No. 23-6859

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SUPREME COURT, U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Andrew Smart — PETITIONER
(Your Name)

vs.

LaManna, et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andrew Smart
(Your Name)

Attica Correctional Facility
(Address)

Attica, N.Y. 14011-0149
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Courts below determination that the witnesses Identification was not unduly suggestive, was contrary to clearly established Federal Law §28 USC 2254[d][1][2] U.S. Const. Amend. 14

2.Whether the District Court committed error by ruling on petitioner's State appeal, Instead of the issues and arguments raised in petitioner's Habeas petition

LIST OF PARTIES

[X] 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:

RELATED CASES

People v. Smart, 142 A.D.3d 513 36 N.Y.S. 3d 197[2016], Appellate Division, Second Department. Judgment entered Aug. 3, 2016.

People v. Smart, 29 N.Y.3d 1098[2017]. Court of Appeals. Judgment entered June 29, 2017.

Smart v. Lamanna, 2023 WL 2895997. U.S. District Court, E.D.N.Y. Judgment entered April 11, 2023.

Rule 60(b)(1). U.S. District Court, E.D.N.Y. Judgment entered June 9, 2023.

Smart v. LaManna, 23-6480. United States Court of Appeals. Judgment entered Oct. 20, 2023.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES(Continued)

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

[X] For cases from **federal courts:**

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

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[X] is unpublished.

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

[X] reported at 2023 WL 2895997; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

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

[X] reported at 29 N.Y.3d 1098 [2017]; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Second Department Appellate Division court appears at Appendix A to the petition and is

[X] reported at 142 A.D. 3d 513 36 N.Y.S. 3d 197 [2016]; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was Oct 20, 2023.

[X] 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).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was June 29, 2017. 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

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend 14.

STATEMENT OF THE CASE

Petitioner, Andrew Smart and his co-defendant, Raneiro Chavez, were charged under Kings County Indictment 3440-11, with two counts of murder in the first degree and related offenses. The charges stemmed from a September 10, 2009, shooting on Bainbridge Street, in Brooklyn, in which two young men were killed and a third seriously wounded. A third co-defendant, Maurice Hall was charged in a separate indictment.

At trial, two witnesses, Laverne Benn and D.H.(surviving victim), identified petitioner as one of the shooters. Both had previously selected him from a lineup on April 22, 2011, over a year and a half after the incident, in which he was the only participant in the lineup with a neck tattoo. Benn asked to have the lineup participants approach the viewing window one-by-one after looking at them seated as a group.

At the Wade hearing, the defense argued that the petitioner stood out in the lineup as the smallest, the lightest in weight, the shortest, having the lightest skin color, the only participant wearing a solid red shirt, and the only one with a tattoo on his neck.

In denying petitioner's motion to suppress, the hearing court, and then the Appellate Division failed to recognize the overall suggestiveness of the lineup, and so ruling, emphasized the absence of a reference to a tattoo in the description of the shooter given to the police. The Court of Appeals affirmed the decision and the Federal Court for the Eastern District of New York and U.S Court of Appeals, Second Circuit Affirmed as well.

According to Detective George Miller, on September 19, 2009, "witness number two," Laverne Benn, described the shortest shooter as 5'2 to 5'4", in his twenties, wearing a red hoodie with a spiderweb pattern on it(H.182)." That day, she also viewed a photo array and said that the petitioner "looked like" the short guy, but asked to see him in person(H.128-130, 149, 163; People's Hearing Exhibit 7). In the array using whiteout, Miller obscured a

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Numbers preceded by "H" refer to the record of petitioner's pretrial Wade hearing, which was part of a multi-issue suppression hearing involving all three co-defendants. Numbers without prefix refer to the trial record.

spot on the left side of the neck of each of the array subjects because of petitioner's tattoo in that area(H.130-31; People's Hearing Exhibit 7). The whiteout created a highly visible patch on each of the images.

On December 2, 2009, Detective Joyce Mariner showed a series of photo arrays to D.H., who was still in the hospital, and apparently had not given any description of his assailants(H.187, 194-196). D.H. denied knowing anyone in any of the arrays, one which contained petitioner's picture and the other two which included co-defendants Chavez and Hall, respectively.

As in the arrays shown to Benn, a portion of each neck was blotted out in the petitioner's array(H.188-90, 210-211, 213; People's Hearing Exhibit 12). On April 22, 2011, Benn and D.H. viewed identical lineups in which petitioner appeared in the fourth position(H.137-38, 140-141, 151; People's Hearing Exhibit 10).

Benn asked to have the lineup participants approach the viewing window after having first looked at them sitting down in a row(H.144-45, 156-57). The participants then approached the window one at a time, each with the left side of their neck visible to Benn(H.156-167). When petitioner came up, Benn started shaking and said that he was the "guy that was closest to her" during the incident(H.145-46, 182). Despite her more complete description in September 2009, on that day of the lineup, Benn told the District Attorney that she "wasn't sure" about the shortest shooter's description, said that he was "black light skin"(H.183).

D.H. said that petitioner "was the guy that was shooting" and later told Detective Miller that he had seen petitioner "a couple times" in the area during the six months preceding the lineup(H.141-43, 210). He failed to relay those alleged sightings contemporanously, however, because "he was thinking about taking care of it himself. And that his two friends--his friends were killed and he wanted to do the right," meaning taking the law into his own hands(H.143). Asked by Detective Mariner why he had not picked anyone out in the photo array previously shown to him, D.H. merely said that, "at the time, he was all messed up"(H.190-91).

Petitioner was the only participant in the lineup with a tattoo on his neck(H.154-55). In contrast to the photo arrays shown to D.H. and Benn, the police failed to obscure the petitioner's neck tattoo or the necks of anyone else in the lineup. They nonetheless, did take this step in the lineup next month exhibiting co-defendant Chavez,whose neck tattoo and the corresponding sections of the necks of the fillers were covered with bandages, even though a neck tattoo was not part of the description that they had of Chavez.(H.36, 41-42, 154-55, 160-62). Petitioner, whose shirt was red with a background design, was also the only member of his lineup dressed primarily in red, although the clothing worn by filler in position one seemed to have black and reddish plaid(People's Exhibit 10).

