

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Cherokee County  
J. Derham Cole, Circuit Court Judge  
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**RECEIVED**

AUG 27 2013

**S.C. Supreme Court**

TRAVIS PARKER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000131  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## ISSUE PRESENTED

Whether trial counsel rendered ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel and Sixth Amendment right to confront the witnesses against him by failing to properly object to and preserve for appeal the inadmissibility of testimonial hearsay statements by the decedent allegedly identifying petitioner as his murderer where these statements were tainted by police suggestion?

## STATEMENT

On October 4, 2007, a Cherokee County grand jury indicted Travis Parker (“Parker”) for murder. App. 567. On August 11, 2008, Parker was tried before the Honorable Roger L. Couch and a jury. App. 1. Michael Morin represented the State. App. 1. Thomas Shealy represented Parker. App. 1. The jury convicted Parker. App. 45, ll. 3 – 7. Parker was sentenced to life imprisonment without the possibility of parole pursuant to section 17–25–45 of the South Carolina Code. App. 487, l. 21 – 488, l. 10. App. 493, ll. 15 – 17. His conviction was affirmed on appeal. State v. Parker, Op. No. 2010-UP-144 (filed February 23, 2010). App. 559.

On November 2, 2010, Parker filed a PCR application. App. 495. On September 4, 2012, a hearing was held before the Honorable J. Derham Cole. App. 506. Ernest Hamilton represented Parker. App. 506. Suzanne H. White represented the State. App. 506. Trial counsel did not appear at the hearing because he was in Afghanistan. App. 556, ll. 13 – 16. On December 17, 2012, Judge Cole denied Parker’s PCR application. App. 558. This petition follows.

## ARGUMENT

Trial counsel rendered ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel and Sixth Amendment right to confront the witnesses against him by failing to properly object to and preserve for appeal the inadmissibility of testimonial hearsay statements by the decedent allegedly identifying petitioner as his murderer where these statements were tainted by police suggestion.

### Introduction

The State's theory of this case was the dubious notion that Travis Parker committed a drive-by shooting from a car driven by a woman who knew nothing about his intentions and was completely shocked and surprised when Parker supposedly leaned out of a moving car and began firing. The driver was a crack and meth user who, despite her admitted involvement in the shooting and her drug history, drove immediately to a police station to report the crime after dropping Parker off near his house. A passenger in the car, who also claimed he was shocked when Parker began shooting, later confessed to two people that he was the one who shot the decedent. The jury convicted Parker after hearing an alleged statement by the decedent identifying Parker as the shooter after the police suggested Parker's name while the decedent was coughing and spitting up blood.

### **Relevant Facts**

Travis Parker testified in his own defense and vehemently denied shooting the decedent, Maraine Foote ("Foote"). App. 346, ll. 19 – 20. Parker's testimony was contradicted by Nicole ("Nicole") and Jarvis Thompson ("Jarvis"). Nicole and Jarvis, who both were from Blacksburg, denied being related to each other. App. 105, ll. 8 – 13. App. 150, ll. 1 – 8. Nicole denied ever seeing Jarvis before the day of the murder. App. 105, ll. 14 – 15. However, Jarvis admitted that he

had seen Nicole “[i]n the trailer park.” App. 150, ll. 3 – 6. Both Nicole and Jarvis claimed that Parker shot Foote in an impromptu drive-by shooting from the passenger seat of Nicole’s car. App. 109, l. 9 – 110, l. 1. App. 154, l. 21 – 155, l. 19. Nicole and Jarvis were never charged in relation to this murder. App. 382, ll. 17 – 25.

Parker testified that on the day of the murder, Jarvis wanted a haircut. App. 322, ll. 23 – 24. Parker and Jarvis were renewing their friendship after a falling out involving Jarvis’s father and a girl. App. 326, ll. 3 – 9. Nicole picked up Parker and Jarvis and took them to the barbershop. App. 323, l. 19 – 324, l. 6. Parker freely admitted to the jury that he sold crack and meth. App. 348, ll. 5 – 7. He testified that he would give Nicole meth in exchange for rides. App. 348, ll. 14 – 17. Parker had crack and meth with him when he got into Nicole’s car. App. 348, ll. 8 – 10.

Nicole took Parker and Jarvis from Blacksburg to a barbershop in Gaffney. App. 324, l. 21 – 325, l. 11. Parker used to work at this barbershop. App. 325, ll. 12 – 18. Parker cut Jarvis’s hair and hung out for a while at the barbershop. App. 327, ll. 1 – 23. Nicole came to the barbershop and picked up Jarvis. App. 327, l. 24 – 328, l. 3. They told Parker they were going to get something to eat. App. 327, l. 24 – 328, l. 3.

