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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN JAMAL WARNER,

APPELLANT

APPELLATE CASE NO. 2020-000930

BRIEF OF PETITIONER

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2.

Whether the Court of Appeals erred by holding petitioner was not entitled to a Neil v. Biggers hearing on the unduly suggestive nature of the identification by Probation Agent Nathan Goolsby, where Goolsby claimed he recognized petitioner from a surveillance video, even though the man in the video clip was wearing a hat and sunglasses, where Goolsby said he recognized petitioner from his "walk," and where the police asked Agent Goolsby if the man in the video was petitioner, since it was an abuse of discretion to deny petitioner an in camera hearing on identification where it occurred under these highly suggestive circumstances?

STATEMENT OF THE CASE

Petitioner was indicted by the Anderson County Grand Jury for the offenses of murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime. R. 526 – 529. His case was called to trial on May 22, 2017, before the Honorable R. Lawton McIntosh, and a jury. Bruce Byrholdt and Bruce Harvey represented petitioner. Catherine T. Huey was the Deputy Solicitor. R. 1.

On May 25, 2017, the jury found petitioner guilty on all three counts. R. 522, ll. 4-14. Judge McIntosh sentenced petitioner to life imprisonment for murder, twenty years for attempted armed robbery, and five years for possession of a weapon during the commission of a violent crime. R. 525, ll. 1-14.

Petitioner's convictions were affirmed in State v. Justin Jamal Warner, 430 S.C. 76, 842 S.E.2d 361 (Ct. App. 2020); App. 1-14. Petitioner sought rehearing in a petition filed on April 22, 2020. App. 15-24. Rehearing was denied in an order dated May 28, 2020. App. 25-26.

Petitioner filed a petition for writ of certiorari with this Court on July 7, 2020. The state filed its return dated August 19, 2020. This Court granted certiorari in its order dated January 22, 2021.

This brief of petitioner follows.

ARGUMENT

1.

The Court of Appeals erred by holding the trial court's failure to suppress the cell phone evidence where that evidence was obtained pursuant to an invalid search warrant issued by a magistrate in Anderson for phone records in New Jersey was saved by the "good faith" exception where the record showed the solicitor and police had a custom of using invalid search warrants because they believed phone companies would nonetheless honor them, since the state was not relying on binding appellate precedent in good faith given that custom, and the phone records evidence should therefore have been suppressed

Introduction

This case involves the attempted robbery and murder of a woman working at the BP station she owned with her husband in Anderson County. A black male was seen inside the store on the surveillance tape, but he was wearing sunglasses and a hat. A probation agent, Nathan Goolsby, in Georgia was asked by the Anderson Police if this man was Warner, and Goolsby opined that it was. Goolsby told the jurors during petitioner's trial that he identified petitioner from his "walk." The judge refused to give petitioner a Neil v. Biggers identification hearing where the defense wanted to challenge the admissibility of this identification by Goolsby as unduly suggestive and subject to a substantial likelihood of irreparable misidentification.

In addition, the judge refused to suppress the cell phone evidence obtained as a result of an invalid search warrant issued by an Anderson County, South Carolina magistrate for corporate records from New Jersey. Despite the fact that the police and solicitor seemed satisfied with the search warrant being invalid because it served its purpose of getting them corporate cell phone records, the Court of Appeals held the "good faith" exception saved the state from suppression of

this evidence. However, as seen more fully infra, local law enforcement and the local solicitor were relying on the convenience of using invalid or illegal magistrate level search warrants to obtain these cell phone records, and not binding appellate precedent.

Relevant Facts

Defense counsel Harvey argued that the state illegally obtained petitioner's cell phone records in this case. Defense counsel correctly argued that a South Carolina magistrate judge did not have the authority or jurisdiction to issue a search warrant "directed to T-Mobile custodian of records in New Jersey." Counsel noted that the local authorities in Anderson, South Carolina did not follow the "particular procedure that must be followed in order to obtain out-of-state witnesses or documents. That's under the uniform act." R. 41, l. 1 – 43, l. 1.

