

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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MAY 20 2015

**S.C. Supreme Court**

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Certiorari to Dorchester County  
Maite Murphy, Circuit Court Judge  
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DERVICK L. PARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002083

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

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South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to move for a Biggers identification hearing prior to trial and in failing to request that a Telfair identity charge be included as a jury instruction in the case.

## STATEMENT

Petitioner Dervick L. Parker was convicted of assault and battery with intent to kill per jury trial held during the April 2, 2008 term of the Dorchester County General Sessions Court before Judge Diane S. Goodstein. Petitioner was sentenced to imprisonment for a period of twenty years. App. 1 – 684. Mark Archer represented petitioner at trial, and Assistant Solicitor B. Harrison Bell, Jr. appeared on behalf of the state. Petitioner appealed, but his conviction and sentence were affirmed. See State v. Parker, Op. No. 2011-UP-060 (S.C. Ct. App. Filed February 16, 2011). The undersigned counsel represented petitioner on direct appeal.

On December 7, 2011, petitioner filed a PCR application with the Dorchester County Office of the Clerk of Court alleging ineffective assistance of trial counsel in the case. App. 686 – 705. The respondent filed a return dated April 12, 2012, requesting that a PCR hearing be held in response to petitioner’s PCR action. App. 706-711. Thereafter, petitioner filed two amended PCR applications dated April 10, 2014, and April 28, 2014, respectively. App. 713 - 722.

A PCR hearing was held on petitioner’s behalf on May 28, 2018, at the Dorchester County Courthouse before Judge Maite Murphy. App. 723 – 768. Petitioner was present at the hearing and represented by Charles T. Brooks, III, and Assistant General Megan H. Jameson appeared on behalf of the state.

On September 8, 2014, Judge Murphy issued an Order of Dismissal in the case therein denying petitioner’s allegations of ineffective assistance of counsel at trial. App. 770 – 782.

Petitioner appealed Judge Murphy’s Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in failing to move for a Biggers identification hearing prior to trial and in failing to request that a Telfair identity charge be included as a jury instruction in the case.

At trial, Officer Shaw Gibbons testified that he was conducting a drug surveillance operation inside a building within Haven Oaks Apartment Complex located on Orangeburg Road in Dorchester County on the night of February 28, 2008, when some of the apartment complex dwellers realized that he was a stranger among them. In other words, at some point during Officer Gibbons' surveillance operation on that night, his undercover status was compromised. Gibbons stated that there were two males also located within the apartment complex who approached him and questioned his identity. Gibbons stated that he knew his cover was blown so he began to flee, but these two males, both of whom he believed held guns, followed him. Gibbons stated that he recognized one of the males as petitioner. Nonetheless, Gibbons stated that he continued walking and then running away. Gibbons added that he pulled out his weapon shortly thereafter and then gunfire erupted, but that he was "not 100 percent sure who fired at him at that point." Gibbons recounted that all he could see was the one male who was not petitioner following behind him. Nonetheless, Gibbons claimed he saw petitioner fire at him and immediately thereafter, he felt numbness go through one leg. App. 84, 1.15-p. 103, 1.22.

Quinntavious Davis testified that he and petitioner approached this unknown male in the apartment complex on the night in question and inquired about his identity. Davis stated that he saw the unknown male "fighting" with something, and that after being previously warned by petitioner that this intruder possessed a gun, he (Davis) fired gunshots at the intruder in effect in self-defense. App. 2481.17- p. 255, 1.20: App. 272, 1.7-p. 273, 1.6. Davis stated that he did not see petitioner shoot at the intruder. App. 257, lm 2-25, App. 274, 1.1-p. 277, 1.14.

Petitioner testified at trial and explained that he and Davis realized that an unknown person was in the complex on that night and that they followed the intruder. Petitioner stated that he saw that the intruder was armed and that Davis fired gunshots, but that he (petitioner) did not fire his weapon. Tr. 513, 1. -p. 522, 1. Donnell Campbell testified that he hid Davis' and petitioner's guns. App. 180, 1. 11 – p. 187, 1. 25

In the PCR application, petitioner claimed that the testimony at trial was conflicting. App. 702; App. 707. In effect, petitioner's allegation regarding conflicting testimony meant by implication that based on the facts, a pretrial identification Biggers hearing should have been held and a Telfair identification change should have been requested and submitted to the jury. Although the trial judge gave the mere presence charge and prior knowledge charges; nevertheless, identity was a main issue at trial.