After Parker finished getting his hair cut, he called Nicole to come get him. App. 328, ll. 15 – 17. Nicole and Jarvis picked him up from the barbershop. App. 328, ll. 18 – 19. Jarvis got out of the front passenger seat and sat in the back. App. 328, ll. 22 – 25. Parker sat in the front. App. 328, ll. 22 – 25. Nicole drove them back to Blacksburg. App. 329, ll. 22 – 23. She seemed in a hurry to get back to Blacksburg. App. 330, ll. 6 – 13. She let Parker off at the trailer park. App. 330, ll. 14 – 18. She then left with Jarvis. App. 330, ll. 21 – 24.

About twenty-five minutes after Parker got home, Nicole called. App. 330, l. 25 – 331, l. 4. She told Parker, “You done risked putting me and my kids in danger.” App. 331, ll. 5 – 11.

Although Parker was not sure what she was talking about, he assumed she meant the drugs he left in her car. App. 331, ll. 5 – 21. She hung up before telling him what she meant. App. 331, ll. 22 – 23. She then called back and asked Parker for his location. App. 331, l. 24 – 332, l. 2. She again blamed him for getting her in trouble and abruptly ended the call. App. 332, ll. 1 – 2.

Parker cooperated with the police. Soon after Nicole hung up on him, a police officer called Parker. App. 332, ll. 3 – 6. The officers informed Parker they needed to speak with him so Parker attempted to turn himself in at the Blacksburg Police Department. App. 332, l. 11 – 333, l. 17. No policemen were at the Blacksburg Police Department. App. 333, ll. 10 – 13. Parker used a metal telephone on the wall to inform the police that he was waiting for them. App. 333, ll. 10 – 17. The police told Parker he would need to wait there for approximately thirty minutes. App. 333, l. 21 – 334, l. 9. Parker told them instead he would report to the Gaffney Police Department. App. 333, l. 21 – 334, l. 2. Parker caught a ride to the Cherokee County jail and waited outside for several hours until a policeman finally came outside and got him. App. 334, l. 3 – 385, l. 19. Parker's long wait was confirmed by a City of Gaffney policeman who used to work at the jail. App. 362, l. 3 – 363, l. 11. The policeman saw Parker waiting outside the jail from approximately 6:30 PM until approximately 10:00 PM. App. 362, l. 3 – 363, l. 11.

When Parker finally was interviewed by the police, he offered to write a statement concerning what he assumed were drug charges. App. 335, l. 23 – 336, l. 8. Parker thought the police had caught Nicole with his drugs. App. 336, ll. 12 – 14. When the police informed him they were charging him with murder, Parker told them he knew nothing about it and asserted his right to be represented by counsel. App. 336, ll. 1 – 5. The investigating officer confirmed Parker's version of the interview. App. 295, l. 16 – 296, l. 9. The officer also confirmed that Parker "always denied" being near the scene of the crime. App. 296, ll. 10 – 11.

Nicole claimed that after picking Parker and Jarvis up from the barbershop, Parker gave her directions to a street in Gaffney. App. 108, l. 18 – 109, l. 8. She claimed that Parker suddenly leaned out of her window with a gun and fired shots. App. 109, l. 9 – 110, l. 3. She said that Parker got back in the car and told her to drive. App. 110, ll. 18 – 22. Nicole admitted driving back to Blacksburg and dropping Parker off before dropping off Jarvis. App. 111, l. 2 – 113, l. 18. She then claimed that she went straight to the Blacksburg police station and told a police officer that Parker “shot someone.” App. 114, ll. 11 – 115, l. 5.

Parker called two witnesses who testified Jarvis admitted killing Foote. Jessica Bullock (“Bullock”) testified that she and Jarvis were discussing Parker’s charges when Jarvis “kind of hung his head.” App. 390, l. 11 – 391, l. 13. Jarvis told her that he was actually the person who shot Foote, but it was better for Parker to go to jail because Jarvis had a child, Parker was older, and Parker could handle incarceration better than him. App. 391, ll. 1 – 21. Bullock also witnessed a fight between Jarvis and another man. App. 400, l. 19 – 401, l. 18. Jarvis told the other man, “I’ve already got away with killing a man and I can do it again.” App. 401, ll. 21 – 24. Scartisha Allen testified she also had a conversation with Jarvis in which he said that Parker was in jail “for something he didn’t do.” App. 405, l. 19 – 406, l. 8. Jarvis said, “[H]e ain’t the one that pulled the trigger. I did.” App. 406, ll. 1 – 2. Jarvis said he couldn’t go to prison because “he had just had a baby.” App. 406, ll. 3 – 8. Jarvis admitted that he knew Bullock and Allen, but denied making these statements. App. 375, l. 20 – 377, l. 4.