The solicitor responded, "Your Honor, *we follow what the telephone companies require of us. We do this all the time.* Even though they are out of state, they are almost always out of state. *That is what they require of us.* And my understanding is ***as long as we say that you don't have to come, that it doesn't matter.***" R. 43, l. 2 – 47, l. 6. (emphasis added).

Defense counsel Harvey reiterated that the search warrant was issued by a local Anderson, South Carolina magistrate, the Honorable Judge Sharp, requesting petitioner's phone records for April 26, 2015–May 4, 2015 from the New Jersey Corporation. "The information can be emailed back or mailed directly to me through any contact information below. Thank you for the help -- for all the help in this matter." Defense counsel repeated that the cell phone records were illegally obtained because the search warrant was for documents outside of the judge's jurisdiction, and that the local judge did not have the authority to issue this warrant. R. 47, l. 13 – 48, l. 10.

The solicitor then incorrectly argued to the judge that the state did not even need a search warrant to obtain the cell phone records. The solicitor "passed up" *an unpublished opinion* to the judge, stating it cited "U.S v. Graham that says you don't even need a warrant to get the cell site location information." Tr. 48, l. 11 – 49, l. 11.

Defense counsel essentially noted that the solicitor was relying on an improper "precedent." "[T]he South Carolina Supreme Court hasn't adopted that in a published opinion, then it's still up to Your Honor." The judge responded: "Well, that is some indication where the thought process is at this stage. Well, you're right about [it] being [an] unpublished opinion." R. 52, ll. 2 – 7. The solicitor confirmed to the judge the state now advocated that "[w]e don't need a warrant in the first place," given the persuasive arguments that the search warrant involved in this case was invalid. R. 52, ll. 13-22.

Defense counsel Harvey disagreed with the judge's new emphasis that records belonged to the company, and therefore that petitioner had no standing to challenge their disclosure. Counsel argued that, while there was a split of authority in state jurisdictions and the federal courts, petitioner did have a privacy interest in the records and noted that the Fourth Circuit case of United States v. Graham, 824 F.3d 421 (4th Cir. 2016) (en banc) was pending before the United States Supreme Court at the time. R. 54, l. 5 – 58, l. 9.

Defense counsel also distinguished cases involving a privacy interest "in your records," from the "traditional third-party doctrine." Counsel referenced United States v. Miller, 425 U.S. 435 (1976) "which was the bank record case that established the third-party doctrine." While jurisdictions were split, the modern cases or trend was to find a defendant had a privacy interest in digital records such as those involved in this case. "[I] think it's time in the digital age that the third-party doctrine be vacated, that it really isn't a doctrine that applies in the digital age. And

that is an exact quote from Justice Sotomayor in her decision that the third-party doctrine should be re-evaluated . . . You put your finger right on those two issues. And that's precisely what it is in front of the U.S. Supreme Court in that trilogy of cases, and it's sort of bubbling up through the system now." R. 49, l. 22 – 56, l. 4.

When the court returned to the issue of the cell phone records being illegally obtained, it noted that the defense argued the magistrate's jurisdiction was limited pursuant to S.C. Code § 17-13-140. The judge reasoned that if the cell phone company voluntarily complied "with whatever process they were doing," that he did not think it made a difference if the search warrant was invalid. The judge rejected the defense argument that the state needed either a valid search warrant or a court order to obtain petitioner's cell phone records. R. 101, l. 5 – 103, l. 13.

While this case was pending on appeal, the United States Supreme Court decided Carpenter v. United States, 138 S.Ct. 2206, 2217 (2018) "which held a person has a legitimate expectation of privacy in his cell phone records held by a third party. The Court therefore declined to extend the third-party doctrine of United States v. Miller, 425 U.S. 435, 443 (1976) due to the "unique nature of cell phone location records," and it held the government could only obtain them by complying "with the Fourth Amendment."

The Court of Appeals in this case correctly held Carpenter applied retroactively to petitioner's benefit on direct appeal. State v. Justin Jamal Warner, Op. No. 5717 (filed April 8, 2020) at app. 11. The Court nonetheless held the actions of the police here in obtaining the cell phone records by an invalid or illegal search warrant was saved by the "good faith" exception of Davis v. United States, 564 U.S. 229 (2011). The Court of Appeals reasoned: "Although the officers exceeded the Fourth Amendment when they obtained Warner's cell phone records without a valid warrant, in light of Miller's validity at the time of the search, their conduct was

not a deliberate or reckless transgression." State v. Justin Jamal Warner, Op. No. 5717 (filed April 8, 2020) at app. 12.