Petitioner's pedigree from his arrest the same night as the lineup listed him as 5'6", 145 pounds(H.152-53). the parallel information for the remaining participants was; number one, 5'10", 190 pounds; number two, 5'11", 190 pounds; number three, 5'9", 180 pounds; number five, 5'11", 170 pounds; and number six, 5'10", 160 pounds(H.153-54).

WADE HEARING ARGUMENT AND DECISION

Defense counsel urged the court to suppress the results of the April 22, 2011 lineup because of their suggestiveness in a variety of respects, including that petitioner was the only participant with a neck tattoo:

> In the lineup, Andrew Smart was the smallest person, the shortest person, the lightest person, the only person in that lineup with a tattoo on his neck, which from all we know was not covered in any way and the only person sitting in the middle wearing a distinctive primarily bright red shirt. Only one other person in that lineup had a shirt on with red in it. He was in position number one Mr. Smart was in position four. The shirt worn by filler ...Number one was actually multicolored and had many colors in it...[J]ust one good look at the photo tells us that Mr. Smart's red shirt was distinctive. All of them circumstances, in my opinion; that he was the shortest in height, the only one in a red shirt, the only one that had a tattoo on his neck, which by the way had to be visible to witness number two when she asked that each of the people in the lineup be brought up to the -- brought up close to the window. And Detective Miller testified if not any other point the necks of all the people in the lineups were visible. Witness number two had to seen that tattoo. Mr. Smart was the only with that tattoo.

> My argument is simple that all of those circumstances taken together add up to a lineup from Mr. Smart for both of these witnesses that was unfair and suggestive. And I would ask the number one, both of those lineups by ID be suppressed and that number two for both of those witnesses your Honor ordered an Independent source hearing(H.222-23).

Counsel later added that the police should have either put the participants in petitioner's lineup in similar clothing, for example, similar colored shirts, or covered them with a sheet or blanket(H.227).

The prosecutor answered that petitioner was not the only participant wearing a red shirt in the lineup and, in addition, that it was not important as to Benn since she could not recall a clothing description by the time of the lineup. She also mentioned a tattoo and argued that, based on the lineup photo, petitioner's tattoo was not a prominent feature(H.234-35). The prosecutor, however, failed to address Detective Miller's acknowledgment that the photo was taken from an angle from the left, thus rendering "not visible" the left side of the neck of each lineup participant, including petitioner(H.154).

In it's finding of facts regarding petitioner's lineup, the court acknowledged that:

> the fillers were heavier and taller than defendant. The defendant was also the only person that had a tattoo on his left side(H.249)[2]

In the court's conclusion of law for petitioner's co-defendant Chavez, the hearing court ruled that Chavez tattoo was not suggestive due to the fact that it was covered:

> and with the red bandanas and the bandaged necks, the fillers look very close to each other, at least in this court's eyes(H.254).
>
> The photo arrays shown, which is -- which is the photo array shown to witness two and three, with co-defendant Chavez, which is People's 7 had the left side of the neck whited out to cover any tattoo, so there is no reason to suppress the lineup for lineup identification testimony or in-court testimony(H.255).

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[2] The court also noted cross examination by counsel for co-defendant Chavez established that the legs and feet of lineup participants were visible under the table where they were seated during the procedure(H.167-68, 203), and the same problem occurred during petitioner's lineup(H.249).

However, the hearing court failed to suppress petitioner's lineup or in-court testimony whose tattoo was displayed during his lineup.

The court further discussed the comparative features of the lineup participants in its conclusion of law, again noting, but minimizing, several factors set petitioner apart:

> Its true that [defendant Smart] may be the youngest; however, its appearance, not the actual age that matters. And ... it looks like the filler in position number five happens to be quite young as well and the skin tone of these six people are not so different to sort of make defendant Smart stick out. And nothing about their pants or the dress also, he is wearing a red shirt. But again, just because he was wearing a red shirt, he is not -- everyone had different colored shirts and different designs. This would not make that lineup unduly suggestive(H.256).

In particular, in discounting the failure of the police to cover petitioner's neck even though he was the only person in the lineup with a neck tattoo, the court emphasized the absence of a tattoo in the description supplied by the lineup witnesses:

> And the fact that he is the one that has a tattoo that was not covered up during this lineup procedure, but as the prosecutor argues, defendant Smart was not ... previously identified by a tattoo. So when the witness spoke to detectives, no one gave his tattoo as an identifying mark.
>
> Next, when the lineup was conducted, the witness that identified defendant Smart did not identify him because of his tattoo. If the witness stated I recognized number four because of his tattoo, counsel may have had a stronger argument that this was somehow unduly suggestive. But that is not what happened in this case.
>
> In addition, in the line of cases, I'll cite ... People versus Boone, Second Department, which is 2551 AD2d 423, such as a small scar on the defendant's face ... just the fact that the defendant was the only individual in the lineup who had a facial scar did not render that lineup unduly suggestive. And more recently, People versus Spence ... 92 AD3d 905. Even though there was a reversal of conviction ... on the prosecutor's summation that court held that the difference in skin tone alone does not render a

> lineup unduly suggestive, nor additionally quoting, we don't find the presence of a small tattoo on the side of defendant's face rendered the lineup unduly suggestive. So I find given those circumstances that this lineup was also not unduly suggestive, and I'm rejecting counsel's argument to suppress the lineup identification testimony ... and also permitting the witnesses to make in-court testimony as well(H.256-258).

TRIAL EVIDENCE

D.H.'S TESTIMONY

Around 5:00 p.m., on September 10, 2009, after picking up Chinese food, D.H., 15 at the time, and his friends Antoine Stokes and S.H., went to the front stoop of 217 Bainbridge Street, where Stokes and S.H. lived, and started eating(T.46, 103-04, 114, 120-22, 147). About five minutes later, three men D.H. never seen before approached them(T.104-05, 113, 126). One asked whether the young men on the stoop were "Chan City," a group from "Chauncey" area according to D.H., was not a gang(T.104-05, 114, 121-24). D.H. said no, but after S.H. answered affirmatively, the three opened fired on the boys(T.104, 106, 114). D.H., who had been looking down as he ate looked up when the man spoke to them, but the incident took only about ten seconds(T.122-25, 132, 145). S.H. and Stokes both died from gunshot wounds(T.203-04, 529).

