

19-7031

No. _____

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

ALLEN JAMES HANCOCK

(Your Name)

— PETITIONER

vs.

STATE OF TEXAS

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Allen James Hancock

(Your Name)

12071 FM 3522

(Address)

Abilene, Texas 79601

(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

During Hancock's trial, the state presented absolutely no physical evidence directly connecting him with the capital murder for which he stood accused. Where the evidence presented created just as much reasonable doubt as the possibility of guilt, as is the case here, by law a conviction must be reversed. Should this Court grant certiorari on Hancock's sufficiency of the evidence claim?

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant / Appellant / Petitioner:

Allen James Hancock

Complainant ~~+~~ / Appellee / Respondent:

State of Texas.

Petitioner's Counsel
~~at Trial:~~
on Appeal:

Thomas J. Burbank
505 West Lucas
Beaumont, Texas 77706

RELATED CASES

Petitioners Counsel
at Trial

James R. Makin
1400 Broadway
Beaumont, Texas 77701

Respondent's Counsel
at Trial:

Ashley Maffino
Michael Laird
Assistant District Attorneys
1085 Pearl
Beaumont, Texas 77701

Respondent's Counsel
on Appeal:

Petitioner never received a copy of the
State's Reply Brief and does not know
who represented the State on appeal

Trial Court:

The Honorable John B. Stevens, Jr.
252nd District Court, Jefferson
County, Texas

Appellate Court:

Chief Justice Steve McKeithen,
Justices Hollis Horton and
Leanne Johnson, Ninth Court of
Appeals, at Beaumont.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☒ reported at 09-17-00239-CR; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Ninth Court of Appeals court appears at Appendix A to the petition and is

☒ reported at 09-17-00239; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Aug. 21, 2019.
A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment U.S. Const. Due Process Clause -
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In June 27, 2013, in the City of Beaumont, Jefferson County, Texas, at approximately 9:00 p.m. that evening, several individuals gathered at a residence located at the corner of Park and Prairie. Several of the individuals were playing dominoes and gambling, with the rest of them standing around talking under a carport at the residence. During this time, someone and/or several persons entered the carport area. These persons had camouflage bandanas on their faces and displayed at least one firearm. Statements were made to the effect that these persons were there to rob the group.

One of the persons at the table, after noticing the weapon, attempted to run into the residence. At that time, the intruders started shooting at everyone. The individuals that were killed by the gun shots were Macgarrett Jack, Preston Wilson and Joshua Caesar. The number of actual shooters was not clear but it appeared that several weapons of different calibers were fired. It was determined during the crime scene processing and investigation that a .45 caliber, 9mm and possible 410 ammunitions were used.

After the shooting, the individual(s) fled the scene in a dark color SUV. While leaving the area, the vehicle side-swiped a parked vehicle a block down the street. This collision left vehicle debris in the roadway from both vehicles. None of the suspects

were stopped or arrested at that time.

Later on, that same night, Latrina Hall (also arrested and indicted for capital murder in this cause), called police to report a motor vehicle accident involving her vehicle. A Beaumont Police officer went to her location to investigate the incident. Ms. Hall alleged that while the vehicle was travelling on Eastex Freeway and Lucas Streets in Beaumont, a white or silver Ford pickup truck side-swiped her vehicle and left the scene without stopping. This location is some distance from the shooting area in another part of the city. The damage to the vehicle was to the passenger side. The vehicle was a dark SUV, as noted by the investigating officer.

During the crime scene investigation of the shooting, it was determined that three individuals were killed by gun shots. At least two other individuals were shot, injured and transported to the hospital for treatment. Through witnesses at the scene a description of the getaway vehicle was broadcasted by law enforcement in an attempt to locate the suspect's vehicle. The description was a dark SUV.

After the officer investigated Ms. Hall's accident complaint and left her location, he contacted investigators at the murder crime scene as to Ms. Hall's accident to see if the

vehicle might be the one they were trying to locate.

Police went back to Mrs. Hall's residence in Beaumont, attempting to talk to her again. She had left, but the police were advised by her mother of where Hall was in Port Arthur, Texas. Police located Mrs. Hall and her vehicle at an apartment complex. Police impounded the vehicle for processing and Mrs. Hall was interviewed.

