STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Bentley Price, Circuit Court Judge

Opinion No. 2021-UP-408 (S.C. Ct. App. Filed November 17, 2021)

Lower Court Case No. 2017-GS-10-02131

THE STATE,

RESPONDENT,

V.

ALLEN ANGELO FIELDS,

PETITIONER

APPELLATE CASE NO. 2019-001393

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Allen Angelo Fields, Appellant.

Appellate Case No. 2019-001393

Appeal From Charleston County
Bentley Price, Circuit Court Judge

Unpublished Opinion No. 2021-UP-408
Submitted November 1, 2021 – Filed November 17, 2021

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Ambree Michele Muller, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

PER CURIAM: Allen Angelo Fields appeals his convictions for armed robbery and possession of a weapon during the commission of a violent crime and his aggregate sentence of thirteen years' imprisonment. On appeal, Fields argues the

trial court abused its discretion by admitting a witness's in-court identification when the witness previously identified someone other than Fields during an out-of-court photo lineup.

Because Fields cross-examined the witness and addressed her in-court identification during closing argument, the trial court did not abuse its discretion in admitting the witness's in-court identification of Fields. Accordingly, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Brown*, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003) ("Generally, the decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error."); *State v. Lewis*, 363 S.C. 37, 42, 609 S.E.2d 515, 518 (2005) ("We conclude, as the majority of courts have, that *Neil v. Biggers*[1] does not apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument.").

AFFIRMED.[2]

HUFF, THOMAS, and, GEATHERS, JJ., concur.

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[1] 409 U.S. 188 (1972).

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ALLEN ANGELO FIELDS,

PETITIONER

APPELLATE CASE NO. 2019-001393

Appeal from Charleston County

Honorable Bentley Price, Circuit Court Judge

Opinion No. 2021-UP-408

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Allen Angelo Fields petitions the Court for rehearing and respectfully submits that this Court overlooked the fact that the in-court identification was unnecessarily suggestive based on the procedure itself and the fact that the witness was unable to identify Petitioner in the previous out-of-court lineup, distinguishing this case from State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005). Petitioner was the only person included in both the out-of-court lineup and the in-court identification. Other jurisdictions have found that in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles. The in-court identification in the present case was unnecessarily

suggestive where the witness failed to identify Petitioner in an out-of court identification procedure and it was obvious to the witness at the time she made the in-court identification that Petitioner, the only black male seated at defense table, was the one on trial. Under the facts of this case involving an unnecessarily suggestive in-court identification, an *in camera* hearing was required to determine if the in-court identification was reliable despite the suggestive nature of the identification. The fact that the witness was unable to identify Petitioner in the out-of-court lineup goes to both the suggestiveness and unreliability of the in-court identification was not reliable. The trial judge erred in allowing the in-court identification.

The trial judge erred in allowing a witness who was unable to identify Petitioner in an out-of-court identification procedure, to make an in-court identification of Petitioner when the in-court identification was unnecessarily suggestive and inherently unreliable.

The jury found Petitioner guilty of robbing the TD bank in the West Ashley area of Charleston County. Bank teller Katherine Lucy Muller testified that on September 13, 2016, a man entered the bank, approached the tellers and demanded money while brandishing a knife. (R. p. 34, lines 13-22). At trial, the prosecutor asked the bank teller, "If you were to see this person [the robber] again would you have any chance in identifying him?" (R. p. 41, lines 13-14). The bank teller answered, "Yes." (R. p. 41, line 15). The prosecutor then asked, "Well, do you see him the courtroom?" (R. p. 41, line 16). The bank teller answered, "Yes." (R. p. 41, line 17). Petitioner immediately objected and advised that he had a matter of law. (R. p. 41, lines 18-19). The judge excused the jury. (R. p. 41, lines 20-25).

Counsel for Petitioner argued that the in-court identification was unreliable because the bank teller previously identified another individual when the police showed her a photo line-up that included a photo of Petitioner. (R. p. 42, lines 1-13). The judge overruled the objection noting

that counsel could cross-examine the bank teller about the prior identification. (R. p. 42, lines 14-18; p. 43, lines 2-15; p. 44, line 15). The bank teller then, in front of the jury for the first time, identified Petitioner. (R. p. 45, lines 4-10). On cross-examination the bank teller admitted that she identified another individual from the photo line-up. (R. p. 52, line 10 – p. 53, 54, lines 1-2). The bank teller admitted that she identified Petitioner for the first time in court. (R. p. 54, lines 5-6). The witness confirmed that the photo line-up contained six photos of African American men. (R. p. 55, lines 16-19). Counsel asked the bank teller, "Something looks a little different lined up here. One person is a different color, quite frankly. Is that what you see?" (R. p. 54, lines 7-9). The bank teller answered, "Yes." (R. p. 54, line 10). Counsel later noted that Petitioner was the only African American man seated at either counsel table. (R. p. 88, line 24 – p. 89, lines 1-5).

