**No. _____**

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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**ULRISTE TULIN — PETITIONER**

**vs.**

**UNITED STATES OF AMERICA— RESPONDENT**

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**ON PETITION FOR A WRIT OF CERTIORARI TO FOURTH CIRCUIT COURT OF APPEALS**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Is an out of court identification of a defendant unduly suggestive and unreliable when the police twice showed the victim the same distorted image of the defendant depicted from a rap poster and his image was the only image that was reoccurring resulting in an unreliable identification for which the victim did not make an in-court identification of the defendant at trial?

II. Is it a violation of the Federal Rules of Evidence 801(d)(1)(C) when the FBI agent testifies about an out of court identification prior to the declarant's testimony wherein the government fails to elicit testimony from the declarant about the identification, and thus the declarant was not subject to cross-examination under the Rule?

III. Is it a violation of a defendant's Confrontation Clause for the court to prohibit defendant's counsel from using as real evidence a victim's courtroom demeanor?

IV. Is it a violation of the defendant's due process rights for the government to shift the burden to the defense to produce evidence at trial during closing arguments?

V. Whether a trial court misapply the correct standard when the court relies on the factual determinations of the jury instead of its own assessment of the evidence for a motion for a new trial pursuant to the Federal Rules of Criminal Procedure 33?

VI. Whether witness testimony, on more than one occasion, reveals that a rape was committed during a kidnapping, by someone other than the defendant, create a prejudice that is too significant to overcome with any curative instruction to the jury?

## LIST OF PARTIES

In addition to the parties listed in the caption of the case on the cover page, Monclaire Saint Louis was a defendant in the district court and an appellant in the court of appeals.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Ulriste Tulin respectfully petitions for a writ of certiorari review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the petitioner's conviction appears at Appendix A and is report at *United States v. Saint Louis,* 889 F.3d 145 (4th Circuit 2018).

## JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion on May 2, 2018. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part: " No person shall…be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…" U.S. Const. amend. VI.

Federal Rule of Criminal Procedure 33(a) provides, in pertinent part: "Upon the defendant's motion, the court may vacate the judgment and grant a new trial if the interests of justice so requires." Fed. R. Crim. P. 33(a).

Federal Rule of Evidence 801(d)(1)(C) provides, in pertinent part: [t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . identifies a person as someone the declarant perceived earlier." Fed. R. Evid. 801(d)(1)(C)

## STATEMENT OF THE CASE

The Petitioner, Ulriste Tulin, was convicted of conspiracy to commit hostage taking (18 U.S.C. § 1203), two substantive counts of hostage taking and aiding and abetting hostage taking (18 U.S.C. § 1203, 2), and using a firearm during a crime of violence (18 U.S.C. § 924).

In June of 2012, a group of men kidnapped Yvroseline Fergile from in front of a residence in Carrefour, Haiti. Six days later, Ms. Fergile escaped her captors. After learning of the escape, the appropriate Haitian authorities went to the site of the kidnapping to investigate. While there, the agents collected several items, including a poster of a Haitian rap group of which Mr. Tulin is a member. The poster contains pictures of the group's members. Agents showed the poster to Ms. Fergile. Ms. Fergile recognized the pictures of [two of the rap group members] Top M.S.T. and Kwason, as they were known. She did not at that time implicate Mr. Tulin, identified on the poster as "Blade."

A little over three months later, on September 12, 2012, the FBI interviewed Ms. Fergile as part of the investigation. The FBI showed her several photo arrays, one of which was for Mr. Tulin. The photo of Mr. Tulin that the FBI used for the array was a close-up headshot of Mr. Tulin's picture from the rap group poster. At this point, some three months later, Ms. Fergile for the first time identified Mr. Tulin as a participant in the kidnapping, according to the FBI. Ms. Fergile stated that she was shown a poster of a rap group and Mr. Tulin was one of the individuals depicted in the poster.

The evidence linking Mr. Tulin to the events charged in the indictment was sparse indeed, and perhaps the most critical piece of that evidence consists of the hearsay testimony of an FBI Agent who testified that one of the victims, Ms. Fergile, identified Mr. Tulin in a photo array conducted three months after the events. Notably, in the immediate aftermath of the subject kidnappings, Ms. Fergile had not identified Mr. Tulin, though she was shown the exact same picture that the FBI used three months later in its photo identification procedure. The FBI's re-use of the same photo of Mr. Tulin was unnecessary; as other options were available to obtain other photos of Mr. Tulin, including a photo from his government issued identification card. Nevertheless, the FBI inexplicably failed to pursue those other options.

Prior to trial, Mr. Tulin filed a motion to suppress any out-of-court identification testimony and in-court identification evidence and testimony as the identification procedures used to procure that identification were unnecessarily suggestive and legally flawed in violation of the Due Process Clause of the United States Constitution. The district court denied the motion with prejudice.

At trial, Agent Watson testified about the poor quality of the photograph of Mr. Tulin (confirming that Tulin's image in the array is "distorted", is "darker than the rest" and is obviously "digitalized", "more difficult to see features"). Agent Watson testified that he failed to secure Ms. Fergile's confidence level of the identification for the photo array and failed to solicit any prior identification description from Ms. Fergile. Additionally, Agent Watson's contemporaneous notes did not include a statement that Fergile positively identified Tulin from the photo array. Notwithstanding, the court allowed Agent Watson to testify, over objection, that Ms. Fergile identified Mr. Tulin from the photo array. Subsequently, when Ms. Fergile testified, the government did not ask Ms. Fergile to make an in-court identification of Mr. Tulin nor ask her to repeat the photo array identification despite the fact she was looking at the photo of Mr.