D.H. briefly passed out from his wounds but woke up in time to see the shooters running towards Stuyvesant Avenue(T.106, 114, 124-25). He remained hospitalized for several months and was unable to speak to detectives until December, at which point he still could not provide any description of the shooters(T.107, 110, 126-28, 378-79, 385). D.H. eventually described one of the men as "Spanish" with long hair; the one who asked about Chaun City as "light skin[ned]" with "like" a mustache, but with hair obscured by a hood; and the third as dark with braids(T.105, 112, 115-16, 124-25).

On April 22, 2011, over a year and a half after the incident, D.H. identified petitioner in a lineup as the "light-skin" assailant(T.108-09, 112, 116, 264). He identified co-defendant Chavez as the "Spanish one" with long hair in a May 5, 2011 lineup. On January 12, 2012, he recognized "two people" in a lineup, including co-defendant Hall. At the time, D.H. said he was not sure whether either of those actually participated in the shooting. At trial, however,

he said he was certain that Hall was the dark man with braids(T.108-11, 128-29, 139-47, 436-44, 463-64, 466-67, 469-72).

Sometime after the shooting, D.H. was shot a second time,requiring another hospital stay. In that subsequent incident, as D.H. put it, he was just "in the wrong place at the wrong time"(T.113, 118). On March 16, 2011, 17 years old, just home from the second hospital stay, he was involved in still another gun episode, but this time as the shooter(T.112-13, 147). Someone his friends robbed earlier that day "grabbed [D.H.'s] crotch," prompting him to retrieve a .45 caliber semi-automatic pistol that he kept in his apartment(T.112-13, 117-20_. D.H., who had nothing to do with the robbery, fired at, but missed, the alleged crotch grabber(T.112-13). He subsequently pled guilty in that case to attempted murder and receive a prison sentence as a youth offender(T.113, 116-18, 147-48, 150).

Having been produced from Rikers Island, D.H. identified the three co-defendants at their Fall 2012 trial(T.109, 112, 139). In acknowledging that he had taken several minutes to identify Chavez in the May 2011 lineup, D.H. contended that he knew Chavez was one of the shooters, but wanted to seek his own vengeance(T.145-46). He gave the same explanation for his admittedly deliberate pace at co-defendant Hall's lineup and failure to make concrete identification there in Hall's grand jury(T.145-47, 149).

LAVERNE BEEN'S TESTIMONY

Just before the shooting, Laverne Benn, 52 at the time, was sitting on her stoop at 223 Bainbridge Street with a "sickly," elderly companion, waiting for an ambulette to take Benn, who used a cane, to physical therapy(T.312-13, 317, 325-26, 358). Three "thuggish" looking "boys, men, whatever" or "guys" whom Benn had never seen before walked by her building(T.313-14, 336, 338). One was short and had a complexion similar to Benn although she did not describe it. One was "pale yellow or Puerto Rican" tall and heavy-set, with long hair, curly hair. The third apparently was taller than the first, but shorter than the second, and "slim and dark"(T.314-15, 340-41, 350).

All three were wearing hoodies, although the second had his hood down, and instead wore a black cap. The hoodie worn by the shortest of them, who was also closest to Benn, was red with a spiderweb design. Benn noticed no facial hair, glasses or tattoos on any of them(T.313-15,

317, 326-27, 334-35, 338-39, 350-51).

Because the building juts out, Benn saw the three for only a second or two as they approached and passed her(T.333, 335-36, 340-41). After they passed by she took her eyes off them, but commented on their appearances to her friend(T.312-13, 316, 335-36, 352-53, 366).

As shots rang out a few minutes late, Benn who had been looking in the other direction, first tried to help her companion into her building and then moved up the stoop and looked toward 217 Bainbridge. There, she saw the three youths lined up, shooting at D.H. and his friends(T.315-16, 324, 327-28, 336-37, 352-53, 356-59, 365-66). Immediately after the gunfire stopped, the shooters ran across Malcolm X Boulevard to the other side of Bainbridge and down Stuyvesant Avenue(T.316, 322-23, 328-29, 338, 362-63).

Benn denied telling a detective the day after the incident that she did not see where the shooter ran and had only been told about it by others, but Detective Patrick Crosby, called by the three defendants, confirmed that Benn told him that she did not see where the shooters fled(T.363-64, 537, 542-43, 545-46) and originally described the shooters as boys to Crosby(T.338-39). Benn admitted at trial that she was "terrified" during the shooting, and thus, could not say how long the gunfire lasted(T.329, 337). She also insisted that she had an adequate view of the shooters from her vantage point on the third step up from the street, despite the bannisters, and stone work abutting the other stoops between her location and the building where the incident occurred, and a tree being there(T.330-33, 352-55, 362).

Benn identified petitioner from an April 22, 2011 lineup as the shortest of the shooters. She selected co-defendant Chavez as the tall, Puerto Rican shooter, in the May 5, 2011 lineup after first indicating a filler. During both lineups, the police accomodated her by having the lineup participants come up to the window(T.264-65, 269, 272, 318-20, 343, 348-49, 436, 441, 454, 456-57, 459-60). She failed to pick co-defendant Hall in an October 2009 lineup(T.274-75, 282-83, 285-86). At trial she identified petitioner and Chavez in the court room(T.321). She admitted that, the day after the shooting, she told detective that she could not identify anyone, but explained that she made that statement because she was frightened(325-39).

Benn acknowledged that, the month after the incident, she telephoned Detective Miller asking for help after her grandson and son were arrested for gambling(T.286-87, 341-42). She

became upset after Miller responded that he could not help her, and in the following days withdrew her cooperation in this case(T.287-88, 343). Miller also received a call directly from the grandson, who hung up after the detective said that there was nothing he could do to help him(T.288-90). However, Benn eventually returned to the fold, cooperating(T.290, 343).