Correy Haney (“Haney”) worked at the barbershop. App. 304, ll. 17 – 18. He was subpoenaed by the State and did not willingly testify. App. 304, ll. 13 – 16. The State called him as a witness because he testified that on the day of the shooting, Parker “said something to the effect of that nigger ran me. He think he gonna be able to stay in Gaffney, I’m gonna burn that nigger,

something like that. Something to that effect.” App. 306, ll. 8 – 13. Parker denied making this statement and testified that he had been in the back of the barbershop shooting dice. App. 327, l. 15 – 328, l. 14. Haney said on cross-examination that Parker had been “[t]alking to everybody” and was being boisterous. App. 309, ll. 5 – 9.

Importantly, Haney confirmed Parker’s version of how he left the barbershop. Parker said that Jarvis left with Nicole and that when they came back to pick him up, Jarvis got in the back. App. 328, ll. 15 – 25. Haney confirmed this:

Q. Okay. Did you see him when he left your shop?

A. Yes.

Q. Can you tell me how he left?

A. Blue car.

Q. Who was driving the car?

A. I could not see the, the female. But I could see the silhouette, and I knew it was a female.

Q. Driving?

A. Yes.

**Q. Was there anybody else in the car?**

**A. Yes.**

Q. Where?

A. It was a young guy. I’d say a little short guy, slim.

Q. Uh-huh. (Affirmative).

A. He got in the back seat.

Q. He got in the back seat?

A. Yes.

Q. What seat did he [likely referring to Parker] get in?

A. The passenger seat.

Q. Front?

A. Front.

App. 306, l. 14 – 307, l. 9 (emphasis added). Nicole claimed that after she dropped Jarvis and Travis off at the barbershop, she ran errands and then picked them both up together at the barbershop. App. 106, l. 14 – 107, l. 9. Jarvis also said that he and Parker got their hair cut and then Nicole came back to pick them up. App. 151, ll. 15 – 23. Haney’s version corroborated Parker’s testimony that Nicole and Jarvis were together when they picked him up from the barbershop. It also made Nicole’s testimony that she had never seen Jarvis before that day suspicious.

At the PCR hearing, Parker provided a possible motive for Nicole to lie about his involvement in the crime. Parker testified that Foote worked with a “Cuban” who dealt drugs. App. 534, l. 14 – 535, l. 6. Nicole was also involved with Foote and the Cuban. App. 534, l. 14 – 535, l. 6. The Cuban went to prison after an altercation involving Nicole and Foote. App. 534, l. 14 – 535, l. 6. Parker testified that he was framed because of the infamy of the Parker family in Cherokee County where “they done a lot of stuff in their life.” App. 535, ll. 7 – 13.

*The Admission of Foote’s Statements*

The court held a pretrial hearing regarding the admissibility of alleged statements by Foote identifying Parker as the shooter. App. 51, l. 21 – 54, l. 6. At the time of the hearing, trial counsel believed the only such alleged statements were made to a police officer and to EMS workers. App. 51, l. 21 – 52, l. 2. Trial counsel argued that these alleged statements should be suppressed because they were tainted by prompting from the police, the statements did not qualify as a dying declaration

because Foote did not believe his death was imminent, and that Rule 403 required their exclusion. App. 52, l. 3 – 54, l. 5. Trial counsel did not explicitly raise the Sixth Amendment’s Confrontation Clause as a ground for excluding the alleged statements.

The first witness to testify in the pretrial hearing was Officer Ken Taylor (“Taylor”) of the Gaffney City Police Department. App. 54, l. 21 – 55, l. 9. He was the first officer to arrive at the crime scene. App. 55, ll. 12 – 25. Taylor said he saw Foote “coming around the corner of a house.” App. 56, ll. 1 – 3. Taylor testified he then started questioning Foote about who shot him. App. 56, ll. 5 – 8. Taylor claimed Foote said, “[h]elp me, I’m dying” and “eventually told me a Parker from Blacksburg shot him.” App. 56, ll. 9 – 13. At that point EMS arrived. App. 56, ll. 14 – 16.

On cross-examination, Taylor testified that after Foote told him “a Parker from Blacksburg” had shot him, Taylor “was on the radio with dispatch, my radio mic, and told them, trying to give information out to the dispatcher for other police units. Told her what information I had, that he stated a Parker from Blacksburg had been the one that shot him.” App. 57, ll. 15 – 22. Dispatch replied, “could it possibly be a Travis Parker? They was chasing him around yesterday.” App. 57, ll. 23 – 25. Foote heard dispatch say the name “Travis.” App. 58, ll. one – 2. After hearing the name “Travis” from dispatch, Foote supposedly said “that’s him.” App. 58, ll. 3 – 5.

Sedrick Littlejohn (“Littlejohn”) was a bystander who called 911. App. 60, ll. 3 – 6. Littlejohn claimed that “in response to the officer’s question,” Foote said the name “Parker.” App. 61, ll. 8 – 10. At no point in the pretrial hearing did Littlejohn mention a first name for “Parker.”