Tulin during her testimony and the photo arrays themselves were admitted into evidence. Notwithstanding, the government asked the other named victim, Ms. Marcelin to make an in-court identification where she positively identified the co-defendant, Moncalire Saint Louis, as the kidnapper. Ms. Marcelin testified that she saw her captors and heard their voices, and that, having previously employed Mr. Tulin, she was very familiar with him and knew him well. Like Ms. Fergile, Ms. Marcelin never identified Tulin as one of the perpetrators. While exiting the witness stand, but still in the courtroom and within plain sight of the jury, Ms. Marcelin purposefully waved and smiled at Mr. Tulin. The district court prohibited counsel from making any references to or arguments to the jurydespite legal precedent that establishes that witnesses' demeanor is part of the evidence before the jury, the district court prohibited Tulin's counsel from commenting on the demeanor of one of the witnesses.

Additionally, highly prejudicial testimony about one of the kidnappers, not Mr. Tulin or the co-defendant Mr. Saint Louis, who raped Ms. Marcelin niece, came out at trial, despite the fact that the district court had granted a pre-trial motion *in limine* to preclude such testimony. The court denied multiple motions to suppress the identification and refused to grant a mistrial.

## REASONS FOR GRANTING THE PETITION

This case presents the Court with an excellent vehicle through which to resolve among the lower federal and state courts on whether the Due Process Clause and Confontation Clause are violated when hearsay testimony regarding a witness's prior identification of a defendant after the police showed the victim the same photograph of the defendant when she initially did not identify the defendant. Additionally, this case is an excellent vehicle through which to resolve a spilt among the federal circuits about the right for a defendant to confront a witness's demeanor in court as real evidence. The issues are of substantial legal and practical importance.

### I. Is an out of court identification of a defendant unduly suggestive and unreliable when the police twice showed the victim the same distorted image of the defendant depicted from a rap poster and his image was the only image that was reoccurring resulting in an unreliable identification for which the victim did not make an in-court identification of the defendant at trial?

### A. Agent Watson's testimony about Ms. Fergile's out-of-court identification of Mr. Tulin during a photo array violated Mr. Tulin's Due Process rights.

FBI Agent Watson testified that Ms. Fergile (one of the victims) positively identified Mr. Tulin during a photo array conducted by the FBI several months after the facts in question and after Ms. Fergile had previously failed to identify Tulin during a similar procedure in Haiti in the immediate aftermath of those events. The testimony was admitted over hearsay and constitutional objections. *Id.* The process that produced that purported identification was unduly suggestive and completely unreliable. That testimony thus violated Mr. Tulin's Due Process rights and should have been precluded. *Foster v. California*, 394 U.S. 440 (1969). When the process that produces

an identification is overly suggestive or unfair, the defendant is entitled to have any out-of-court and expected in-court identification testimony suppressed. *Simmons v. United States*, 390 U.S. 377 (1968); *Williams v. Lockhart*, 736 F.2d 1264, 1266 (8th Cir. 1984).

In *Manson v. Brathwaite*, 432 U.S. 98 (1977), the Supreme Court elaborated on the standards to use in determining the procedure for a motion to suppress due to suggestive pre-trial identification. The Court held that "reliability is the linchpin" in determining the admissibility of identification testimony and applied the "totality of the circumstances" standard of *Stovall v. Denno*, 388 U.S. 293 (1967).

**The process that produced Ms. Fergile's identification of Mr. Tulin was unnecessarily suggestive and unfair, as the Haitian authorities' use of the rap poster was tantamount to a "show up" identification.**

The testimony was clear and unequivocal that, before ever identifying Mr. Tulin as an alleged participant in the charged crimes, Haitian authorities showed Ms. Fergile a poster of a rap group that included Mr. Tulin's picture along with other members of the group who were known to have participated in the subject kidnappings. The Haitian authorities' action in showing that poster to Ms. Fergile amounted to a show-up identification, whereby the authorities themselves were showing Ms. Fergile pictures of those they believed were involved in the kidnappings, thereby unmistakably suggesting to Ms. Fergile that the authorities believed all persons pictured in the poster were involved in the kidnappings, rather than letting Ms. Fergile make that determination. *See, e.g., Stanley v. Cox*, 486 F.2d 48, 51 (4th Cir., 1973) ("suggestiveness is inherent in th[is] situation"); *cf. Simmons v. United States*, 390 U.S. 377, 383 (1968) (permitting use of group photos in identification procedure where the groups consisted of the suspects "and others").

In *Carter v. Bell*, 218 F.3d 581, 605-06 (6th Cir. 2000), the defendant challenged admission of identification testimony that resulted from the identifying witness being shown only the pictures of suspects. The Sixth Circuit noted that this constituted an "improper photo identification procedure" that has been "widely-condemned" because of the suggestive nature of the procedure. *Id.; see also Abrams v. Barnett*, 121 F.3d 1036, 1041 (7th Cir. 1996) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 for the proposition that "the use of show-up identification procedures has been widely condemned" (internal quotation marks omitted). And so it is. By showing Ms. Fergile the poster containing the pictures of only those individuals the Haitian authorities considered suspects in the kidnappings, they employed a patently improperly photo identification technique that taints the entirety of the resulting identification.