ADDITIONAL EVIDENCE

Willie Spears, who was convicted of assault in the second degree in an unrelated case, testified against petitioner under a grant of immunity for his involvement in this case, and ultimately was the subject of an accomplice corroboration charge(T.405-06, 697).

On September 10, 2009, Spears, then 23, lived next door to co-defendant Chavez in the Marcy Houses, and also knew co-defendant Hall and petitioner(T.391-95). That day he gave the three a ride in his mother's Trail Blazer to Bainbridge Street, where all three of them got out(T.197-98, 262-63, 395-97, 400, 405-06). At petitioner's request, Spears waited for them up the block at the corner of Malcolm X Boulevard and Bainbridge(T.400). Shortly thereafter, Spears heard gunfire behind him, although he did not see who fired the shots and could not remember whether he saw any guns when the three co-defendants came running back to the car and jumped inside(T.401-02, 407, 414). There was panic in the car as Hall told him to take off and not stop for lights(T.402). A police car came behind them and Spears pulled over, but then kept going because Hall told him not to stop(T.402-403). Chavez, Hall, and petitioner got out at Marcy Houses, at which point Spears parked and went upstairs to his apartment(T.403-404).

The day of the incident between 5:30 and 5:45 p.m., Nicola Richardson, was in the front passenger seat of a car with several relatives stopped at a red light(T.55, 68-70). She heard gunfire and, turning to her right, saw "three guys" standing side by side, each with a gun, shooting at three young men on a stoop(T.56). She described the shooters looking like they were about 15, 16 years old, then later on that night said they looked to be 14 or 15, the tallest one looked a little older; maybe 17(T.65, 75). She also stated that one of the shooters was less than five feet tall(T.74).

As the light was changing, Richardson called 911 before she and her family continued on to the restaurant to which they had been heading before the incident(T.56-58, 66-67, 70-71, 77).

She did not contact the police again until later after midnight(T.58, 64-65, 72-73). Richardson made no in-court identification(T.64).

At the shooting scene, Detective Bruce Kapp recovered 16 discharged shell casings(all .9 millimeter), nine deformed bullets, five bullet fragments, a hat, and two shirts(T.157-58). Based on the crime scene ballistics evidence and additional evidence received from the medical examiner, Detective Matthew Parlo found that at least three guns were used in this incident, at least two of them semi-automatics(T.83-84, 157-58, 165, 180, 215-18, 220-22, 224-25, 232-34, 236-37, 248-51, 513-14, 521-22).

After his arrest, Petitioner told the police that he was born in 1984, was 5'7" tall, and weighed 145 pounds(T.273-74). There was no testimony about Chavez's height or weight, but his date of birth was May 4, 1998(T.447), and his pre sentence report stated that he was 6' tall and weighed 185 pounds.[3] Hall was 6'2" tall and weighed 257 pounds(T.469).

VERDICT AND SENTENCE

The jury found both petitioner and Chavez guilty of two counts of murder in the first degree, and two counts of criminal possession of a weapon in the second degree(T.886). A mistrial verdict was declared for co-defendant Hall, who had a separate jury at the same trial, and who, upon retrial, was convicted of murder in the first degree and related charges.

APPELLATE DIVISION

In the Appellate Division, it was argued that petitioner stood out in his lineup as the only participant who matched all of the descriptive factors provided to the police by Benn: he was one of the only two noticeably light skinned men; the closest to matching Benn's age estimate of someone in his twenties, the shortest, the lightest in weight, and the only one wearing a fully-red shirt. It was also argued that petitioner stood out as the only participant with a neck tattoo, even though Benn did not mention one to the police, and that this factor became especially problematic when petitioner and the fillers were required to

[3] The information from Chavez's lineup pre-sentence report is cited in his Appellate Division brief(Appellant's Brief, A.D. No.2012-09476, p.27).

approach the viewing window singly. It was argued that given the overall suggestiveness of the lineup, petitioner stood out to D.H. too, even though the suppression hearing record failed to show that he described the shooters. It was further argued that under these circumstances, the lineup identification made by these witnesses should have been suppressed and that neither of them should have been allowed to make in-court identifications absent a showing of independent source(Appellate Division Brief, Point III).

By decision and order dated August 3, 2016, the Appellate Division, Second Department affirmed petitioner's appeal by a 3-to-1 vote(See People v. Smart, 142 A.D. 3d 513 [2d Dept. 2016]). The Appellate Division found the following:

> "the lineup fillers possessed physical characteristics which were reasonably similar to those of defendants, and ... the police took reasonable steps to conceal any differences between the appearance of the lineup fillers and the defendant."

The court added that our "contention regarding the age of the lineup fillers lack[ed] merit. As to the petitioner's neck tattoo, a characteristic not shared by any of the fillers, the majority concluded that petitioner was not "singled out" by it, because none of the lineup witnesses had mentioned a tattoo in their description to police. In regard, the court cited, among other decisions People v. Tinnen, 238 A.D. 2d 615, 616 (2d Dept. 1997). Id.

In dissent, Hon. Cheryl Chambers would have held that the lineup was overall "unduly suggestive," in part because of the tattoo:

> "when age is considered along with other factors such as skin tone, height,and the presence of a distinctive tattoo on the defendant's neck(Which was plainly visible when one of the witnesses ask each of the lineup participants to step close to the one-way mirror) the lineup, in my view, was unduly suggestive."

On January 6, 2017, Justice Chambers granted petitioner permission to appeal to the Court of Appeals.

COURT OF APPEALS

In the Court of Appeals it was argued that petitioner was subjected to a highly suggestive

lineup and deprived due process by failure to suppress identification testimony, where he stood out because of his diminutive stature, light skin color, red shirt, youth, and neck tattoo, and the courts employed an incorrect legal standard in discounting the tattoo simply because the witnesses had not mentioned it to police, petitioner cited, People v. Perkins, 28 N.Y. 3d 432 (2016). Petitioner also argued the feature must have particularly manifested itself at the lineup because of the way that the police did and did not deal with it during the investigation.

By prominently covering the left side of the neck of each subject portrayed in an earlier photo array with a patch of whiteout, they alerted Benn and D.H. that the suspect had a distinctive feature there. Because the police failed to take the same precaution in the subsequent lineup, the tattoo would have attracted the witnesses attention, especially Been, when the detectives accommodated her by parading each participant by the viewing window where the tattoo was directly in her line of vision.