At the close of the State's case Petitioner moved for a mistrial based on the in-court identification. (R. p. 379, lines 5-11; p. 386, line 18 – p. 387, lines 1-3; p. 389, lines 4-12; p. 390, lines 4-8). The judge denied the motion for a mistrial. (R. p. 390, line 9 – p. 391, lines 1-22). The State, citing State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005), noted that a Neil v. Biggers[1] hearing was not necessary under the facts presented. (R. p. 393, lines 16 – p. 394, lines 1-9). Counsel for Petitioner stated, "I would like to just address that to clarify for the record. For Appellate purposes, ours is not a Biggers. We don't think it's – we don't think that anything short of a mistrial is curative." (R. p. 394, lines 11-14). The mistrial motion was the appropriate motion at this point in the trial after the judge, over objections, admitted the in-court identification. The judge erred in allowing the bank teller to identify Petitioner in court for the first time when she previously identified someone else from a photo line-up containing Petitioner's photo.

[1] 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

In United States v. Greene, 704 F.3d 298, 305 (4th Cir. 2013)(n. #3 omitted), the Fourth Circuit Court of Appeals, addressing an in-court identification, wrote:

> The Supreme Court has established a two-step process to determine whether identification testimony is admissible. See Manson v. Brathwaite, 432 U.S. 98, 110, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Satcher v. Pruett, 126 F.3d 561, 566 (4th Cir.1997). "First, the court must consider whether the identification procedure is unnecessarily suggestive." Satcher, 126 F.3d at 566. "Second, if the procedure was unnecessarily suggestive, a court must look at several factors to determine if the identification testimony is nevertheless reliable under the totality of the circumstances." Id. Those factors were set out by the Supreme Court in Neil v. Biggers, 409 U.S. 188, 199–200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

The in-court identification in the present case was unnecessarily suggestive, requiring a reliability determination prior to admission. The South Carolina Supreme Court discussed the requirement for a hearing to determine reliability in State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012), writing:

> 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 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 the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199–200, 93 S.Ct. 375).
>
> Our courts have held this determination should be made during an *in camera* hearing, outside of the presence of the jury. See 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); State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (same); *see also* Rule 104(c), SCRE (providing that "[h]earings on the admissibility of ... pretrial identifications of an accused shall in all cases be

> conducted out of the hearing of the jury"). "The purpose of the *in camera* hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Ramsey, 345 S.C. at 613, 550 S.E.2d at 297.

First, a hearing was required becasue the present case is distinguished from the Lewis case cited by the State. In Lewis the witness did not make any pre-trial identification. The Court in Lewis held that, "Accordingly, we conclude Neil v. Biggers does not apply to a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations." 363 S.C. at 43, 609 S.E.2d at 518.

In the present case, however, the witness made a pre-trial identification and identified someone other than Petitioner. As noted by the Court in footnote nine in Lewis:

> The Court of Appeals found that the protection afforded a defendant when there has been an out-of-court identification does not apply to the situation where there has been only an in-court identification. If there had been a pre-trial identification, a hearing is mandated on the admissibility of that identification. *See* Rule 104(c), SCRE (hearings on admissibility of pretrial identifications of an accused shall in all cases be conducted out of the jury's hearing); State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (2002) (*in camera* hearing required by Rule 104(c) allows defendant to question witness more stringently regarding possible misidentification or bias outside jury's presence; *per se* rule requiring court to hold *in camera* hearing when State offers identification testimony and defendant challenges in-court identification as being tainted by previous illegal identification.).

363 S.C.at 42, 609 S.E.2d at 517–18. Although the witness in the present case identified someone other than Petitioner pre-trial, prior to admitting the in-court identification, the judge should have conducted an in-camera hearing to determine what influence the prior identification procedure had on the in-court identification of Petitioner.