**The FBI photo array, conducted some three months after the Haitian authorities showed Ms. Fergile the rap poster with Mr. Tulin's image, used the same image of Mr. Tulin from that poster and did so in a manner that was flawed for other reasons.**

Despite the patently improper suggestive conduct by the Haitian authorities, Ms. Fergile did not identify Mr. Tulin as one of the alleged kidnappers at that time. Ms. Fergile is certain she identified Kwason, not Mr. Tulin. When the FBI later interviewed Ms. Fergile and showed her a photo array months later, the agency used the headshot of Mr. Tulin from the same poster shown

to her by the Haitian authorities. It was not until that same picture of Mr. Tulin from that same poster was included in an FBI photo array many months after her initial interactions with the Haitian authorities that Ms. Fergile suddenly implicated Mr. Tulin. Notably, when Ms. Fergile identified Mr. Tulin in the FBI photo array, she told the agent she expressly remembered having seen that photo of Tulin on the poster the Haitian authorities showed her – something she may have told him before he even showed her the array. Yet, it is worth repeating, she did not identify Mr. Tulin as a perpetrator when first shown that image in the immediate aftermath of the kidnapping.

Something happened between the investigation conducted by the Haitian authorities and the FBI interview that materially altered Ms. Fergile's reaction to the picture of Mr. Tulin on the rap poster. Notably, Ms. Fergile never identified Tulin at trial as one of her kidnappers; she did not even repeat the identification of the photo of Tulin. Something about the FBI's recycling and use of the same picture of Mr. Tulin from the rap poster plainly and inappropriately influenced Ms. Fergile's "recollection." If nothing else, continued use of that same photo by the FBI perpetuated the idea that the authorities suspected Mr. Tulin was guilty of involvement in the crimes charged. It is unnecessarily suggestive for authorities to repeatedly show a witness the same photograph of the accused in successive arrays. As the Northern District of Illinois has said:

> [T]he possibility of a mistaken identification is increased where witnesses are shown collections of photographs in which the picture of a single individual recurs. *Simmons v. United States*, 390 U.S. 377, 383, 88 S.Ct. 967, 970-71, 19 L.Ed.2d 1247 (1968). The danger inherent in repetitious showings of a particular photograph is the likelihood that an identification will result from recognition of a particular individual's photograph rather than the witness' recollection of the actual assailant. *Id.*; *United States v. Eatherton*, 519 F.2d 603, 608 (1st Cir. 1975). Generally, this danger is enhanced when it is shown that a witness was equivocal on the first showing and later became firm after viewing subsequent arrays in which only the photograph of one individual recurs. *United States v. Higginbotham*, 539 F.2d 17, 23 (9th Cir. 1976).

*US ex rel. Kubat v. Thieret*, 679 F. Supp. 788, 801 (N.D. Ill., 1988). As that court went on to observe, "the danger of a mistaken identification [in such a situation] is substantially reduced *when different photographs are used and particularly where the second photograph differs greatly from the first.*" *Id.* (emphasis added).

The Northern District's statements are directly on point here and in conflict with the Fourth Circuit Court of Appeals opinion in Tulin. As noted above, Ms. Fergile did not identify Mr. Tulin from the poster when Haitian authorities showed it to her in June of 2012. Three months later, when the FBI showed her the same picture, she was, according to Agent Watson, suddenly firm in her identification, though the Agent had to admit that Ms. Fergile made her supposed identification by reference to her memory of the rap poster she was shown in the aftermath of the events. The FBI did nothing to mitigate the significant risk of a false identification that resulted from repetitive use of the same photos, despite the fact that there were some steps that could have been easily taken in that regard. The agent could have easily asked the Haitian government for a government

identification photograph or could have tried to use a different picture from Facebook or YouTube videos – both of which the agent knew to exist, however, he did neither.

Notably, after Ms. Fergile confirmed at trial that she had indeed initially identified Kwason rather than Mr. Tulin, the government went silent on the issue. The government did not ask her so much as a single question about the identification – no attempt to explain why she identified Kwason initially and later Mr. Tulin. Ms. Fergile never identified Tulin at trial as one of her kidnappers; the only identification evidence was the hearsay testimony of Agent Watson. And the government made no attempt to flesh out questions that would allow the government to defend its apparently indefensible identification procedures. The government did nothing to remove or otherwise ameliorate the taint of the suggestive, defective identification procedure followed in this case. As the proponent of the evidence, the government bore the burden of establishing its appropriateness and admissibility. The government did not do so. Ms. Fergile's testimony effectively gutted any thought the government may have had of being able to do so. These procedures were plainly inappropriate and plainly do not pass constitutional muster. *Foster v. California*, 394 U.S. 440, 443 (1969) (unconstitutional for authorities to utilize photo procedures that "ma[ke] it all but inevitable" that the identifying witness will pinpoint the defendant where the procedure notifies the identifying witness that the authorities think it was the defendant who committed the crime).

It is also critical to note that Mr. Tulin previously filed a motion to suppress testimony about Ms. Fergile's purported identification of Mr. Tulin during the FBI photo array, arguing that the unreliability of the process and the inconsistency engendered by the fact that Ms. Fergile initially identified Kwason, not Mr. Tulin, as a perpetrator rendered the testimony inadmissible. In an effort to salvage the admissibility of the identification testimony, the government attempted to justify the offered by pure speculation that Ms. Fergile had actually identified Mr. Tulin, not Kwason, from her initial view of the poster and that there was some miscommunication with the Haitian authorities that resulted in them recording that Ms. Fergile identified Kwason instead of Mr. Tulin. However, Ms. Fergile completely discredited the government's conjecture, affirming unambiguously that she had in fact initially implicated Kwason and not Mr. Tulin.

