

**RECEIVED**

**Oct 03 2023**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

---

BRIAN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000724

---

BRIEF OF APPELLANT  
PURSUANT TO WHITE V. STATE

---

SARAH E. SHIPE  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW ..... 4

ARGUMENT

The trial court erred allowing multiple witnesses to make in-court identifications of petitioner as the shooter where the court ruled the photographic lineup used by law enforcement was suggestive but wrongly found the identifications were nonetheless reliable...... 5

CONCLUSION..... 14

**TABLE OF AUTHORITIES**

**Cases**

*Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972)..... 6, 10, 12

*State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012) ..... 10

*Sellner v. State*, 416 S.C. 606, 787 S.E.2d 525 (2016) ..... 5

*State v. Moore*, 343 S.C. 282, 540 S.E.2d 445(2000)..... 5

*State v. Traylor*, 360 S.C. 74, 600 S.E.2d 523 (2004) ..... 5, 10

**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred allowing multiple witnesses to make in-court identifications of petitioner as the shooter where the court ruled the photographic lineup used by law enforcement was suggestive but wrongly found the identifications were nonetheless reliable?

## STATEMENT OF THE CASE

On May 14, 2018, a Spartanburg County grand jury indicted petitioner for murder, possession of a firearm or ammunition by a person convicted of a violent crime, three counts of attempted murder, and four counts of possession of a weapon during a violent crime. App. 13, l. 25-15, l. 12; 667-74. Petitioner's case was called to trial before the Honorable J. Derham Cole and a jury on April 8, 2019. App. 1. Petitioner was represented by Beverly Jones and the state was represented by assistant solicitors, Spenser Smith and Candace Clark. App. 1.

The jury convicted petitioner of murder, attempted murder, two counts of possession of a weapon during the commission of a violent crime, and possession of a firearm or ammunition by a person convicted of a violent crime. App. 550, l. 9-551, l. 1. The jury found petitioner was not guilty of two counts of attempted murder and two counts of possession of a weapon during a violent crime. App. 550, l. 9-551, l. 1. Judge Cole sentenced petitioner to life imprisonment for murder, thirty years' imprisonment for attempted murder, and five years' imprisonment for both weapon charges. App. 572-73.

Defense counsel filed an untimely notice of appeal on April 23, 2019, and the Court of Appeals dismissed the appeal. App. 575-77. On June 26, 2019, counsel filed a motion to reinstate the appeal, which was denied by written order. App. 578-79. The remittitur was issued October 3, 2019. App. 580.

Thereafter petitioner filed an application for PCR. App. 581-86. On June 7, 2022, an evidentiary hearing was held before the Honorable William A. McKinnon. App. 594-649. Petitioner was represented by Rodney Richey and the state was represented by Chelsey Marto. App. 594.

On March 22, 2023, Judge McKinnon signed an order granting belated appellate review pursuant to *White v. State*, and denied PCR as to all other claims. App. 652-65. Judge McKinnon found petitioner was entitled to belated review of his conviction where counsel assumed responsibility for her failure to timely file and serve the notice of appeal. App. 664. Judge McKinnon found this failure denied petitioner an opportunity to seek appellate review of his convictions and that he had not knowingly, voluntarily, and intelligently waived that right. App. 664.

Petitioner now files this brief addressing the direct appeal issue, as required by Rule 243, SCACR, simultaneously with a petition.

## STANDARD OF REVIEW

“[W]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact.” *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) (finding show-up identification unreliable as a matter of law); *see also State v. Traylor*, 360 S.C. 74, 81-82, 600 S.E.2d 523, 526-27 (2004) (*citing Moore* and holding that photographic line-up procedure was “patently suggestive”). “Generally, the decision to admit an eyewitness identification is at the trial judge’s discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error.” *Moore* at 288, 540 S.E.2d at 448. “In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court.” *Id.* Questions of law are reviewed *de novo*. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

## ARGUMENT

The trial court erred allowing multiple witnesses to make in-court identifications of petitioner as the shooter where the court ruled the photographic lineup used by law enforcement was suggestive but wrongly found the identifications were nonetheless reliable.

