
MURPHY LAW OFFICES, LLC

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April 19, 2018

RECEIVED

APR 23 2018

S.C. SUPREME COURT

VIA U.S. MAIL

The Honorable Daniel E. Shearhouse
Clerk of South Carolina Supreme Court
Supreme Court Building
Post Office Box 11330
Columbia, SC 29211

Re: *Marvin Porcher, #315900 v. State of South Carolina*
Civil Action No.: 2015-CP-10-2045

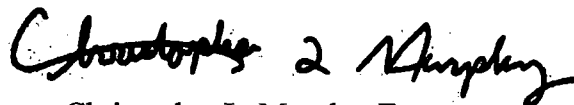
Dear Mr. Shearhouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief, and a Proof of Service regarding same. If you find everything in order, please file the original and return the clocked-in copies in the enclosed self-addressed envelope.

Please note, I was appointed to this and case and have copied the Office of Appellate Defense on this who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy, Esq.
chris@chrismurphyfirm.com

CLM/jh

Enclosures

cc (w/ encls.): Mr. Marvin Porcher
Megan H. Jameson, Sen. Asst. Deputy AG
Robert M. Dudek, Esquire, Off of Appellate Defense
The Honorable Jean H. Toal
The Honorable Julie J. Armstrong, Clerk, 9th Jud. Cir.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

APR 23 2018

S.C. SUPREME COURT

Jean H. Toal, Circuit Court Judge

Case No.: 2015-CP-10-2045

Marvin Porcher, #315900 Appellant

v.

State of South Carolina Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for post-conviction relief.
Attached is the order from the court dated January 22, 2018 and received April 13, 2018.

April 19, 2018



Christopher L. Murphy
Murphy Law Offices, LLC
234 Seven Farms Drive, Suite 128
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APR 23 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No.: 2015-CP-10-2045

Marvin Porcher, #315900 Appellant

v.

State of South Carolina Respondent

PROOF OF SERVICE

I certify that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 19th day of April, 2018, on the following:

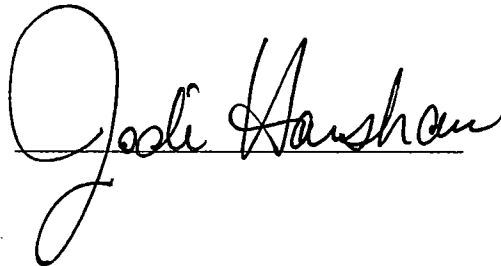
Megan H. Jameson, Esquire
Senior Deputy Asst. Attorney General
SC Office of the Attorney General
PO Box 11549
Columbia, SC 29201

The Honorable Jean H. Toal
1231 Gervais Street
Columbia, SC 29201

The Honorable Julie J. Armstrong
Clerk of Court, Ninth Judicial Circuit
100 Broad Street, Suite 106
Charleston, SC 29401

Robert M. Dudek, Esquire
Office of Appellate Defense
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Mr. Marvin Porcher, SCDC #315900
MacDougall Correctional Institution
1516 Old Gilliard Road
Ridgeville, SC 29472



STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
Marvin Porcher, #315900)
 Plaintiff,)
 vs.)
)
STATE OF SOUTH CAROLINA)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

CASE NO: 2015-CP-10-2045

MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET

Plaintiff's Attorney: Christopher L. Murphy, Bar No. Address: Murphy Law Offices, LLC 234 Seven Farms Drive, Suite 128 Charleston, SC 29492 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Justin J. Hunter, Bar No. Address: South Carolina Attorney General's Office PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCF) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

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 JAN 19 2018
 SC Court of Appeals
 RUS

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Marvin Porcher, SCDC # 315900,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-2045

ORDER OF DISMISSAL

FILED
2018 APR -9 PM 3:13
JULIE K. ARMSTRONG
CLERK OF COURT
BY

This matter comes before the Court by way of an application for post-conviction relief filed April 10, 2015, by Marvin Porcher (Applicant). Respondent made its Return on November 24, 2015, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened September 15, 2016, at the Charleston County Courthouse. Applicant was present at the hearing and represented by Christopher L. Murphy, Esquire. Assistant Deputy Attorney General James Rutledge Johnson from the South Carolina Attorney General's Office appeared on behalf of the State. Following the evidentiary hearing, this Court denied the application. This order follows.

