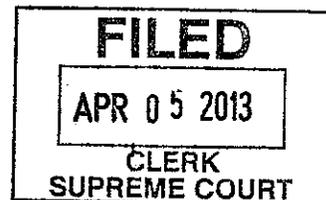


COMMONWEALTH OF KENTUCKY

KENTUCKY SUPREME COURT  
2012-SC-000164-DG  
(2010-CA-001371-MR)



COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM THE FAYETTE CIRCUIT COURT  
ACTION NO. 09-CR-00516-2  
Honorable James D. Ishmael, Jr., Judge

JOSEPH WILLIAM PARKER

APPELLEE

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**BRIEF FOR APPELLEE, JOSEPH WILLIAM PARKER**

---

SUBMITTED BY:

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The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first-class postage prepaid on April 5, 2013: Honorable James D. Ishmael, Jr., 120 N. Limestone St, Lexington, KY 40507; Hon. Robert Friedman, 163 W. Short, Street, Suite 600, Lexington, KY, 40507; Hon. Ray Larson, 116 N. Upper Street, Suite 300, Lexington, KY 40507; and delivered by messenger-mail to the Hon. W. Bryan Jones, Assistant Attorney General, Commonwealth of Kentucky, 1024 Capital Center Drive, Frankfort, Kentucky 40601. The undersigned does also certify that the record was not removed from the Clerk's office for the preparation of this brief.

  
LINDA ROBERTS HORSMAN

## INTRODUCTION

Joseph William Parker appealed his conviction after the trial court failed to suppress evidence which led to his identification as a participant in a purse snatching that occurred in a Lexington Target store parking lot. He was convicted by a jury, while his co-defendant was acquitted. He received a sentence of eleven and one-half years after being found guilty of Robbery in the First-degree and Fleeing or Evading the Police in the Second-degree.

The Court of Appeals reversed Mr. Parker's conviction in a To Be Published Opinion, holding that the identification made by the victim was impermissibly tainted by actions taken by store personnel. Additionally, the Court of Appeals held that the Commonwealth was estopped from raising Mr. Parker's lack of "standing" to complain of the identification procedures used to identify his co-defendant as the prosecutor at trial had not so objected. Having found reversible error, the Court of Appeals did not address a discovery violation of the prosecution, which was conveniently the failure to turn over the surveillance tape which showed the victim being shown still photographs of Mr. Parker and his co-defendant by store security personnel, despite a notation in the tendered police report that the officer prevented store personnel from tainting the victim by showing the surveillance stills.

The Commonwealth sought this Court's review of the Court of Appeals' Opinion, which was granted. Mr. Parker now responds to the Commonwealth's argument before this Court.

**STATEMENT CONCERNING ORAL ARGUMENT**

Although this Court has previously indicated that oral arguments will not be heard in this matter, the Appellee would invite oral argument if the Court believes arguments would assist in proper determination of the matter.

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## COUNTER-STATEMENT OF THE CASE

The Appellee accepts as accurate the Commonwealth's Statement of the Case as a true and correct recitation of the facts of this case. However, several salient and pertinent facts were omitted and are vital to a proper understanding of the issues presented in this appeal.

The Commonwealth conveniently left out those facts that led the Court of Appeals to determine that the victim of the purse snatching, Susan Martin, should not have been allowed to testify about her identification of Mr. Parker's co-defendant, Justin Masengale.

After her purse was snatched from her in the parking lot, Ms. Martin was helped into the store by fellow shoppers and was seated by the customer service counter. (VR 4/22/10; 4:37:24). 911 was called and the store manager, Rodney Branham, and members of his security staff began gathering evidence. (VR 4/22/10; 4:10:40). An off-duty detective, Todd Iddings, was shopping in the store and when he arrived at the check-out, he noticed the commotion and saw fellow officer, Chris Van Brackel, who had responded to the 911 call. (VR 4/22/10; 4:51:31; 4:37:02). Det. Iddings stepped out of the check-out line and began working the case.