This undisputed critical testimony completely undermines the government's theory of consistency and reliability. Particularly in light of this testimony, there is simply no way for the government to posit, and no basis upon which the court can find, that the identification process was either consistent or reliable. Ms. Fergile has put that question to rest – she unquestionably identified different individuals at different times, and – according to the hearsay testimony of the FBI Agent - only identified Mr. Tulin after authorities repeatedly showed her the same photo of Mr. Tulin on different occasions spanning several months. It bears repeating that she herself never confirmed or repeated this alleged identification in court, and one can only wonder why the government did not ask her to do so.

Indeed, the prejudice and unreliability of this process is further underscored by the fact that Fergile did not identify Mr. Tulin at trial. When asked whether she had identified persons pursuant to the photo array procedure, Ms. Fergile could only say "I think so," though she could not say with assurance how many she had identified or who they were; she was "not too sure" about the procedure. The substantial prejudice is also confirmed by the government's own closing argument, wherein it stated to the jury that "[i]dentification … is the strongest part of this case." That certainly is not true as to Mr. Tulin; in fact, the identification testimony is so fundamentally flawed

as to have deprived Mr. Tulin of substantial constitutional right. Moreover, in light of Ms. Fergile's own testimony, there is no theory of reliability or consistency left.

In addition to the fact that the photo in the array is merely an enlarged close-up of Mr. Tulin's picture from the poster, and that Fergile did not initially identify Tulin when shown that poster in the immediate aftermath of the events, there are other problems with the photo array that make its use inappropriate and unconstitutional. Mr. Tulin's photo in the array is darker, appears to be digitalized, and is not as clear. *See, e.g., U.S. v. Storey*, 97 F.3d 1465 (10th Cir. 1993) (quoting case law for the proposition that in assessing the constitutionality of a photo array courts consider "the size of the array, the manner of its presentation by the officers, and the details of the photographs themselves."). Agent Watson himself confirmed these problems with the photograph. (confirming that Mr. Tulin's image in the array is "distorted", is "darker than the rest" and is obviously "digitalized", "more difficult to see features"). The array photo is such that it is nearly impossible to make out any facial features of Mr. Tulin. *Id.* The photo is of such poor quality when compared to the others in the array, and when compared to those in other arrays shown to Fergile, that it plainly stands out from the rest of the photos and requires closer attention to scrutinize. *See, e.g., Storey*, 97 F.3d at 1465 (photo is constitutionally problematic where it "lead[s] the eye of the unguided viewer to [the defendant's] photograph"); *U.S. v. Mays*, 822 F.2d 793, 798 (8th Cir. 1987) ("differences in appearance tending to isolate the accused photograph" renders a photo array unnecessarily suggestive).

Again, Agent Watson's testimony itself confirmed the poor quality of the photograph. These facts are of particular importance given that there were only six photos in the Mr. Tulin photo array. *See, e.g., Storey*, 97 F.3d at 1465 (even "minor differences in the photographs can have a greater effect in an array consisting of a small number of photographs" and thus the court "must pay particular attention to the alleged irregularities between the photographs" "[b]ecause there were only six photographs presented in [the subject] photographic array").

And the procedure followed by the FBI here, three months after the crime, was not necessary; there were no exigent or other circumstances that precluded use of a photo array properly insulated from the suggestive influences present here. *See, e.g., Stovall v. Denno*, 388 U.S. 293 (1967) (permitting suggestive identification procedures under exigent circumstances). Nothing in the testimony or evidence introduced at trial indicates that there was any emergency or urgent circumstances that would justify use of this flawed procedure. *Brathwaite*, 432 U.S. at 109 (for suggestive procedure to be "necessary" there must be an "emergency or exigent circumstance"). Indeed, just the opposite. The testimony was that the authorities did not even go look for Mr. Tulin in the immediate aftermath of the subject events. The authorities did very little, if anything, in the immediate aftermath of the kidnappings to try to locate or communicate with Mr. Tulin.

For the forgoing reasons, Mr. Tulin was entitled to have all evidence of the identification from the photo array suppressed. When the process that produces an identification is overly suggestive or unfair, the defendant is entitled to have any out-of-court and expected in-court identification testimony suppressed. *Simmons v. United States*, 390 U.S. 377 (1968); *Williams v. Lockhart*, 736 F.2d 1264, 1266 (8th Cir. 1984). As the Fourth Circuit has observed, in circumstances such as those present in this case, "as the Supreme Court has said, the witness 'is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent . . . courtroom identification.'" *U.S. v. Saunders*, 501

F.3d 384, 390 (4th Cir. 2007) (quoting *Simmons*, 390 U.S. at 383-84); *see also United States v. Workman*, 470 F.2d 151, 153 (4th Cir. 1972) (in-court identification testimony precluded because of pre-trial out-of-court taint from the photo identification procedure used); *Kimbrough v. Cox*, 444 F.2d 8, 11 (4th Cir. 1971) (same).