Through investigation and many different statements, versions, but no physical evidence, the police determined that the main individual in this incident was Allen Hancock. In addition, police during their investigation determined that the getaway vehicle and Mrs. Hall's vehicle were one in the same. Further, Mrs. Hall finally admitted that her vehicle was not involved in a hit and run accident as alleged.

Hancock was arrested for the offense of Capital Murder. It appears the basis of the arrest were; 1) Mr. Sims, a victim at house who was shot, identified Hancock from a photo lineup some time after the incident; and 2) Mrs. Hall, after several statements to law enforcement in which she implicated other individuals who were using her car that evening, finally admitted that she let Hancock borrow her car many hours earlier that day.

On June 6, 2017, the case was called to jury trial, in the 252nd District Court in Jefferson County, Texas. After a five day trial the jury found Hancock guilty of Capital Murder. Judge Stevens sentenced Hancock to life imprisonment without the possibility of parole.

Hancock appealed his conviction in the Ninth Court of Appeals, Beaumont Division. On May 29, 2019, the Beaumont Court of Appeals affirmed Hancock's conviction and sentence. Hancock v. State, NO. 09-17-00239-CR. (Appx. A).

Hancock timely filed a Petition for Discretionary Review in the Texas Court of Criminal Appeals. The Court of Criminal Appeals refused Hancock's petition on August 21, 2019. (Appx. B).

SUMMARY OF THE ARGUMENT

On June 12, 2017, Hancock was convicted of capital murder in the 252nd Judicial District Court in Jefferson County, Texas. (6 R.R. 40). The State was not seeking the death penalty. Accordingly, the trial court sentenced Hancock to life in prison without the possibility of parole. (6 R.R. 42). However, the State failed to meet its burden to prove beyond a reasonable doubt that Hancock was guilty of the offense for which he had been charged where the State offered up no physical directly tying Hancock to the capital murders, and instead relied solely upon the testimonies of Latrina Hall (4 R.R. 23-81; 5 R.R. 50-51), and Jason Sims (3 R.R. 154-192; 5 R.R. 5-8). But because the evidence presented at Hancock's trial also established a reasonable doubt as to whether Hancock had any involvement in the capital murders of Macgarrett Jack, Preston Wilson and Joshua Caesar, as a matter of law the evidence is insufficient to support Hancock's conviction.

QUESTION PRESENTED

During Hancock's trial, the State presented absolutely no physical evidence directly connecting him with the capital murder for which he stood accused. Where the evidence presented created just as much reasonable doubt as the possibility of guilt, as is the case here, by law a conviction must be reversed. Should this Court grant certiorari on Hancock's sufficiency of the evidence claim?

1. Inadmissible In-Court Identification.

An in-court identification is inadmissible when it has been tainted by an impermissibly suggestive pretrial photographic identification. Roberts v. State, 220 S.W. 3d 521, 531 (Tex. Crim. App.), cert. denied, 552 U.S. 920, 128 S.Ct. 282, 169 L.Ed.2d 206 (2007). The test is whether, considering the totality of the circumstances, "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Ibarra v. State, 11 S.W. 3d 189, 195 (Tex. Crim. App. 1999); citing Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); see also Madden v. State, 799 S.W. 2d 683, 695 (Tex. Crim. App. 1990), cert. denied, 499 U.S. 954, 111 S.Ct. 1432, 113 L.Ed.2d 483 (1991). Reliability is the critical question:

If the totality of the circumstances reveals no substantial likelihood of misidentification despite a suggestive pretrial procedure, subsequent identification testimony will be deemed "reliable", "reliability being the linchpin in determining the admissibility of identification testimony."

Webb v. State, 760 S.W. 2d 263, 269 (Tex. Crim. App. 1988), cert. denied, 491 U.S. 910, 109 S.Ct.

3202, 105 L.Ed. 2d 109 (1989) (quoting Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53

L.Ed. 2d 140 (1977)).

2. Assessing The Reliability Under The Totality Of The Circumstances.

Reliability is the linchpin in determining the admissibility of identification testimony. The following five non-exclusive factors should be "weighed against the corrupting effect of any suggestive identification procedure in assessing reliability under the totality of the circumstances."

- The opportunity of the witness to view the criminal at the time of the crime;
- The witness' degree of attention;
- The accuracy of the witness' prior description of the criminal;
- The level of certainty demonstrated by the witness at the time of confrontation; and
- The length of time between the crime and the confrontation.