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In State v. Simmons, 308 S.C. 80, 82–83, 417 S.E.2d 92, 93 (1992), the South Carolina Supreme Court wrote:

> State v. Williams, 258 S.C. 482, 189 S.E.2d 299 (1972) is dispositive of this case. The question is whether Ricky Crosby's identification of Simmons arises solely from his observation of her when she made the buy on the night of August 15, 1989. The identification must be free of and independent of any later suggestion that Simmons was the person who sold him the crack. The identification may be so tainted by the circumstances surrounding the bond hearing as to require that it be suppressed. In State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971), this Court adopted a *per se* rule requiring the court to hold an *in camera* hearing when the state offers witnesses whose testimony identifies the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous illegal identification. Contra Watkins v. Souder, 449 U.S. 341, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981). The lower court refused to hold a hearing. This error warrants reversal.

The Court in Simmons remanded the case for a hearing to determine if the identification was so tainted as to require suppression at trial. Counsel in the present case did not specifically request a hearing but objected to the in-court identification based on inherit unreliability. This Court should find that the judge erred in admitting the in-court identification without first determining if the identification was reliable. Alternatively, this Court should remand the case, based on the objection, for a hearing outside the presence of the jury to determine if the in-court identification of Petitioner by the bank teller was so tainted by the prior identification procedure to require suppression.

Second, while the present case is distinguished from Lewis because there was an out-of court identification procedure, there is a split of authority on whether, contrary to the holding in Lewis, first time, in-court identifications can implicate due process protections. In United States v. Morgan, 248 F. Supp. 3d 208, 211 (D.D.C. 2017), the District Court for the District of Columbia noted that most federal courts apply the same analysis to both out-of court identification procedures and first time, in court identifications writing:

> To evaluate whether the Due Process Clause bars admission of identification evidence, courts use a two-pronged test. United States v. Rattler, 475 F.3d 408, 411 (D.C. Cir. 2007). "A court must determine first, whether the identification procedure 'was impermissibly suggestive.' " *Id.* (quoting United States v. Washington, 12 F.3d 1128, 1134 (D.C. Cir. 1994)). "[I]f so, [it must determine] second, whether, under the totality of the circumstances, the identification was sufficiently reliable to preclude 'a very substantial likelihood of irreparable misidentification.' " *Id.* (quoting Manson v. Brathwaite, 432 U.S. 98, 116, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)). Although the Supreme Court and the D.C. Circuit have developed this test in the context of out-of-court identification procedures, most federal courts have applied the same test to initial in-court identifications (i.e., identifications that are made for the first time in court). See, *e.g.*, Lee v. Foster, 750 F.3d 687, 691–92 (7th Cir. 2014); United States v. Greene, 704 F.3d 298, 305–10 (4th Cir. 2013); Kennaugh v. Miller, 289 F.3d 36, 45–48 (2d Cir. 2002); United States v. Rogers, 126 F.3d 655, 658–59 (5th Cir. 1997); United States v. Hill, 967 F.2d 226, 232 (6th Cir. 1992); but see United States v. Domina, 784 F.2d 1361, 1367–69 (9th Cir. 1986) (distinguishing in-court identifications from pretrial ones because the jury can observe the witness, but still acknowledging that an in-court identification could be so unnecessarily suggestive as to violate due process).

In United States v. Hill, 967 F.2d 226, 232 (6th Cir. 1992)(emphasis added), the Sixth Circuit Court of Appeals wrote:

> The United States argues that the government is not required to conduct a lineup. However, the government is prohibited under the Due Process Clause from introducing the fruits of an impermissibly suggestive and inherently unreliable identification as evidence against the accused. In this case, the court had to make an *ex ante* determination of whether to allow a witness, who had never before positively identified the defendant in person, to make an identification in court. **We hold that the *Biggers* analysis applies to such in-court identifications for the same reasons that the analysis applies to impermissibly suggestive pre-trial identifications. The due process concerns are identical in both cases and any attempt to draw a line based on the time the allegedly suggestive identification technique takes place seems arbitrary.** All of the concerns that underlie the *Biggers* analysis, including the degree of suggestiveness, the chance of mistake, and the threat to due process are no less applicable when the identification takes place for the first time at trial.