Furthermore, the Fourth Circuit Court of Appeals ruling in Tulin is in conflict with other federal and state court on this issue. The Ninth Circuit Court of Appeals found the identification procedures were impermissibly suggestive, as a matter of federal constitutional law, when only the defendant's photo, was repeatedly shown to the witness. *Heath v. Hill*, 397 Fed. Appx. 308 (9th Cir. 2010). The Second Circuit Court of the Appeals held that the defendant's Due Process rights were violated when the police repeatedly showed the victim photos of the defendant and the victim was uncertain that the defendant was the preparator during the first viewing of the photo. In *People v. Tindal, 69 A.D.2d 58, 418 N.Y.S.2d 815* (4th Dep't 1979), the court properly suppressed the identification when the victim was shown two groups of photographs in which only the same photograph of the defendant recurred. In *State v. Ledbetter*, 185 Conn. 607, 441 A.2d 595 (1981), the court held that recurrence of only a criminal defendant's photograph in two arrays displayed by the police to a robbery victim who identified the defendant after viewing both arrays was impermissibly suggestive. Similarly, in *People v. Hall*, 81 A.D.2d 644, 438 N.Y.S.2d 148 (2d Dep't 1981) two arrays in which only the defendant's photograph recurred was unduly suggestive, as a matter of federal constitutional law and held that the process of displaying only the defendant's picture twice in a short span of time was fraught with the possibility that the identification resulted from the procedure used and not the witness's recollection.

**II. Is it a violation of the Federal Rules of Evidence 801(d)(1)(C) when the FBI agent testifies about an out of court identification prior to the declarant's testimony wherein the government fails to elicit testimony from the declarant about the identification, and thus the declarant was not subject to cross-examination under the Rule?**

In addition to violating the Due Process Clause, admission of the testimony about Ms. Fergile's out-of-court identification of Mr. Tulin during the photo array violates the rule against hearsay. This Court reviews a district court's hearsay rulings for abuse of discretion. *United States v. Gonzales-Flores*, 701 F.3d 112, 117 (4th Cir. 2012).

Admission of Agent Watson's testimony, over objection, about Ms. Fergile's out-of-court identification of Mr. Tulin also should have been excluded as hearsay. The Government attempted to justify admission of that testimony based on Federal Rule of Evidence 801(d)(1)(C), but the requirements of that Rule were not met in this case. J.A. 725-26. That Rule provides that testimony about prior out-of-court identifications is not hearsay, so long as the declarant testifies and is subject to cross-examination about the statement. *See also U.S. v. Bailey*, 817 F.2d 102 (4th Cir. 1987) (agent allowed to testify to out-of-court identification where declarant testified and statements "were subject to cross-examination").

Here, Ms. Fergile testified, but the Government did not ask her any questions about the identification, apparently preferring to rely solely on Agent Watson's testimony about the identification and not attempt to confirm his testimony with testimony from the actual declarant. Be that as it may, the Government never asked Ms. Fergile a single question about the identification and thus she was not subject to cross-examination concerning it. The Government failed to lay the foundation for admissibility under Rule 801(d)(1)(C).

**III. Is it a violation of a defendant's Confrontation Clause for the court to prohibit defendant's counsel from using as real evidence a victim's courtroom demeanor?**

Ms. Marcelin, one of the victims of the charged crimes, testified. She confirmed that saw her captors and heard their voices, and that, having previously employed Mr. Tulin, she was very familiar with him and knew him well. Like Ms. Fergile, Ms. Marcelin never identified Tulin as one of the perpetrators. While exiting the witness stand but still in the courtroom and within plain sight of the jury, Ms. Marcelin (one of the two victims) purposefully waved and smiled at Mr. Tulin. Mr. Tulin, through counsel, brought this fact to the court's attention; however, the court precluded counsel from making any references to or arguments from this action to the jury. Mr. Tulin respectfully submits that this ruling constituted prejudicial error in violation of the Confrontation Clause. This Court reviews de novo a district court's evidentiary rulings implicating the Confrontation Clause. *United States v. Summers*, 666 F.3d 192, 197 (4th Cir. 2011).

In Barber v. Page, 390 U.S. 719, 725 (1968), the court said:

> Many years ago this Court stated that '(t)he primary object of the (Confrontation Clause of the Sixth Amendment) was to prevent depositions or ex parte affidavits being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' *Mattox v. United States*, 156 U.S. 237, 242—243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895). More recently, in holding the Sixth Amendment right of confrontation applicable to the States through the Fourteenth Amendment, this Court said, 'There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' *Pointer v. State of Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065 1068, 13 L.Ed.2d 923 (1965). *See also Douglas v. State of Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

*Barber v. Page*, 390 U.S. 719, 721 (1968); *see also California v. Green*, 399 U.S. 149, 158 (1970) (Confrontation Clause rights include the right of the jury to consider and assess the demeanor of the witnesses); *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990) (Confrontation Clause serves several functions including "permit[ing] the jury that is to decide the defendant's fate to observe

the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility (internal quotation marks omitted); *Cross v. Hardy*, 632 F.3d 356, 362 (7th Cir., 2011) ("the jury's ability to evaluate a witness's demeanor via live testimony is the foremost concern of the Confrontation Clause"); *U.S. v. Curbello*, 940 F.2d 1503, 1506 (11th Cir. 1991) ("the underpinnings of the Confrontation Clause [are] the opportunity to cross-examine and the opportunity to weigh the demeanor of the witness"); *United States v. De Jesus–Casteneda*, 705 F.3d 1117, 1121 (9th Cir., 2013) ("[B]ody language" is a "key element of one's demeanor that shed[s] light on credibility.").

Or as the Second Circuit explained long ago:

> It is true that the carriage, behavior, bearing, manner and appearance of a witness — in short, his "demeanor" — is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

*Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2nd Cir., 1952). This explanation echoed the following case, which the Second Circuit decided a few years prior:

> For the demeanor of an orally-testifying witness is "always assumed to be in evidence." It is "wordless language." The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, ***his gestures***, and the like — all matters which "cold print does not preserve" and which constitute "lost evidence" so far as an upper court is concerned.