Rehearing

Petitioner pointed out to the Court of Appeals on rehearing: "This Court may have overlooked the fact that law enforcement obtaining an illegal search warrant from a local Anderson County magistrate for records housed in New Jersey should not be found to be a 'good faith' exception to the exclusionary rule since obtaining a search warrant in this fashion was never legal, the solicitor knew that, and law enforcement was therefore not relying on that procedure being good law pursuant to existing case law at the time. This Court noted that the trial judge found the warrant was invalid, and that 'the State does not challenge this ruling.'" State v. Justin Jamal Warner, Op. No. 5717 at app. 15.

Standard of Review

In Fourth Amendment search and seizure cases, the standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

On appeals from a motion to suppress based on Fourth Amendment grounds, the appellate court reviews questions of law *de novo*. State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017); State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014). Where the police conduct a search in objective reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. Davis v. United States, 564 U.S. 229 (2011). The existence of binding appellate precedent is a pure question of law and is reviewed *de novo*. See State v. Brown, 401 S.C. 82, 93-96, 736 S.E.2d 263, 268-70 (2012).

Discussion

The conduct of the police and the solicitor here in using an Anderson County Magistrate to issue an invalid search warrant for records located in New Jersey because "*as long we say you don't have to come, then it doesn't matter*," is the antithesis of acting in good faith and respecting the privacy rights of citizens in their cell phone records. App. 16. "We have always done it this [illegal] way," works until a defendant, as in this case, correctly challenges the procedure. That the state here does not defend the *patently invalid search warrant* issued by a local Anderson magistrate in this case for New Jersey corporate records is telling. The Court of Appeals nonetheless concluded that "when the officer's actions are taken in *objective good faith* or involve only *isolated simple negligence*, the benefit of deterrence is dwarfed by the 'heavy toll' the exclusionary system costs the justice system and society." *Citing* Davis v. United States, 564 U.S. at 237-39. State v. Justin Jamal Warner, Op. No. 5717 at app. 11.

The actions of the police and the solicitor here were neither simple negligence nor were their actions undertaken in objective good faith. Just as the state did not ultimately deny that the search warrants were invalid, it was apparent from this record that the state only cared about its convenience in obtaining petitioner's cell phone records, and the New Jersey company was

happy to comply with the invalid search warrant as long as no employee had to come and testify. R. 43, l. 2 – 47, l. 6. Thus, the actions of law enforcement officials were in reliance on their jaded custom and practice of obtaining an invalid search warrant expecting that the out-of-state, out-of-jurisdiction corporation would turn over the citizen's cell phone records so long it could be done quietly with no expectation of traveling and testimony. Objective reasonable reliance on binding appellate precedent was never a consideration, and it only became an academic issue for lawyers and judges once the state in this case realized that defense counsel had called its hand on the invalid search warrant custom and practice. "Scrupulous adherence to governing law" simply was not a factor in this case. See Davis v. United States, 564 U.S. 229, 249 (2011).

Further, the arguments in the lower court and on appeal pertained to the Fourth Circuit case of United States v. Graham, 824 F.3d 421 (4th Cir. 2016) (en banc), which was pending before the United States Supreme Court at the time of trial, and which had been abrogated by Carpenter v. United States, 138 S.Ct. 2206, 2223 (2018) while the present case was pending on appeal. Therefore, the only tool still remaining in the state toolbox was the "good faith exception."[1]

Seemingly, the state would concede the solicitor's reliance on an apparent state court unpublished appellate opinion supplied to the trial court by the solicitor, which seemingly supporting its position regarding Graham, was highly improper. An unpublished opinion is not "binding appellate precedent," or even precedent, and respectfully, any practicing lawyer in this state should know better than to cite an unpublished opinion to the court.

