STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARCHIE MORE HARDIN,

APPELLANT

APPELLATE CASE NO. 2018-002035

BRIEF OF RESPONDENT

DANIEL C. BOLES
Appellate Defender

ROBERT M. DUDEK
Chief Appellate Defender

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ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Did the Court of Appeals err in failing to properly apply existing precedent and the appropriate standard of review in reaching its conclusion that the identification procedure utilized by the police was BOTH impermissibly suggestive AND conducive to substantial likelihood of misidentification where it failed to consider whether the admittedly "unduly suggestive" procedure used by police was also "unnecessarily suggestive" such as to render it impermissible under the circumstances of this case?

STATEMENT OF THE CASE

An Orangeburg County grand jury indicted Respondent on September 8, 2014 for three counts of kidnapping, armed robbery, assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime. App. 697-708. His case was called to trial on February 23, 2015 before the Honorable Maite Murphy, and a jury. App. 7. Assistant Solicitors Ashley Cornwell and Sarah Ford represented the state, and Breen Stevens and Doug Mellard represented Respondent. App. 7.

On February 27, 2015, the jury found Respondent guilty as indicted. App. 686, l. 8 – 687, l. 6. He was sentenced to thirty years for each count of kidnapping, thirty years for armed robbery, twenty years for assault and battery of a high and aggravated nature, and five years for possession of a weapon during the commission of a violent crime. App. 694, l. 18 – 695, l. 13. The sentence for the weapons offense was ordered to be served consecutive for an aggregate sentence of thirty five years. App. 695, ll. 12-13.

The Court of Appeals affirmed Respondent's convictions and sentence in a published opinion. State v. Hardin, 425 S.C. 1, 819 S.E.2d 177 (2018). Senior Assistant Deputy Attorney General J. Benjamin Aplin represented the state, and Daniel Boles represented Respondent.

On August 30, 2018, the state filed a petition for rehearing. App. 806-821. By order filed October 19, 2018, the Court of Appeals denied the petition for rehearing. App. 822-823.

On November 15, 2018, the state filed a petition for writ of certiorari with this Court. This Court granted the petition by order filed May 30, 2019. The state filed its brief of petitioner on July 3, 2019.

This brief of respondent follows.

STATEMENT OF FACTS

On May 16, 2014, two black men armed with revolvers entered a T-Mobile store in Orangeburg and robbed it after binding the store's three employees in a back room with duct tape. App. 349, l. 11 – 355, l. 24. Among the property stolen from the store was a personal iPad belonging to one of the store employees, Thomas Sims. App. 358, ll. 1-4. By using the "Find My iPad" application, law enforcement tracked the iPad to an apartment complex off Bentley Court in Columbia. App. 225, l. 18 – 226, l. 22; App. 242, l. 14 – 251, l. 25; App. 372, l. 1 – 373, l. 13. Upon arriving at the apartment complex, Corporal Cain observed a gray Toyota sedan, which generally matched the description of the suspected getaway car, parked in front of one of the apartment buildings with the door open. App. 73, ll. 4-11; App. 229, ll. 18-24; App. 583, ll. 7-16. Cain saw Respondent walking down the stairs of the building towards the gray car and made contact with him in the parking lot. App. 583, l. 20 – 584, l. 1. Respondent, who lived at the apartment complex, admitted he rented the car. App. 584, ll. 2-14. However, he told police he had let his friend nicknamed "Black" borrow it earlier that day. App. 607, l. 12 – 608, l. 25.

Investigator Wade immediately patted Respondent down for weapons. He was unarmed. App. 231, ll. 9-12; App. 562, ll. 1-9. The officers told Respondent they were looking for an iPad and gave him a general description of the armed robber. App. 231, ll. 5-22; App. 548, l. 23 – 549, l. 10. Cain then took Respondent's apartment key and asked for consent to search his apartment. App. 231, ll. 13-22; App. 549, l. 11 – 550, l. 6. While handcuffed, Respondent signed a consent to search form on the hood of a patrol car in front of his on looking neighbors. App. 231, l. 25 – 234, l. 16; App. 274, l. 2 – 284, l. 23; App. 524, l. 19 – 528, l. 2; App. 614, l. 18 – 615, l. 21.