In State v. Dickson, 322 Conn. 410, 422, 141 A.3d 810, 821-22 (2016) (n. 8 omitted), the Supreme Court of Connecticut wrote:

> With this general background in mind, we now turn to the case law governing in-court identifications that are not preceded by an unnecessarily suggestive

> identification procedure, which is the case here. The United States Supreme Court has not yet addressed the question of whether first time in-court identifications are in the category of unnecessarily suggestive procedures that trigger due process protections. See Galloway v. State, 122 So.3d 614, 663 (Miss.2013) ("[t]he United States Supreme Court has not decided whether *Biggers* applies to an in-court identification not preceded by an impermissibly suggestive pretrial identification"), cert. denied, —— U.S. ——, 134 S.Ct. 2661, 189 L.Ed.2d 209 (2014).

The Connecticut Supreme Court then held:

> Accordingly, we conclude that first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court. United States v. Greene, 704 F.3d 298, 308 (4th Cir.) (applying *Biggers* constitutional analysis to in-court identification), cert. denied, —— U.S. ——, 134 S.Ct. 419, 187 L.Ed.2d 279 (2013); United States v. Rogers, 126 F.3d 655, 658 (5th Cir.1997) (same); United States v. Hill, 967 F.2d 226, 232 (6th Cir.) ("We hold that the *Biggers* [constitutional] analysis applies to ... in-court identifications for the same reasons that the analysis applies to impermissibly suggestive [pretrial] identifications. The due process concerns are identical in both cases and any attempt to draw a line based on the time the allegedly suggestive identification technique takes place seems arbitrary. All of the concerns that underlie the *Biggers* analysis, including the degree of suggestiveness, the chance of mistake, and the threat to due process are no less applicable when the identification takes place for the first time at trial."), cert. denied, 506 U.S. 964, 113 S.Ct. 438, 121 L.Ed.2d 357 (1992); United States v. Rundell, 858 F.2d 425, 427 (8th Cir.1988) (noting "suggestiveness inherent in the witnesses' knowing that [the defendant] was the sole [person] charged with the [crime]" and applying *Biggers* factors to in-court identification); United States v. Archibald, 734 F.2d 938, 943 (witness' in-court identification suggestive when on cross-examination, witness stated he had "feeling he would be sitting next to" defense counsel, and applying *Biggers* factors), modified, 756 F.2d 223 (2d Cir.1984); E. Mandery, "Due Process Considerations of In–Court Identifications," 60 Alb. L.Rev. 389, 423 (1997) ("[t]here is no sound basis for this distinction" between in-court identifications and suggestive out-of-court identifications); see also Commonwealth v. Crayton, 470 Mass. 228, 241–42 and n. 16, 21 N.E.3d 157 (2014) (concluding pursuant to "[c]ommon law principles of fairness" that first time in-court identifications are inadmissible except for "good reason," as when identity is not at issue or eyewitness knew defendant before crime [internal quotation marks omitted].).

Dickson, 322 Conn. 410, 426–30, 141 A.3d 810, 824–27 (2016) (footnotes omitted).

While the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuit Courts of Appeals have applied the same analysis to both out-of-court identification procedures and first time, in-court

identifications, the First, Tenth, and Eleventh Circuit Courts of Appeals, relying on Perry v. New Hampshire, 565 U.S. 228, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012), found that due process does not require the district court to make a reliability assessment to determine the admissibility of an in-court identification. In United States v. Thomas, 849 F.3d 906, 910 (10th Cir. 2017), the Tenth Circuit Court of Appeals wrote:

> Since Perry, other circuits have debated whether or not the Court's decision overruled circuit-level precedent requiring inquiries into the suggestiveness and reliability of in-court identifications. See, e.g., United States v. Correa-Osorio, 784 F.3d 11, 17–22 (1st Cir. 2015) (noting the debate and rejecting the defendant's in-court identification argument under both Perry and the circuit's pre-Perry suggestiveness and reliability test); Lee v. Foster, 750 F.3d 687, 690–92 (7th Cir. 2014) (inquiring into the suggestiveness and reliability of an in-court identification even after Perry). We find most persuasive the approach taken by the Eleventh Circuit in United States v. Whatley, where the court held that the Supreme Court's decision in Perry applies not only to pretrial identifications but also to in-court identifications. 719 F.3d 1206, 1214–17 (11th Cir. 2013).

