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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Anderson County
The Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE, Respondent,

v.

JUSTIN JAMEL WARNER, Petitioner.

Appellate Case No. 2020-000930

Opinion No: 28094

RETURN TO PETITION FOR REHEARING

On April 13, 2022, this Court filed a published opinion affirming Petitioner's Anderson County convictions and life sentence for the murder of Mradulaben Patel, the attempted armed robbery of the BP station which she co-owned and was working as a cashier, and the possession of a weapon during the commission of a violent crime.[1] The majority also remanded the case to the trial court "for further proceedings as to Warner's motion to suppress CSLI." *State v. Justin Jamel Warner,* Op. No. 28094, 2022 WL 1101634 (S.C. S.Ct., Apr. 13, 2022) (Howard's Adv. Sh. No. 13 at 37-47). Petitioner filed a Petition for Rehearing on April 28, 2022, and the Court directed Respondent to file a return to the petition the following day. Rehearing should be denied for the following reasons:

I.

Petitioner first argues that "this Court took an unjustifiably broad reading of S.C. Code §

[1] More specifically, he received 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.

17-13-140 [(2014)] in finding that the search warrant [for historical cell site location information] was not invalid even though it sought property from an out-of-state corporation that was not located in Anderson County, or in any place in South Carolina." Respondent submits that this issue is unique because there are two paths that could be followed with respect to Petitioner's challenge to the search warrant and neither path leads to reversal. The first path is the statutory interpretation chosen by a majority of the Court. See *Warner*, Howard's Adv. Sh. No. 13 at 42-43. The other path is the dissent's finding that the officers acted in good faith when they obtained the warrant and that any alleged error was harmless beyond a reasonable doubt. *See id.* at 48-49 Hearn, J., dissenting).

II.

Because it was the reasoning of the lower courts and because the warrant was obtained and Petitioner's case tried before the United States Supreme Court's decision in *Carpenter v. United States*, 138 S.Ct. 2206 (2018), Respondent has previously argued on appeal the argument accepted by the dissent. *See* Brief of Respondent at 2-16. Respondent submits that those reasons will hold true, and the case should be affirmed regardless of what occurs on remand. However, Petitioner's attacks on the majority opinion lack merit. The South Carolina Constitution makes this Court "the final arbiter of South Carolina law." *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 219 n. 4, 810 S.E.2d 856, 860 n. 4 (2018); *Santee River Cypress Lumber Co. v. Query*, 168 S.C. 112, ___, 167 S.E. 22, 26 (1932) (Bonham, J. dissenting). The first issue in this case raises a novel question of law. As a result, this Court is "free to decide this question of law with no particular deference to the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718–19 (2000) (citing S.C. Const. art. V, §§ 5 and 9) (other citations omitted).

Although the Court "assume[d] for purposes of [its] analysis T-Mobile stores the applicable

[cell site location information (CSLI)] records in New Jersey," the Court reasoned that:

> the important fact is T-Mobile clearly does business in South Carolina, in particular, in Anderson County. T-Mobile, therefore, is subject to the jurisdiction of an Anderson County magistrate. The warrant sought records reflecting information generated in South Carolina through the interaction of Warner's cell phone and cell towers in Anderson County. While the T-Mobile office to which officers were told to send the warrant is located in New Jersey, section 17-13-140 specifically provides, "The property described in this section ... may be seized ... from the person, possession or control of any person who shall be found to have such property in his possession or under his control." T-Mobile is in possession and control of property that section 17-13-140 permits to be seized. T-Mobile is a "person" doing business in Anderson County. Thus, T-Mobile is subject to the jurisdiction of our courts, and we find it was not beyond the power of the magistrate to issue the warrant.

Warner, Howard's Adv. Sh. No. 13 at 43. (footnote omitted).

The majority quoted the following portions of § 17-13-140:

> Any magistrate ... may issue a search warrant to search for and seize ... property constituting evidence of crime or tending to show that a particular person committed a criminal offense .... The property described in this section, or any part thereof, may be seized from any place where such property may be located, or from the person, possession or control of any person who shall be found to have such property in his possession or under his control.

Warner, Howard's Adv. Sh. No. 13 at 42-43. (footnote omitted).

In finding that the limiting language in the statute did not apply to "[a]ny magistrate," footnote 5 makes clear the majority applied two well-settled rules of statutory construction in reaching this conclusion. The first was the "antecedent doctrine." Second, the Court noted its concern that "to read the limiting language as applying to all items in the series would contradict—and render superfluous—the language enabling the seizure of property within the "control of any person," because if all seizures are limited to property inside the jurisdiction of the individual judge, it would not have been necessary to alternately authorize the seizure of property was under a person's control. *Warner*, Howard's Adv. Sh. No. 13 at 42 n. 5.