Further, United States v. Miller, 425 U.S. 435 (1976), cited by the Court of Appeals in its "good faith" analysis in this case, was not cited or relied upon by either party on appeal in this

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[1] Earlier, in Riley v. California, 573 U.S. 373 (2014), the Supreme Court had held that privacy interests are involved and at stake involving a person's cell phone data.

case. Yet, as seen above, it was correctly distinguished in the trial court by defense counsel as not applying to the digital age of privacy legal issues. Miller involved a respondent "convicted of possessing an unregistered still, carrying on the business of a distiller without giving bond and with intent to defraud the Government of whiskey tax, possessing 175 gallons of whiskey upon which no taxes had been paid, and conspiring to defraud the United States of tax revenues" under several federal statutes. United States v. Miller, 425 U.S. 435, 436 (1976).

In Miller, the Supreme Court held that documents disclosed to the government pursuant to the challenged subpoena, "on their face," were not the defendant's "private papers" but were business records of the bank. "[B]anks are . . . not . . . neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance. The records of respondent's accounts, like 'all of the records (which are required to be kept pursuant to the Bank Secrecy Act,) pertain to transactions to which the bank was itself a party.'" *Citing* California Bankers Assn. v. Shultz, 416 U.S. 21, 52 (1974). See United States v Miller, 425 U.S. at 440-441.

The bank records involved in United States v. Miller were materially different than the cell-site location information (CSLI) involved in United States v. Graham, 824 F.3d 421 (4th Cir. 2016) (en banc), and in the present case. What law enforcement and the solicitor's office did in this case with knowingly using invalid search warrants was antithesis of "good faith." When their hand was called on the custom and practice of using invalid search warrants, the solicitor's secondary position was that the state did not even need a search warrant to obtain petitioner's cell phone information in this case.

The Fourth Circuit opinion in United States v. Graham, 824 F.3d 421 (4th Cir. 2016) (en banc) was not "binding appellate precedent" in South Carolina for purposes of the "good faith

exception," and Davis v. United States, 564 U.S. 229 (2011). See Toghill v. Comm., 289 Va. 220, 227, 768 S.E.2d 674, 677 (Va. 2015) (While state Supreme Court considers federal Fourth Circuit decisions as persuasive authority, such decisions are not binding precedent for decisions of the state Supreme Court). *Citing* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.") To not be subject to the exclusionary rule, the state had to show the search was conducted in objectively reasonable reliance on binding appellate precedent at the time. Davis v. United States, 564 U.S. 229, 231 (2011).

Despite all of the other problems with the state claiming any good faith exception in this case, its belated reliance on United States v. Graham, 824 F.3d 421 (4th Cir. 2016) (en banc) for the good faith exception in Davis v. United States, 564 U.S. 229, 231 (2011) also fails. Further, no legal fiction of a reliance on Miller should be possible where it is apparent in this case from the solicitor's own representations to the trial court that the illegal magistrate court search warrants were simply convenient for law enforcement purposes. That is conduct that needs to be deterred.

In that light, petitioner understands that exclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search. Stone v. Powell, 428 U.S. 465, 486 (1976). The rule's sole purpose is to deter future Fourth Amendment violations. Davis v. United States, 564 U.S. 229, 236-37 (2011) *citing* Herring v. United States, 555 U.S. 135, 141 n. 2 (2009); United States v. Leon, 468 U.S. 897, 921, n. 22 (1984); Elkins v. United States, 364 U.S. 206, 217 (1960) ("calculated to prevent, not to repair").

As to the exclusionary rule, the Court in Davis v. United States, 564 U.S. 229, 238 (2011) noted:

> The basic insight of the Leon line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. Herring, 555 U.S., at 143, 129 S.Ct. 695. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Id.*, at 144, 129 S.Ct. 695. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, Leon, supra, at 909, 104 S.Ct. 3405 (internal quotation marks omitted), or when their conduct involves only simple, "isolated" negligence, Herring, supra, at 137, 129 S.Ct. 695, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way," Leon, *supra,* at 919, 908, n. 6, 104 S.Ct. 3405 (quoting United States v. Peltier, 422 U.S. 531, 539, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975)).

