had any interaction with the manager of the Family Dollar store on May 10, 2010. R. 67, l. 23 – 68, l. 6; R. 73, ll. 15-18. Appellant noted that even though he had previously been in the Family Dollar store with Sims, "[s]o has [his] twin . . . the whole family's (sic) been in that Family Dollar store." R. 74, l. 17 – 75, l. 23.

Post-trial

After the jury found Appellant guilty as charged, defense counsel renewed his trial objections and his motion for a directed verdict. R. 86, l. 24 – 87, l. 4. "Specifically [his] objection that dealt with the photograph that was viewed by Michelle Williams, and the procedure that was used there." R. 86, ll. 1-3.

ARGUMENT

The trial court erred in refusing to suppress the out-of-court identification of Appellant where the testimony of the State's key witness revealed that the State failed to disclose under *Brady v. Maryland* an inherently suggestive single person photographic "lineup," which denied Appellant his due process right to require the trial court to conduct an *in camera* hearing prior to the witness's testimony pursuant to *Neil v. Biggers*.

At trial, the key witness's testimony revealed that the State failed to disclose under *Brady v. Maryland*, 373 U.S. 83 (1963) an inherently suggestive single person photographic "lineup," which denied Appellant his due process right to require the trial court to conduct an *in camera* hearing prior to the witness' testimony pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972). R. 41, l. 5 – 48, l. 4. Accordingly, the trial court erred in refusing to suppress the out-of-court identification of Appellant.

A. The trial court erroneously found that the procedure used by the police to obtain the out-of-court identification was suggestive on its face, but permissible since the witness had seen Appellant on prior occasions.

In *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012), the South Carolina Supreme Court overruled *State v. McLeod*, 260 S.C. 445, 196 S.E.2d 645 (1973), finding due process required a trial court to conduct an *in camera* hearing pursuant to *Neil v. Biggers*[4] to determine the reliability of an eyewitness's out-of-court identification of defendant, regardless of how well the eyewitness knew the defendant. *See Perry v. New Hampshire*, 565 U.S. ___, 132 S.Ct. 716 (2012) (finding preliminary judicial inquiry is required once it is contended that an identification is obtained under unnecessarily

[4] In *Neil v. Biggers*, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness's identification: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures; and (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*, 409 U.S. at 198.

suggestive circumstances arranged by State action, regardless of the witness's prior knowledge of the accused); *see also* Rule 104(c), SCRE (noting "[h]earings on the admissibility of . . . pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury").

In this case, the State's key witness, Michelle Williams, the manager of the manager of the Family Dollar store, recalled at trial that on May 10, 2010, she "[saw] someone [a white man] conceal beef jerky in their (sic) pocket" and then leave the store without paying for it. R. 41, ll. 5-21. The State inquired as to whether Williams was able to identify the shoplifter:

> THE STATE: And had you ever seen that man before . . . ?
>
> WILLIAMS: *I had not seen him that day*, but I had seen him in prior days before that.

78, l. 22 – 79, l. 1 (emphasis added). Williams then admitted that she did not provide the police with any other description of the shoplifter, except that the shoplifter was a white male wearing a tan hat. R. 45, l. 22 – 46, l. 24. Williams identified Appellant as the shoplifter to the jury. R. 44, ll. 1-4. Notably, in *direct contradiction* to Officer Thomas's testimony, Williams testified that Officer Thomas brought her one photo of Appellant the day after the shoplifting incident occurred and that Officer Thomas told her Appellant was the man in the photo. R. 47, l. 2 – 48, l. 4.

After the close of the State's case, defense counsel argued that Williams's out-of-court identification of Appellant was unreliable because it was procured by Officer Thomas through an unduly suggestive procedure (i.e., showing a single photograph of Appellant and informing Williams that Appellant is the person in the photograph). R. 59, ll. 9-22. Defense counsel further argued, "[W]ithout [Williams's] testimony, without that identification, the

State doesn't have any identification." R. 59, ll. 19-21.

