

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAR 18 2015

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

SC Court of Appeals

The Honorable Brooks P. Goldsmith

Appellate Case No. 2013-002537

The State,

Respondent,

v.

Marion Benjamin Powell,

Appellant.

**APPELLANT'S RETURN TO RESPONDENT'S MOTION TO STRIKE AND
REQUIRE FILING OF AMENDED INITIAL BRIEF OF APPELLANT**

Appellant hereby responds to Respondent's motion to strike and to require filing of an amended initial brief of Appellant. For the following reasons Respondent's petition should be denied.

1.

This is an appeal from a criminal conviction in which the sole issue is whether the photo array at issue was unduly suggestive and created a substantial likelihood of irreparable misidentification such that the eyewitness identification from the photo array should have been excluded.

2.

Appellant filed his Initial Brief on December 8, 2014 in accordance with this Court's Order of October 7, 2014. Respondent then sought a thirty day extension for

filing its initial brief by sending a letter to the Clerk on the day its brief was due, January 22, 2015. On February 26, 2015, Respondent sought yet another thirty day extension for filing its initial by letter to the Clerk on the date its brief was due. Both extensions were sought on the basis of a heavy workload. On March 10, 2015, Respondent moved the Court for an order striking a reproduction of the photo array that was included in Appellant's initial brief. *See* Initial Brief of Appellant at p.9.

3.

Respondent's motion relies on two arguments. The first is that Appellant failed to designate the actual exhibit to be included in the Record on Appeal, as required by Rule 209, SCACR. The second is that the Appellate Court Rules do not allow for an exhibit to be inserted into the body of the brief. In support of the second argument Respondent cites Rule 208, Rule 210 and Rule 267, SCACR. Appellant will address each argument in turn.

4.

Respondent's assertion that Appellant failed to designate the exhibit which is inserted into the body of his brief is patently false. Even a cursory review of Appellant's Designation of Matter shows he designated the exhibit. *See* Ex. 1 – Appellant's filed Designation of Matter at p.2, (4)(d) (designating State's Exhibit 46 (Photo array initialed by A.H): p.252). A cursory review of Appellant's brief would have confirmed this as Appellant cited the exhibit inserted into the brief. *See* Initial Brief of Appellant at p.9 (citing to the photo array as "Tr. p.252, State's Ex. 46"). Moreover, the same photo array – which is relevant to the sole issue on appeal – is included *twice more* in Appellant's designation. *See* Ex. 1 at p.2, (4)(b) and (4)(e). Respondent's assertion that Appellant

failed to designate the subject photo array is either an oversight or a misrepresentation to this Court. In either event Respondent is simply incorrect.

5.

Rule 208(b)(4) allows a party to include “references to the . . . exhibits, or other materials that may be properly included in the Record on Appeal to support the salient facts alleged.” Rule 208(b)(4), SCACR. Rule 210(f), SCACR, permits “[p]hotographs . . . [to] be inserted in the Record on Appeal where they can reasonably be reduced . . . to a size which permits them to be printed and inserted into the Record on Appeal” Rule 210(f), SCACR. Rule 267(c) provides that “[w]ith the *exception of exhibits* as provided in Rule 210(f), no photographic reduction of the Record on Appeal . . . is acceptable” Rule 267(c), SCACR. The rules cited by Respondent in support of its motion to strike are unavailing. The Appellate Court Rules clearly provide for the use and reduction of trial court exhibits in the Record on Appeal and clearly allow a party to reference such exhibits in their briefs. There is nothing in the Appellate Court Rules which prohibits a party from inserting for reference a properly designated exhibit in the body of its brief.

6.

Appellant included the photo array in the brief for convenience only. It was not done with an eye to some unknown advantage, and it can hardly be said it provides one considering the exhibit is in the Record and speaks for itself. Should the Court determine the inclusion of the photo array in the brief itself was error, there has been no prejudice to Respondent. First, this is the initial brief. Rather than strike the initial brief the Court

can merely order Appellant to remove the photo array from the body of his final brief.¹ Second, the included photo array is not inaccurate – it is the same as the exhibit in the Record – and nothing about it would prevent this Court from evaluating the trial court’s ruling.

7.