David Swank (“Swank”) and Ken Edelmeyer (“Edelmeyer”) were the EMS workers who responded to the scene. Swank claimed that Foote said “Travis Parker” shot him. App. 66, ll. 1 – 6. Edelmeyer also testified that Foote said “Travis Parker” shot him. App. 69, l. 25 – 70, l. 9. Edelmeyer said he “was familiar” with Travis Parker and asked him if he was “talking about from

Blacksburg.” App. 70, ll. 5 – 9. Edelmeyer said, “I said something to the effect of are you talking about blacks, from Blacksburg, and he said yes, from Open Air mobile home park, from Open Air.” App. 70, l. 25 – 71, l. 2. The solicitor asked again to confirm whether Foote mentioned the “Open Air” mobile home park and Edelmeyer replied, “Yes, sir. And that’s where I was familiar with Travis Parker from.” App. 71, ll. 3 – 6. Trial counsel only asked Edelmeyer questions regarding whether or not Foote heard about the Open Air trailer park from the police or from dispatch. Edelmeyer did not know. App. 71, ll. 14 – 25.

What trial counsel did not inform the trial judge during the pretrial hearing was that Edelmeyer had been a police officer “for a good many years” before working for EMS. App. 227, ll. 22 – 25. He was familiar with the name “Parker” from his work at the Sheriff’s Department. App. 228, ll. 1 – 5. He knew Parkers from Blacksburg and Parkers from Gaffney. App. 228, ll. 6 – 8. He admitted there were a “large number of Parkers” from Blacksburg. App. 228, ll. 9 – 11. In fact, Edelmeyer admitted that he knew where Parker lived and used this information to question Foote. App. to 25, ll. 20 – 24.

Importantly, all of the fact witnesses who knew Parker testified that he was not known as “Travis,” but was known as “Dick.” App. 358, ll. 1 – 6. (Bridget Foote). App. 104, ll. 4 – 10 (Nicole). App. 148, ll. 14 – 18. (Jarvis). App. 305, ll. 3 – 6 (Correy Haney). App. 390, ll. 21 – 25 (Bullock). Foote’s wife, Bridget Foote (“Bridget”), testified that Foote only knew Parker as “Dick.” App. 358, l. 19 – 359, l. 2. Trial counsel used Bridget’s testimony to make this point in the pretrial hearing. App. 74, l. 22 – 75, ll. 7. Foote and Bridget were separated. App. 358, ll. 10 – 15. Bridget and Parker were in a relationship and this was the reason for her separation from Foote. App. 358, ll. 10 – 15. Foote and Bridget had both moved on with their lives and had agreed to get

“a cheap divorce.” App. 359, ll. 3 – 10. Foote said she wasn’t aware of “any bad blood” between Parker and Foote. App. 74, ll. 17 – 21.

After argument, the trial court denied Parker’s motion in limine to suppress Foote’s alleged statements. App. 80, ll. 12 – 13. Trial counsel argued that it was a “tainted identification” and did not qualify as a dying declaration. App. 77, ll. 17 – 25. Trial counsel also argued that the prejudicial value outweighed its probative value. App. 78, ll. 1 – 4. Trial counsel again failed to explicitly mention the Confrontation Clause.

Littlejohn changed his testimony between the pretrial hearing and when he was called during the State’s case-in-chief. App. 194, ll. 7 – 9. During the pretrial hearing, Littlejohn never claimed that Foote mentioned a first name, but during the trial he claimed that Foote said “Dick Parker, Dick Parker shot him.” App. 194, ll. 7 – 9. Trial counsel did not object. When Taylor testified before the jury, trial counsel did not make a contemporaneous objection. App. 205, l. 1 – 206, l. 8. Similarly, when Swank and Edelmeyer testified before the jury, trial counsel failed to make a contemporaneous objection. App. 215, l. 25 – 216, l. 19 (Swank). App. 225, ll. 3 – 19 (Edelmeyer). Appellate counsel for Parker filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967).

#### *The PCR Hearing and the PCR Court’s Ruling*

In his PCR application, Parker raised the ground that “counsel failed to raise crucial objections during the trial.” App. 497. Before calling witnesses, PCR counsel informed the court that this also would be a ground for PCR. App. 509, ll. 11 – 16. Parker testified that his lawyer failed to object to Foote’s alleged statements identifying Parker as the shooter. App. 521, ll. 2 – 16. The PCR court ruled on this ground stating, “Applicant testified that counsel should have objected to the victim’s statements indicating that the applicant was the one who shot him. However, after

questioning, applicants acknowledge the counsel made several pre-trial motions, including a Batson motion and a motion to keep out the victim's identification." App. 563. The PCR court held that Parker "failed to establish that there were any particular items of testimony or evidence that counsel should have objected to, but failed to do so." App. 563. The PCR court also ruled that Parker could not show prejudice because he failed to show that any such objections or motions "would have been granted by the trial court." App. 563.