The trial court subsequently found that "*a single photo is suggestive, but that would not affect the reliability in this case because the witness had observed the individual in the past.*" R. 60, ll. 13-16 (emphasis added). Defense counsel explained to the trial court: "*I did not request to do a Biggers hearing regarding identification before the trial[because] ... [a]t that point, the discovery that had been provided to me by the State indicated that there was no identification made by Ms. Williams in this case . . . .*" R. 61, l. 24 – 62, l. 5 (emphasis added). Defense counsel then "renew[ed] [his] objection to the admissibility of that testimony at this time." R. 62, ll. 8-10. The Assistant Solicitor admitted that the State *did not* provide defense counsel with a copy of the photograph because the Assistant Solicitor *does not* have a copy of the photograph. R. 62, ll. 18-23.

Despite defense counsel's argument, the trial court reiterated, "*I did put on the record that I believe[d] that the showing of one photograph lineup, so to speak, is suggestive on it's (sic) face. . . . But I found that in spite of that because the witness knew [Appellant] from previous encounters, that he testimony still feels liable (sic) and, of course, that will be up to the jury to determine.*" R. 63, ll. 2-7 (emphasis added).

It is clear that the trial court relied upon the ruling set forth in *McLeod*, 260 S.C. 445, 196 S.E.2d 645[5] *overruled by Liverman*, 398 S.C. 130, 727 S.E.2d 422, because the trial court found that the use of a single person photographic "lineup" was suggestive on its face, but permissible based on the witness's belief that she had seen Appellant prior to the shoplifting incident. R. 60, ll. 13-16; R. 63, ll. 2-7. Accordingly, the trial court erred in

[5] In *McLeod*, the South Carolina Supreme Court held that the procedural safeguard of a pretrial hearing to determine the reliability and ultimate admissibility of eyewitness identification testimony was not necessary where the eyewitness knows the accused. *Id.*

refusing to suppress the out-of-court identification of the State's key witness. *See State v. Traylor,* 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (noting "[a] criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification[,]" and finding "[a]n in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.").

Furthermore, unlike in *Liverman*, 398 S.C. 130, 727 S.E.2d 422, the error was not harmless. *See State v. Reeves,* 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990) (finding no definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case). This is because not only did the error involve the State's key witness, it denied Appellant his due process right to require the trial court to conduct an *in camera* hearing prior to the witness's testimony pursuant to *Biggers*, 409 U.S. 188. *See State v. Clark,* 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994) (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431 (1986) (finding "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.").

B. Appellant was denied his fundamental right to a fair trial when the State failed to disclose to Appellant an inherently suggestive single person photographic "lineup."

The State's duty to disclose evidence favorable to the defendant is addressed by

the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963). "The suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady,* 373 U.S. at 87. Consequently, an individual asserting a *Brady* violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. *See Kyles v. Whitley*, 514 U.S. 419, 432-42 (1995); *see also State v. Moses*, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

In this case, Officer Thomas admitted that he "*never had training on photo lineups*[,]" but *denied* that he conducted a "photo lineup" with Williams. R. 37, l. 10 – 38, l. 4 (emphasis added). Williams testified that Officer Thomas brought her one photo of Appellant the day after the shoplifting incident occurred and that Officer Thomas told her Appellant was the man in the photo. R. 47, l. 2 – 48, l. 4. After the close of the State's case, defense counsel argued to the trial court, "*Obviously we've heard some testimony that would say she did view a photograph the day after the day of the incident.*" 61, l. 24 – 62, l. 7 (emphasis added). The Assistant Solicitor admitted that the State *did not* provide defense counsel with a copy of the photograph because the Assistant Solicitor *does not* have a copy of the photograph. R. 62, ll. 18-23.

i. The existence of a single person photographic "lineup" was *Brady* material.

The photograph was *Brady* material for three reasons. First, defense counsel would have known to move for an *in camera* hearing pretrial to determine the reliability of the out-of-court identification of Appellant. *See Biggers*, 409 U.S. 188; *see also State v. Ramsey,* 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (holding that generally, a trial

court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as a person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation).