Law enforcement then conducted a warrantless search of Respondent's apartment. App. 586, l. 7 – 587, l. 1. During the search, officers activated the "play music" function on the iPad so

the device would emanate sound. App. 237, ll. 2-11; App. 586, l. 22-25. However, no sound was heard from the iPad in Respondent's apartment. App. 586, l. 24 – 587, l. 1. Respondent, who had accompanied the officers during the search, was taken back downstairs to the parking lot and detained in the back of a patrol car. App. 617, ll. 5-15. During a subsequent perimeter sweep, the iPad was found emanating sound from a grocery bag near a dumpster located "about a hundred yards" from Respondent's apartment. App. 237, l. 12 – 238, l. 13; App. 535, l. 2 – 536, l. 5; App. 587, ll. 2-5.

Following the discovery of the iPad, law enforcement demanded the detained Respondent again sign the original consent to search form, which had been modified by Investigator Wade in different colored ink to include additional evidence, such as firearms. App. 231, l. 13 – 239, l. 8; App. 279, l. 9 – 280, l. 7. Respondent unequivocally refused to consent to this second search, and although Wade's modification to the consent to search form was not initialed by Respondent, the officers nevertheless returned upstairs to search his apartment. App. 279, l. 9 – 280, l. 7; App. 618, l. 18 – 619, l. 24. During this second search, officers allegedly found a box of cell phones and two firearms. App. 65, ll. 10-15; App. 278, l. 3 – 279, l. 8; App. 540, ll. 8-20.

Respondent informed officers that these items belonged to his friend "Black" and offered to help the officers find him. He provided the officers with a bill which was addressed to one of Black's girlfriends. App. 258, l. 23 – 259, l. 23; App. 289, l. 20 – 290, l. 23. As of Respondent's trial, his friend Black was still under active investigation. App. 129, l. 13 – 130, l. 19.

While officers were searching for the iPad, Corporal Cain took a photograph of Respondent with his cell phone and texted the picture to Lieutenant Schumpert, who was at the T-Mobile store with the employees who were robbed. App. 66, l. 5 – 67, l. 6. This single photograph was shown to the employees on a small cell phone screen, which was held by a uniformed officer, more than three

hours after the robbery. App. 193, l. 14 – 194, l. 5. The photograph showed Respondent standing next to several vehicles with a fully uniformed law enforcement officer featured very prominently in the background. App. 193, l. 14 – 194, l. 5. Despite the fact that their descriptions of the suspects varied substantively, the employees positively identified Respondent as one of the disguised robbers, and Respondent was arrested. App. 67, ll. 7-10.

Respondent moved pretrial to suppress the identifications. Testimony concerning the identifications was interspersed with testimony regarding the search of Respondent's apartment and the admissibility of his statements to the police. First, in regard to the identification, Corporal Cain testified that, prior to locating the iPad and prior to Respondent's arrest, he took a picture of Respondent with his cell phone and sent it to Lieutenant Schumpert in Orangeburg. App. 66, ll. 10-13; App. 68, ll. 9-15. Schumpert later told Cain the three employees all positively identified Respondent as one of the armed robbers. App. 66, l. 9 – 67, l. 10; App 89, l. 20 – 90, l. 23; App. 96, ll. 7-24. Cain identified a printed copy of the photograph he sent, which was marked and entered as State's Exhibit No. 2. App. 66, l. 22 – 67, l. 6.

Sergeant Stokes testified he was the officer who instructed Cain to take the photograph of Respondent and send it to Lieutenant Schumpert. He explained the photograph was shown to the three employees and they positively identified Respondent as having robbed the T-Mobile store that morning. App 89, l. 20 – 90, l. 23; App. 96, ll. 7-24. On cross-examination, Stokes acknowledged an officer in uniform is also visible in the photograph standing behind Respondent. App. 120, l. 11 – 121, l. 14. He also admitted the photograph was shown to the employees on a cell phone, not as a printout or as part of a "six-pack" photographic lineup. App. 121, l. 17 – 122, l. 9. Finally, Stokes acknowledged that several days after the robbery, the police put together a six person photographic lineup, which did not include Respondent's

photograph, and Thomas Sims, the store manager, identified an individual from that lineup as one of the robbers. App. 131, l. 19 – 132, l. 9. On redirect, Stokes explained this photographic lineup was presented to Sims on May 21, 2014 in an effort to ascertain the identity of the second suspect, and that he was not attempting to determine if Sims could further identify Respondent. App. 143, ll. 4-11.