### **Discussion**

Trial counsel performed deficiently in two ways. First, he failed to preserve the issue of the whether Foote's alleged hearsay statements were tainted by the police for appellate review. Second, trial counsel failed to raise any objection based on the Confrontation Clause. U.S. Const. amend. VI. Had trial counsel properly raised and preserved the objections, which would have required suppression of Foote's alleged statements, there is a reasonable probability the outcome of the trial would have been different. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 – 13 (Ct. App. 2004). A motion in limine is not a final ruling except under certain conditions and a contemporaneous objection was required to preserve this issue. See State v. Johnson, 363 S.C. 53, 58 – 59, 609 S.E.2d 520, 523 (2005); State v. Simpson, 325 S.C. 27, 32, 522 S.E.2d 398, 600 (1999). Trial counsel failed to make contemporaneous objections when Foote's alleged statements were introduced. App. 194, ll. 7 – 9 (Littlejohn). App. 205, l. 1 – 206, l. 8 (Taylor). App. 215, l. 25 – 216, l. 19 (Swank). App. 225, ll. 3 – 19 (Edelmeyer). Therefore, trial counsel was deficient in failing to preserve the issue for appeal. Furthermore, trial counsel was

deficient for failing to raise the Confrontation Clause as an explicit bar to the alleged statements' admission.

The fact that this issue was not preserved for appeal is further indicated by the fact that appellate counsel filed an Anders brief. The failure to preserve an issue for appeal constitutes ineffective assistance of counsel. McHam v. State, , Op. No. 27287, Shearouse Advance Sheet No. 32 at page 60, 2013 WL 3723690 (July 17, 2013). In McHam, trial counsel failed to make a contemporaneous objection after losing a motion in limine. Id. Appellate counsel filed an Anders brief. Id. The State attempted to argue that no prejudice existed because of the Anders review. Id. This Court rejected that argument, stating that under the Anders procedure, the court reviews the entire record “for any *preserved* issues with potential merit.” Id. (emphasis in original). The McHam Court held that trial counsel’s performance was deficient. Id. Just as in McHam, trial counsel’s failure to preserve this issue for appeal constitutes deficient performance. See Strickland v. Washington, 466 U.S. 668, 687 (2011).

*Parker was Prejudiced Because Foote’s Alleged Statements Were Tainted by Police Suggestion*

Had Parker been able to raise the issue of the suppression of Foote’s alleged statements on appeal, his conviction would have been reversed. The police’s suggestion of the name “Travis” was impermissible and required suppression of the statements regardless of any exceptions to the hearsay rule.

Foote’s alleged statements were hearsay. They were made out of court and were offered for the truth of the matter asserted—that Travis Parker shot Foote. SCRE 801(c). The State argued that the excited utterance and dying declaration exceptions applied. Petitioner does not contest that under traditional circumstances, Foote’s alleged statements would satisfy the requirements of both of these exceptions.

However, Foote's alleged statement that the Parker who shot him was Travis Parker was not given under the traditional circumstances of either the excited utterance or dying declaration exceptions. Whether a hearsay statement qualifies as an excited utterance depends upon the totality of the circumstances. State v. Washington, 379 S.C. 120, 665 S.E.2d 502 (2008) (holding statement to police officer did not qualify as an excited utterance under totality of the circumstances test). The questioning by police and the suggestiveness of the questioning must be considered under the totality of the circumstances in this case.

First, even under both Littlejohn and Taylor's versions, Foote's offering of "Parker" was only in response to police questioning. Taylor testified that he immediately questioned Foote about who shot him. App. 56, ll. 5 – 8. Littlejohn claimed that "in response to the officer's question," Foote said the name "Parker." App. 61, ll. 8 – 10.

Second, Foote only said "Travis" after hearing the name "Travis" on the radio dispatch. App. 57, ll. 23 – 25. Officer Taylor's testimony that Foote heard dispatch say the name "Travis" was uncontradicted. App. 58, ll. 1 – 2. After hearing the name "Travis" from dispatch, Foote supposedly said "that's him." App. 58, ll. 3 – 5. "Travis" was suggested to Foote by the police while they were questioning him. Not only was the name suggested to Foote, but it was also suggested that "Travis" was a criminal the police were already pursuing. Dispatch stated that "They was chasing [Travis] around yesterday." App. 57, ll. 23 – 25. The police implanted the name "Travis" as associated with criminal behavior into the mind of a dying man who was spitting up blood. Importantly, Foote only knew Parker as "Dick" and would not have offered "Travis" as Parker's name without suggestion and prompting. App. 74, l. 22 – 75, ll. 7. App. 358, l. 19 – 359, l. 2.