Second, defense counsel would have been able to use the photograph to impeach Officer Thomas's testimony on cross-examination that he did not conduct a single photographic "lineup." R. 37, l. 10 – 38, l. 4; *See United States v. Bagley,* 473 U.S. 667, 676 (1985) (noting evidence considered favorable to the defendant includes both exculpatory and impeachment evidence as well as evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf). Third, the overall strength of the State's case would have been crippled without the identification of the State's key witness. *Id.*

ii. The single person photographic "lineup" was imputable to the State.

Based on the testimony of the State's key witness, Michelle Williams, Officer Thomas showed her the single person photographic "lineup." R. 47, l. 2 – 48, l. 4; *See Kyles,* 514 U.S. at 437-38 (finding "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); *see also Gibson v. State,* 334 S.C. 515, 524, 514 S.E.2d 320, 324, n. 3 (1999) (finding "*Brady* and its progeny place the burden upon the prosecutor to know all the relevant facts of a case in order to decide what information to disclose as exculpatory or impeachment evidence). Thus, the photograph was imputable to the State. *See State v. Von Dohlen,* 322 S.C. 234, 240-41, 471 S.E.2d 689, 693 (1996) (noting information known to investigative agencies may be imputable to the State).

iii. The single photographic "lineup" was not provided by the State.

The Assistant Solicitor admitted that the State *did not* provide defense counsel with a copy of the photograph because the Assistant Solicitor *does not* have a copy of the photograph. R. 62, ll. 18-23; *See Gibson,* 334 S.C. at 528, 514 S.E.2d at 326-27 (noting whether the prosecutor's failure to reveal evidence pursuant to *Brady* is due to negligence or an intentional act is *irrelevant* because a court may find a *Brady* violation *regardless* of the good or bad faith of the prosecutor).

iv. The single photographic lineup was material to Appellant's case.

Appellant was denied his due process right to require the trial court to conduct an *in camera* hearing prior to the witness' testimony pursuant to *Biggers*, 409 U.S. 188. *See Bagley,* 473 U.S. at 682 (finding "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). Appellant was further prejudiced because, although the trial court found the procedure used by the police to obtain the identification was suggestive on its face, the trial court erroneously held that the identification was permissible since the eyewitness had seen Appellant on prior occasions. *See Liverman*, 398 S.C. 130, 727 S.E.2d 422; *see also Perry v. New Hampshire*, 565 U.S. ___, 132 S.Ct. 716; Rule 104(c), SCRE.

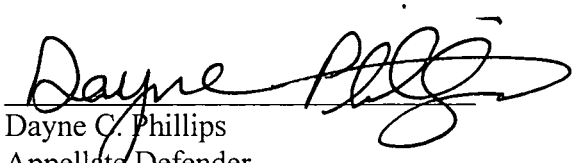
Accordingly, Appellant was denied his due process right to a fair trial. *See Riddle v. Ozmint,* 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006) (noting "[t]he question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial

'resulting in a verdict worthy of confidence.' " (quoting *Kyles,* 514 U.S. at 434)); *see also Gibson*, 334 S.C. at 327, 514 S.E.2d at 326-27 (because *Brady* is founded upon a sense of fairness and justice, the focus in a *Brady* analysis should not be on the misconduct of the prosecutor, but rather on the fairness of the procedure, and that "[t]he principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused[, and thus,] [s]ociety wins not only when the guilty are convicted but when criminal trials are fair[.]" (quoting *Brady,* 373 U.S. at 87)).

CONCLUSION

For the foregoing reasons, Appellant Donald Altman requests that this Court reverse his convictions and remand this case to the York County Court of General Sessions for a new trial.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 5, 2013

Dayne C. Phillips
Appellate Defender

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THE STATE,

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V.

DONALD R. ALTMAN,

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Appellate Case No. 2011-196626

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of March, 2013.

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of March, 2013.

Marion Hightower (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.