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[Handwritten signature]

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Charleston County Grand Jury indicted Applicant for two counts of breaking and entering a motor vehicle (2012-GS-10-1910 & 2013-GS-10-0411) and first-degree burglary (2013-GS-10-4867). He was represented by William T. (Ted) Smith, Esquire, and Jason T. King,

Esquire, of the Charleston County Public Defender's Office represented Applicant. Assistant Solicitors Tyler S. Whitaker and Jennifer Shealy prosecuted the case on behalf of the State.

On July 18, 2013, the State called Applicant to trial on the first-degree burglary indictment in the Charleston County Court of General Sessions before the Honorable Deadra L. Jefferson, circuit court judge. On July 19, 2013, the jury convicted Applicant as indicted of first-degree burglary. After his conviction for the burglary indictment, Applicant pled guilty to the two counts of breaking and entering a motor vehicle. Judge Jefferson sentenced Applicant to the minimum sentence of fifteen years imprisonment for first-degree burglary and five years imprisonment for each count of breaking and entering a motor vehicle, with all sentences to be served concurrently.¹

Applicant filed a timely notice of appeal challenging only his burglary conviction and was represented by Appellate Defender Lanelle C. Durant, of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Marvin Porcher, Op. No. 2015-UP-124 (Ct. App. filed March 11, 2015). The Remittitur was issued on April 3, 2015

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FACTUAL HISTORY

Facts from which the First-Degree Burglary Conviction Arose

Mr. Salgado was a neighborhood resource officer for the North Charleston Police Department. (T.124-125). Just after midnight on November 4, 2011, he was patrolling on shift when he passed a bicyclist wearing dark clothing and without a rear light. (T.128). He made a U-turn and made contact with the bicyclist. Salgado recognized the bicyclist, but when asked for

¹ An unrelated additional breaking and entering a motor vehicle indictment (2012-GS-10-1111) was dismissed pursuant to his plea.

his name, the cyclist gave him a different name from the one Salgado knew. (T.130-131). Applicant gave him the name Marvin Swinton and his date of birth and then told Salgado he was from New York. Salgado had the North Charleston Police run the name and birthdate through South Carolina and New York records and found no one with that combination. (T.131-133).

Salgado testified Applicant appeared nervous and sweaty. He also indicated there was a bulge under Applicant's jacket. Salgado asked consent to search Applicant's person and Applicant gave consent. Salgado found a laptop and charger under Applicant's jacket, and his wallet with ID in his pant pocket. The ID contained Applicant's real name, Marvin Porcher. (T.133-134). Salgado also found a pearl necklace in Applicant's jacket pocket and a cylinder, ultimately found to contain jewelry, in Applicant pant pocket. (T.135). Applicant also had a razor knife, a wrench, an allen wrench, and a zip tie in his pocket. (T.137). Applicant tried to explain the laptop indicating he was going to a friend's house to use the internet. (T.137).

Salgado arrested Applicant for providing false information to a police officer. Applicant was taken to the North Charleston City Hall to meet with a detective. He met with Detective Evans. (T.137-138). Evans was a detective assigned to the persons crime unit. (T.149). Evans met with Salgado and was given the laptop and charger taken off Applicant's person. Evans turned on the laptop and located information linking the laptop to the victim. He called the victim, provided his name and job title, and asked if she knew where her laptop was located. The victim responded it was at her residence. (T.151). Evans asked her to return to her residence and meet someone from Charleston County Sheriff's Office and North Charleston Police Department. (T.152).

Evans then interviewed Applicant. After reading Miranda warnings to Applicant, Evans discussed the laptop. Applicant indicated he bought it from someone on Remount Road. He did not provide any details about from whom he purchased the laptop, where exactly on Remount he purchased it, or "any other pertinent details." (T.157-158). He did not provide the name of the person or even a description of the person that allegedly sold him the laptop. (T.158).

The victim lived in a mobile home with a roommate. The home was near the residence of Applicant and his girlfriend. (T.169-171). Applicant came to her house to do some exterior work several weeks before the burglary. (T.172-173). On November 2, 2011, Applicant, his girlfriend, and another friend came over to the victim's home so Applicant could put a tattoo on the victim. While in the victim's home, Applicant used her laptop to go on Facebook. (T.175). -

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On November 3, the victim and Applicant's girlfriend visited Applicant where he worked so the victim could give him a payment for the work he performed on her house. While there, he asked if the victim and his girlfriend were planning to go out that night. (T.176-177). At that time, the victim did not plan to go out, but later changed her mind and around 9:30 p.m. picked up Applicant's girlfriend at Applicant's house. (T.178).