In the meantime, store manager Rodney Branham had gone to the security room to determine whether the attack had been caught on camera. (VR 4/22/10; 4:11:50; 4:14:23). When he told the security person on duty, Shavon Johnson, what had occurred in the parking lot, she remarked to him that she had noted two young men matching the description given by Ms. Martin hanging out near the inside of the front vestibule of the store. (VR 4/22/10; 4:24:07). Mr. Branham instructed Ms. Johnson to print out stills

from the inside surveillance tape that contained the two questionable young men. (VR 4/22/10; 4:15:11).

When Mr. Branham returned to the Customer Service area, Ofc. Van Brackel had arrived and Det. Iddings had begun investigating. Mr. Branham approached one of the officers, he was unsure which one, and showed the officer the stills and asked if he should show them to Ms. Martin in an attempt to identify the purse snatchers. (VR 4/22/10; 4:16:47). The officer gave him permission to show the photos to Ms. Martin and she confirmed that the photo contained the two young men who had taken her purse from her. (VR 4/22/10; 4:16:20; 4:25:05; 4:30:18).

After being shown these still photos, Ms. Martin was then taken to the location where Masengale had been apprehended and positively identified him as one of her attackers. (VR 4/22/10; 4:45:31; 4:47:15). Massengale told officers the identity of his accomplice, the Appellee Joseph William Parker. (VR 4/22/10; 5:06:16).

Prior to trial, Mr. Masengale's counsel, joined by counsel for Mr. Parker requested the store surveillance videos—all of them, not just of the snatching outside, but video of the defendants inside the store—be turned over in discovery. (VR 5/22/09; 10:50:23; 10:50:53). Two months later, the trial court advised Mr. Parker and his counsel that counsel for Mr. Masengale had earlier been before the court reiterating the need for the surveillance video and that the judge had ordered it should be turned over. (VR 7/24/09; 11:05:00).

It must be noted that the police report submitted by Det. Iddings stated, "Also (sic) at that time the Target store personnel came out with surveillance photos and were

attempting to show them to the victim so I requested that they not do that which would taint the identification.” (TR 135).

Ten months later, a month before trial, counsel for Mr. Masengale filed a Motion to Suppress Ms. Martin’s identification of Mr. Masengale, which in turn led to the identification of Mr. Parker. (VR 4/9/10; 11:29:43; 11:30:06). Counsel for Mr. Masengale informed the trial court that the Motion was so untimely filed because the Commonwealth failed to tender the surveillance tape in discovery. In his motion, it was stated that counsel had hired a private investigator who had gone to the Target store and viewed the video, which contained video of Ms. Martin being shown the stills from the surveillance video—of Masengale and Parker in the store before the snatching—in front of officers, in direct contravention of the police report that stated an officer expressly prevented the victim from being shown the photos. (VR 4/9/10; 11:30:23; TR 132-133). Counsel for Mr. Parker informed the court that he had just learned of the discovery of the video that day and would join in the motion and would file a supplemental motion and such he did. (VR 4/9/10; 11:31:00; TR 129-135).

A suppression hearing was held on April 22, 2010. The Commonwealth presented only the testimony of Target store manager Rodney Branham and Lexington police officer Chris Van Brackel. (VR 4/22/10; 4:09:55-4:49:50). The Commonwealth did not present any testimony from the victim, Susan Martin. The trial court did not rule after the hearing, but reconvened the following day. (VR 4/23/10; 4:12:50).

Before ruling, the trial court discussed the missing testimony of Ms. Martin, since her “mindset” was part of the consideration he must undertake to determine whether to exclude the identification. (VR 4/23/10; 4:15:05; 4:16:29). He then recounted that the

defense had first requested the surveillance video in discovery in July of 2009, when the trial court had ordered the surveillance video be turned over. (VR 4/23/10; 4:18:24). The Commonwealth told the trial court to just rule, and that the Commonwealth purposely did not call the victim. (VR 4/23/10; 4:19:51; 4:20:40).

The Court of Appeals succinctly recounted what occurred next in its Opinion:

Based upon the factual circumstances surrounding the show-up, the court concluded that the preshow-up procedure was inherently suggestive in that Ms. Martin was shown photos and told that the person the officers wanted her to identify fit the description of one of her assailants. The court then considered the five *Neil v. Biggers* factors to decide whether under the totality of the circumstances, the identification was reliable. In making this ruling, the court was clearly disturbed that the Commonwealth had not called Ms. Martin to testify and, accordingly, made several conclusions without the benefit of her testimony, but inferred what she would have testified to based upon other testimony that had been admitted. The court ultimately found that the *Neil v. Biggers* factors had been satisfied and determined that the identification was reliable.