“The rationale behind the excited utterance exception is that the startling event suspends the declarant’s process of reflective thought, reducing the likelihood of fabrication.” Washington at 124, 665 S.E.2d at 604. This reasoning, which supports the admission of a spontaneous excited utterance, detracts from the reliability of Foote’s statements in this case. The proposition that Foote’s thought processes were suspended increased his susceptibility to suggestion. The same analysis applies if a dying declaration analysis is performed. To be admissible, dying declarations must be made voluntarily, freely, and without coercion. 40A Am. Jur.2d Homicide § 355 (2013). The tainting of Foote’s statements by police suggestion renders them inadmissible under either an excited utterance or dying declaration theory. This brief discusses excited utterance and dying declaration cases interchangeably.

In Washington, statements made to a police officer were not admitted as excited utterances because the officer “was seeking detailed answers regarding the specific facts of the incident as opposed to emotional, **unprompted**, or inherent responses.” Id. (emphasis added). The name “Travis” was clearly prompted by the police.

Since at least 1887, Texas courts imposed a requirement that a dying declaration must not be the result of persuasion or leading questions. See Ledbetter v. State, 5 S.W.226, 256 (Tx. Ct. App. 1887); Gardner v. State, 306 S.W.3d 274, 289-90 (Tex. Crim. App. 2009) (noting that common law dying declaration had been modified by adoption of a rule of evidence). In Ledbetter, the court cited concern over whether the decedent was of sound mind when he made the challenged statement. Id. That factor is also present in this case as Foote was spitting blood and uncooperative with EMS personnel. App. 216, ll. 7 – 14.

In another Texas case, a stabbed woman gave statements implicating her husband. Love v. State, 581 S.W.2d 679, 680 (Tex. Crim. App. 1979). When police responded to the scene, they

asked questions ranging from “Who did it?” to “Was it your husband?” Id. The court held the statements were inadmissible hearsay. Id. at 681. The court stated, “We express concern about the admissibility of certain statements attributed to the deceased following the stabbing. It appears some of these statements were made in response to leading or suggestive questioning.” Id. The court further held that admission of the statements was not harmless error. Id.

The suggestiveness of the police’s conduct towards Foote is similar to that of a suggestive identification procedure. Neil v. Biggers, 409 U.S. 188 (1972). Identifications resulting from unreliable and unduly suggestive police procedures are not admissible. Id. at 198. The police’s suggestion of the name “Travis” along with the information that “Travis” was wanted by the police amounts to verbal single-person show-up. “Single person show-ups are particularly disfavored in the law.” State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000). In Moore, the Court held that a show-up identification procedure with only two individuals was patently suggestive. Id. Here, what occurred was even more suggestive because Foote was given a name and the information that the person was wanted by the police. Since the hearsay statements were the result of an inherently suggestive question and were unreliable, they should have been suppressed. Parker was prejudiced because trial counsel failed to preserve this reversible error for appeal.

*The Confrontation Clause Should Be Considered as Part of the Totality of the Circumstances*

Parker’s Sixth Amendment right to confront Foote as a witness was violated by the admission of Foote’s statements. U.S. Const. amend. VI. The PCR court failed to consider the impact of the Confrontation Clause because it stopped its analysis after finding that trial counsel performed adequately by raising the admissibility of Foote’s statements in a pretrial motion. Stopping its analysis at this point was error by the PCR court. Appellate counsel candidly admits that PCR counsel did not assist his client in raising the Confrontation Clause, but since the Sixth

Amendment analysis is inextricably intertwined with the taint flowing from the police interrogation and Parker himself raised the issue that his attorney failed to object to this evidence, the Court must consider its impact on this case.

Had the PCR court not erred and conducted a proper analysis, it would have found that the violation of Parker's Sixth Amendment rights required reversal of his conviction. The Confrontation Clause should be considered as part of the totality of the circumstances test when analyzing a hearsay statement under the excited utterance or dying declaration exceptions. In Washington, the Court subjected the challenged statements to a higher degree of scrutiny because they were the product of police questioning. Washington at 125, 665 S.E.2d at 604. The Court noted that statements to law enforcement can qualify as excited utterances, but distinguished the statements in Washington from the "off-the-cuff, volunteered responses to law enforcement" in other excited utterance cases. Id. In State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007), the Court conducted a Confrontation Clause analysis in an excited utterance case.