*Broadcast Music v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2nd Cir., 1949) (bold italics added).

Many other courts have issued similar statements. The Seventh Circuit, for example, long ago quoted Learned Hand on this subject:

> "the carriage, behavior, bearing, manner and appearance of a witness — in short, his `demeanor' — is a part of the evidence. . . . We have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story . . . ." *Dyer v. MacDougall*, 201 F.2d 265, 268-269 (2d Cir. 1952) (footnote omitted).

*United States v. Scher*, 476 F.2d 319 (7th Cir., 1973); *see also U.S. v. D'Allerman*, 712 F.2d 100, 104 (5th Cir. 1983) (noting that district court assessed defendant/witness's credibility by reference to demeanor in the courtroom as well as on the witness stand).

It is readily apparent then, that under a wealth of authorities, witness "demeanor is regarded as a sort of 'real evidence.'" *Aylett v. Secretary of Housing and Urban Development*, 54 F.3d 1560, 1566 (10th Cir. 1995); Ettinger v. Johnson, 556 F.2d 692 (3d Cir. 1977) (demeanor evidence is "real evidence"). Mr. Tulin, through his counsel, should have been permitted make use of Ms. Marcelin's "demeanor evidence" (The government was allowed to comment and draw the jury's attention to Mr. Tulin's demeanor at counsel's table.). The Court's ruling to the contrary, denied Mr. Tulin his rights under the Confrontation Clause. This Court should so hold, reverse Mr. Tulin's convictions, and remand for further appropriate proceedings.

## IV. Is it a violation of the defendant's due process rights for the government to shift the burden to the defense to produce evidence at trial during closing arguments?

During closing arguments, the government stated that Mr. Tulin failed to present evidence for the jury to consider. As is fairly common, Tulin's counsel had taken the government to task for failing to present certain evidence, appropriately arguing in effect (among other things) that the government had fallen short on its burden of proof. The government responded in kind, which is completely improper. Specifically, the government responded by declaring to the jury that "[w]hat evidence exists on a physical level is available to both parties. Why didn't [Tulin's counsel] introduce it?" The government continued its challenge to Tulin's failure to produce certain evidence: "Why didn't [Tulin's counsel] ask any of those questions of the Haitian police officers? Why didn't [Tulin's counsel] ask any of those questions of the FBI? Because [Tulin's counsel] was saving it for closing because that's the only place she might catch somebody to believe it."

Perhaps realizing the patent inappropriateness of these arguments, the government did intersperse the single statement that "[Tulin] doesn't bear the burden, I do," but that certainly is not the idea that the government conveyed with its arguments. The government was plainly chastising Tulin (via his counsel) for failing to produce certain evidence. Once that patently improper, and indeed unconstitutional, idea has been expressly planted in the jury's collective head, the single rote recitation of the applicable law on the burden of proof is insufficient to cure the resulting prejudice. It is the most basic axiom of criminal law that the defendant does not have the burden to produce anything whatsoever; the burden of proof rests entirely on the government and government arguments that so much as suggest a shifting of that burden are unlawful. Here, the government's arguments should be deemed as burden-shifting and unconstitutional. Mr. Tulin presented this argument to the district court, to no avail. This Court exercises plenary review over claims that a defendant's due process rights were violated. *Shealy*, 641 F.3d at 633.

A burden-shifting argument occurs where a prosecutor makes a comment on a defendant's failure to testify, to produce evidence, or in even the form of a statement that the prosecutor's evidence is uncontradicted. *See e.g., Lockett v. Ohio*, 438 U.S. 586, 594-95 (1978). A prosecutor may not shift the burden of proof to the defendant, *Patterson v. New York*, 432 U.S. 197, 215 (1977), or "suggest that the defendant ha[s] the burden of proof or *any* obligation to produce

evidence to prove his innocence." *Joseph v. Coyle*, 469 F.3d 441, 474 (6th Cir. 2006) (quoting United States v. Clark, 982 F.2d 965, 968-69 (6th Cir. 1993)) (emphasis added); *see also Sandstrom v. Montana*, 442 U.S. 510, 512-13 (1979) (holding due process was violated when jury could have interpreted instruction to relieve the state of its burden of proof.

Courts have recognized that proper instructions by the trial court may suffice to prevent undue prejudice and make the misconduct harmless. *See United States v. Cruz*, 797 F.2d 90, 93 n. 1 (2d Cir. 1986) (affirming a conviction despite prosecutor's language "the defense . . . has to convince you", because it was cured by trial court's instructions); *United States v. Skandier*, 758 F.2d 43, 45 (1st Cir. 1985) (finding prosecutor's burden-shifting remarks harmless in light of curative measures).

Here, the district court erred when it did not take curative measures after an objection was raised. Without such measures, a court cannot be confident that the jury did not consider the government's argument shifting the burden to the defendant, thus prejudicing Mr. Tulin and violating his rights to a fair trial. This Court should hold that the government's improper burden shifting argument violated Mr. Tulin's constitutional rights and requires reversal of his convictions.

## V. Whether a trial court misapply the correct standard when the court relies on the factual determinations of the jury instead of its own assessment of the evidence for a motion for a new trial pursuant to the Federal Rules of Criminal Procedure 33?