The court issued a written order signed on May 4, 2010, and entered a few days later memorializing its oral ruling, and the matter proceeded to trial on May 6, 2010.

(Slip Op. at 4-5, citations omitted).

The Court of Appeals reversed and remanded Mr. Parker's convictions because it found that the trial court abused its discretion when it found that even though the means of securing the identification were inherently suggestive, under the totality of circumstances the identification was reliable, despite the presence of evidence to support each of the *Biggers* factors. (Slip Op. at 8-9).

Mr. Parker now asks this Court to Affirm the Court of Appeals' Opinion.

## ARGUMENT

### I. THE COMMONWEALTH DID NOT ADEQUATELY PRESERVE ANY OBJECTION TO MR. PARKER'S STANDING TO CONTEST THE IDENTIFICATION OF MR. MASENGALE, WHICH LED TO HIS IDENTIFICATION.

#### 1. Regardless of waiver, Mr. Parker had standing.

The Commonwealth protests that it was held to have waived the argument that Mr. Parker did not have standing to contest Mr. Masengale's identification. Whether the Court of Appeals was correct in so holding will be discussed *infra*, however it is rather unnecessary for this Court to so determine. On the merits, Mr. Parker had standing to raise this issue.

But for Ms. Martin's identification of Mr. Massengale, Mr. Parker's identity would not have been secured. Mr. Massengale was arrested and transported to the police station only after the show-up identification, which had been tainted by Ms. Martin having been shown the still photos from the store surveillance video. Once at the police station, he was interviewed and eventually revealed the name of his companion that day, Appellant, Joseph Parker. (VR 4/22/10; 5:06:16).

[E]vidence obtained through an illegal search is not admissible against an accused. The rule extends to the direct as well as to the indirect products of official misconduct. Thus, evidence cannot be admitted against an accused if the evidence is derivative of the original illegality, i.e., is "tainted" or is the proverbial "fruit of the poisonous tree."

*Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001)(citations omitted).

A police officer, despite his report to the contrary, assented to Ms. Martin being shown still photos pulled from the surveillance video. (VR 4/22/10; 4:16:47). She was then told that she was going to be taken by police to where a young man matching her

description had been found. (VR 4/22/10; 4:45:31; 4:47:15). At the suppression hearing, Mr. Parker's counsel asked Det. Iddings if Mr. Parker's identity became known to police through Mr. Masengale and that question was answered affirmatively. (VR 4/22/10; 5:06:16). The Commonwealth did not ask that question, which underlies why it was appropriate and proper for Mr. Parker to have standing to challenge Mr. Masengale's identification—it led directly to his identification, was fruit of the poisonous tree--information that no one else (Masengale, the Commonwealth) was interested in eliciting.

This Court has never had occasion to determine whether to recognize what law scholars like to call "third-party standing."<sup>1</sup> This case does not present, however, a clear cut case of "third-party standing," but instead one more properly styled as "second-party standing." In essence, Mr. Parker's identification is part and parcel of Mr. Masengale's identification—and it cannot be seriously argued that the methods used to secure Mr. Masengale's identity were not improper. In other words, but for Ms. Martin's identification of Massengale, he would not have identified Mr. Parker as his compatriot that day.

As the Commonwealth acknowledged in its brief, the South Carolina Supreme Court recognized that when the identification of a co-defendant leads to the implication of the accused, the accused shares the right to protest the identification with his co-defendant.

In this case, we find respondent has a substantial personal stake in the admissibility of the identification evidence because the identification undercut his ability to present his

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<sup>1</sup> For a review of cases on "third-party standing," See Roger L. Michel Jr., Third-Party Standing to Challenge Identifications in Massachusetts, 92 Mass. L. Rev. 180, 183 (2010).

defense that he and Tavo Glenn were with each other the entire day of the crime and that he did not know anything about the Alltel robbery. *See State v. Clausell*, 121 N.J. 298, 580 A.2d 221 (1990) (because defendant had a substantial personal stake in the admissibility of the identification evidence, he had standing to challenge identifications of his co-defendant).