Ibarra, 11 S.W. 3d at 195; citing Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972); see also Brathwaite, supra; Webb, supra. A court considers the five Biggers factors, all issues of historical fact, deferentially in a light favorable to the trial court's ruling. The factors viewed in this light, are then weighed de novo against "the corrupting effect" of the suggestive pretrial identification procedure. Loserth v. State, 963 S.W. 2d 770, 773-74 (Tex. Crim. App. 1998).

3. Suggestiveness.

Suggestiveness may be created by the manner in which the pretrial identification is conducted, for example, by police pointing out the suspect or suggesting that a suspect is included in the line-up or photo array. Barley v. State, 906 S.W. 2d 27, 33 (Tex. Crim. App. 1995), cert. denied, 516 U.S. 1176, 116 S.Ct. 1271, 134 L.Ed. 2d 217 (1996); Rogers v. State, 774 S.W. 2d ~~244~~ 247, 260 (Tex. Crim. App.), cert. denied, 493 U.S. 984, 110 S.Ct. 519, 107 L.Ed. 2d 520 (1989); Herrera v. State, 682 S.W. 2d 313, 318 (Tex. Crim. App. 1984), cert. denied, 471 U.S. 1131, 105 S.Ct. 2665, 86 L.Ed. 2d 282 (1985). The further question is whether the procedures were so suggestive as to present a very substantial likelihood for irreparable misidentification. The court considers the Biggers factors in addressing this question. Ibarra, 11 S.W. 3d at 196.

4. Due Process Violation.

Out-of-court identification procedures violate a defendant's due process rights if those procedures are (1) unnecessary and suggestive, and (2) unreliable. Amador v. Quarterman, 458 F.3d 397, 413 (5th Cir. 2006); Manson v. Brathwaite, 432 U.S. 98 (enunciating the two-prong test to determine the admissibility of in-court identification testimony based on out-of-court identification procedures); United States v. Atkins, 698 F.2d 711, 713 (5th Cir. 1983) applying the two-prong Brathwaite test to possibly suggestive identifications procedures.

5. Burden Of Proof.

Where the "totality of the circumstances show no substantial likelihood of misidentification," the testimony is considered "reliable." Webb, 766 S.W. 2d at 269. The appellant bears the burden of establishing by clear and convincing evidence that the in-court identification is unreliable. Cooks v. State, 844 S.W. 2d 697, 731 (Tex. Crim. App. 1992); Harris v State, 827 S.W. 2d 949, 959 (Tex. Crim. App. 1992).

6. Five Biggers Factors.

- Opportunity Of The Witness To View The Criminal At The Time Of The Crime.

It was Sims' testimony that he saw a guy with a bandana on his face. (3 R.R. 157).

Sims went on to testify that the man's bandana fell down as he was going for Mack. (3 R.R. 157).

Sims testified that the man whose bandana fell down was Hancock. (3 R.R. 168, 176). When asked about how the gunman pulled the bandana back up over his face, Sims responded, 'real quick'. (3 R.R. 187). This weighs in Hancock's favor.

- The Witness' Degree Of Attention.

Sims was unable to say how many gunmen there were, and that it was dark outside. (3 R.R. 161). That all hell had broke loose. (3 R.R. 162). And that he was diving for cover. (3 R.R. 163). This second factor weighs in Hancock's favor.

- The Accuracy Of The Witness' Prior Description Of The Criminal.

Initially, Sims told EMS and police that there were as many as three or four gunmen in ski masks. (3 R.R. 168). This was immediately after he was shot, and he was not under the influence of any drugs. (3 R.R. 186). While Sims was at UTM B Galveston, Detectives went to see him and showed him a photographic line-up. Sims was unable to identify Hancock. (3 R.R. 171). Sims was unable to explain why he had initially said the men wore ski masks. However, he did agree that ski masks and bandanas are real different. (3 R.R. 187). This factor weighs in Hancock's favor.

- The Level Of Certainty Demonstrated By The Witness At The Time Of The

Confrontation.

When Detective Dischler brought the photo line-up to Sims' home, at Sims' request, Sims said that he was absolutely certain that it was Hancock whom he had seen that night. (3 R.R. 183). However, this was the same photo that Sims was shown while in the hospital. Yet, Sims had been unable to positively identify Hancock from the line-up. (3 R.R. 171). This factor is neutral.