By decision and order dated June 29, 2017, the Court of Appeals affirmed petitioner's appeal(See People v. Smart, 29 N.Y. 3d 1098 [2017]). The Court of Appeals found the following:

> "the order of the Appellate Division should be affirmed; the record supports the Appellate Division's finding that the challenged lineup was not unduly suggestive. Accordingly, defendant;s claim is beyond our further review(People v. McBride, 14 N.Y. 3d 440, 902 N.Y.S. 2d 830, 928 N.E. 1027 [2010] [citation ommitted]).

HABEAS CORPUS

In the Eastern District Court, petitioner argued that; the decision rendered by the State Court resulted in a decision that was either contrary to, or involved an unreasonable application of, clearly established Federal Law,as determined by the Supreme Court of the United States, and/or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State Court proceeding, when it denied petitioner's due process by failure to suppress an unduly suggestive lineup and failure to suppress identification testimony, 28 USC §2254 [d][1][2]; U.S. CONST. AMEND. XIV.

However, the Eastern District Court, affirmed petitioner's Habeas Corpus stating:

> "Smart filed the petition Pro Se, raising the same claims he raised before the Appellate Division"(Smart v. LaManna, 2023 WL 2895997)

It was further stated by the the Eastern District Court:

> "Smart raised four claims. As the Appellate Division did, I will address the claims in the following order..."

RULE 60(B) MOTION

Petitioner, presented a Rule 60(B) motion to the Eastern District Court(See Appendix F), arguing that in his habeas petition there was only one claim; suggestive identification. Petitioner presented evidence that the four claims that the Eastern District Court addressed and ruled on was actually petitioner's New York State Appeal and not his habeas petition. However, the District Court still affirmed the decision(See Appendix D).

U.S COURT OF APPEALS, SECOND CIRCUIT

Petitioner, filed a motion for a Certificate of Appealability and in Forma Pauperis status. Petitioner argued that a reasonable jurist would debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Petitioner also argued the same issues raised in his Rule 60(B) motion. The Second Circuit denied both motions and dismissed the appeal stating:"Appellant has not made a substantial showing of the denial of a constitutional right"(See Appendix E).

REASON FOR GRANTING THE WRIT

THE COURTS BELOW DETERMINATION THAT THE WITNESSES IDENTIFICATION WAS NOT UNDULY SUGGESTIVE WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW 28 USC §2254 [d][1][2] U.S. CONST. AMEND 14

" A defendant's right to due process includes the right not to be the object of suggestive police identification procedures that make an identification unreliable"(United States v. Douglas, 525 F.3d 225, 242 [2d Cir. 2008]).

"An identification procedure may be deemed unduly or unnecessarily suggestive, if it is based on police procedures that created a very substantial likelihood of irreparable

misidentification"(Perry v New Hampshire, 565 US 228 [2012][quoting Simmons v. United States, 3909 US 377, 384 [1968]). "A lineup is unduly suggestive as to a given defendant if he meets the description of the perpetrator previously given by the witness and the other lineup participants obviously do not"(Raheem v. Kelly, 257 F.3d at 134 [2001]). "Due process requires courts to assess, on a case-by-case basis, whether improper police conduct created a substantial likelihood of misidentification"(Sexton v. Beaudreaux, 138 S.ct. 2555).

Building on these principles, the courts below failed to follow clearly established Federal Law. This occurred when the trial court and Appellate placed heavy emphasis that a tattoo was not suggestive because it wasn't part of the witnesses description.

The issue wasn't that the tattoo wasn't part of the witnesses description; the issue was how the police did and did not deal with the tattoo during the investigation that made the lineup unduly suggestive. By prominently covering the left side of the neck of each subject in an earlier photo array with a patch of whiteout, they alerted to the witnesses that the suspect had a noteworthy distinctive feature there. Then, because the police failed to take the same precaution in the subsequent lineup, having petitioner as the only participant with a neck tattoo displayed, the tattoo would have necessarily attracted the witnesses attention. Especially, for Benn, when the detective accommodated her by parading each participant in front of the viewing window one-by-one making petitioner's neck tattoo difficult for her to miss. The tattoo was a visual clue to remind both witnesses of the photo array, especially when Benn stated the petitioner "looked like" the guy, but would like to see him in person. This method turned a selection that was only tentative into one that is positively certain. "A defendant's protection against suggestive identification procedures encompasses not only the right to avoid methods that suggest the initial identification, but as well as to avoid having suggestive methods transform a selection that was only tentative into one that is positively certain"(See Raheem v. Kelly, 257 F.3d 122 [2001]; Solomon v. Smith, 645 F.2d 1179 [1981]; U.S. CONST. AMEND 14.

The courts below should have followed Federal Law and judged petitioner's case on a

case-by-case basis to determine whether improper police conduct created a substantial likelihood of misidentification(See Sexton v. Beaudreaux, 138 S.ct. 255) and not simply dismissed petitioner's tattoo because it wasn't part of the description given. Petitioner's case should have been judged under the totality of the circumstances(See U.S. ex. rel. Cannon v. Montanye, 486 F.2d 263, 266-67 [2d Cir.1973]).

Furthermore, it was a clear indication that police knew the tattoo was suggestive due to the fact they whitedout petitioner's neck and the fillers in the photo array and the way they conducted petitioner's co-defendant Chavez photo array and lineup. Even though the description they had of Chavez did not include a tattoo,police managed to take the simple, but crucial step of covering Chavez neck tattoo and the fillers by using whiteout during the photo array and a large band-aid during his lineup. Stating that he wanted everyone to look similar(H.42; T.440-41, 443). Petitioner should have been afforded the same protection.