### **Relevant facts**

On February 18, 2018, Eric Morris was shot and killed in his home. His friend Joel Campbell and his house mates, Joe Lewis and Thomas Koepke, were outside the house when the shooting occurred. Koepke entered the home to check on Morris and was shot and injured.

Prior to trial a *Neil v. Biggers*<sup>1</sup> hearing was held to determine the admissibility of the identifications of petitioner by Joel Campbell and Joe Lewis. App. 52-112. Testimony from the hearing is summarized below.

Officer Mark Gaddy claimed that shortly after he arrived at the scene of the incident, he was given petitioner's name as the individual who was potentially responsible for the shooting. Gaddy said petitioner generally fit the description of the shooter that law enforcement had been given at that time. App. 52, l. 11-53, l. 6. Gaddy stated that Joel Campbell described the shooter as "5'6" to 5'8", skinny with no facial hair, close on the sides with a mop-top haircut, dark skin with a hoodie, possibly blue and white." App. 59, ll. 15-21. A neighbor, Jim Moore, described the suspect as, "5'7" to 5'8", skinny with hair close on the sides with a mop top . . . black t-shirt with a white hand on it . . . black sweatpants." App. 59, l. 22-60, l. 1

Gaddy testified he and Jon Guest generated the photographic lineup using "people with the same physical characteristics" as petitioner. App. 53, ll. 7-25; 684-94. Gaddy said he and Guest showed the same lineup to every witness. App. 54, ll. 15-21. He took a statement from a

---

<sup>1</sup> 409 U.S. 188 (1972).

neighbor Jim Moore and showed him the lineup to see if he could identify the person he saw shortly after the incident.<sup>2</sup> App. 54, l. 23-55, l. 6. Moore identified petitioner. App. 56, ll.

Joel Campbell was at Eric Morris's, home on the day of the incident. App. 82-87. Campbell testified at some point during the afternoon a man in a hoodie showed up and Morris told him he was a friend. App. 83, l. 15-84, l. 6. Campbell described the man as a young black man 5'6" to 5'8" skinny without facial hair and wearing a "possibly blue and white" hoodie. App. 84, ll. 9-12; 91, ll. 17-19. He claimed that prior the shooting the man was outside for forty-five minutes to an hour. App. 85, ll. 16-21. After the incident, Campbell was shown the photographic lineup. Campbell testified that he identified petitioner as the shooter, "as soon as [he] saw his eyes." App. 89, ll. 1-23.

Joe Lewis was also at Morris's home the day of the shooting. Lewis alleged he had seen petitioner before because petitioner lived with Morris for a short time. However, he also said he had never spoken to petitioner. App. 99, ll. 22-25. Lewis did not know petitioner's name he just recognized him as someone he had seen before. App. 100, ll. 1-5; 101, ll. 1-3. He testified he did not interact with the man on the day of the incident but said they were both outside at Morris's house for around twenty minutes. App. 100, ll. 11-25; 103, ll. 20-23. Lewis claimed when he saw the photographic lineup, he recognized petitioner and was certain he was the shooter. App. 102, ll. 11-25.

Defense counsel argued both Campbell's and Lewis's identifications of petitioner were inadmissible because the photographic lineup used by law enforcement was inherently suggestive based on the description Officer Gaddy said they used to generate the lineup. App. 108, ll. 9-13. Counsel asserted that law enforcement was told the shooter did not have facial hair

---

<sup>2</sup> Moore's in-camera testimony is given later during trial and was not a basis for the pretrial determination that Campbell's and Lewis's in-court identifications of petitioner were admissible.

and every other individual used for the lineup had facial hair except petitioner. App. 108, ll. 11-13. The solicitor argued law enforcement did the best they could in this circumstance based on the photographs they had access to at the time. The solicitor contended each person who viewed the lineup was admonished not to pay attention to hair length or facial hair. App. 108, ll. 15-24. The solicitor averred that the witness, Thomas Koepke, who arguably had the closest look at the shooter was unable to identify anyone in the lineup which demonstrated that the lineup was not unduly suggestive. App. 108, ll. 18-21.