While out with Applicant's girlfriend, the victim received a phone call from a detective who asked if she reported a burglary and if she owned an Acer laptop. The victim indicated the laptop was left on her bed on top of papers. (T.179). The victim then met a county sheriff and someone from North Charleston Police at her home. (T.180). Walking through her home with the officers, the victim indicated her laptop, some of her jewelry, and her roommate's television was missing. (T.182). The victim later learned Applicant was found with her laptop. She was

surprised he would have it. (T.188). She also indicated she never gave him permission to be in her home or have her computer. (T.185).

Deputy Baldwin was the Charleston County Deputy who met the victim at her residence. (T.206-207). He indicated that upon entering the residence and making certain it was secure, he noticed the rear door was pried open from the outside. He testified the door frame was pried so the door could open. (T.208-209). He explained many metal objects could be used to pry the door open, including some of the objects found on Applicant's person when he was arrested. (T.209; 215-216).

Facts from which the Breaking and Entering a Motor Vehicle Convictions Arose

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As to the first breaking and entering a motor vehicle charge, on August 9, 2011, the victim contacted the North Charleston Police Department to report that his vehicle had been broken into and his car radio was missing. Crime scene technicians were able to lift a fingerprint from the vehicle which was identified as a match to Applicant. (T.304).

As to the second breaking and entering a motor vehicle charge, on September 5, 2011, the victim reported his vehicle was broken into while parked at a Quality Inn and items valued at over a thousand dollars were taken. Blood was found inside the vehicle and DNA testing revealed the blood matched Applicant. (T.304).

ALLEGATIONS RAISED

In his application, Applicant alleged he is being held in custody unlawfully based on allegations of:

1. Ineffective Assistance of Counsel "for failure to submit motions to alleviate the indictment which was a 'nullity' "
2. "Denial of Due Process and/or Equal Protection"

3. "Insufficient Indictment"
4. "False Imprisonment/Lack of Jurisdiction to convict"

At the evidentiary hearing, Applicant proceeded forward on allegations that counsel was ineffective for failing to investigate, failing to hire experts to analyze the fingerprints on the door and computer, failing to hire a crime scene expert to analyze the door damage, failure to strike a juror who knew the victim, and failure to address the destroyed tools or request a spoliation charge. These are the only allegations upon which Applicant proceeded forward.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf. He testified he pled guilty to the breaking and entering a motor vehicle charges because he was guilty of them, but proceeded to trial on the first-degree burglary charge because he was not guilty. Applicant testified he was incarcerated for approximately two years prior to his trial and that he met with his attorney four times prior to trial. He testified these conversations were via video teleconference and lasted between fifteen to thirty minutes each. He testified Ted Smith was his primary counsel and Jason King only assisted with the trial. He testified he did not review discovery with his attorneys prior to trial. He testified he was aware of the elements and potential sentences for first-degree burglary prior to trial. Applicant testified the State presented him with a plea offer three weeks prior to trial to the lesser-included offense of second-degree burglary for a ten to fifteen year term of imprisonment. He testified he turned this offer down because he was not guilty. He testified counsel did not have a pre-trial strategy, which alarmed him. Applicant testified he filed a *pro se* motion to compel the State to turn over the alleged burglary tools

before he learned the tools were missing. He testified he did not learn the tools were missing until the end of trial.

Applicant testified counsel failed to strike a juror who knew the victim. He testified counsel also failed to strike a "mental health patient said he couldn't predict what he was going to do at the trial." Applicant testified counsel failed to make any pre-trial motions. Applicant also testified there was some confusion over the jurisdiction where the crime occurred and the solicitor improperly asked the witness leading questions to get this information into the record. However, he acknowledged North Charleston is in Charleston County.

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Applicant testified the State alleged he broke into a mobile home by breaking into a door with burglary tools, including an allen wrench, zip ties, and a plastic ratchet. He testified these tools were discussed by witnesses, but were not introduced into evidence because they were destroyed. He testified he does not know who destroyed them. He testified counsel did not request a spoliation charge. Applicant also testified the stolen laptop was admitted into evidence, but the State did not test it for fingerprints. He testified a television was also taken from the residence but was not found on his person when he was arrested. He testified he attempted to speak with counsel during trial to tell them the victim was lying on the stand, but his attorneys refused to listen to him. Applicant testified he was in the victim's home the evening before the robbery to give her a tattoo, but did not have any other permission to be in the home or to have her laptop.

Applicant testified the State admitted his prior burglary conviction into the record at trial, which was contrary to what counsel had advised him. He elaborated that counsel had advised him that if he did not testify, the State would not be able to introduce his prior record into

evidence. He testified he elected not to testify on his own behalf because he did not want his prior criminal record to be introduced. However, he acknowledged on cross-examination that he was charged with first-degree burglary based on his prior burglary convictions and is aware that his prior burglaries are elements of the offense that the State must prove.