The state also called the three employees to describe the armed robbery as well as their out of court identification of Respondent. Thomas Sims testified the suspect came into the T-Mobile store before the robbery. He watched the suspect talk with his employee, Jarron Weaver, about getting an iPad for his daughter. App. 172, l. 20 – 173, l. 2. The suspect was the first customer of the day. App. 184, l. 7. He was wearing a black shirt, khakis, sunglasses, and a baseball hat. App. 173, ll. 16-22. Sims said he was able to view the suspect for approximately five to ten minutes before he left the store the first time. App. 173, ll. 9-15. The suspect briefly returned, left again, and then came in a third time with another guy. App. 173, l. 23 – 174, l. 16. The two men had guns and told Sims and Weaver to go to the back of the store where they ordered them to the ground and duct taped their hands behind their backs and their feet together. App 174, l. 17 – 175, l. 4. Sims testified the police later showed him a photograph on a cell phone and asked if he could identify the person in the picture. He said he was immediately able to identify the person in the photograph as the person who robbed the store. App. 176, l. 12 – App. 178, 4.

On cross-examination, Sims admitted that the robbers pushed him to the ground and told him if he looked up, they would shoot him. App. 185, l. 21 – 86, l. 18. He was questioned about his opportunity to see the men who robbed the store and discrepancies in the details he gave when describing those men to the police. App. 179, l. 9 – 195, l. 25.

Jarron Weaver testified that he talked with the suspect for ten to fifteen minutes the first time he came into the T-Mobile store and then for maybe five minutes the second time he came in prior to the robbery. App. 380, l. 8 – 382, l. 6. He maintained the robbery itself lasted ten to fifteen minutes during which he was taken to the back at gunpoint, ordered to the floor, and duct taped. App. 196, ll. 5-14. Weaver described the robber as wearing a gray undershirt with a black shirt over it, khaki pants, sunglasses, and a baseball cap. App. 197, ll. 4-13. Weaver testified about being shown the photograph of Respondent by the police. He said he was taken over to the side, by himself, and shown the picture and was able to immediately recognize Respondent as the person who robbed the store. Weaver said he was a hundred percent certain of the identification. App. 197, l. 17 – 198, l. 19.

Kirstie Berry testified that she was outside on a smoke break when she was "snatched" into the back door of the T-Mobile store, ordered to the ground, hit in the back of the head, and then duct taped. She claimed she got a good look at her assailant because she was face to face with him, less than a foot away, when she was pulled into the store. App. 210, l. 7 – 215, l. 21. Berry described the robber as wearing a long sleeve lavender shirt with a black shirt over it, blue jeans, a hat, and sunglasses. App. 211, ll. 12-19. She testified about being shown the photograph. She said she was immediately able to identify Respondent as the person who robbed the store. Berry claimed she was one hundred percent certain of the identification and then identified Respondent in the courtroom. App. 212, l. 12 – 213, l. 24.

At the conclusion of the testimony, Respondent moved to suppress the out of court identifications. Defense counsel referenced the two pronged Neil v. Biggers inquiry and argued the identification procedure used by the police was both unduly suggestive and so unreliable that it created a substantial likelihood of misidentification. Defense counsel asserted the act of

showing the employees a single photograph of Respondent, with an officer standing directly behind him, rather than a photographic lineup or a traditional lineup with actual people was unduly suggestive. He also argued that, given the limited opportunity to view the robbers at the time of the offense, the limited the degree of attention, the accuracy of the prior descriptions, and the length of time between the armed robbery and the identification of the photograph, there was a substantial likelihood of misidentification. He requested the out of court identifications and any in court identifications be suppressed. App. 311, 13 – 317, 22.

