

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

ORIGINAL

\_\_\_\_\_  
Appeal from Jasper County

Honorable R. Lawton McIntosh, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

JOSHUA LENARD POACHER,

APPELLANT

APPELLATE CASE NO 2017-000918  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

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APR 04 2018

SC Court of Appeals

KATHRINE H. HUDGINS  
Appellate Defender

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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in refusing to find that an out of court identification procedure was unduly suggestive?

### **STATEMENT OF THE CASE**

In December of 2015, the Jasper County Grand Jury indicted Appellant, Joshua L. Poacher, for two counts of murder, armed robbery and possession of a weapon during the commission of a violent crime, indictments #2015-GS-27-378, 379, 490, 491. (R. p. 512-519). On April 10, 2017, Appellant proceeded to jury trial before the Honorable R. Lawton McIntosh. Stephen T. Plexico represented Appellant at trial. McDuffie Stone and Mary Jones prosecuted the case. The jury returned verdicts of guilty. Judge McIntosh sentenced Appellant to two life sentences for murder, thirty (30) years for armed robbery and five (5) years for the weapon charge. A timely notice of intent to appeal was served on April 13, 2017. This appeal follows.

## ARGUMENT

**The trial judge erred in refusing to find that an out of court identification procedure was unduly suggestive.**

The jury found Appellant guilty in the fatal shooting and robbery of Hansaben and Kantibhai Patel. Indian currency was taken during the course of the robbery. Hardik Patel, in an out of court identification procedure using a photo line-up, identified Appellant as the person who tried to exchange Indian currency. (R. pp. 203 – 215). Prior to trial Appellant moved to suppress the identification and the judge conducted a hearing pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972). (R. pp. 31-46). After hearing testimony the trial judge denied the motion to suppress stating:

I will find that the procedure they used was not unduly suggestive. There's nothing to suggest, other than mere speculation from names given, that the photographs on observation looked fairly similar. They're drawn from a computer. They didn't have any suggestability to them. They don't have to get into the second aspect of the other factors in there so I'm going to find that would be admissible.

(R. p. 46, lines 13-20). During trial Appellant objected to the admission of the out of court identification. (R. p. 212, lines 23-25). The objection was overruled and the photo line-up was admitted. (R. p. 213, lines 1-3). The judge erred in refusing to find that the identification procedure was unduly suggestive.

In State v. Wyatt, 421 S.C. 306, 310–11, 806 S.E.2d 708, 710 (2017), the South Carolina Supreme Court wrote:

When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-pronged inquiry to determine whether due process requires suppression. Biggers, 409 U.S. at 198-200, 93 S.Ct. at 381-82, 34 L.Ed. 2d at 410-11; State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). First, the


court must determine whether the identification resulted from “unnecessarily suggestive” police identification procedures. Biggers, 409 U.S. at 198-99, 93 S.Ct. at 381-82, 34 L.Ed. 2d at 410-11; Liverman, 398 S.C. at 138, 727 S.E.2d at 426. The Supreme Court of the United States has repeatedly emphasized “that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.” Perry v. New Hampshire, 565 U.S. 228, 238-39, 132 S.Ct. 716, 724, 181 L.Ed. 2d 694, 707 (2012) (citing Manson v. Brathwaite, 432 U.S. 98, 107, 109, 97 S.Ct. 2243, 2249, 2250, 53 L.Ed. 2d 140, 149, 151 (1977), and Biggers, 409 U.S. at 198, 93 S.Ct. at 382, 34 L.Ed. 2d at 411); see also Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (describing the trial court's task under the first prong as determining “whether the identification resulted from unnecessary and unduly suggestive police procedures”). If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong. See United States v. Sanders, 708 F.3d 976, 984 (7th Cir. 2013) citing Perry for the proposition that “courts will only consider the second prong if a challenged procedure does not pass muster under the first”; State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013) (same).

In the present case the identification procedure was unduly suggestive because the State failed to establish that Appellant was not the only local person in the line-up. During cross examination of the agent who showed the photo line-up to Patel, counsel for Appellant asked, “Do you know where any of these pictures, what county they were taken from?” (R. p. 36, lines 19-20). The agent answered, “I do not.” (R. p. 36, line 21). Counsel asked, “Could he be the only local person that is on this six-pack line-up?” (R. p. 36, lines 22-23). The agent answered, “I cannot answer that.” (R. p. 36, line 24).

The identification in the present case resulted from an unduly suggestive and unnecessary police procedure. The crimes took place at a motel in Yemassee. Hardik Patel, the person who identified Appellant, was the manager of a different motel located in Ridgeland. Yemassee and Ridgeland are small communities. Mr. Patel may have identified Appellant because he was local. A line-up containing only one local person would be unduly suggestive and unnecessary.

**CONCLUSION**

Based on the above argument, this Court should reverse Appellant's convictions and sentences and remand the case for a new trial.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of April, 2018.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

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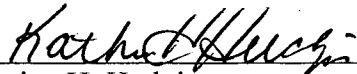
SC Court of Appeals

Counsel for Joshua Lenard Poacher states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge R. Lawton McIntosh, which was held on April 10 - 13, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for Joshua Lenard Poacher.

Respectfully Submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 4th day of April, 2018.

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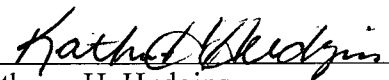
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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

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

- (1) True-billed indictments
- (2) Trial transcript dated April 10-13, 2017

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

April 4, 2018

  
Kathrine H. Hudgins  
Appellate Defender

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ATTORNEY FOR APPELLANT

**CERTIFICATE OF COUNSEL**

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."

April 4, 2018.



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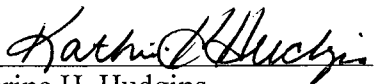
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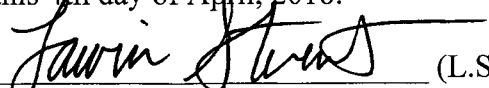
APPELLANT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned 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 Melody J. Brown, 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 have been served on Joshua Lenard Poacher, 372249, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 4th day of April, 2018.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 4th day of April, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.