In Perry the Court found that due process did not require review of an out-of-court identification under the Biggers factors because the government did not orchestrate the out-of-court identification. Perry, however, did not involve an in-court identification. As the District Court in Morgan wrote, "To find an identification procedure impermissibly suggestive after Perry, a court must determine that it is (1) suggestive, (2) unnecessary, and (3) arranged by law enforcement." United States v. Morgan, 248 F. Supp. 3d 208, 212 (D.D.C. 2017). The in-court identification in the present case was suggestive, unnecessary and arranged by law enforcement.

This Court should follow the majority of federal courts and find that in-court identifications can implicate due process protections. Under the facts of this case where the witness failed to identify Petitioner in the out-of- court identification procedure and it was obvious to the witness at the time she made the in-court identification that Petitioner, the only black male seated at defense

table, was the one on trial, that the in-court identification was unnecessarily suggestive. The in-court identification was "arranged by law enforcement." In Morgan the Court wrote:

> An in-court identification of defendant would be "arranged by law enforcement," Perry, 565 U.S. at 248, 132 S.Ct. 716, because the government chose to bring this particular defendant to trial and would be choosing to ask the witness for an identification at his trial. To ask for such an identification would be "improper" government conduct, *id.* at 245, 132 S.Ct. 716, if the government did not have a basis for believing that the witness could make a reliable identification. Although the Supreme Court implied in Perry that it did not want *all* in-court identifications to be subject to judicial reliability screening, *see id.* at 244, 132 S.Ct. 716, due process concerns require such screening for an initial in-court identification that is equivalent to a one-man showup.

248 F. Supp. 3d at 213(n. #2 omitted). The in-court identification in the present case was "arranged by law enforcement" and was unnecessarily suggestive, as the equivalent of a one person show up ID.

In United States v. Greene, 704 F.3d 298, 301 (4th Cir. 2013), "At trial, through a series of leading questions to which no objections were made, the government elicited so-called "resemblance testimony" from a bank teller who had made no out-of-court identification and concededly could not make an in-court identification of Greene as the robber." The Court in Greene discussed the suggestive nature of the testimony writing, "Sitting across the courtroom from the defendant, with the judge and jury looking on, and a prosecutor drawing her attention to the defendant and asking for similarities, the witness understandably may have felt pressure to find something in the defendant that reminded her of the bank robber. These circumstances present a suggestive situation in which it is not clear whether the witness's own recollections, or outside pressures, are driving the testimony." Greene, 704 F.3d at 307. The Fourth Circuit in Greene found that testimony from the bank teller was unnecessarily suggestive and unreliable. Under the plain error standard of review the Court found plain error but affirmed

finding that the error did not affect Greene's substantial rights. While the prosecutor's questioning in the present case did not include the resemblance questioning used in Greene, the questioning was still suggestive and presented the same problems discussed in Greene. Additionally, trial counsel objected to the in-court identification in the present case, unlike in Greene.

Importantly, the Fourth Circuit in Greene wrote:

> The Second Circuit has found that when a defendant was the only African–American in the courtroom, and was seated at the defense table, the in-court identifications by three witnesses were "so clearly suggestive as to be impermissible." United States v. Archibald, 734 F.2d 938, 942–43 (2d Cir.1984). "Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor." Id. at 941. The court ultimately found, however, that admitting the in-court identifications was harmless error because the witnesses had also identified the defendant in photo arrays prior to trial. Id. at 943.

704 F.3d at 306. As noted by defense counsel, Petitioner was the only African American male seated at counsel table. (R. p. 88, line 24 – p. 89, lines 1-5). The in-count identification in the present case, like the in-court identification in Archibald, was unnecessarily suggestive and impermissible. The error in the present case, however, was not harmless.

In Greene the Fourth Circuit also discussed a case from the Fifth Circuit writing:

> The Fifth Circuit, in another bank robbery case in which a teller's in-court identification was at issue, held that "it is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant." United States v. Rogers, 126 F.3d 655, 658 (5th Cir.1997). In Rogers, when the teller first took the stand, she described what the robber was wearing. Id. at 657. But following cross-examination, the prosecutor thought that he saw something odd about the witness. Id. He asked an FBI agent to approach the witness, and she told the agent that she recognized the defendant as the robber. The witness was recalled to the stand and provided an in-court identification. Id. In holding the identification to be impermissibly suggestive, the Fifth Circuit noted that ten months had passed between the crime and the identification and stated that the circumstances surrounding the identification rose to the level of a due process violation. Id. at 659. "Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime." Id.