This case involves a practice of deliberate conduct on the part of the police and solicitor in disregard of citizen's Fourth Amendment rights, here petitioner's rights. This is not a case of simple isolated negligence. The holding that that the police in this case *relied on "binding appellate precedent*" where the solicitor admitted the mere convenience of the solicitor and law enforcement made the custom of seeking invalid search warrants from a magistrate for out-of-state documents a durable practice *was a legal fiction of the highest order*. Further, there was no binding legal precedent that was relied on as argued above. The Court of Appeals held, "Although Davis has taken on withering criticism, mainly for what some perceive as its sabotage of retroactivity, see LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.3(h) (5th ed. 2012), we are obligated to follow it." State v. Justin Jamal Warner, Op. No. 5717 at app. 12. However, and again, there was no binding legal precedent that was relied on in this case as argued above. The harm to the judicial system in this case was its deliberate misuse by law enforcement, and that harm is on the same side of the scale as

deterrence in this unusual case. See Herring v. United States, 555 U.S. 135, 147 (2009) *citing* United States v. Leon, 468 U.S. 897, 909-910 (1984). Given the demonstratable lack of "good faith" in the actions of the state in this case, this Court should rule that the evidence should have been suppressed, and grant petitioner a new trial.

2.

The Court of Appeals erred by holding petitioner was not entitled to a *Neil v. Biggers* hearing on the unduly suggestive nature of the identification by Probation Agent Nathan Goolsby, where Goolsby claimed he recognized petitioner from a surveillance video, even though the man in the video clip was wearing a hat and sunglasses, where Goolsby said he recognized petitioner from his "walk," and where the police asked Agent Goolsby if the man in the video was petitioner, since it was an abuse of discretion to deny petitioner an *in camera* hearing on identification where it occurred under these highly suggestive circumstances

Relevant Facts

Defense counsel requested a Neil v. Biggers, 409 U.S. 188 (1972) hearing based on the highly unusual facts of this case. On its face, the identification here looked unduly suggestive. Defense counsel correctly told the judge that petitioner's probation agent, Nathan Goolsby, was provided with a film clip of the store surveillance tape. The man on the tape was a black male wearing a hat and glasses. Goolsby, the probation agent in Georgia, later testified before the jury that he saw petitioner once a month. R. 223, l. 17 – 224, l. 19.

Goolsby admitted that the hat and sunglasses made it hard "to see the face" of the black man. However, Goolsby maintained that he identified petitioner because of "the way that he walked, the way he carried himself, and he exhibited the same signs." R. 226, l. 23 – 227, l. 9. In short, Goolsby said that he was able to identify petitioner from his walk, and "how he carried himself" – the specifics of which were never provided in this case -- despite the enormous prejudice of this identification. R. 228, l. 11 – 229, l. 8; R. 58, l. 19 – 61, l. 10.

The solicitor urged that a Neil v. Biggers hearing was not necessary because Goolsby was not an eyewitness and because he knew petitioner. The judge ruled that a Neil v. Biggers

hearing or analysis was not necessary in this case, finding the state's position persuasive. R. 58, l. 15 – 62, l. 19. Thus, Goolsby's identification of petitioner as being the robber by the way the robber walked and "carried himself" was never subject to a preliminary challenge on the issue of a substantial likelihood of irreparable misidentification.

Court of Appeals

The Court of Appeals affirmed the denial of a Biggers hearing:

> Like the eyewitness in Liverman, Goolsby knew the defendant before the crime. Unlike the witness in Liverman, Goolsby was not an eyewitness to the crime. This court has held the Neil v. Biggers due process inquiry does not apply to a non-eyewitness. State v. McGee, 408 S.C. 278, 286–87, 758 S.E.2d 730, 734–35 (Ct. App. 2014). Further, even if delivery of the surveillance video here amounted to "state action," we disagree it was unnecessary. The State did not create the video. The State's use of it was necessary under the circumstances. At the time of their contact with Goolsby, the police had just received the Crimestoppers' tip, and the investigation was at a critical point. The armed perpetrator of a violent crime was still on the run and had already traveled between at least two states. It would have been impractical for the police to produce an array of videos recreating the crime scene, casting different actors as the perpetrator, before sending them to Goolsby. See Wyatt, 421 S.C. at 314–15, 806 S.E.2d at 712 (questioning whether less suggestive procedures were realistic alternatives, as under the circumstances "a lineup would be unworkable"); see also Simmons v. United States, 390 U.S. 377, 384–85, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (police display of photos of bank robbery suspects to bank employee victims day after robbery necessary; it was "essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities"); United States v. Sanders, 708 F.3d 976, 987 (7th Cir. 2013) (holding single photographic "show-up" was necessary when armed felon at large as police "could not have produced a significantly less suggestive procedure without sacrificing critical time"); see generally LaFave, et al., Criminal Procedure § 7.4(b) (4th ed. 2003).
>
> Even if sending the video to Goolsby was unnecessarily suggestive, we are confident Goolsby's identification was reliable. See Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53