Benn, who never gave any facial description, described one of the perpetrators as 5'2 to 5'4(H.182). Petitioner's pedigree from his arrest listed him as 5'6", 145 pounds(H.152-53). The information of the remaining lineup participants were:

Number 1 5'10" 190 pounds
Number 2 5'11" 190 pounds
Number 3 5'9" 180 pounds
Petitioner 5'6" 145 pounds
Number 5 5'11" 170 pounds
Number 6 5'10" 160 pounds

"A lineup is unduly suggestive as to a given defendant if he meets the description of the perpetrator previously given by the witness and the other lineup participants obviously do not"(See Foster v. California, 394 US 440 [1969]; Solomon v. Smith, 645 F.2d 1179 [1981]; U.S. CONST. AMEND 14. Petitioner's lineup is similar to Solomon v. Smith, who was surrounded by participants that were 3 to 5 inches taller than him and weighed considerably more than him. Petitioner was the shortest participant in the lineup. The only one closest to Benn's 5'2 to 5'4 description. The only one closest to Benn's 5'2 to 5'4 description. The suggestiveness increased when Benn asked to have the lineup participants stand and approach the viewing window(H.144-45, 156-57), further revealing the height and weight difference

between the petitioner and the fillers. It was then that Benn made her selection of the shortest person in the lineup. Benn placed heavy emphasize on the height of the perpetrator. She described him as "the short guy that was closest to me"(H.128-30, 149, 163). So there's no doubt that the petitioner's height and weight difference played a part in Benn's selection; making the lineup unduly suggestive. The State Court acknowledged the suggestive factor but still failed to suppress the lineup identification:

> "the fillers were all heavier and taller than the defendant. The defendant was also the only person that had a tattoo on the left side."(H.249)

Another feature that Benn described of the perpetrator was a red hoodie. Benn stated the shortest shooter had on a red hoodie. Petitioner was the shortest participant and the only participant wearing a red shirt. State Court rendered a decision that was contrary to clearly established Federal Law as determined by the Supreme Court of the United States §2254 [d][1]. This occurred when in the State Court's finding of facts it stated:

> "he[petitioner] was wearing a red shirt. But again, just because he was wearing a red shirt, he is not - everyone has different colored shirts and designs. This would not make that lineup unduly suggestive."(H.256)

State Court's determination is contrary to Foster v. California, 394 U.S. 440 [1969], "Petitioner stood out form the other two men by contrast of his height and by the fact that he was wearing a black jacket similar to that worn by the robber." Also See Raheem v. Kelly, 257 F.3d 122 [2001], "A lineup is unduly suggestive as to a given defendant if he meets the description of the perpetrator previously given by the witness and other lineup participants do not." "Lineups in which suspects are the only participants wearing distinctive clothing or otherwise matching important elements of the description provided by the victim have been severely criticized as substantially increasing the dangers of misidentification." Petitioner was the only one with a red shirt. The fact that other participants had different colored shirts and designs is irrelevant and contrary to Federal Law. §2254 [d][1]; U.S. CONST. AMEND 14.

Petitioner was also the participant who most looked to be in his 20's; another feature mentioned by Benn, and another factor the State Court minimized and acknowledged:

> "It is true he[Petitioner] may be the youngest; however, it's the appearance, not the actual age that matters. And it looks like here -- it looks like the filler in position number five happens to be quite young as well."(H.256)

There was no way for the State Court to actually know that the petitioner was the youngest due to the fact that the remaining fillers were never mentioned. So petitioner's youthful appearance had to stand out for the court to make that determination and most importantly stood out to Benn as well. As far as the filler in position number five looking quite young as well; filler number five is 5'11, 170 pounds. No where close to Benn's 5'2 to 5'4 description. "When appearance of participants in a lineup is not uniform with respects to a given characteristic, the principle question is determing suggestiveness is whether the appearance of the accused, matching description given by the witness, so stood out from all of the others as to suggest to an identifying witness that person was more likely to be the culprit" (Roldan v. Artuz, 78 F.Supp.2d 260 [2000]); U.S. CONST. AMEND 14.

Lightness of skin color was another description that Benn gave. In the State Court's finding of facts, it stated:

> "And skin tone of these six people are not so different to sort of make defendant Smart stick out."(H.256)

State Court stated "sort of" make defendant stick out. Which is not actually a reliable determination and showed hesitation from the State Court. Petitioner stood out as one of the two light skinned participants in the lineup. However, petitioner was the lightest of them all.

State Court rendered a decision that was contrary to Federal Law and involved an unreasonable application of clearly established Federal Law, as determined by the Supreme Court of the United States, and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State Court proceedings §2254 [d][1][2]. In State Court's conclusion of law it cited People v. Spence, 92 A.D. 3d 90. Which held that the difference inn skin ton alone does not render a lineup unduly

suggestive. State Court correctly identified the correct legal principle, but unreasonably applied that principle to the facts in petitioner's case. Which is the Federal Application used in Robinson v. Artuz, 664 F.SUPP. 2d 247 [2009]; Roldan v. Artuz, 78 F.Supp. 2d 269 [2000] "Differences in complexion tones between subjects in an identification procedure, standing alone does not create an unduly suggestive procedure." However, skin tone was not the only suggestive factor. The State Court acknowledged several other suggestive factors, but ignored them: height difference, weight difference, being the youngest, being the only one with a tattoo on his neck, and the only one with a red shirt on. Therefore, State Court's decision was based on an unreasonable determination of the facts in light of the evidence presented in State Court proceedings because the State Court ignored legally relevant facts that it needed to consider in order to reach the correct results §2254 [d][1][2].

In the State Court's conclusion of law it stated in co-defendant Chavez lineup:

> "And with the red bandanas and the bandaged necks, the fillers look very close to each other, at least in this courts eyes."(H.254)
>
> "The photo array shown, which is -- which is the photo array shown to witness two and three, with defendant Chavez, which is People' 7 had the left side of the neck whited out to cover any tattoo, so there is no reason to suppress the lineup for lineup identification testimony or in-court testimony."(H.255)

However, in petitioner's conclusion of law the State Court ruled opposite. State Court should have suppressed petitioner's lineup because the State Court acknowledged that the tattoo was a suggestive feature and unlike Chavez's lineup, petitioner did not have a bandage on his neck to cover his tattoo. Therefore, State Court resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State Court proceedings §2254 [d][2].