- The Length Of Time Between The Crime And The Confrontation.

Again, Detectives went to UIMB Balveston within days after the shooting. Sims was unable to identify anyone at that time. (3 R.R. 171). On July 18, 2013, when Detectives went to Sims' home, roughly three weeks after the shooting, Sims picked Hancock out of the line-up. (3 R.R. 171, 183). Three weeks is not so long that it should call into question Sims' ability to positively identify anyone. However, it should not be ignored that in his earlier interview with Detectives, Sims was unable to identify anyone when looking through the line-up. The Ninth Court of Appeals did point out that Sims was medicated at the time that Detectives went to the hospital to speak with him. But this is of no consequence because by his own admission, Sims was still on medication when Detectives went to his home. (3 R.R. 182). This factor is neutral.

7. Suggestiveness.

Suggestiveness may be created by the manner in which the pretrial identification is conducted. Ibarra, 11 S.W. 3d at 196. In Hancock's case, at some point, Sims was sitting at home watching the television when a news clip came on which showed Hancock being led away in handcuffs, announcing that he was a suspect in the Triple-Homicide. (3 R.R. 173, 193). It was only after this impermissibly suggestive tactic, which was tantamount to the police presenting a single photograph to Sims and saying, 'this is one of the guys that we believe was involved', that Sims contacted Detective Dischler to say that he could now identify the shooter. (3 R.R. 176). Prior to seeing Hancock on the news, Sims never contacted the police with any claim that he recalled anyone's face. Rather, after seeing Hancock on the news in direct relation to the shooting on June 27, 2013, Sims alleges to have experienced a flashback. (3 R.R. 173). It is undisputed that prior to this news clip, Sims could not identify anyone. Nor had he requested to look at the photos again to see if he could possibly identify anyone.

It is Hancock's argument that this procedure was so suggestive as to present a very substantial likelihood for irreparable misidentification.

8. Sims' Identification Testimony Is Unreliable.

Reliability is the linchpin in determining the admissibility of identification testimony. Ibarra, 11 S.W. 3d at 195. At the outset, Sims told police that there were three to five men wearing ski masks. (3 R.R. 161, 168, 186). Then Sims claimed that a bandana fell from one man's face. (3 R.R. 157). However, there were three eye witnesses. All of whom testified specifically about one person in particular. A man who they all said was pointing a gun at Mack. (3 R.R. 133, 145, 157). Yet, no one corroborated Sims' claim of a bandana falling briefly from anyone's face. Jones testified that there were only eyes showing. (3 R.R. 134). And there were no looks at unobscured faces. (3 R.R. 136). While Jackson testified that the shooter took the gun off of him, he put the gun back on Mack then and started shooting. (3 R.R. 145). Again, Sims was never able to identify anyone until after Hancock was shown on the news as a possible suspect in this case. (3 R.R. 173, 183). But Sims could not explain why he first stated that there were four or five shooters. (3 R.R. 186). Neither could Sims explain why he had initially said these men were wearing ski masks. But he ultimately conceded that ski masks could not be mistaken for bandanas. (3 R.R. 187). Sims' identification testimony is patently unreliable, and thus should not be considered.

In support of his argument, Hancock relies on Ex parte Amezcua, 223 S.W. 3d 363,
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364-65 (Tex. Crim. App. 2006) (where petitioner was wrongly convicted based on the eye witness testimony of the victim); Eye-witness testimony is implicated in a large percentage of wrongful convictions. See e.g., Bernal v. People, 44 P. 3d 184, 190 (Colo. 2002) (citing a study that concluded that "mistaken eye witness identification is responsible for more of these wrongful convictions than all other causes combined."); State v. Cotton, 318 N.C. 663, 351 S.E. 2d 277 (1987) (wrongful conviction based on victim's eye-witness testimony); State v. Youngblood, 153 Ariz 50, 734 P. 2d 592 (Ariz. Ct. App. 1986) (same) See also Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero, and C.A.E. Brimacombe, Eye-witness Identification Procedures: Recommendations for Lineups and Photospreads, 22 LAW AND HUM. BEHAV., No. 6, at 1 (1998) (study of 40 cases of DNA exoneration; "Of these 40 cases, 36 (or 90%) involved eye witness identification evidence in which one or more eyewitnesses falsely identified the person. One person was identified by five separate eyewitnesses. It is important to note that the 40 cases... were not selected because they happen to have eyewitness identification as the primary evidence. Instead, the cases are simply the first 40 cases in the U.S. in which DNA was used to exonerate a previously convicted person. Hence, the kind of evidence that led to these wrongful convictions could have been anything. The fact that it happens to