The majority's application of these rules is hardly unique or improper. "The cardinal rule

of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Bankers Trust of South Carolina v. Bruce,* 275 S.C. 35, 37, 267 S.E.2d 424, 425 (1980). "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). Also, this Court "must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.' " *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citations omitted) (alterations in original); *State v. Heyward*, 432 S.C. 296, 317, 852 S.E.2d 452, 462 (Ct. App. 2020), *reh'g denied* (Jan. 15, 2021). *See also Commissioners of Pub. Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 219-20, 833 S.E.2d 834, 839 (2019) (Few, J., concurring) (applying the "last antecedent doctrine" and citing ..." 82 C.J.S. *Statutes* § 443 (2009)); Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (reversing because the Third Circuit's statutory construction was "precisely contrary to" the last antecedent rule of statutory construction and explaining that although not an absolute, "construing a statute in accord with the rule is 'quite sensible as a matter of grammar' "). Most importantly, the Court correctly noted that a contrary interpretation would render superfluous "the language enabling the seizure of property within the 'control of any person,' " which is contrary to the above-stated basic rules of statutory construction and the obvious intent of the General Assembly.

Most of Petitioner's attack on the majority's interpretation of § 17-13-140 is based on the erroneous contention that the Court's construction gives county magistrates broader jurisdiction to issue search warrants that circuit court judges. That argument is not properly before this Court

because it was not raised at trial. At trial, he asserted that the search warrant was invalid under S.C. Code Ann. § 17 -13-140 (2014), because § 17-13-140 did not give the magistrate jurisdiction under over the location where the CSLI were kept, since they were kept out-of-state, *i.e.*, in New Jersey. *See* ***R. 41; 44; 100-03***. He also argued that "the warrant itself doesn't provide probable cause for the obtaining of these out-of-state records." *See* ***R. 48, lines 8-10***. Thus, he did not preserve this argument for appellate review. *See* Rule 210(h), SCACR (stating an appellate court need not consider any fact which does not appear in the record); *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 319 (1991) (abolishing *in favorem vitae* review and holding a contemporaneous objection is required to properly preserve an error for appellate review); *see also State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003); *State v. Hoffman,* 312 S.C. 386, 440 S.E.2d 869 (1994)).

More importantly, this argument is premised on a fundamental misunderstanding of the circuit court's jurisdiction. S.C Const. art. V, § 4 states that "[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law." As a result, the jurisdiction of circuit court judges is not limited by county. Instead, their jurisdiction is statewide. See *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994). (There is but one Circuit Court in South Carolina, with uniform subject matter jurisdiction 'throughout the State' ") (quoting *State ex rel. Riley v. Martin*, 274 S.C. 106, 111, 262 S.E.2d 404, 406 (1980)). So, the majority's construction of § 17-13-140 does not limit or otherwise adversely impact the jurisdiction of circuit court judges to issue search warrants or grant greater power to magistrates to issue search warrants than circuit court judges.

He also contends that the majority "mistakenly blend[s] the concept of personal jurisdiction

in the Anderson County magistrate's power to hale T-Mobile into court under the minimum contacts test with the separate concept of the Anderson County magistrate's territorial jurisdiction that is countywide." Pet. at p. 6. His argument lacks merit. Indeed, he does not support this contention with a citation to any authority, whatsoever. He simply refuses to acknowledge that the Court has determined that because "T-Mobile is in possession and control of property that section 17-13-140 permits to be seized" and because "T-Mobile is a 'person' doing business in Anderson County," it was subject to the magistrate's jurisdiction. See *Warner*, Howard's Adv. Sh. No. 13 at 42-43.

Petitioner likewise argues that "[t]he search warrant on its face sought records far beyond Anderson County and in fact the records ultimately received by and relied on by the state included cell phone records from Greenville County and the State of Georgia." *See* Pet. at pp. 7-8. Once again, this argument is not properly before this Court because it was not raised at trial. *See* Rule 210(h), SCACR (stating an appellate court need not consider any fact which does not appear in the record); *Torrence*, 305 S.C. at 51, 406 S.E.2d at 319; *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal").

Moreover, the majority opinion makes clear that it was remanding the case "to the trial court for a ruling on *any unresolved issues* related to Warner's motion to suppress." *Warner*, Howard's Adv. Sh. No. 13 at 45 (emphasis added). This portion of his argument on rehearing, if meritorious, may be heard at that time. With regard to the evidence actually obtained, Respondent notes that no text messages were received, only CSLI information. ***R. 56-57.***

III.