The solicitor admitted show up identification procedures that involve a single suspect are generally disfavored. However, she asserted such procedures may nevertheless be proper when they occur shortly after the crime while the witnesses' memories are still fresh and the suspect has not had time to alter his looks or dispose of evidence. The solicitor also emphasized that a show up procedure may expedite the release of innocent subjects and enable the police to determine whether to continue searching. However, she never argued why a show up was necessary *in this case*. App. 317, l. 24 – 318, 8.

The solicitor then went through the factors supporting admission of the identification under the totality of the circumstances, including the opportunity the employees had to look at the suspect, the fact that they continued to have a conversation in close proximity with the robber when guns were pointed at them, the consistency of their clothing descriptions of the robbers, and the fact that the identifications were made only three hours after the robbery while their memory was still fresh. App. 318, l. 9 – 320, l. 12.

The solicitor again maintained the show up identification procedure "might have expedited the release of innocent suspects." App. 320, ll. 20-21. However, she admitted the police would not have released Respondent if the employees were unable to identify him as a

suspect from the show up due to the active investigation at the apartment complex. App. 320, l. 20 – 321, l. 4. In conclusion, the solicitor argued that even if the trial court determined the procedure was unduly suggestive, it still did not create a substantial likelihood of irreparable misidentification and therefore the motion to suppress should be denied. App. 321, ll. 4-10.

The following morning, the trial judge ruled on the identification issue. The judge found the procedure used by the police in showing the employees the single photograph of Respondent was "unduly suggestive." App. 331, ll. 2-6. She also found the identification of Respondent was sufficiently reliable to allow admission of the testimony. In so ruling, the judge examined the likelihood of misidentification by considering the totality of the circumstances. She maintained: (1) the employees had ample opportunity during daylight hours to view the robbers at the time of the crime; (2) the employees were able to pay close attention to what the suspect looked like; (3) the employees gave accurate descriptions of the perpetrator; (4) the employees testified their level of certainty was one hundred percent; and (5) the length of time between the armed robbery and the confrontation when the employees identified Respondent was brief. Ultimately, the trial judge found the employees' identification of Respondent was admissible and denied the motion to suppress. App. 331, l. 6 – 332, l. 4.

On appeal, the Court of Appeals ultimately held that, under the totality of the circumstances, "the circuit court erred in assessing the reliability of an otherwise unnecessarily suggestive identification procedure." State v. Hardin, 425 S.C. 1, 14, 819 S.E.2d 177, 184 (Ct. App. 2018). In so holding, the Court asserted:

> Our review of the record reveals (1) the victims did not have ample opportunity to view the disguised assailants at the time of the crime as the victims were face-down on the floor for most of the robbery; (2) based on their descriptions of the assailants, which focused on their clothing rather than their physical appearances, the victims did not and probably could not pay close attention to their appearances; and (3) the victims did not accurately describe the armed and

> disguised men to police—they merely noted the assailants were black males, one of whom was taller than the other, and what clothing they wore.

Id. at 15, 819 S.E.2d at 184.

While the Court noted the employees testified they were one hundred percent certain that Respondent was one of the robbers and the length of time between the robbery and the identifications was only a little over three hours, it held these two factors alone do not suffice to support a finding that the out of court identifications were proper and admissible. Id. at 14-15, 819 S.E.2d at 184.

Despite holding the trial judge erred in admitting the out of court identifications, the Court of Appeals concluded the error was harmless because the challenged identification evidence was cumulative to other properly admitted evidence. Id. at 15-16, 819 S.E.2d at 184-185. Specifically, the court cited to the witnesses' identification of the getaway Toyota, the employees' identification of the guns found in Respondent's apartment as the guns used in the armed robbery, and law enforcement's discovery of T-Mobile merchandise and the stolen iPad in or near Respondent's apartment less than three hours after the crime. Id.

In its petition for rehearing filed with the Court of Appeals and the petition for writ or certiorari filed with this Court, the state argued the Court of Appeals "failed to properly apply existing precedent and the appropriate standard of review in reaching its conclusion that the identification procedure utilized by police was both impermissibly suggestive and conducive to substantial likelihood of misidentification." The state asserted the Court of Appeals did not address whether the unduly suggestive procedure was unnecessarily suggestive. Pet. for Rehearing at 11-12. It further argued the court misapplied the abuse of discretion standard, conducted its own review of the record, and assigned its own weight to the factors used in assessing the reliability of the suggestive identification procedure. Pet. for Rehearing at 12-13.