The trial court found the lineup *was* suggestive where petitioner was the only person in the lineup that was clean shaven and where he appeared “right in the middle of the lineup.” App. 110, ll. 3-11. However, the court ultimately found the identifications by the witnesses were admissible.

As to Lewis the court found the suggestiveness was “likely negligible” where Lewis knew petitioner. App. 110, l. 22-111, l. 15. As to Campbell the court noted he picked petitioner “immediately based upon his eyes.” The court also noted Campbell’s level of certainty was high that the shooter was petitioner. App. 111, l. 16-112, l. 8. The court found there was “no real corrupting influence” of the suggestive lineup based on the testimony and the other factors. The court stated:

[w]hile the procedure might have been somewhat suggestive, I find that their testimony is, nevertheless, credible and that their identification of the [petitioner] was not based upon any suggestive lineup but based upon their own certainty and recollection as to the events, the circumstances relating to that event and their ability to identify the [petitioner] as the perpetrator of the offense; and therefore the in-court identification shall be permitted.

App. 112, l. 23-113, l. 7.

During trial Jim Moore, a resident that lived near Morris, testified in-camera. App. 207. Moore said that on the day of the incident a man entered his backyard saying someone had raped

and killed his mother. App. 208, ll. 8-18. Moore went to get his home phone to call 911 for help. App. 208, ll. 19-25. Moore testified that while he was on the phone with 911, the man grabbed the phone and walked away. App. 209, ll. 1-6. He said that he heard the man asking someone to come get him. App. 209, ll. 7-16. Moore claimed that before law enforcement arrived the man left. App. 209-210. Moore estimated that the interaction with the man was twenty minutes and that they were standing only a few feet from each other. App. 211, ll. 2-5. Moore described the man as a young black man wearing black sweatpants and a black hoodie with a large white hand on it. App. 210, ll. 17-24. When law enforcement showed him the photographic lineup he choose petitioner. App. 212, ll. 1-17. (207-217)

After Moore's in-camera testimony, the court ruled Moore's identification of petitioner was admissible. The court again found the lineup was "arguably suggestive," but found that the identification of petitioner was "nevertheless, reliable." App. 215, ll. 20-25

All three witnesses made in-court identifications of petitioner as the shooter. App. 153, l. 1-154, l. 17; 179, ll. 18-25; 223, ll. 11-16. Thomas Koepke who had not been able to identify petitioner from the lineup testified he was one hundred percent sure petitioner was the person who killed decedent and shot him. App. 201, ll. 18-21; 203, l. 9-204, l. 21; 245, l. 19-246, l. 1.

## **Discussion**

The trial court erred in allowing Lewis, Campbell, and Moore to make in-court identifications of petitioner where the photographic lineup used by law enforcement was suggestive and created a substantial likelihood of irreparable misidentification.

An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. *State v. Liverman*, 398 S.C. 130, 138,

727 S.E.2d 422, 425 (2012). A witness's subsequent in-court identification is inadmissible “if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.” *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added); *see also Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401, 410 (1972).

Trial courts use a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from “unnecessarily suggestive” police procedures. *Biggers*, 409 U.S. at 198–99, 93. If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless “so reliable that no substantial likelihood of misidentification existed.” *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 199, 93).

To determine whether an identification is reliable, it is necessary to consider the factors set forth in *Biggers*: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation. *Biggers* at 199-200.

The trial court correctly found that lineup used by law enforcement was suggestive where the suspect had been described as not having facial hair and the petitioner was the only individual depicted in the lineup that did not have facial hair. The trial court’s reasoning was sound where it discussed that when generating a lineup law enforcement should include persons with similar characteristics that are based on witness’ descriptions. Here law enforcement was

informed the suspect did not have facial hair. Petitioner's photograph in the lineup showed him without facial hair. Notwithstanding those facts law enforcement selected five additional individuals for the lineup that had facial hair. Accordingly, the lineup was suggestive where, as the trial court noted, "an important part of the description was that the perpetrator was clean shaven," and all of the other photographs included were of individuals that had facial hair.