be eyewitness identification evidence lends support to the argument that eyewitness identification evidence is among the least reliable forms of evidence and yet persuasive to juries." "Add to this the inconsistencies between Sims' testimony and those of Jones and Jackson, and Sims' inability to identify anyone until after Hancock's picture was plastered on television screens as a suspect, and Sims' identification of Hancock is even more suspect.

Because reliability is the linchpin of identification testimony, Sims' identification testimony should be disregarded.

4. Hancock's Due Process Rights Were Violated.

Out-of-court identification procedures violate a defendant's due process rights if those procedures are (1) unnecessary and suggestive, and (2) unreliable. Amador, 458 F.3d at 413. At the time of Hancock's arrest, law enforcement was aware that none of the witnesses had identified any possible suspect, and that placing Hancock's image on television as a suspect would irreparably taint any further investigation into the possible identities of the persons responsible for the crime. It was not a necessary part of Hancock's arrest to have him on television, or to show an unobstructed view of his face. Moreover, it is well established that whenever there is an active investigation is ongoing, the authorities are not at liberty to discuss any specifics, as

to the details, with the public. Which is exactly what was done when Hancock's identity was provided in circumstances where no one was able to make a positive identification.

Furthermore, this act by police, which was beyond the boundaries of 'suggestive', was unreliable because even at this time there was no physical evidence, or anything whatsoever, which placed Hancock at the scene of the shooting.

Placing Hancock's face on the news when there were no eye witnesses who would identify him otherwise, nor a single sliver of evidence placing him at the scene of this crime violated Hancock's right to due process of law.

10. Standard Of Review

A court considers the five Biggers factors, all issues of historical fact, deferentially in a light favorable to the trial court's ruling. The factors, viewed in this light, are then weighed de novo against the "corrupting effect" of the suggestive pretrial identification procedure.

Loserth v. State, 963 S.W. 2d at 773-74. Even when viewed in the light most favorable to the court's verdict, the fact is that the State presented absolutely no direct evidence that Hancock was involved in the crime for which he was tried, other than the testimony of Sims. When viewed in an even-handed manner against the corrupting effect of placing

Hancock's image on television, which then prompted Sims to change his story from men in ski masks to men in bandanas, and that one bandana conveniently fell to expose, quite coincidentally, the same face that Sims happened to see on the news, which he was able to immediately identify as the gunman with one-hundred-percent certainty, whereas previously Sims had been unable to identify anyone. The corrupting effect of placing Hancock on the news and stating that he was also arrested in connection with this incident far outweighed the case presented by the State, and Hancock's conviction was unjust.

11. The Evidence Is Legally Insufficient To Support Hancock's Conviction.

Under the standard of review for legal sufficiency challenges, evidence ~~must~~ be insufficient to support a conviction after considering all evidence in the light most favorable to the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970); Carter v. State, 275 S.W. 3d 572 (Tex.Crim.App. 2009); Williams v. State, 235 S.W. 3d 742 (Tex.Crim.App. 2007). Viewed in the light most favorable to the verdict, the evidence is insufficient when 1) the record contains no evidence or merely a "modicum" of evidence probative of an element of the evidence, or 2) the evidence

conclusively establishes a reasonable doubt.

In short, the appeals court affirmed Hancock's conviction based upon the testimonies of Latrina Hall and the questionable identification testimony of Sims. However this is not enough. Even taken in the light most favorable to the verdict, Hall's testimony was not beneficial to the State's case. Ultimately, what Hall testified to was that she did not know who was driving her car 'because numerous of times [Hancock] let other people drive my car.' (4 R.R. 42). That she did not tell the truth because she did not know the truth. (4 R.R. 47, 54). That at some point during the night she had called her OnStar and heard a lot of guys talking and laughing. (4 R.R. 59). And more than anything, Hancock never made any admissions to Hall about anything that happened on June 27, 2013, on Prairie and Park. (4 R.R. 65).