Petitioner also poses hypotheticals, suggesting that "law enforcement will no longer need to obtain an out-of-state search warrant for a car [van, or other property] located in a different state because this Court has opined that the territorial jurisdiction limitation in S.C. Code § 17-13-140 does not apply to magistrate judges in South Carolina." Pet. at 5-6, 9. All such hypotheticals must await the appeal of a conviction in a different case because the statute as applied to him is not over broad. He conveniently ignores that " '[o]ne to whose conduct the law clearly applies does not have standing to challenge it for vagueness' as applied to the conduct of others." *In re Amir X.S.*, 371 S.C. 380, 391, 639 S.E.2d 144, 150 (2006) (quoting *Vill. of Hoffman Estates,* 455 U.S. at 495, 102 S.Ct. 1186); *State v. Neuman,* 384 S.C. 395, 403, 683 S.E.2d 268, 272 (2009) ("One to whose conduct the law clearly applies does not have standing to challenge it for vagueness") (quoting *Curtis v. State,* 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001))). See also *State v. Lewis*, 434 S.C. 158, 168, 863 S.E.2d 1, 6 (2021), *reh'g denied* (Oct. 12, 2021); *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 507, 757 S.E.2d 388, 393 (2014) ("[W]hen raising a claim of unconstitutional vagueness, the litigant must demonstrate that the challenged statute is vague *as applied to his own conduct,* regardless of its potentially vague application to others"). Additionally, he is impermissibly seeking an advisory opinion. "It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975). *See also Richland Cty. Sch. Dist. 2 v. Lucas*, 434 S.C. 299, 306, 862 S.E.2d 920, 924 (2021) (same) (quoting *Grissom*).

IV.

Moreover, even if the majority is otherwise inclined to grant rehearing based on any of the other points Petitioner raises, Justice Hearn's dissent correctly recognizes that the Court should affirm because the reasons found by her dissent and those argued by Respondent make clear that

suppression of the CSLI in this case is still not required because the officers acted in good faith in obtaining the warrant at a time when no warrant was required for CSLI, *see Davis v. United States*, 564 U.S. 229, 237 (2011), and because any error is harmless beyond a reasonable doubt. *See Warner*, Howard's Adv. Sh. No. 13 at 48-49 (Hearn, J., dissenting); Brief of Respondent at 5-16. *See also Warner*, Howard's Adv. Sh. No. 13 at 40-41 (discussing pre-*Carpenter* case law).

As previously argued, the Court's reasoning in *Carpenter* was a stark and dramatic break from over fifty years of Fourth Amendment precedent. *See, e.g., Carpenter*, 138 S.Ct. at 2223 (Kennedy, J., dissenting) (referring to the majority's decision as a "stark departure from relevant Fourth Amendment precedents"); *id.* at 2224 (Kennedy, J., dissenting) ("In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other"); *id.* at 2235-36 (Thomas, J., dissenting). As the four *Carpenter* dissents make abundantly clear, prior Supreme Court precedent before *Carpenter* supported the conclusion that an individual did not have any reasonable expectation of privacy in information voluntarily disclosed to a third party, such as CSLI, even if the individual was unaware of how the third party would use the information. *See also, e.g., United States v. Miller*, 425 U.S. 435, 443 (1976);); *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection").

Also, most American courts did not routinely grant similar protection to data revealing a person's location that was held by a third party, such as CSLI, before the *Carpenter* opinion. In fact, as late as 2012, "*no circuit court had yet held the Fourth Amendment applicable* to CSLI

data," *United States. v. Elmore*, 1068, 1078 (9th Cir. 2019) (collecting cases) (emphasis added), and neither this Court nor the South Carolina Court of Appeals had held that an individual had a reasonable expectation of privacy in CSLI or that law enforcement had to comply with the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings to obtain CSLI. To the contrary, the Court of Appeals had issued two unpublished opinions that followed the Fourth Circuit's reasoning in *Graham*. See *State v. Drayton*, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015), *vacated in part, affirmed in result*, 415 S.C. 43, 780 S.E.2d 902 (2015) (*Drayton* II); *State v. Wallace*, 2016–UP–344, 2016 WL 3595792, at *1 (Ct. App., June 29, 2016) (*per curiam*) (unpublished) ("[W]e note that although our supreme court has not directly addressed the issue of whether the warrantless procurement of cell-site location data violates the Fourth Amendment, the federal appellate courts, including a recent en banc decision from the United States Court of Appeals for the Fourth Circuit, have uniformly found such police action does not violate the Fourth Amendment") (citing *Graham* with approval).