Mr. Tulin challenged the sufficiency of the evidence to support his conviction, filing a Motion for New Trial that urged those grounds and others as a basis for relief. Rule 33(a) provides: "Upon the defendant's motion, the court may vacate the judgment and grant a new trial if the interests of justice so requires." Fed. R. Crim. P. 33(a). When the Rule 33 motion "attacks the weight of the evidence, the court's authority is much broader than when it is deciding a motion to acquit on the ground of insufficient evidence" in that "it may evaluate the credibility of the witnesses." *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985). "[T]he court may consider the credibility of witnesses and need not view the evidence in the light most favorable to the government in determining whether to grant a new trial." *United States v. Souder*, 436 Fed.Appx. 280, 289 (4th Cir. 2011) (citation omitted). This Court reviews the denial of motion for new trial for abuse of discretion. *United States v. Bartko*, 728 F.3d 327, 334 (4th Cir. 2013).

Here, once the unconstitutional identification evidence from Ms. Fergile is excluded (evidence that also violates the hearsay rule), the only evidence connecting Mr. Tulin to the charged crimes comes from a single source – the self-serving, obviously perjured testimony of Samson Jolibois.

Mr. Jolibois cut a deal with the government to avoid the prospect of life imprisonment and was providing testimony in this case in hopes of getting a further reduction of his 16-year sentence. While that fact standing alone is not terribly uncommon in multi-defendant cases, here Mr. Jolibois obviously perjured himself, repeatedly contesting information that he himself had previously given the government, casting aspersions on the very investigative process that led to this case, as well as the law enforcement professionals conducting the investigation, and casting serious doubt on the veracity of his testimony and completely undermining his own credibility as a witness.

The Court simply must consider that after Mr. Jolibois cut a deal to save himself and now has incentives to help the government convict others in an effort to gain more leniency; Mr. Jolibois' testimony has significantly changed in many highly material respects. At trial, Mr. Jolibois said, for the first time, that Mr. Tulin actually held a gun on him and forced him to allow the victims to stay in a house associated with Mr. Jolibois. He also expressly disavowed information that he had given Agent Watson and the Haitian authorities about being a leader and the one that carried the gun and made every effort to paint Mr. Tulin as the leader of the kidnapping ring. Despite never having told Agent Watson that Mr. Tulin went into Ms. Marcelin's house during her kidnapping, Mr. Jolibois now avers that Mr. Tulin – whom Mr. Jolibois said had wanted to avoid recognition by Ms. Marcelin – did in fact go into the house at some point. His simple explanation for the discrepancy is that he "didn't have to tell the[ police] that" when he spoke to them. He also changed his story to assert that it was Mr. Tulin who provided the information to facilitate the Ms. Marcelin kidnapping rather than the individual he had previously implicated. Mr. Jolibois also disputed Agent Watson's report about what he did with the ransom money.

Mr. Jolibois elaborated at length in ways that were either directly contrary to the official reports or were details that one would certainly expect to find in those reports. He affirmatively accused the law enforcement officers who filled out those reports of "lying." The government puts forth no evidence the law enforcement report and the agents were untruthful. Agents and police interviewed Mr. Jolibois in accordance with their professional duties of investigation kidnappings. In contrast, Mr. Jolibois testified as a self-confessed felon trying to obtain further relief from a 16-year sentence by implicating others and contradicting himself and law enforcement officers in doing so.

Mr. Jolibois' testimony simply cannot be credited by any rational fact finder. He went to great lengths to avoid saying he "escaped" from prison, despite having previously told authorities that he had in fact done so. He denied the obvious fact that his reason for using a different name after escaping from prison was to avoid detection, offering perfectly innocent, but perfectly implausible explanations for the change, despite having previously told authorities that the purpose for the change was to avoid problems with police. He testified that, with respect to the rap group, he was "responsible for the group," but at the same time was not trying to get them jobs because he "didn't know anything about music" and "[t]hey already had their musical group." Mr. Jolibois ultimately admitted to having duped his kidnapping cohorts out of portions of the ransom money.

Much of the time Mr. Jolibois testified, he simply refused to give straight answers, preferring to give narratives that he undoubtedly hopes will help his efforts to get his lengthy sentence reduced. Hardly a word came out of Mr. Jolibois' mouth that did not contradict himself or the law enforcement officers who investigated the case, or both. He was either lying at the time of his initial interviews with authorities, or was lying at trial, or both. Either way, there is no way the Court can place any confidence in Mr. Jolibois' testimony. He was obviously willing to say or do anything to try to help himself curry favor with the government, all other considerations notwithstanding. Taking all of this together, the weight of the evidence cannot support Mr. Tulin's conviction.

And with all due respect to the court, Mr. Tulin submits that that court effectively misapplied the analytical framework applicable to Mr. Tulin's Rule 33 Motion. Specifically, in addressing Mr. Tulin's argument that the weight of the evidence entitled him to a new trial, the district court stated:

> … Mr. Jolibois' testimony was compelling, *and the jury obviously believed that, that these events occurred in the manner Mr. Jolibois testified*. He was subject to rigorous cross-examination. *The jury made the factual decisions that they (sic) made*, although he was impeached on – in part on some of his testimony, *but his story was found believable and credible by the jury, who makes the factual decisions*.