STANDARD OF REVIEW

"[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." Id. (citing Clyburn v. Sumter County Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887-888 (1994)). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." Id. (citing State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct. App. 1993)). "However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law." Id. (citing Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir.1976)).

ARGUMENT

The Court of Appeals properly applied existing precedent and the correct standard of review in reaching its conclusion that the identification procedure utilized by the police was both unnecessarily suggestive and conducive to substantial likelihood of misidentification.

The Court of Appeals properly applied existing precedent and the correct standard of review in reaching its conclusion that (1) the identification procedure used by law enforcement in this case was unnecessarily suggestive and (2) that the out of court identifications were unreliable as a matter of law and should have been excluded by the trial judge. Respondent respectfully requests this Court affirm the decision of the Court of Appeals.

"When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-pronged inquiry to determine whether due process requires suppression." State v. Wyatt, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017) (citing Neil v. Biggers, 409 U.S. 188, 198-200 (1972) and State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). "First, the court must determine whether the identification resulted from 'unnecessarily suggestive' police identification procedures." Id. (quoting Biggers, 409 U.S. at 198-199 and Liverman, 398 S.C. at 138, 727 S.E.2d at 426). "The Supreme Court of the United States has repeatedly emphasized 'that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.'" Id. (quoting Perry v. New Hampshire, 565 U.S. 228. 238-239 (2012)); see Manson v. Brathwaite, 432 U.S. 98, 107 (1977); Biggers, 409 U.S. at 198. "If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong." Id. (citing United States v. Sanders, 708 F.3d 976, 984 (7th Cir. 2013)); see Perry, 565 U.S. at 730 ("[C]ourts will only consider the second prong if

a challenged procedure does not pass muster under the first."); see also State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013).

"If, however, the court determines the procedures were both suggestive and unnecessary, the court must then determine 'whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.'" Id. at 311, 806 S.E.2d at 710 (citing Liverman, 398 S.C. at 138, 727 S.E.2d at 426); see Biggers, 409 U.S. at 198-199.

"Single person show-ups are particularly disfavored in the law." State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000) (citing Stovall v. Denno, 388 U.S. 293, 302 (1967) (the practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned)). In this case, the three employees were shown a single photograph of Respondent in which a fully uniformed law enforcement officer is present in the background. It is undisputed that this identification procedure was unduly suggestive and the state conceded so at trial and on appeal.

The state complains the Court of Appeals failed to address whether this unduly suggestive procedure was nonetheless necessary. However, in holding the trial judge erred in admitting the unreliable identifications, the court explicitly stated it had "no doubt" the single photograph of Petitioner and a uniformed officer, shown to the employees on a cell phone screen by another uniformed officer in the hours after the robbery was an "*unnecessarily* suggestive identification procedure." Hardin, 425 S.C. at 14, 819 S.E.2d at 184 (emphasis added). The Court of Appeals' conclusion is supported by this Court's precedent.

In Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013), this Court explained that a suggestive police identification procedure may be necessary "where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the suspect

has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching." Id. at 494, 744 S.E.2d at 175 (quoting State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000)).

In State v. Wyatt, 421 S.C. at 312, 806 S.E.2d at 711, this Court discussed Stovall v. Denno, 388 U.S. 293 (1967) to illustrate the necessity requirement. In Stovall, the police performed a show up procedure by bringing the defendant to the witness' hospital room. Wyatt, 421 S.C. at 312, 806 S.E.2d at 711 (citing Perry v. New Hampshire, 565 U.S. 228, 237-238 (2012)). "The witness was the only person who could identify or exonerate the defendant; the witness could not leave her hospital room; and it was uncertain whether she would live to identify the defendant in more neutral circumstances." Id. (quoting Perry, 565 U.S. at 238) (internal quotation marks omitted). While the United States Supreme Court held this police arranged show up was undeniably suggestive, it concluded no due process violation occurred because of the procedure's necessity. Id. (citing Perry, 565 U.S. at 238)