State Court made an unreasonable determination of the facts in light of the evidence presented in State Court proceedings when in it's finding of facts made a determination

that Benn had selected petitioner out in the photo array:

> "And witness number two identified defendant Smart as position number five by saying five was the short guy that was closest to me"(H.247)

According to Detective Miller, witness Benn stated that it "looked like" the gentleman; not that it was him:

> Q. And how exactly did she indicate that is was photo number five
> A. That it looked like the gentleman, but would like to see him in person
> Q. Okay. She said it looked like him
> A. Yes
> Q. Not that it was him, right
> A. Correct(H.149)

The factual determination of the State Court was erroneous and not fairly supported by the record. Benn never made a positive identification during the photo array. This error went to Benn's creditability. Therefore, petitioner was entitled to a presumption of correctness (See Sumner v. Mata, 449 US 539).

While the hearing court contains no information about a description of the shooters by D.H.; petitioner undoubtedly stood out in his eyes as well, given the overall suggestiveness of the lineup. During D.H.'s stay at the hospital he was shown a photo array of petitioner. Just like in the photo array shown to Benn, the petitioner and the remaining fillers left side of their necks were whited out. D.H. did not make any identification. Then the prior six months before the lineup, D.H. stated that he seen petitioner several times in the area(H.141-43, 210). Then, D.H. actually seeing the suggestive lineup with petitioner as the only one with a distinctive feature which the photo array suggested or indicated; that he may have seen several times when he saw petitioner in the area. Only then was D.H. able to make an identification. Also in co-defendant's Hall lineup, D.H. also picked out someone who he recognized from the area(T.109, 111, 140-41) along with Hall. D.H. produced no description until trial. "Affirming the grant of petitioner where the witness's vague description devalued other Bigger factors where considering the witness did not describe the defendant in greater detail until after he viewed the defendant inn the court room" (See Dickerson V. Fogg, 642 F.2d 238, 245-247 [2d Cir. 1982]). In failing to recognize the overall suggestiveness of both

Benn and D.H. lineup, the hearing court, then the Appellate Court erred in not suppressing both lineups. The same is true of the New York Court of Appeals, Eastern District Court, and United States Court of Appeals, Second Circuit, which erred in the same respects and thus had no basis for affirming the prior court's refusal to suppress the lineup.

"Where pretrial identification procedures used with a given defendant have been impermissibly suggestive, a later in-court identification by that witness will violate due process unless in-court identification is shown to have reliability independent of those procedures, on the other hand, if the procedure were not impermissibly suggestive, independent reliability is not a constitutionally required condition of admissibility, and the reliability of the identifications is simply a question for the jury"(Alvarez v. Keane, 92 F.Supp. 2d 137 [2002]). "While the reliability of eyewitness identification testimony is usually an issue for jury determination, when the degree of unreliability leads to a very substantial likelihood of irreparable misidentification, the tainted testimony must be excluded to preserve the defendant's due process right" (Kennaugh v. Miller, 289 F.3d 36, 42 [2002]). Both Benn and D.H. pretrial identification procedure were unduly suggestive violating petitioner 14th amendment. Therefore, in-court identification and in-court testimony should have been suppressed.

Since independent source hearings were not held as to either Benn or D.H., the prosecution never demonstrated that either had an untainted basis for making an in-court identification, and thus, their identification of petitioner as well as trial testimony should not have been permitted. "Identification evidence will be admissible if (1) The procedure were not suggestive or (2) the identification had independent reliability" (See Raheem v. Kelly, 257 F.3d 122 [2001]).

Both Benn and D.H. did not have sufficient opportunity to view perpetrator at the time of the shooting. (See Neil v. Biggers, 409 U.S. at 199-200). Despite State Court's error as excepting the photo array as a positive identification, Benn made no positive identification during viewing the photo array. Benn's initial description in which she told Detective Crosby

referred to the perpetrators as boys, in which she said the very next day after the crime that she never seen the boys and knew she couldn't identify any of them(T.313, 317, 325, 338-39). Only after Benn was told certain elements about the crime did the description change(T.537). "If witness initial description more accurately describes an alternate candidate then defendant and selection of defendant is not positive, thus pointing towards a misidentification rather than toward reliability, a finding that the witness had a good opportunity to observe and a high degree of attentiveness will further support a conclusion of misidentification than suggesting reliability" (Solomon v. Smith, 645 F.2d 1179 [1981]). Benn's initial description was more similar to Richardson's description. Benn described the shortest shooter as 5'2 to 5'4" and as a boy. Richardson described one of the perpetrators as less than 5' feet and said they looked to be 15, 16 years old, then later on that same night as the crime, she said they looked to be 14, 15, and 17(T.65, 74).

Testimony showed that Benn's attention was towards the perpetrators clothing and not their face; as she described them as dressed thuggish and said that their pants were hanging from their waist(T.313, 315, 334, 336, 338, 366). Also when the perpetrators passed, Benn admitted that they didn't look in her direction(T.327), so at best all Benn had was a side view and she insinuated that the "short one" has his hood on. The "short one, the one closest to me had a red hoodie with spider web type designs on it, the middle one, the big one, he had on a black cap with a black hoodie, but he didn't have his hood on. And the other boy nearer the curb had his hoodie on, a dark colored hoodie"(T.315)

During the shooting Benn was facing the opposite direction because she was trying to get the elderly woman into the building(T.316, 327, 357) which in the past had suffered a stroke so it was hard for Benn to move her(T.358). The lady was older than Benn, which Benn herself was 55, had osteoarthritis and lumber in her back, and used a cane(T.317). Also testimony showed that there was a stone wall, bannister, and tree that obstructed Benn's view(T.331-33, 362). Benn was several houses away from the shooting which occurred at 217 Bainbridge Street, from where Benn was at on 223 Bainbridge Street(T.331). Which at that distance and with the stone wall, bannister, and tree; Benn could only see the flashes from the

guns(T.316, 359, 362). "No, I don't remember the color of the guns. But I know they was coming from out all of them guns, because the bullets were like red and blue coloring and stuff. All of that was just coming out. I actually saw all of that"(T.316). Benn admitted being terrified and scared(T.325, 337).