Appellant respectfully requests the Court deny Respondent’s motion to strike and to deny its request for Appellant to file an amended initial brief. Because there has been no prejudice to Respondent, should the Court desire the photo removed from the body of the brief it may simply order Appellant to remove it from the final brief. The Court should also deny Respondent’s request for yet another extension of its deadline for filing its initial brief. If Respondent’s workload was such that it required two prior extensions for the filing of briefs, clearly it has since subsided to afford Respondent the time to file this frivolous motion. Respondent should be ordered to file its initial brief without further extensions so that the parties may move on to the real issues of this appeal.

Most respectfully,

RICHARDSON, PATRICK, WESTBROOK
& BRICKMAN, LLC

By:



Chris Moore
1730 Jackson Street
Barnwell, South Carolina 29812
803.541.7850

-and-

¹ It is regrettable that the Appellate Court Rules do not include a similar provision as that found in Rule 11, SCRCP, which requires parties to confer in good faith prior to the filing of motions. Had that been required here this matter could likely have been resolved or a remedy fashioned.

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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March 16, 2015

ATTORNEYS FOR APPELLANT

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's Return to Respondent's motion to strike and require filing of amended initial brief in the above referenced case has been served by U.S. Mail upon Jennifer Ellis Roberts, at Post Office Box 11549, Columbia, SC 29211, this 16th day of March 2015.



Chris Moore (SCB 77934)
RICHARDSON, PATRICK, WESTBROOK
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ATTORNEY FOR APPELLANT

EXHIBIT 1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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The State,

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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 indictment(s);
- (2) Sentencing sheets;
- (3) The following portions of the trial transcript from November 18-22, 2013:
 - a. Trial transcript index: pp.1-13
 - b. Call of the case / charges: p.14
 - c. Neil v. Biggers *in limine* hearing: pp.129-143
 - d. Trial court's order on Biggers hearing: pp.142-143
 - e. Officer Chandler's testimony: pp. 231-238
 - f. A.H.'s testimony: pp.239-256; 260-273
 - g. Senora Jones's testimony: pp.273-315
 - h. Officer Duke's testimony: pp.354-355; 360-376; 382-386; 390-400; 402-404
 - i. Motion and ruling on directed verdict: pp.579-582
 - j. Dr. Lori Vanwallendael's testimony: pp.607, 612, 630-641
 - k. Renewed motion and ruling on directed verdict: pp.709
 - l. Jury charges: pp.710-721
 - m. Verdict: pp.724-725
 - n. Post-trial motion: pp.728-729
 - o. Sentence: p.738

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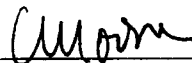
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- (4) The following trial exhibits:
- a. Court's Exhibit 2 (email from Assistant Solicitor Ben Shelton): p.130
 - b. Court's Exhibit 3 (Photo array with Appellant's photo): p.130
 - c. Court's Exhibit 4 (State's Neil v. Biggers motion and memo): p.189
 - d. State's Exhibit 46 (Photo array initialed by A.H.): p.252
 - e. State's Exhibit 48 (Photo array initialed by S.J.): p.290
 - f. State's Exhibit 49 (Photo array identified at trial): p.367

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

December 8th, 2014



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-and-

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The State,

Respondent,

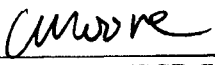
v.

Marion Benjamin Powell,

Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served by U.S. Mail upon Salley W. Elliott, Esquire, at Post Office Box 11549, Columbia, SC 29211, this 8th day of December, 2014.


Chris Moore (SCB 77934)
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March 16, 2015

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: **State v. Marion Benjamin Powell**
Appellate Case No. 2013-002537

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the appellants return to respondent's motion to strike and require filing of amended initial brief of appellant along with proof of service for filing in the above referenced appeal. Please return one of the stamped filed copies back to me in the provided self-addressed stamped envelope.

Most respectfully,

Chris Moore

CJM/jhh

Enclosures

Cc: Robert M. Dudek, Esq.

Jena L. Borden (IL & MO only)
James C. Bradley
Michael J. Brickman
Nina Fields Britt
Elizabeth Middleton Burke
J. David Butler
Aaron R. Dias
D. Charles Dukes
Jerry Hudson Evans
H. Blair Hahn
Daniel S. Haltiwanger
Gregory A. Lofstead
Christiaan A. Marcum
Katie McElveen
Christopher J. Moore
Matthew A. Nickles
Karl E. Novak
Misty Black O'Neal
Kimberly Keever Palmer
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Of Counsel:
Gordon C. Rhea (CA, DC & USVI only)
David L. Suggs (MN & NY only)

LLC

Honorable Jenny A. Kitchings
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