In Wyatt, the defendant was convicted of attempting to furnish contraband to a prisoner and possession with intent to distribute cocaine, cocaine base, and marijuana. Id. at 308, 806 S.E.2d at 709. The charges stemmed from an incident at Kershaw Correctional Institution. While Officer Schnettler was at his post in a watch tower, he observed a man run from the woods to the fence surrounding the prison. Id. Schnettler watched the man throw eight packages over the fence, and then run back into the woods. Schnettler estimated his distance from the man to be about eighty or ninety yards. Id. He described the suspect as a white male wearing long jean shorts and a dark shirt. Id. A few minutes later, Officer Brenda Lippe was driving to work when she passed a man walking away from the prison on Highway 601. Id. at 309, 806 S.E.2d at 709.

When Lippe arrived at work, she heard about the incident and told the correctional officer in charge of contraband that she had seen a man walking away from the prison. She described him as a light skinned black man with a "nice neat haircut," a black shirt, and charcoal colored shorts. Id.

Within fifteen minutes of the incident, Deputy Kirkley with the Lancaster County Sheriff's Office saw Wyatt walking along Highway 601. Id. Kirkley detained Wyatt and notified the prison that he had located the suspect. Id. Officer Schnettler drove to the side of the road where Wyatt was being detained. Id. After Kirkley removed Wyatt from the back of his patrol car, Schnettler identified him as the man he saw throwing packages over the prison fence based on his clothing and "how light the skin was on his legs." Id. Wyatt was then transported to the prison where Officer Lippe, who was in a watch tower forty or fifty yards away, positively identified Wyatt as the man she had seen walking along Highway 601 minutes earlier. Id.

Wyatt moved pretrial to suppress the identifications arguing the procedures used were unnecessarily suggestive and created a substantial likelihood of misidentification. Id. at 310, 806 S.E.2d at 710. The trial court denied the motion. Id. On appeal, this Court held the show up procedure used for Schnettler's identification was necessary under the circumstances. Id. at 313, 806 S.E.2d at 711. The Court asserted that "because Schnettler had not been able to observe the suspect's facial features, but rather had described him primarily in terms of the clothes he was wearing that left his distinctive calves exposed, the best opportunity for Schnettler to say whether the suspect was the man he saw was right then, before the suspect could change his appearance." Id. at 313, 806 S.E.2d at 711-712. This Court further concluded that by conducting the show up procedure immediately, law enforcement "was able to quickly determine whether Wyatt was the person who threw the contraband into the prison, or whether Wyatt should be released because

he was innocent and the sheriff's office needed to continue its search before other suspects could leave the area. Id. at 313, 806 S.E.2d at 712.

This Court also emphasized that without Schnettler's identification, the vague description the correctional officers gave Kirkley of a "black male wearing a black shirt and jean shorts" raised serious concerns as to whether Kirkley had probable cause to arrest Wyatt. Id. at 314, 806 S.E.2d at 712. While Kirkley had reasonable suspicion to briefly detain Wyatt based on Wyatt's close proximity to the prison and the descriptions from Schnettler and Lippe, the Court was doubtful this evidence was sufficient to establish probable cause. Id. (citing State v. Dubose, 699 N.W. 582, 593-594 (Wis. 2005) (holding a show up is necessary if the police lack probable cause to make an arrest without it).

Finally, this Court questioned whether there were other procedures Kirkley could have used that would have been less suggestive since the characteristics Schnettler described observing in the suspect, the clothing he was wearing and the skin color on his legs, were not features that could have been presented on a typical photographic lineup. Id. at 314-315, 806 S.E.2d at 712.

As far as Officer Lippe's identification, the Court first concluded that her identification was of little consequence to the outcome of the trial since she did not witness the crime, and her testimony only proved a fact already established conclusively: that Wyatt was walking away from the prison on Highway 601 minutes after the incident. Id. at 315, 806 S.E.2d at 712. Second, the Court held there was evidence in the record to support the trial court's finding that "no substantial likelihood of misidentification existed." Id. at 315, 806 S.E.2d at 713.