> L.Ed.2d 140 (1977) ("[R]eliability is the linchpin" of the due process inquiry). Without disclosing he was Warner's probation officer, Goolsby told the jury he had spent time with Warner every month over the past nine or so months, usually for fifteen to thirty minutes each time. He testified he was sure of his identification because he was familiar with Warner's gait, the way he carried himself, and the way he held his hands and shoulders, and Warner had the same height and build as the person on the video. See, e.g., State v. Hall, 940 A.2d 645, 650, 653–54 (R.I. 2008) (single photo of suspect shown to police officer who identified defendant as suspect was neither suggestive nor unnecessary; suspect was object of ongoing manhunt, and experienced officer was less likely to be affected by a "suggestive procedure"). As Liverman noted, a witness's prior knowledge of the accused "remains a significant factor in determining reliability" and mitigates even the extreme suggestiveness of a show-up. 398 S.C. at 135, 141–42, 727 S.E.2d at 424, 427–28 (concluding eyewitness's in-court identification had origins independent of suggestive taint of police orchestrated show-up, as eyewitness was acquaintance and former neighbor of defendant and had known him since elementary school). We affirm.

State v. Justin Jamal Warner, Op. No. 5717 at app. 9-10.

Standard of Review

"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." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id. See, also, State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012).

Discussion

All citizens have a valid interest in seeing that violent crimes are solved. That is not at issue in this case. At issue is whether the denial of a preliminary determination – an in camera hearing -- is justified because the critical witness identifying the defendant as the perpetrator of

the crime is not an "eyewitness" in the technical sense of the word in this modern day of surveillance cameras being practically everywhere. Petitioner submits it is not justified. Further, the minimal cost of an in camera hearing on identification is small in relation to the irreparable harm of a misidentification where that substantial likelihood of misidentification can be avoided by a relatively brief in camera hearing on the surveillance tape identification. Moreover, *this* surveillance tape identification was latently problematic since the robber wore sunglasses and a hat deliberately obscuring his identity.

In State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012), this Court encountered a similar case where a Neil v. Biggers, 409 U.S. 188 (1972) pre-trial hearing was denied to the defense. This Court noted that a criminal defendant may be deprived of due process of law by an identification procedure arranged by police which was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Neil v. Biggers, 409 U.S. at 198. See State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004).

This Court in Liverman noted that Neil v. Biggers set forth a two-pronged inquiry to determine whether due process requires suppression of eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so whether out-of-court identification was nevertheless so reliable that no likelihood of misidentification existed. Neil v. Biggers, 409 U.S. at 198.

In Liverman, the trial court also relied heavily on the fact the witness knew the defendant. This Court held that the reliance on State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973) could not stand after the Supreme Court issued its opinion in Perry v. New Hampshire, 565 U.S. 228 (2012), in which the Supreme Court made clear that due process requires a trial court to conduct

a preliminary assessment of the reliability of an eyewitness identification made *under suggestive circumstances arranged by law enforcement.* McLeod had held that United States Supreme Court rulings attempting to the avert the danger of mistaken identity by establishing mandatory constitutional and procedural safeguards applied when the accused and the victim were strangers to each other, and "were never intended to apply where the victim knew the accused." State v. McLeod, 260 S.C. 445, 448, 196 S.E.2d 645, 646 (1973)

Again, Agent Goolsby was sent a surveillance film clip of a black man wearing sunglasses with a hat on and asked by another branch of law enforcement whether this man was "Justin Warner." Goolsby opined to the Anderson police that the man in this surveillance tape they suspected was petitioner -- was indeed petitioner. On its face, that was a very unduly suggestive identification.