704 F.3d at 306–07. As in Rogers, the in-court identification in the present case was unnecessarily suggestive.

In United States v. Emanuele, 51 F.3d 1123, 1130 (3d Cir. 1995), the Third Circuit Court of Appeals wrote, "We conclude that the confrontation was caused by the government, albeit inadvertently, and that to walk a defendant-in shackles and with a U.S. Marshal at each side-before the key identification witnesses is impermissibly suggestive. The more difficult question is whether this impermissibly suggestive confrontation created a "substantial likelihood of misidentification," in light of the totality of circumstances." A critical factor considered by the Court in determining unreliability in Emanuele was the fact that one of the bank tellers could not identify the defendant from an out-of-court photo array. The Court in Emanuele found that it was an abuse of discretion to admit that teller's in-court identification.

In the present case the trial judge abused his discretion by admitting the in-court identification. When the State sought to admit the in-court identification testimony, Petitioner objected. The trial judge erred in failing to conduct an *in camera* hearing to determine both that the in-court identification was unnecessarily suggestive and unreliable based on the Biggers factors, especially in light of the fact that the witness was unable to identify Petitioner in the out-of-court photo lineup as discussed in Emanuele.

In affirming the conviction this Court wrote:

> Because Fields cross-examined the witness and addressed her in-court identification during closing argument, the trial court did not abuse its discretion in admitting the witness's in-court identification of Fields. Accordingly, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003) ("Generally, the decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion, or the commission of prejudicial legal error."); State v. Lewis, 363 S.C. 37, 42, 609 S.E.2d 515, 518 (2005) ("We conclude, as the majority of courts have, that Neil v. Biggers does not

apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument.").

Counsel first respectfully submits that this Court overlooked the fact that the present case is distinguished from Lewis because Lewis involved a first time in-court identification with no prior out-of-court identification procedure. In the present case the witness was unable to identify Petitioner in the out-of-court identification procedure. Second, counsel respectfully submits that the majority of federal courts now conclude, contrary to Lewis, that Neil v. Biggers can apply to in-court identifications. Counsel respectfully submits that the in-court identification in the present case was unnecessarily suggestive where the witness failed to identify Petitioner in an out-of- court identification procedure and it was obvious to the witness at the time she made the in-court identification that Petitioner, the only black male seated at defense table, was the one on trial. The trial judge erred in allowing the in-court identification. Counsel respectfully seeks rehearing and finding by this Court that the trial judge abused his discretion in admitting the in-court identification.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 2nd day of December, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

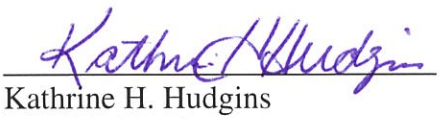
ALLEN ANGELO FIELDS,

PETITIONER

APPELLATE CASE NO. 2019-001393

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Allen Angelo Fields, #259294, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128, this 2nd day of December, 2021.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

The State, Respondent,

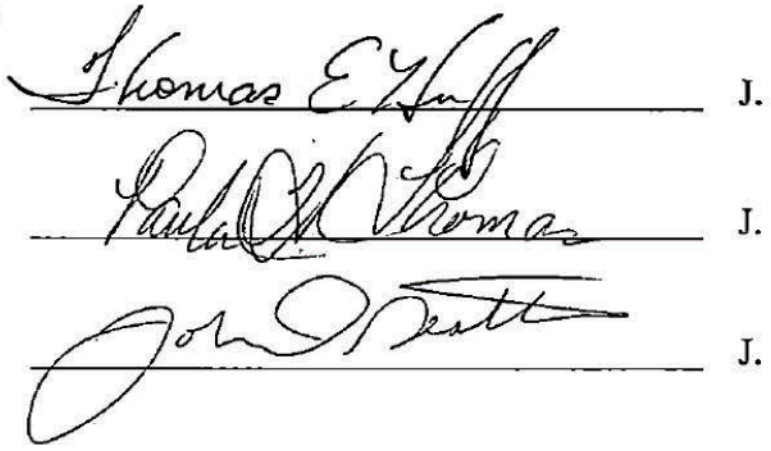
v.

Allen Angelo Fields, Appellant.

Appellate Case No. 2019-001393

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Kathrine Haggard Hudgins, Esquire
Ambree Michele Muller, Esquire
The Honorable Bentley Price

FILED
Dec 16 2021