In this case, not only was the show up identification procedure undeniably suggestive, it was also unnecessary. Corporal Cain had tracked the stolen iPad to an apartment complex on

Bentley Court in Columbia. When Cain arrived at the apartment complex, he found Respondent walking to a vehicle matching the description of the Toyota sedan used as the getaway car during the robbery. Respondent admitted he had rented the car. Respondent also gave written consent for the officers to search his person and his apartment. When officers were unable to locate the iPad inside Respondent's apartment using the "play music" function, they searched outside and found the device in a plastic bag near a dumpster about one hundred yards from Respondent's building. During a more comprehensive search of Respondent's apartment, the officers found a box of cell phones and two guns matching the description of those used in the robbery.

At the time the show up was conducted, law enforcement *at a minimum* had reasonable suspicion to detain Respondent and further investigate his possible involvement in the armed robbery. Consequently, the show up procedure was not necessary to "expedite the release of innocent suspects." See Wyatt, 421 S.C. at 313, 806 S.E.2d at 711 (quoting Gibbs, 403 S.C. at 494, 744 S.E.2d at 175). The assistant solicitor admitted during her argument at trial that the police would not have released Respondent if the employees were unable to identify him as a suspect from the show up due to the active investigation at the apartment complex. App. 320, l. 20 – 321, l. 4. Moreover, the police ultimately had probable cause to arrest Respondent without the show up identifications. See Wyatt, 421 S.C. at 314, 806 S.E.2d at 712 (holding a show up identification may be necessary if the police lack probable cause to arrest the suspect without it).

Moreover, the photograph of Respondent was taken nearly three hours after the robbery, which was sufficient time for the suspect to change his appearance, specifically his clothes, which was primarily how the employees were able to describe the suspect after the robbery. See Wyatt, 421 S.C. at 313, 806 S.E.2d at 711 (quoting Gibbs, 403 S.C. at 494, 744 S.E.2d at 175) (stating a situation in which the circumstances may make suggestive police identification

procedures necessary is when "the suspect has not had time to alter his looks"); see also Wyatt, 421 S.C. at 313, 806 S.E.2d at 711-712 (holding the show up identification procedure was necessary in part because the witness was unable to observe the suspect's facial features and had described him primarily in terms of the clothes he was wearing, making the best opportunity for the witness to say whether the suspect was the man he saw was right then before the suspect could change his appearance). Notably, Respondent was wearing a blue and white striped shirt at the time the photograph was taken, which varied significantly from the black shirt with a gray or lavender undershirt described by the employees. He also was not wearing a hat or sunglasses. See State's Exhibit No. 2.

Additionally, Respondent was located approximately three hours after the armed robbery occurred off Bentley Court in Columbia, which is over forty miles from the T-Mobile store in Orangeburg. Consequently, the show up did not occur "shortly after the alleged crime, near the scene of the crime." Wyatt, 421 S.C. at 313, 806 S.E.2d at 711 (quoting Gibbs, 403 S.C. at 494, 744 S.E.2d at 175).

Accordingly, there is ample evidence to support the Court of Appeals' holding that the show up identification procedure utilized by law enforcement in this case was "unnecessarily suggestive." See Hardin, 425 S.C. at 14, 819 S.E.2d at 184.

The state also challenged the Court of Appeals' determination that the identifications should have been suppressed because they were unreliable as a matter of law. The state argued the court "misapplied the abuse of discretion standard by failing to give appropriate deference to the trial court's conclusion that the identification was sufficiently reliable." BOP at 14. It further maintained that the Court of Appeals "should not have reweighed the evidence that was before the trial court." BOP at 15. However, relying on this Court's opinion in State v. Moore,

343 S.C. 282, 540 S.E.2d 445 (2000), the Court of Appeals properly held the identifications were unreliable *as a matter of law* and thus inadmissible. Therefore, the court did not misapply the abuse of discretion standard. See Moore, 343 S.C. at 288, 540 S.E.2d at 448) ("Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error. However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law.") (internal citations omitted).

In assessing the reliability of an otherwise unnecessarily suggestive identification procedure, courts are to consider the following factors, under the totality of the circumstances: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' 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. Biggers, 409 U.S. at 199-200.