*State v. Miller*, 367 S.C. 329, 336, 626 S.E.2d 328, 331 (2006) (a copy in Appendix).

In the *Clausell* case cited by the South Carolina Court, the Supreme Court of New Jersey made much the same distinction.

Initially, we conclude that defendant has standing to challenge the identifications of his co-defendant. Although a litigant generally may assert only his or her own constitutional rights, *State v. Saunders*, 75 N.J. 200, 208–09, 381 A.2d 333 (1977), when the party raising the claim “is not simply an interloper and the proceeding serves the public interest, standing will be found.” *In re Quinlan*, 70 N.J. 10, 34–35, 355 A.2d 647, cert. denied sub nom. *Garger v. New Jersey*, 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976).

*State v. Clausell*, 121 N.J. 298, 324, 580 A.2d 221, 234 (1990)(copy in Appendix).

In the present case, Mr. Parker is clearly no interloper. The identification of Mr. Masengale led directly to the identification of Mr. Parker as the other participant in the crime. At the suppression hearing, the Commonwealth offered no testimony that his identity would have been otherwise discovered.

In the Commonwealth’s statement of the case, they mention that Mr. Parker was apprehended by a plainclothes officer sweeping the streets and recognizing his description. (Commonwealth’s Brief at 5). However, that testimony was not offered at the suppression hearing, but at the trial. This Court should not consider any evidence not before the trial court when the trial court made its determination on the suppression motion.

The Commonwealth's exhortations that public safety would be placed at risk and criminal syndicates allowed to operate without impunity were this Court to recognize that Mr. Parker had standing to contest Mr. Masengale's identification ring hollow in this case. First, this was a purse snatching—a thoughtless and, according to Mr. Masengale, unplanned act. (VR 5/6/10; 3:32:05). Second, it was the carelessness, if not outright nefariousness, of the police in allowing Ms. Martin to be tainted (and then misstating such on the police report) that allowed for any motion to be made by either party. But ultimately, if this Court holds that an accused in the position of Mr. Parker, whose identification was made by a co-defendant identified himself through improper methods, to forward an argument concerning the methods of identification, such will not allow corrupt organizations to flourish or estop prosecutions. The Commonwealth doth protest too much.

Further, public policy actually supports allowing defendants in Mr. Parker's position to protest the improper methods utilized by law enforcement by ensuring assiduous attention to the constitutional rights of the citizenry by law enforcement.

The reason for excluding identification evidence based on an unfairly conducted showup is that such evidence is unreliable as a matter of law and may result in the conviction of innocent persons. Obviously such evidence is equally unreliable when it is directed toward the identity of a coparticipant in a crime as when it relates to the identity of the defendant on trial. Accordingly, whenever the identity of a confederate is essential to prove the defendant's participation in a crime and when, as here, such evidence effectively destroys the defense offered by the defendant, he has standing to challenge the fairness of the identification procedures of the alleged coparticipant.

*People v. Bisogni*, 4 Cal. 3d 582, 586, 483 P.2d 780, 783 (1971) (internal citations omitted)(copy in Appendix).

Further, suppressing the identification of Mr. Masengale, and his pointing the finger at Mr. Parker would not render the Commonwealth incapable of prosecuting Mr. Parker on remand. The Commonwealth would simply have to persevere without this evidence, something that should be relatively easy since Mr. Masengale was acquitted by the jury and is capable of being subpoenaed to testify as to who did what that day in the Target parking lot.

**2. The Commonwealth waived any objection when it failed to file a cross appeal or lodge a timely objection to Mr. Parker's counsel's participation in the hearing.**

The Court of Appeals correctly held that the Commonwealth waived complaint of the standing issue. Not only does a fair review of the suppression hearing, as conducted by the Court of Appeals, reveal no specific objection to Mr. Parker's standing to raise or join in the motion, but the Commonwealth's failure to file a cross-appeal on that issue is fatal to consideration of it now.

Initially, we agree that the Commonwealth did not file a cross-appeal preserving the argument that the trial court erroneously granted the initial motion to suppress the search and seizure of the Kawasaki. Thus, its current arguments on appeal that the initial search and seizure was valid are without merit, as they were not preserved for appeal and are not properly before this Court.