In State v. Liverman, this Court rejected the state's invitation to hold that the denial of the Neil v. Biggers pretrial hearing fully comported with due process requirements nonetheless. In Liverman, the witness also previously knew Liverman.

Here, however, the identification of petitioner was definitely procured by a state action. The Anderson police asked Agent Goolsby if the man in the surveillance film clip was petitioner, and Goolsby opined that it was petitioner. While the United States Supreme Court held in Perry v. New Hampshire, 565 U.S. 228 (2012), that a preliminary judicial assessment of eyewitness testimony was not required in that case, our Supreme Court noted in Liverman that "in refusing to expand judicial screening to *all* eyewitness identifications, the Supreme Court [in Perry] reemphasized the necessity of pretrial judicial review when an identification is infected by improper police influence, as expounded by Neil v. Biggers and its progeny. Thus, Perry mandates that preliminary judicial inquiry is required once it is contended that an

identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused. Therefore, we overrule McLeod to the extent it permits circumvention of a Neil v. Biggers hearing." State v. Liverman, 398 S.C. 130, 140-41,727 S.E.2d 422, 427 (2012).

The fact that Agent Goolsby was not an eyewitness to the crime but served the same function by identifying petitioner from the BP surveillance film clip should not have been the deciding factor in determining whether an in camera preliminary identification hearing was necessary where Goolsby's identification of petitioner from the film clip was critical evidence for the state during petitioner's trial.

As the Court of Appeals recognized, "[R]eliability is the linchpin" of the due process inquiry, *citing* Manson v. Brathwaite, 432 U.S. 98, 114 (1977). The Court of Appeals emphasis on the use of the show up film clips of the robber with Agent Goolsby *being necessary* under the circumstances respectfully begged the question of whether a Biggers hearing was also necessary in this case. The trial judge would have heard testimony and had brief arguments on the necessity of the photographic show up if a Biggers hearing had been held, and the judge could then have determined in camera whether the show up so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Neil v. Biggers, 409 U.S. at 198.

In our modern day, surveillance videotapes are ever present in businesses and private homes. Identifications from surveillance tapes will continue to grow. Some police techniques or practices are common during investigations, i.e. the polygraph examination, but their use in the courtroom in front of the fact-finding jury presents a very different legal issue. So it is with an identification from a government law enforcement officer from a surveillance tape out-of-court and in-court. Some surveillance tapes will undoubtedly be grainy and hard to view, while others

may be relatively clear. A one size fits all rule that all identifications from surveillance tapes do not require an in camera identification hearing because the identifying witness was not a traditional "eyewitness" and/or because the identifying witness knew the accused is not likely to satisfy due process as our evolution from McLeod to Liverman has shown.[2]

Finally, a holding on this novel issue that a Biggers hearing was necessary in Liverman, but not in this case, is only going to foster confusion for the bench and bar. That is particularly true where state action was directly involved between Anderson County law enforcement and the Probation Officer in procuring the surveillance film clip identification in this case, and the Court held in a published opinion that no Biggers hearing was required. Yet no state action was involved in Liverman and a Biggers hearing was held to be required in that published opinion. This Court should hold that an in camera identification hearing should have been held granted the facts in this case, and it should respectfully grant petitioner a new trial.

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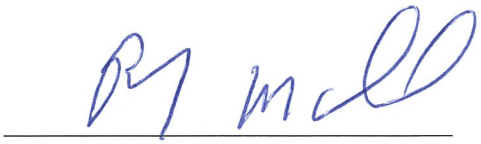
[2] Petitioner understands the floodgates argument the state will undoubtedly make that the defense will eventually want a Biggers hearing on all identifications if relief is granted in this case. This Court should reject that overblowing urging since the limited expansion urged by petitioner here -- given the unusual facts of this case -- is a small and common-sense principled expansion.

CONCLUSION

By reason of the foregoing arguments, petitioner's convictions should be reversed, and this case remanded to the Anderson County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2021.