And Sims, who alleges to have had the fortuitous circumstance to get a glance at a man's face 'real quick' when the bandana fell down. (3 R.R. 157, 168, 176, 187). While two other eyewitnesses who were watching the exact same man, at the exact same time, and have told the same story as Sims, have absolutely no recollection of this crucial detail. (3 R.R. 134, 136, 145). A reasonable doubt has been established by Jones and Jackson's testimony as

to whether a bandana fell from anyone's face. This coupled with the fact that this story came into existence only 'after' Hancock's face was shown on television in connection with this incident, (3 R.R. 173) makes the positive identification testimony even more suspect. Especially considering that immediately after the shooting Sims told authorities that there were three or four gunmen in ski masks, (3 R.R. 168). Sims' identification testimony is patently unreliable.

The evidence at Hancock's trial conclusively establishes a reasonable doubt that Hancock could have participated in this crime. There was no physical evidence whatsoever that placed Hancock at the scene of the shooting. It is reasonable to believe that there were no unobstructed views of a gunman's face, just as both Jones and Jackson had testified to. It is undisputed that this story of a bandana falling from Hancock's face was concocted only after Sims had seen Hancock on television, and prior to that he alleged four or five men with ski masks. Neither did Sims dispute that there is a very big difference between ski mask and bandanas, and thus, a very big difference between the story he told immediately after the shooting, and the story he told after Hancock's face had been unnecessarily placed on television in connection with the shooting, though Sims was never able to explain these inconsistencies. And

since reliability is the linchpin of identification testimony, and Sims' testimony is conclusively unreliable, Hancock asserts that a reasonable doubt as to whether he was a participant in this crime has been conclusively established.

In U.S. v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996) the court held; The narrow scope of our review for sufficiency of the evidence following a conviction is well established. We must affirm if a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt. Jackson, 443 U.S. at 319; United States v. Salazar, 66 F.3d 723, 728 (5th Cir. 1995). We thus consider the evidence, all reasonable inferences drawn therefrom, and all credibility determinations in the light most favorable to the prosecution. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); Salazar, 66 F.3d at 728; United States v. Casel, 995 F.2d 1299, 1303 (5th Cir.), cert. denied, — U.S. —, 114 S.Ct. 472, 126 L.Ed.2d 424 (1993). Our role does not extend to weighing the evidence or assessing the credibility of witnesses. Glasser, 315 U.S. at 80, 62 S.Ct. 469; Casel, 995 F.2d at 1303. The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. Salazar, 66

F.3d at 728; United States v. Resio-Trejo, 45 F.3d 907, 911 (5th Cir. 1995) (quoting United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2348, 76 L.Ed.2d 638 (1983)). If the evidence, however, gives equal or nearly equal circumstantial support to a theory of innocence, we must reverse the conviction, as under these circumstances "a reasonable jury 'must necessarily entertain' a reasonable doubt." United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir. 1992) (quoting Clark v. Pecunier, 755 F.2d 394, 396 (5th Cir. 1985) (emphasis in original), cert. denied, 506 U.S. 918, 113 S.Ct. 330, 121 L.Ed.2d 248 (1992)).

Hancock believes that because the evidence in this case gives equal or nearly equal circumstantial support to the theory that anyone could have been driving Hall's vehicle on the night of the shooting and it could have been anyone doing the shooting because there were no unobscured looks at any faces just as Jones and Jackson testified to, and finally, the theory that Sims only pointed Hancock out because it was Hancock's picture that was on ~~the~~ the news, a reasonable jury had to entertain a reasonable doubt, and therefore his conviction should be reversed, as a matter of law, as stated in Clark, 755 F.2d at 396.

REASONS FOR GRANTING THE PETITION

Petitioner, Hancock, believes that this Honorable Court should grant this petition because it is well established law that a conviction based upon insufficient evidence violates due process, and the appeals court's holding that the evidence was sufficient is contrary to clearly established law. Furthermore, it would set a precedent making it clear in the future that it violates due process where law enforcement officers publicize photographs of previously unidentified persons on television. That such tactics are impermissibly suggestive, and that any identifications made after such antics by person who could not make any identifications previously will be held unconstitutional and inadmissible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Allen Hancock

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