It is evident then, that in considering Mr. Tulin's argument that the weight and weakness of the evidence entitled him to a new trial, the district court relied on the apparent factual determinations of the jury. But, under Rule 33, the court is to make its own assessment of the evidence, including but not limited to the credibility of the various witnesses. *Arrington*, 757 F.2d at 1485. The court's statements suggest that it misapplied the analytical approach and standard to Mr. Tulin's Rule 33 Motion. That fact constitutes an abuse of discretion. "A 'court by definition abuses its discretion when it makes an error of law.'" *Brodziak v. Runyon*, 145 F.3d 194, 196 (4th Cir. 1998) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

The Fourth Circuit addressed a nearly identical situation in *Gill v. Rollins Protective Services Co.*, 773 F.2d 592 (4th Cir. 1986). There, the district court confused the analysis applicable to a new trial motion, instead applying the standard applicable to a JNOV motion. This Court did not hesitate to find an abuse of discretion:

> In this case, the district court confused the standard for ruling on a new trial motion with the standard for considering a JNOV motion. Specifically, the district court made two statements which illustrate the court's application of the wrong standard. First, the district court explained that the jury's "resolution of [the case] is binding on me." (JA 383). This statement is clearly at odds with the duty of a trial judge on a motion for a new trial to "weigh the evidence and the credibility of the witnesses" to see whether the verdict is "against the clear weight of the evidence ... or will result in a miscarriage of justice." Wyatt, 623 F.2d at 842. In no way was the district court so bound that he had no discretion in ordering a new trial as he seems to say here.
>
> The district court also stated that "I now in effect would have to be saying that as a matter of law the plaintiff has to recover on the evidence in the case." Such a statement is consistent with the standard for a motion for JNOV, not a motion for a new trial. It contemplates that no rational jury could have reasonably returned a verdict in the defendant's favor after viewing the evidence in the light most favorable to the defendant, whereas, in deciding whether to grant a new trial, a district court must simply consider whether the verdict was against the clear weight of the evidence and is unfair.
>
> Consequently, we conclude that the district court applied the wrong standard in considering the appellants' motion for a new trial. Although the grant or denial of such a motion may "be reversed only upon a showing of abuse of discretion," Abasiekong, 744 F.2d at 1059, the application of the wrong standard in considering a motion for a new trial is plainly just such an abuse of discretion.

*Id.* at 595.

In short, once the improper identification evidence is excluded from consideration, the remaining evidence (or lack thereof), such as it is, certainly meets the criteria for a new trial under Rule 33; for the reasons stated above, Mr. Jolibois is completely and utterly devoid of any credibility whatsoever. As that testimony is the only evidence linking Mr. Tulin to the charged crimes (once the improper identification testimony is excluded), the court should certainly exercise is much broader discretion, and grant Mr. Tulin a new trial – a fair trial.

**VI. Whether witness testimony, on more than one occasion, reveals that a rape was committed during a kidnapping, by someone other than the defendant, create a prejudice that is too significant to overcome with any curative instruction to the jury?**

Prior to trial, there was some indication that one of the victims was sexually assaulted by some individual other than Mr. Tulin and Mr. Saint Louis. This matter was the subject of a pre-trial *motion in limine*. Recognizing the prejudice inherent in this testimony, the district court restricted the permissible testimony such that there could be no mention of sexual assault or rape. Such testimony would be, in the district court's own words, "highly prejudicial"; therefore, the court precluded testimony that would "identify the sexual nature of the assault."

Notwithstanding this ruling, the government's witness, Mr. Jolibois, gave testimony that violated the restriction. Mr. Jolibois stated that one of the kidnappers "raped" Ms. Marcelin's niece. The government and the Court attempted to address the matter, but the bell had been rung – the jury had heard the testimony that this Court had already ruled would be "highly prejudicial." Again, when testifying about the assault later, Mr. Jolibois stated that the after the assault the perpetrator was "pulling up his pants."

Review of this case is warranted because of the need for this Court to clarify whether a curative instruction is sufficient to remove the prejudice created by testimony of a rape committed by someone other than the accused, on two occasions, that was specifically precluded from trial. Such testimony would be, in the district court's own words, "highly prejudicial"; therefore, the court precluded testimony that would "identify the sexual nature of the assault."

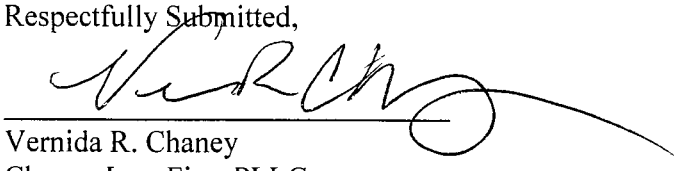
Notwithstanding this ruling, the government's witness, Mr. Jolibois, gave testimony that violated the ruling. Mr. Jolibois first stated that one of the kidnappers "raped" Ms. Marcelin's niece. The government and the Court attempted to address the matter with a curative instruction, however, Mr. Jolibois mentioned the rape a second time when he stated that the after the assault the perpetrator was "pulling up his pants." At this point, there was not a curative instruction that could properly address the prejudice created by the testimony.

Mr. Tulin submits that this series of events warrants a review of this case. "[I]f prejudicial evidence that was not introduced at trial comes before the jury, the defendant is entitled to a new trial." *United States v. Barnes*, 747 F.2d 246, 250 (4th Cir.1984). "[T]here is a presumption of prejudice where such improper evidence has been made available to the jury, and the burden is on the government to prove that it is harmless." *Id.* at 250-51. It is not necessary that the defendant prove that the prejudicial evidence was intentionally placed before the jury to obtain a new trial; accidental or inadvertent submission of the materials will suffice. *See United States v. Greene*, 834 F.2d 86, 88 (4th Cir.1987); *U.S. v. Lentz*, 383 F.3d 191 (4th Cir. 2004).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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