Implicit in nearly every excited utterance and dying declaration case is the Confrontation Clause. The reason the excited utterance or dying declaration is offered is almost always because the declarant is unavailable. In these situations—particularly dying declarations—the defendant will not have had an opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 53-54 (2004) (holding that the Confrontation Clause bars testimonial hearsay unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness). Situations where excited utterances or dying declarations are offered that do not implicate the Confrontation Clause will be extremely rare. Therefore, when a court is considering whether to admit an excited utterance or a dying declaration, the impact of the Confrontation Clause should almost always be considered as part of the totality of the circumstances.

When the Confrontation Clause is considered, it further shows that Parker's rights were violated by the admission of Foote's hearsay statements. The question whether the admission of Foote's statements violate the Confrontation Clause revolves around whether it is testimonial or non-testimonial evidence. See Crawford, at 68; Davis v. Washington, 547 U.S. 813 (2006). In Crawford, the Court ruled the Confrontation Clause barred the admission of statements made in response to a police interrogation. The Court observed that the involvement "of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuses. . . ." Crawford at 56, n.7. The Court also noted that the witness's hearsay statements were given "[i]n response to often leading questions from police detectives. . . ." Id. at 65. See also State v. Campbell, 1 Rich. 124, 30 S.C.L. 124, 1844 WL 2558 (S.C. Ct. App. L. 1844) (cited in Crawford and emphasizing the necessity of subjecting statements to cross-examination).

In fact, this Court came close to predicting Crawford's testimonial versus non-testimonial distinction in State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334, (1978). In Blackburn, a woman was assaulted and burned. Id. at 326, 247 S.E.2d at 336. An hour later, she was questioned at the hospital by a deputy. Id. at 327, 247 S.E.2d at 336. She told police she felt sure that the defendant was behind the attack. Id. The Court held that even though her statements were made while under the stress of the initial assault and appeared to qualify as *res gestae* or as an excited utterance, the nature of the statements prevented their admission. Id. at 328, 247 S.E.2d at 337. First, the Court noted that the witness was giving an opinion. Id. Second, and more importantly in this case, the statements were accusatory and the product of consideration and reflection. Id. These considerations, made under a totality of the circumstances analysis, are very similar to the Crawford analysis of whether a statement is testimonial hearsay. As in Blackburn, Foote's

statements are accusatory and are the product of reflection—albeit brief—upon a name and information given to him by the police.

In Davis, the Court addressed this issue with respect to a 911 call made during a domestic violence situation. Id. at 817-18. During the call, the victim identified the defendant as her attacker. Id. The Davis Court ruled the 911 call was admissible. Id. at 826-30. The Court stated, “A 911 call . . . and at least the initial connection with a 911 call is ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance.” Id. The Court noted an important distinction between calls for emergency assistance and interrogations by the operator about the facts of the incident. Id. at 828-29. The Court stated, “This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot . . . evolve into testimonial statements once that purpose has been achieved.” Id. at 828 (internal quotations and citations omitted). The Court noted that after the operator told the victim to be quiet and “proceeded to pose a battery of questions,” those statements could be construed as testimonial. Id. at 828-29. The Court noted that trial courts “should redact or exclude the portions of any statement that have become testimonial.” Id. at 829. See also, Hammon v. Indiana, companion case decided with Davis, at 819-20 (excluding excited utterances made to police shortly after the witness had been beaten by her husband as violating the Confrontation Clause).

The Supreme Court revisited the Confrontation Clause in Michigan v. Bryant, 131 S.Ct. 1143 (2011). Bryant’s facts somewhat resemble this case, but with important distinctions. In Bryant, the police responded to a scene where a man was suffering from a gunshot wound. Id. at 1150. The police asked non-leading questions and the victim told them the identity of the shooter and some of the circumstances of the shooting. Id. The Court held the statements were

not testimonial because the “primary purpose” of the interrogation was to meet an ongoing emergency. Id. The State will likely argue that a simplistic comparison of the facts of Bryant to the instant case compels the same result.

The important difference is there is no indication that the police asked any leading questions or suggested the identity of the shooter to the victim in Bryant. The majority agreed with Justice Scalia, who dissented, that “the content and tenor” of the interrogator’s questions “can illuminate the ‘primary purpose’ of the interrogation.” Id. at 1162. And the majority’s conclusion that not all such scenarios would result in nontestimonial statements is explained in an example that prophesies this case. Id. at 1160-61. The Court said:

To give an extreme example, if the police say to a victim, “Tell us who did this to you so that we can arrest and prosecute them,” the victim’s response that “Rick did it,” appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.

Id. at 1161. The Court’s example sheds much light on this case. Here, the police admittedly asked a leading question along with information that they “was chasing him around yesterday.” App. 57, ll. 15 – 25. The police questioning in this case is much more like the Bryant example of testimonial hearsay than the actual facts of Bryant. This Court should not be led astray by a facile comparison of this case with Bryant.

Even if the Court choose to analyze the instant situation to determine the “primary purpose” of the questioning of Foote, the circumstances do not indicate that an ongoing emergency was taking place. When Officer Taylor arrived, he saw Foote “coming around the corner of the house.” App. 56, ll. 1 – 3. He saw “other individuals there.” App. 56, l. 5. Instead of asking questions to see if there was still an ongoing danger or a shooter was still present, Officer Taylor “[s]tarted questioning who shot him.” App. 56, ll. 4 – 6. This questioning was one of the first things Officer Taylor did when he arrived on the scene. App. 56, ll. 22 – 24.

Officer Taylor did not testify that he asked if the shooter was still present.<sup>1</sup> He saw Foote “trying to sit on [a] swing set,” not diving for cover or looking for a place to hide. App. 57, ll. 2 – 5. Littlejohn was standing around Foote and not diving for cover. App. 60, ll. 5 – 24.

The unconcern of Foote, Littlejohn, Officer Taylor, and the bystanders objectively indicates that the emergency—someone firing shots in a neighborhood—was over. Officer Taylor’s questions were meant to determine “What happened?” instead of “What is happening?”. Davis, 126 S.Ct. at 2278; State v. Parks, 142 P.3d 720, 721 (Ariz. Ct. App. 2006) (finding responses to police questioning soon after a shooting were testimonial). Therefore, even under the “primary purpose” analysis of Bryant, Foote’s statements were testimonial and their admission violated the Confrontation Clause.<sup>2</sup> See Lopez v. State, 888 So.2d 693, (Fla. App. 2004) (holding an excited utterance made to police officers at crime scene nonetheless was testimonial and barred by the Confrontation Clause).

### Prejudice

Parker certainly was prejudiced by the admission of Foote’s statements. The State will likely point to the testimony of Jarvis and Nicole and claim that any error is harmless. But as pointed out above, these witnesses were far from unimpeachable. Nicole and Jarvis’s testimony

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<sup>1</sup> During his trial testimony, Officer Taylor attempted to add that he “didn’t know if the shooter was still on the scene,” but never testified that he asked this question of any of the “five to seven” males standing around Foote. App. 204, ll. 4 – 20.

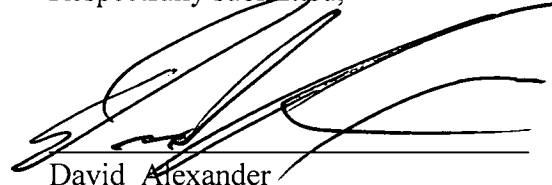
<sup>2</sup> The temptation in this case may be to say that the police did nothing wrong and were just doing their job trying to investigate the case. However, there is an important distinction between investigative tactics and the admissibility of evidence according to the Constitution. While questions such as Officer Taylor’s may or may not have been good police work, such an inquiry is wholly irrelevant to the question of admissibility and should not corrupt the Court’s analysis of these issues. Just as coerced confessions, lie detector tests, and forensic interviewers’ assessments of children’s credibility may be important investigative tools, they, like testimonial hearsay, have no place in the courtroom. See New York v. Quarles, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting)(explaining the difference between police action necessary to grapple with an emergency and the rights of the accused at trial).

that Nicole picked up Parker and Jarvis from the barbershop was contradicted by Haney, the unbiased witness from the barbershop. App. 306, l. 14 – 307, l. 9. Haney’s testimony not only corroborated Parker’s, but showed that Nicole and Jarvis told an identical lie about a key portion of their testimony. Two witnesses testified that Jarvis admitted shooting Foote and also said Parker was in jail for a crime he did not commit. App. 391, ll. 1 – 21. App. 401, ll. 21 – 24. App. 405, l. 19 – 406, l. 8. Finally, the words of a dead man would engender sympathy with the jury and were undoubtedly extremely prejudicial to Parker. After hearing the dead man identify his assailant, the jury likely turned a deaf ear to the other evidence in the case, including Parker’s testimony. Had Foote’s testimonial hearsay statements not been admitted, it is probable the outcome of the trial would have been different. Cherry at 117-18, 386 S.E.2d at 625.

CONCLUSION

For the foregoing reasons, the Court should grant the petition, reverse petitioner's conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of August, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Cherokee County  
J. Derham Cole, Circuit Court Judge

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TRAVIS PARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

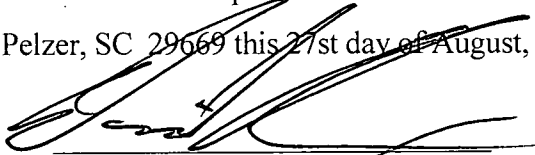
APPELLATE CASE NO. 2013-000131

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Travis Parker #240822 Perry Correctional Institution 430 Oaklawn Road Pelzer, SC 29669 this 27st day of August, 2013.



David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27st day  
of August, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.