*Stevens v. Commonwealth*, 354 S.W.3d 586, 589 (Ky. Ct. App. 2011).

As the Commonwealth states in its brief, the prosecutor objected to Mr. Parker's counsel questioning Det. Iddings after Mr. Masengale's counsel had examined him on direct at the suppression hearing. (Commonwealth's Brief at 10). Defense counsel answered that he should be allowed to question because of the *Brady* violation

(concerning the detective stating in his report that he stopped the store personnel from showing the still photos to Ms. Martin when the video, once it was finally obtained, displayed just the opposite) and because of the “fruits,” clearly referring to the “fruit of the poisonous tree” doctrine, addressed *supra*. (VR 4/22/10; 5:03:36). The trial court overruled the prosecution’s objection, thus birthing an issue upon which the Commonwealth could have filed a cross-appeal, but did not. (VR 4/22/10; 5:04:04).

However, what the Commonwealth leaves out is that Mr. Parker’s counsel had already participated in the hearing. Det. Iddings was a *defense* witness, called by counsel for Mr. Masengale. Counsel for Mr. Parker had cross-examined the Commonwealth’s two proffered witnesses—store manager Rodney Branham and Ofc. Van Brackett—without a peep from the prosecution. (VR 4/22/10; 4:30:18-4:33:13; 4:48:52-4:50:00). In essence, the prosecution first waived any objection to standing when it allowed counsel for Mr. Parker to question its witnesses. It just affirmed that waiver when it took no cross-appeal on the standing issue. This Court must hold that the Commonwealth waived its opportunity to question Mr. Parker’s standing to challenge the identification of Mr. Masengale, which led to his own identification as a participant in the crime.

**II. THE COURT OF APPEALS HOLDING THAT THE IDENTIFICATION PROCEDURES EMPLOYED IN THIS CASE WERE IMPERMISSIBLY SUGGESTIVE SUCH AS TO VIOLATE DUE PROCESS WAS CORRECT.**

At the suppression hearing, it was established that Ms. Martin was accosted on her way into the Target store by two men wearing hooded sweatshirts. (VR 4/22/10; 4:12:55; 4:39:03). She gave a description of the two to the store manager, Mr. Branham. (VR 4/22/10; 4:11:03). Armed with the description, Mr. Branham went to the security room and watched replays of the inside and outside surveillance tapes and caused still

photographs to be printed of two shoppers who matched the description. (VR 4/22/10; 4:14:23). He showed those photographs to Ms. Martin, after asking the police officer's permission to do so. (VR 4/22/10; 4:16:20).

Before she was taken to the scene to identify Mr. Massengale as one of the two men who took her purse and hurt her, she was told by Det. Iddings that the police had in their custody a suspect that matched her description. (VR 4/22/10; 5:13:10). She was then taken to the scene of capture where Mr. Massengale, and him alone, was offered for identification while standing next to a police car. (VR 4/22/10; 4:47:15).

The trial court held that the methods employed were unduly suggestive, and the Court of Appeals agreed with that finding, stating, "since Ms. Martin was shown photographs of the suspected assailants and was told she was going to be asked to identify an individual who met the description she provided." (Slip Op. at 8). The trial court then moved to the second step of the analysis called for by this Court in *King v. Commonwealth*, 142 S.W.3d 645, 649 (Ky. 2004), an analysis of the factors articulated in *Neil v. Biggers*, 409 U.S. 188 (1972).

**1. Unduly suggestive.**

Clearly both the trial court and the Court of Appeals were correct in finding that the measures employed here by law enforcement were unduly suggestive. Again, the Commonwealth took no cross-appeal on this issue, and therefore any objection to that threshold finding is arguably waived.

The United States Supreme Court has acknowledged that the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects an accused against the admission of unreliable evidence derived from unnecessarily suggestive

identification procedures. In *Stovall v. Denno*, 388 U.S. 293, 301-302 (1967), the Supreme Court framed the due process test for identification issues as whether:

[T]he confrontation conducted ... was so unnecessarily suggestive and conducive to irreparable mistaken identification that [defendant] was denied due process of law ... [A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it ...