Also Benn was not trustworthy, on October 30, 2009, she phoned Detective Miller asking for help for her grandson and son who had been arrested for gambling(T.286-87, 341-42). She became upset after Miller responded that he could not help her and in the coming days withdrew her cooperation in this case(T.243, 287-88). Miller also received a call directly from the grandson who hung up after the detective said that there was nothing he could do to help him(T.288-90). However, Benn eventually returned to the fold, cooperating(T.290, 343).

D.H. also didn't have sufficient opportunity to view the perpetrators at the time of the shooting. D.H. stated when the perpetrators approached he had his head down eating his meal(T.114). He did not look up until someone asked if they were affiliated with "Chaun City." An instant later, after S.H. replied that they were, all three of the gunmen started shooting. D.H. was hit and said that it was a bright flash from the gun(T.115). D.H. closed his eyes as he lost consciousness(T.124). D.H. said the perpetrator whom he identified as petitioner had on a hood and the perpetrators didn't stand in front of him long(T.105, 122). He admitted that he watched the guns and the incident happened very fast(T.125, 132). When he awoke he saw Stokes entering/entering the building and falling and then the shooters running off; giving D.H. a view of the shooters back.

Both Benn and D.H. made an identification a year and a half after the incident. See U.S. v. Wong, 40 F.3d 1347, 1360 [2d Cir. 1994] "noting that a ten-month period between the crime and a lineup militating against reliability." Both witnesses admitted to seeing the flashs of the gun. See U.S. v. Williams, 469 F.2d 540 [C.A.D.C 1972] "One need not be a trained psychologist to realize that during such a brief glance fear alone would draw one's attention to the gun rather than the face." See Roger Handberg, Expert Testimony on Eyewitness Identification: A new pair of glasses for the jury, 32 A.M. Crim. L. Rev 1013, 1018-1019 [1995] "Explaining that research indicates that witness exposed to violence are

better of recalling the perpetrators general actions than they are at describing the perpetrator." See Smith v. Smith, No. 02 Civ. 7308, 2003 WL 22290984 at 11 [S.D.N.Y 2003] "Studies have indicated that a crime witness attention will often be highly focused on the weapong being used in the crime, the(barrel of a gun or the blade of a knife), resulting in a reduction in ability of the witness to remember other details of the crime(Including of assailant). D.H. also admitted to lying under oath(T.147-49).

Finally, State Court's error in admitting unduly suggestive and unreliable identification testimony and the rest of the court's below for affirming, was not harmless. The error had a "substantial and injurious effect or influence in determing the jury's verdict"(See Brecht v. Abrahamson, 507 U.S. 619, 623 [1993]). The case against the petitioner hinged on witness Benn and D.H. testimony that petitioner was one of the shooters. There was no physical evidence that linked petitioner to the crime. Richardson, the woman inn the car who was at the red light, made no identification whatsoever when shown a photo array which included petitioner and didn't ID petitioner at trial and described one of the shooters as under 5' feet. Without Benn and D.H. this would have left Spears as the only meaningful witness. Spears asserted that he drove the alleged shooters to a spot near the scene and then back home, but acknowledged that he received immunity for his testimony and that he did not witness the actual event. "Eyewitness identification evidence has a powerful impact in juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime"(Watkins v. Sowders, 449 U.S. 341, 353 [1981]). Therefore, without Benn and D.H., the prosecutor would have only had a circumstantial case based on a witness testimony which required corroboration(C.P.L §60.22). Therefore, the failure to suppress the identification by Benn and D.H. was not harmless and testimony bore an issue that is plainly critical to the jury's decision.

For the above reasons, petitioner conviction was infected with significant prejudice, and deprived him of due process of law, U.S. Const. Amend 14, and therefore cannot stand. Accordingly, petitioner request for relief be granted or an independent source hearing should the prosecution seek one.

THE DISTRICT COURT COMMITTED ERROR BY RULING ON PETITIONER'S STATE APPEAL, INSTEAD OF THE ISSUES AND ARUGMENTS RAISED IN PETITIONER'S HABEAS PETITION

Petitioner only raised one issue in his habeas petition; suggestive identification. However, in the District Court's "Memorandum Decision; Proceedings Below," it stated:

> "Smart filed the petition pro se, raising the same claims he raised before the Appellate Division."

In the District Court's "Analysis" it stated:

> "Smart raises four claims. As the Appellate Division did, I address the claims in the following order:(1) the denial of his request for new appointed counsel; (2) the purported suggestiveness of the lineup identification; (3) the sufficiency of the evidence; and (4) the sentence."

These are not the claims in the petition, but the claims raised in petitioner's State Appeal to the Appellate Division (See People v. Smart, 142 A.D. 3d 513 [2 Dept. 2016]. Petitioner filed a Rule 60 B motion addressing to the District Court that they ruled on his State Appeal and not his Habeas Petition(See Appendix F). The District Court claimed that they did rule on petitioner's Habeas Petition. However, not only were the claims the District Court rules on not the claims raised, but they were never exhausted; only the suggestive identification claim. "The Antiterrorism and Effective Death Penalty Act(AEDPA) requires that a habeas petition exhaust each claim he wishes to raise in Federal Court by first seeking remedies that may be available in the courts of the state in which he was convicted, or demonstrate that there is an absence of available state corrective process or that circumstances exist that render such process ineffective to protect his right." 28 U.S.C.A §2254 [b][1]; U.S.C.A. CONST. AMEND 14.

The sole purpose of a habeas petition pursuant to 28 U.S.C.A §2254 is for the petitioner to show that "State Court adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of , clearly established Federal Law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court

proceeding."

The District Court ruled on petitioner's State Appeal, instead of petitioner's habeas petition. In doing so, never considered the arguments or theories that would have supported petitioner's petition under 28 USCA §2254 [d][1][2]. The District Court considered arguments that petitioner never even made in his habeas petition (See Sexton v. Beaudreaux, 138 S.ct. 2555 [2018]; Harrington v. Richter, 562 U.S. at 102, 131 S.ct. 770 [2011]).

CONCLUSION

For all of the above stated reasons, your petitioner, Andrew Smart, urges this court to grant the relief sought.

Dated: Jan 29, 2024

Respectfully Submitted,

Andrew Smart 138565