Given the present record, the trial judge and the Court of Appeals properly applied the United States Supreme Court's good faith exception to the exclusionary rule. The Supreme Court adopted the exclusionary rule as a judicially-created remedy to effectuate the right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment of the United States Constitution. *See Weeks v. United States*, 232 U.S. 383, 393-394 (1914). Importantly, adoption of the exclusionary rule did *not* create a personal constitutional right to the exclusion of evidence, and the rule itself was *not* designed to redress the injury caused by an unconstitutional search or seizure. *Davis*, 564 U.S. at 236; *see also Stone v. Powell*, 428 U.S. 465, 486 (1976). Instead, the rule was adopted and solely exists to deter *future* Fourth Amendment violations. *Davis*, 564 U.S.

at 236-37 (citing *United States v. Leon*, 468 U.S. 897, 909, 921 n.22 (1984));[2] *see also Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair").

The Court of Appeals correctly recognized,

> Our conclusion is in accord with many state and federal courts that have confronted the retroactivity of *Carpenter* and whether CSLI records obtained without a valid warrant before *Carpenter* should be subject to the exclusionary rule. *See United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018); *United States v. Goldstein*, 914 F.3d 200, 203–07 (3d Cir. 2019); *Reed v. Commonwealth*, 71 Va.App. 164, 834 S.E.2d 505, 510–12 (2019).

See State v. Warner, 430 S.C. 76, 93-94, 842 S.E.2d 361, 369-70 (Ct. App. 2020) (*Warner I*).[3] The dissent properly cites two South Carolina cases stating that suppression of evidence for a Fourth Amendment violation is "harsh medicine" and "should be applied only where [the purpose of] deterrence is clearly subserved." *See Warner*, Howard's Adv. Sh. No. 13 at 49 (Hearn, J.,

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[2] In *Leon*, the Supreme Court rejected the contention that the exclusionary rule should be applied to evidence "obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." 468 U.S. at 900. Instead, the Court adopted a "good faith" exception to the exclusionary rule and cautioned that the exclusion of evidence should only "rarely" occur in cases where officers reasonably relied upon subsequently-invalidated search warrants. *Id.* at 926. The Court explained that suppression of evidence based on a subsequently-invalidated search warrant was *only* appropriate in four limited situations: (1) where the affiant misled the issuing judge by including false or misleading information in the search warrant affidavit; (2) where the issuing judge wholly abandoned his neutral and detached judicial role; (3) where the search warrant affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]" and (4) when a search warrant was so facially deficient in some technical respect the officer executing the warrant could not reasonably have presumed it to be valid. *Id.* at 923 (citations omitted). None of these exceptions applies here.

[3] In *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012), the United States Supreme Court stated that "[w]here the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.' " (Quoting *Leon*, 468 U.S. at 922-23).

dissenting).

In addition to *Chavez*, *Reed*, and *Goldstein*, Respondent submits that any number of cases from other jurisdictions support the finding the officers in this case acted in objectively good faith reliance on the warrant. *See, e.g., United States v. Zodhiates*, 901 F.3d 137, 143 (2nd Cir. 2018) (acknowledging the *Carpenter* decision was issued during the pendency of that appeal, but holding that "when the Government "act[s] with an objectively reasonable good-faith belief that their conduct is lawful, the exclusionary rule does not apply"); *United States v. Beverly*, 943 F.3d 225, 234 (5th Cir. 2019) ("We hold that the [*Illinois v. Krull*, 480 U.S. 340, 349-50 (1987)] strand of the good-faith exception properly applies to the [CSLI at issue], since it was obtained pursuant to a pre-*Carpenter* warrantless order authorized by statute"); *United States v. Carpenter*, 926 F.3d 313, 317-18 (6th Cir. 2019) *("Carpenter II")* (on remand from Supreme Court, finding that government agents reasonably relied on the SCA at the time they acquired certain CSLI), *sentence vacated on other grds and case remanded*, 788 Fed.Appx. 364 (6th Cir., Dec. 19, 2019); *Pembrook*, 876 F.3d at 823 (applying the good-faith exception to CSLI obtained under the SCA); *United States v. Curtis*, 901 F.3d 846, 847-49 (7th Cir. 2018) (same); *United States v. Davis*, 785 F.3d 498, 511, 518 n. 20 (11th Cir. 2015) (same); *United States v. Joyner*, 899 F.3d 1199, 1204-05 (11th Cir. 2018) (same). *See also United States v. Parrish*, 942 F.3d 289, 293 (6th Cir. 2019) ("[C]ourts will not exclude evidence from trial that was seized 'by officers reasonably relying on a warrant issued by a detached and neutral magistrate'") (quoting *Leon*, 468 U.S. at 913); *United States v. Korte*, 918 F.3d 750, 758 (9th Cir. 2019); *State v. Burke*, 2019-Ohio-1951, ¶¶ 31-33, 2019 WL 2172718, *5 (Oh. Ct. App. 2019), *appeal not allowed,* 157 Ohio St.3d 140, 2019-Ohio-3731, ¶¶ 31-33, 6, 131 N.E.3d 75 (2019) (applying good-faith exception to CSLI acquired by grand jury subpoena); *Reed v. Commonwealth*, 71 Va.App. 164, 834 S.E.2d 505, 510–12 (2019).