Gibbons admitted that he was running for his life during this shoot-out in question and that he did not know which victim fired the first of shots towards him, but that he recognized petitioner as the one fired the gunshot that injured his leg. Questions regarding the accuracy of Gibbons' identification of petitioner as the perpetrator who shot him in the leg in light of this mass pandemonium that occurred during this shoot out obviously exist. Gibbons' identification of petitioner as the shooter who shot him in the leg was particularly troubling in light of petitioner's testimony that he fired no gunshots during the shoot-out and Davis' testimony that he did not see petitioner shoot Gibbons, but that he did see petitioner fire shots. Davis also testified that he did not see petitioner with a gun in his possession on that night of the shootings.

Therefore, due to the conflicting facts and testimony in the case, counsel erred in failing to move for a pretrial identification hearing per Biggers and in failing to request a Telfaire identification jury change at the close of the case.

Reliability (under the totality of the circumstances test) is the linchpin in determining the admissibility of identification testimony. See State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000) citing to Manson v. Braithwaite, 432 U.S. 98 (1977), and Neil v. Biggers, 409 U.S. 188 (1972). A defendant may be deprived of due process by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. Mansfield, supra, citing to Stovall v. Denno, 388 U.S. 293 (1967). The test follows:

In determining whether an identification is reliable, it is necessary to consider the factors set forth in Neil v. Biggers, supra: 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 some and the confrontation. State v. Mansfield, supra.

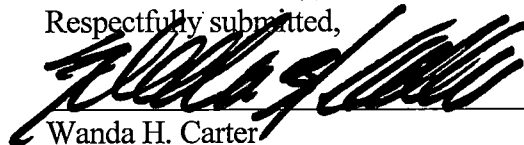
Also, our United States Supreme Court has previously recognized the fact that identification testimony has special reliability concerns. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Simmons v. United States, 390 U.S. 377 (1968). In United States v. Telfaire, 469 F.2d 552 (U.S. App. D.C. 1972), however, the Court announced a model identification jury instruction for use in identification cases. The Telfaire model identification charge was adopted by the fourth circuit in United States v. Holly, 502 F.2d 273 (4th Cirri. 1974). The Telfaire model contains certain inquiries which should be brought to the jury's attention in identification cases. For example, the jury should take the strength of the identification into consideration, scrutinize the identification with great care, and finally, remember that it is the government's burden to prove the identification beyond a reasonable doubt. Compare State v. Robinson, 274 S.C. 198, 262 S.E.2d 190 (1995), State v. Motes, 215 S.E.2d 190 (1975), and State v. Patterson, 337 S.C. 215, 522 S.E. 2d 845 (1999).

Thus, due to the circumstances of this case, i.e., the conflicting evidence presented in the case that bore on questions regarding the reliability of Gibbons' identification of petitioner as the perpetrator who shot him, then the identification issue should have been questioned and tested via a pre-trial Biggers hearing and a Telfaire identification jury charge. Counsel's omissions regarding this identification issue constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 608 (1984). Also, but for counsel's above outlined omissions, a reasonable probability exists that the outcome of petitioner's trial would have been different.

CONCLUSION

Based on the foregoing argument, petitioner would request that this Court grant the petition and allow full briefing on this issue.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of April, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO DORCHESTER COUNTY  
MAITE MURPHY, CIRCUIT COURT JUDGE

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DERVICK L. PARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-002083

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PETITION TO BE RELIEVED AS COUNSEL

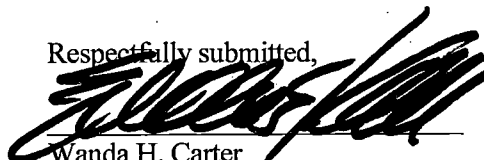
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Counsel for Dervick L. Parker states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 28, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Dervick L. Parker.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 20th day of April, 2015

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

\_\_\_\_\_

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Dervick L. Parker, #334246, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 20th day of April, 2015.

  
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Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day  
of April, 2015.

  
\_\_\_\_\_ (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.