Clearly, printing out a single photograph from the surveillance video and asking the victim, "Is this him?" is unduly suggestive. Surely, telling the victim that she was being taken to the location where a suspect that "fits her description" is being held, and being asked to identify him as he stood alone next to a police cruiser is unduly suggestive. This Court can come to no other conclusion that the methods employed were unduly suggestive.

## **2. *Neil v. Biggers* totality review.**

If the manner in which the suspect is presented to the witness for identification is inherently suggestive, the central question then becomes whether under the "totality of the circumstances" the identification was reliable even though the identification procedure was suggestive. *Neil v. Biggers*, 409 U.S. 188 (1972). The primary evil to be avoided is a substantial likelihood of irreparable misidentification. See *Simmons v. United States*, 390 U.S. 377 (1968).

As set out in *Neil v. Biggers, supra*, the important factors to be considered include: 1) the opportunity of the victim to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the confrontation.

In discussing the *Biggers* factors in the present case, the Court of Appeals noted the impossibility of doing so without the testimony of Ms. Martin. The trial court, hesitant to rule without her testimony, all but requested the Commonwealth to present her testimony for his review, but he was rebuffed by the prosecution. One very good reason that the Commonwealth may not have wanted to call Ms. Martin, aside from the reasons given on the record that she had to work, was that she would affirm that she was shown photographs of a young man in a hoodie and told that they had found a person who met her description before she made the identification.

The Court stated:

Of the five factors, several specifically address what the witness experienced. In this case, the witness was Ms. Martin, whom the Commonwealth did not call to testify at the suppression hearing. With regard to the first two factors, Ms. Martin's opportunity to view the criminal at the time of the crime and her degree of attention, the trial court noted that there was no testimony admitted to establish either factor. However, the court ruled that because Ms. Martin was able to give a general description and because "common sense" would support the idea that a victim would be at full attention, those factors were met. Regarding the fifth factor, the length of time between the crime and the confrontation, the court again noted that no testimony had been presented to establish this time line. It went on to reconstruct the time line based upon the testimony that had been admitted and estimated that between fifteen and twenty minutes had elapsed. Despite the lack of proof offered on any of these three factors, the trial court found that Ms. Martin's identification was reliable.

We agree with Parker that because the Commonwealth failed to offer any testimony or evidence from Ms. Martin herself, or from anyone else, addressing these three factors, the trial court committed reversible error in determining that her identification of Masengale was reliable. None of the witnesses testified specifically about Ms. Martin's opportunity to view her assailants, her degree of attention,

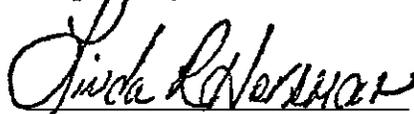
or the length of time that had elapsed. This left the trial court in the position of having to make assumptions as to what that testimony might have been when considering those three factors. Therefore, we hold that the trial court's ruling violates Parker's rights under the United States and Kentucky Constitutions, was an abuse of discretion, and must be reversed.

Because the Commonwealth failed to offer proof on many of the factors required to be established by the United States Supreme Court in *Neil v. Biggers, supra*, the trial court erred in holding that the identification of Mr. Massengale, which directly led to the arrest of Mr. Parker, was proper. The Court of Appeals correctly so found. Mr. Parker's rights under the 14th Amendment to the United States Constitution and §§ 2, 3, and 11 of the Kentucky Constitution were violated by the trial court's ruling and justice requires that this Court affirm the Court of Appeals' Opinion.

#### CONCLUSION

Mr. Parker asks this Court to hold that he had standing to complain about the methods utilized to gain Mr. Masengale's identification because that identification directly led to his identification by Mr. Masengale. Further, this Court should hold that the methods utilized to identify Mr. Masengale were improper and therefore his identification, and all evidence that flowed therefrom, should be suppressed as "fruit of the poisonous tree."

Respectfully submitted,



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**APPENDIX**

<b><u>Tab Number</u></b>	<b><u>Item Description</u></b>
1	<i>State v. Clausell</i> , 121 N.J. 298, 580 A.2d 221 (1990)
2	<i>State v. Miller</i> , 367 S.C. 329, 626 S.E.2d 328 (2006)
3	<i>People v. Bisogni</i> , 4 Cal. 3d 582, 483 P.2d 780 (1971)