The trial court erred finding that despite the suggestive lineup the identifications were reliable under the *Biggers* factors. As to Lewis the court relied heavily on the fact that Lewis knew petitioner. However, his testimony was not that he knew petitioner it was that he had seen him before. In fact, Lewis did not know petitioner at all. Lewis did not even know petitioner's name as he had admittedly only seen petitioner one time before. This is not a situation where these two men were well acquainted and there would be no mistaking petitioner for someone else. According to Lewis's own testimony he had seen him once or twice before in passing and the two had never spoken to each other. The court stated that the other factors—witness opportunity to view individual, degree of attention, level of certainty—were all considered. However, the court failed to make specific findings as to the listed factors.

As to the first factor Lewis testified that he did not interact at all with petitioner on that day although they were both outside for about twenty minutes. Lewis did not testify at all about the second factor, his degree of attention. As to the third factor, Lewis previously described the individual as skinny, medium build, black guy with short hair. In the lineup you cannot see petitioner's build or weight. Petitioner is black as were all of the men shown in the lineup but his photograph in the lineup depicts longer hair. Lewis was certain that petitioner was the person he saw at the house and the lineup was shown to him the same day as the incident. However, when considering all of the factors together and weigh those factors against the corrupting effect of the

suggestive lineup Lewis's identification cannot be deemed reliable.

Regarding Campbell's identification of petitioner, the trial court appeared to rely solely on Campbell's level of certainty that petitioner was the shooter because of the way his eyes looked. However, Campbell admitted he did not give any description of the man's eyes to law enforcement on the day of the incident. App. 91-92. The court also noted the short time between the incident and the identification. Campbell testified that he and the man were outside Morris's home together for less than an hour. Campbell claimed at one point the man was staring at him but also testified that he was not really involved in the conversation because he was working on Morris's moped. App. 83, ll. 15-86, l. 12. However, the court did not make any specific findings as to the first three *Biggers* factors and when considering all of the factors together and weighing those factors against the corrupting effect of the suggestive lineup Campbell's identification cannot be deemed reliable.

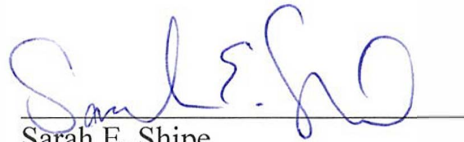
As to Moore's identification of petitioner the trial court did not make specific findings as to the *Biggers* factors although he summarily stated he considered them. Only two *Biggers* factors establish any degree of reliability in Moore's identification. Moore claimed he was around the man for twenty minutes and that they were standing very close. Moore's testimony was completely silent as to his "degree of attention." Moore's description was vague at best and did not match the clothing description of the other witnesses. Accordingly, when considering all of the factors together and weighing those factors against the corrupting effect of the suggestive lineup Moore's identification cannot be deemed reliable.

While it is true the state offered other evidence that pointed towards petitioner's guilt the in-court identifications made by Lewis, Campbell, and Moore, were incredibly damaging to petitioner. The out of court identifications of petitioner by all three witnesses violated

petitioner's due process and should have been suppressed where the photographic lineup used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification.

**CONCLUSION**

By reason of the foregoing argument, petitioner's convictions should be reversed, and this case remanded for a new trial.



Sarah E. Shipe  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

This 3rd day of October, 2023.

RECEIVED

Oct 03 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

---

BRIAN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

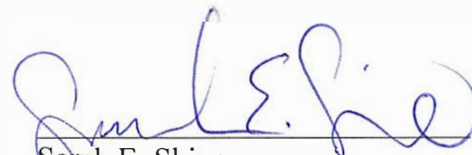
APPELLATE CASE NO. 2023-000724

---

CERTIFICATE OF SERVICE

---

The undersigned hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Suzanne Shaw, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Brief of Appellant pursuant to White v. State has been served on Brian Cornelius Foster, #371789, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of October, 2023.



Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER