

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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NOV 13 2014

Appeal from Darlington County  
Howard P. King, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOSHUA A. REED,

APPELLANT

APPELLATE CASE NO. 2013-002318

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ANDERS BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in refusing to suppress the identifications of appellant because the lineup photographs used, which had a significantly lighter background for appellant, suggested appellant as the suspect to the eyewitnesses?

## STATEMENT OF THE CASE

On January 21, 2013, a Darlington County grand jury indicted appellant Joshua Reed ("Reed") for murder and a related weapons charge. R. 695 - 698. Appellant was indicted along with his brother, Johnathan Reed. R. 1. On October 21, 2013, appellant was tried before the Honorable Howard P. King and a jury. R. 1. John W. Holt, IV and Patti M. Parker represented the State. R. 1. Julie Wooten and J. Richard Jones represented appellant. R. 1. Matthew S. Swilley represented appellant's brother. R. 1. The jury convicted appellant and acquitted his brother. R. 678, l. 16 - 679, l. 20. Judge King sentenced appellant to life imprisonment. R. 693, ll. 2 - 7. This appeal follows.

## ARGUMENT

The trial court erred in refusing to suppress the identifications of appellant because the lineup photographs used, which had a significantly lighter background for appellant, suggested appellant as the suspect to the eyewitnesses.

On February 15, 2012, at approximately 4:00 PM, Milton Hunter (“Hunter”) was shot in Pride Park in Hartsville. R. 320, l. 17 – 322, l. 20. R. 204, l. 23 – 205, l. 1. R. 208, ll. 12 – 14. Prior to trial, the court held a lengthy Neil v. Biggers, 409 U.S. 188 (1972) hearing. Six witnesses testified at the hearing. Three of the witnesses claimed to see the shooting and claimed they could identify appellant as the shooter. The other three witnesses were police officers who participated in the lineup procedure.

The first witness was Asia Gregg (“Gregg”). Hunter was her brother. R. 56, ll. 21 – 23. On the day of the shooting, Gregg, Hunter, and Gregg’s boyfriend, Johnny Lee Washington (“Washington”) were eating in the park. R. 57, l. 5 – 58, l. 14. Gregg claimed that Hunter saw appellant and his brother drive by in a blue truck. R. 58, ll. 1 – 5. Gregg said the brothers got out of their car and approached them in the park. R. 61, ll. 11 – 21. The brothers greeted Hunter. R. 61, ll. 17 – 24. At the hearing, Gregg testified that from the time the brothers entered the park until the time they left was approximately 30 to 35 minutes. R. 64, ll. 13 – 15. This was despite the exchange of only a few sentences. R. 68, ll. 7 – 25. Gregg claimed that everyone just stood there staring at each other for the remaining 30 to 35 minutes. R. 69, ll. 1 – 15. Gregg changed her testimony at trial and claimed that the time period was only 10 minutes. R. 221, l. 4 – 225, l. 1.

Pretrial, Gregg claimed that after Reed asked Hunter if he had talked to his big brother, her brother replied that everything was “squash” which meant that the matter was “done, dealt with, nothing more to deal with it.” R. 62, l. 20 – 63, l. 4. Gregg said, “five seconds after that Joshua took – it was a silver revolver out of his pocket and just started shooting.” R. 63, ll. 5 – 8. She also claimed that appellant’s brother had a gun in his pocket. R. 63, ll. 5 – 20.

Gregg claimed she first told the police that a man named “Juby” shot her brother. R. 65, l. 21 – 66, l. 18. She also claimed that she knew that Juby’s last name was Reed. R. 65, l. 21 – 66, l. 12. Gregg stated she knew appellant from school where they were acquaintances. R. 70, l. 24 – 71, l. 20. She admitted that the first name she gave the police was not Reed, but “Rail”. R. 72, ll. 16 – 22.

The police showed Gregg a photo lineup that evening. R. 66, l. 13 – 67, l. 9. She claimed that she was “a hundred percent” certain of her identification of appellant in the lineup. R. 66, l. 24 – 67, l. 14. On cross-examination, Gregg admitted that all of the lineup pictures had dark backgrounds except for appellant’s codefendant. R. 84, l. 22 – 87, l. 12.

Anthony Wingate (“Wingate”) was in the park drinking “a little bit of liquor” when he began socializing with Gregg, Washington, and Hunter. R. 88, l. 19 – 90, l. 10. Wingate claimed he witnessed the shooting and that appellant was the shooter. R. 92, ll. 9 – 23. Wingate admitted that he did not know the defendants’ names. R. 93, ll. 1 – 2. He was also shown a lineup. R. 93, l. 20 – 94, l. 15.

Washington also identified appellant as the shooter. R. 183, ll. 22 – 23. When asked if he knew the defendants before the shooting, he replied, “I’m saying I know them

but I ain't had known them like that." R. 183, l. 24 – 104, l. 1. He was also shown a photo lineup. R. 107, l. 19 – 108, l. 8.

Police Officer Brian Rudick ("Rudick") created the lineups that were used. R. 114, ll. 1 – 7. He initially used a software program to attempt to create a lineup R. 116, l. 14 – 117, l. 5. Rudick testified that when he accessed the defendants' pictures, the pictures "were significantly old" from when the defendants were in their teens and he "did not feel they were representative of what they look like currently." R. 116, l. 25 – 117, l. 5. Instead of using the software, the police took the defendants' photographs "in front of a neutral wall of the detective division and imported those photographs into the system." R. 117, ll. 6 – 22.

Officer Rudick agreed that the backgrounds for the defendants were different than the backgrounds for the other lineup choices. R. 123, ll. 2 – 11. He explained the difference resulted from his office taking the photographs of the defendant's versus other locations having taken the pictures of the other subjects. R. 123, ll. 12 – 19. The second officer to testify at the hearing also agreed that there were differences in the backgrounds between the defendants and the other subjects. R. 137, l. 23 – 138, l. 5.

Appellant argued that the identifications made by the State's witnesses should be suppressed because the photographs of the defendants had "significantly different backgrounds than the other pictures" that were presented. R. 146, l. 21 – 147, l. 3. Appellant argued this rendered the lineups unduly suggestive. R. 147, ll. 2 – 4. Appellant also argued that inconsistencies within Gregg's testimony showed that she did not "have the degree of knowledge of the defendants that she claimed." R. 147, l. 9 – 148, l. 4. Appellant argued that Wingate had been drinking. R. 148, ll. 4 – 13. Washington's testimony that he

knew the defendants was equivocal. R. 149, ll. 6 – 10. The trial judge denied the defendant’s motion to suppress the identifications. R. 154, l. 4 – 158, l. 12.

Unnecessarily suggestive identification procedures that create irreparable mistaken identifications violate due process. Biggers, 409 U.S. at 196. “[T]he primary evil to be avoided is a very substantial likelihood of irreparable misidentification.” Id. at 198 (internal quotations omitted). “Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” Id.

The two-prong inquiry used to determine the admissibility of an out-of-court identification is as follows: (1) whether the identification process was unduly suggestive; and if so, (2) whether the out-of-court identification was so nevertheless so reliable that no substantial likelihood of misidentification existed. See State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000).

Several factors should be considered when evaluating the totality of the circumstances to determine the likelihood of misidentification, including the following: (1) the witness’s opportunity to view the perpetrator at the time of the offense; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the incident and confrontation. See Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977); State v. Traylor, 360 S.C. 74, 82, 600 S.E.2d 523, 527. “Only after a determination as to the reliability of a witness’ identification has been made by the trial court may the witness testify before the jury.” Moore, 343 S.C. at 289, 540 S.E.2d at 449 (citing State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)). “An in-court

identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.” Traylor, 360 S.C. at 81, 600 S.E.2d at 526.

These lineups were unduly suggestive. (Court’s Ex. 1-2). The lighter background made appellant’s photograph stand out from the other photographs. The police agreed that the backgrounds were different. R. 123, ll. 2 – 11. R. 137, l. 23 – 138, l. 5. This led the witnesses to choose appellant in the lineup. The suggestiveness of the lineup was compounded by the police showing the witnesses another lineup with a highlighted background showing appellant’s brother. The one thing in common between the two lineups were the backgrounds and the witnesses knew they were looking for two brothers. Under these circumstances, the identifications were irreparably tainted by the suggestive photographs and the court erred in not suppressing the witnesses’ in-court identifications of appellant.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,

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

David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2014.

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THE STATE,

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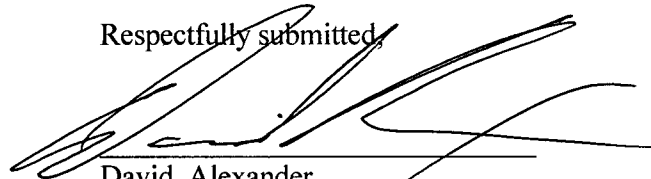
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PETITION TO BE RELIEVED AS COUNSEL  
\_\_\_\_\_

Counsel for Joshua A. Reed states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Howard P. King, which was held on October 24, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Joshua A. Reed.

Respectfully submitted,



\_\_\_\_\_  
David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2014.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

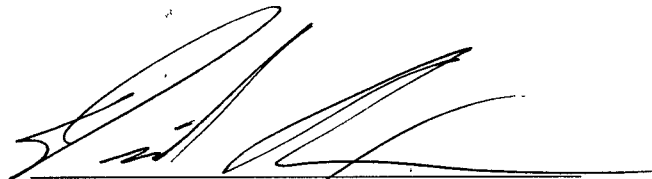
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial transcript;
- (3) State's Ex. 1-2; (to be transported)

I certify that this designation contains no matter which is irrelevant to this appeal.

November 13th, 2014



David Alexander  
Appellate Defender

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PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

Attorney for Appellant

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CERTIFICATE OF COUNSEL

**SC Court of Appeals**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 13<sup>th</sup>, 2014



David Alexander  
Appellate Defender

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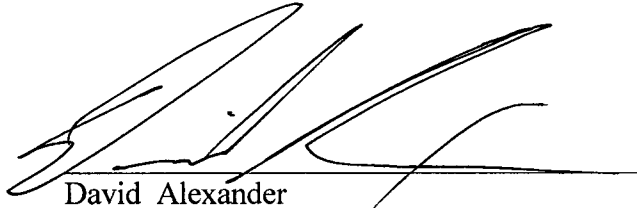
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Joshua A. Reed, #357568 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 13th day of November, 2014.



David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 13th day of November, 2014.

Walter J. Underwood (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.