Finally, it is clear that any error was harmless beyond a reasonable doubt because proof of identity was conclusively established by other evidence and the CSLI was merely cumulative proof thereof, as argued in the Brief of Respondent at pp. 15-16, and as correctly found by Justice Hearn. *See Warner*, Howard's Adv. Sh. No. 13 at 49 (Hearn, J., dissenting).

V.

Petitioner further argues that this Court should reconsider its holding that the trial judge did not abuse his discretion by refusing Petitioner's request for a *Neil v. Biggers*, 409 U.S. 188 (1972), hearing on the identification of Petitioner by his probation agent, Nathan Goolsby, because Agent Goolsby was not an eyewitness to the crimes. Respondent submits that the Court correctly reasoned that:

> In every case decided by the Supreme Court or by this Court under *Biggers* and the line of cases that led to it, the witness who made the identification was an eyewitness to the crime itself, a witness who observed the crime take place in real time. The Supreme Court has given no reason to believe it would extend the *Biggers* analysis beyond eyewitnesses, nor has this Court. In *Perry*, the Supreme Court prefaced its discussion of the line of cases leading to *Biggers* by stating, "Only when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' have we imposed a constraint tied to the Due Process Clause." 565 U.S. at 237, 132 S. Ct. at 723, 181 L. Ed. 2d at 706 (citations omitted). The dangers of misidentification associated with eyewitness identification that threaten "fundamental conceptions of justice" are simply not present in a situation like the one in this case. While we agree with Warner the detective's question suggested to Goolsby that Warner is the man in the video, we nevertheless find Warner's due process rights do not require a hearing because Goolsby was not an eyewitness to the crime, and thus, *Biggers* does not apply.[8]
>
> [Fn8] Our court of appeals reached the same conclusion in *State v. McGee*, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). There, the court found the identification was not subject to a *Biggers* analysis because the witness who made the identification "was not an eyewitness to the crime." 408 S.C. at 286, 758 S.E.2d at 735. In a recent decision by the Court of Appeals of Maryland on almost identical facts, the court held the "identification is not governed by the due process analysis in *Biggers*." *Greene v. State*, 469 Md. 156, 229 A.3d 183, 193 (2020). Before reaching that conclusion, the Court of Appeals of Maryland conducted a thorough analysis of the same line of Supreme Court cases discussed above. 229 A.3d at 192-94. After our own thorough review of decisions on this point nationwide, we are

> aware of no court that has held the *Biggers* analysis extends to witnesses who are not "eyewitnesses."

See *Warner*, Howard's Adv. Sh. No. 13 at 46 & n. 8.

Respondent submits that the Court properly recognized that his argument has absolutely no legal support in either United States Supreme Court or South Carolina jurisprudence. Petitioner misunderstands the reason the United States Supreme Court created the rule in *Biggers*. As the United States Supreme Court explained in *Manson v. Brathwaite*, 432 U.S. 98, 111-12 (1977), "[t]he driving force behind [*United States v. Wade*, 388 U.S. 218 (1967)], [*Gilbert v. California*, 388 U.S. 263 (1967)] (right to counsel at a post-indictment line-up), and [*Stovall v. Denno*, 388 U.S. 293, 302 (1967)], all decided on the same day, was the Court's concern with the problems of *eyewitness* identification." (Emphasis added). Mr. Goolsby was not an eyewitness, and Petitioner's claim does not warrant rehearing.

CONCLUSION

Based on the forgoing, Respondent submits that the Petition for Rehearing should be denied.

Respectfully submitted,

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