In Moore, the appellants, who were convicted of second degree burglary and grand larceny, challenged the admissibility of the identification given by the homeowner's neighbor, Stephanie Davis. Moore, 343 S.C. at 285, 540 S.E.2d at 446. From fifty yards away Davis observed two men coming out of her neighbor's house. Id. When Davis asked the two men what they were doing, they both "startled" and ran. Id. at 285, 540 S.E.2d at 447. Davis called 911 and gave a description of the men. She described two black males. Id. One was taller, thinner, and darker, and was wearing a white hat, a white shirt, and blue shorts. Id. She said this man's white hat fell off and she saw braided hair. Id. The other man had on a white shirt, either shorts or pants, and a black hat. Id. Davis could not say whether this man was stocky or thin, only that he was the shorter of the two. Id. About ninety minutes later, Davis was taken in a

patrol car to where two men were being detained by police. Id. She identified them as the burglars based on their clothing. Id. After Davis had seen the taller man with braided hair up close, she identified him as having lived in an apartment near her sister. Id.

This Court reviewed the Neil v. Biggers factors outlined above and held only one factor was "established with any degree of reliability," specifically the amount of time between the crime and the confrontation, which was between an hour and a half and two hours. Moore, 343 S.C. at 289, 540 S.E.2d at 449. The Court concluded this factor was clearly outweighed by the other factors. Id. It asserted:

> Davis saw the two defendants for only a very brief period of time, at some distance. This is not a case in which the witness had an opportunity to observe the defendant at close proximity for some considerable period of time. As to the second factor, Davis' attention was likely not as acute as it might have been had she been the victim of a crime. Third, the degree of accuracy of Davis' description is tenuous, at best. **Her descriptions were based primarily on the suspects' clothing and race, and that one was taller than the other. She really did not get a look at either suspect's face, but saw one from the profile** . . . Further, as to the defendant Moore, Davis gave no physical description of him other than the fact that he was shorter and wore a black hat. She did not recall if he was stocky or thin; she recognized him at the show-up only by virtue of the black hat on the ground beside him.

Id. at 289-290, 540 S.E.2d at 449 (internal citation omitted).

Consequently, this Court held, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification such that the identifications were unreliable as a matter of law. Id. at 290, 540 S.E.2d at 449.

Like this Court in Moore, after considering the Neil v. Biggers factors, the Court of Appeals properly held that, under the totality of the circumstances, the identifications were unreliable as a matter of law and should have been suppressed. Hardin, 425 S.C. at 14-15, 819 S.E.2d at 184. In so holding, the Court of Appeals asserted:

> Our review of the record reveals (1) **the victims did not have ample opportunity to view the disguised assailants *at the time of the crime*** as the victims were face-down on the floor for most of the robbery; (2) *based on their descriptions of the assailants, which* ***focused on their clothing rather than their physical appearances*****, the victims did not and probably could not pay close attention to their appearances**; and (3) the **victims did not accurately describe the armed and disguised men** to police—they merely noted the assailants were black males, one of whom was taller than the other, and what clothing they wore.

Id. at 15, 819 S.E.2d at 184 (emphasis added).

While the court noted the employees testified they were one hundred percent certain that Respondent was one of the robbers and the length of time between the robbery and the identifications was only a little over three hours, it held these two factors alone did not suffice to support a finding that the out of court identifications were proper and admissible. Id. at 14-15, 819 S.E.2d at 184.

Because the evidence at trial supports only one reasonable inference, the question of reliably was a matter of law for the Court of Appeals to determine. See Moore, 343 S.C. at 288, 540 S.E.2d at 448. The Court of Appeals properly concluded, given the evidence presented at trial, that there was a substantial likelihood of irreparable misidentification and that the trial judge should have excluded the unreliable identifications.

Consequently, Respondent respectfully requests this Court affirmed the opinion of the Court of Appeals.

CONCLUSION

Based on the foregoing argument, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR RESPONDENT

This 30th day of August, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Orangeburg County
Honorable Maite Murphy, Circuit Court Judge

THE STATE,

PETITIONER,

V.

ARCHIE MORE HARDIN,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Joshua A. Edwards, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Respondent has been served on Archie More Hardin, #363195, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of August, 2019.

Lara M Caudy

LARA M. CAUDY
Appellate Defender

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ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me this 30th day of August, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028