Applicant testified officers also investigated a "John Hudson" as a suspect who was involved in the burglary but that he does not know anyone named John Hudson. He testified counsel failed to investigate this or present John Hudson to testify at trial. He testified he generally thinks counsel should have done a more intensive investigation. He also alleged counsel should have retained a fingerprint analyst to test the laptop and door and a crime scene analyst to review the damage to the door frame. He acknowledged he did not hire any such experts in advance of the evidentiary hearing.

Applicant testified he pled guilty to a receiving stolen goods charge stemming from the stolen laptop because he bought it off of somebody. He testified he received a thirty day sentence for this charge. He testified he also pled guilty to giving false information to police because he gave law enforcement a fake name and received an additional thirty day sentence. However, he testified he had the jewelry because he found it outside the victim's home.

Applicant testified he filed an appeal following his trial and spoke with appellate counsel once by phone. He testified he did not speak with appellate counsel after the Court of Appeals affirmed his conviction. He testified he elected to file a post-conviction relief application thereafter.

Trial counsel Ted Smith testified next. Smith testified he was appointed to represent Applicant on November 17, 2011 while at the public defender's office. He testified he had been

at the public defender's office for thirteen years at the time of appointment. Counsel testified he met with Applicant over ten times, including several times the week immediately before his trial. He testified he asked fellow public defender Jason King to act as a second-chair and assist during trial. Counsel testified he filed discovery motions and sent all materials to Applicant. He testified he specifically recalled discussing the damage to the victim's door with Applicant. He testified he used the public defender's office investigator, who mainly served subpoenas for this case. He testified Applicant told him that he found the jewelry outside the victim's home and had purchased the laptop from someone else.

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Counsel testified that because this was a circumstantial evidence case, his trial strategy was to highlight the lack of direct evidence tying him to the crime scene, including a lack of any fingerprint evidence. He testified he argued the lack of direct evidence in his closing argument and raised a direct verdict motion on this ground. He testified he had fully prepared Applicant for trial. He testified he had explained to Applicant that his prior burglary convictions would be introduced at trial as an element of the offense. Counsel testified he asked the solicitor to stipulate to Applicant's prior convictions but the solicitor refused. Counsel testified he discussed Applicant testifying in his own defense and the possibility that other crimes of dishonesty could be used to impeach him if he decided to testify. He testified it was ultimately Applicant's decision whether he wanted to testify and Applicant decided not to testify. He testified Applicant had previously indicated he wanted to testify to tell his story to the jury, and because of this, Counsel reference this in his opening statement.

Counsel testified he had no recollection of a juror that knew the victim, and if he had knowledge of that, he would have struck the juror. Counsel testified he thinks the burglary tools were destroyed prior to trial, but they were all photographed prior. He testified he does not believe there was any specific reference to Applicant having used those tools, but that was certainly inferred. He testified he did not further investigate whether these tools had been used to break into the victim's home because Applicant alleged he did not commit the crime. He testified he was aware law enforcement was also investigating a man named John Hudson as a possible co-conspirator who worked with Applicant, but he did not investigate him. He identified an email he received in discovery indicating there had been a string of burglaries in the area and that Applicant and Mr. Hudson's fingerprints were being compared to the various scenes. He testified there were numerous other burglaries and he did not significantly investigate this because he was afraid it would not have been to Applicant's advantage. He testified Applicant was adamant the entire course of his representation that he did not commit the burglary and wanted to go to trial.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or

she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to his allegations of ineffective assistance of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant.

Allegation: Trial counsel failed to investigate

Applicant asserts trial counsel was ineffective for failing to fully investigate his case. However, Applicant failed to establish what specifically counsel could have or should have done to more fully investigate the case. Moreover, Applicant failed to present any additional evidence or information that would have resulted from additional investigation. Therefore, this Court finds Applicant has failed to meet his requisite burden of proof. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding failure to conduct an independent investigation is not per se ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information); Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (“Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”); See also Strickland, 466 U.S. at 691 (“[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.”). This Court finds counsel’s performance was reasonable according to professional standards and his allegation counsel was ineffective for failing to investigate must be denied and dismissed with prejudice.

Allegation: Trial counsel failed to hire necessary experts

Applicant asserts trial counsel was ineffective for failing to hire experts to analyze the fingerprints on the door and computer and for failing to hire a crime scene expert to analyze the door damage. Counsel testified Applicant adamantly denied any involvement in the crimes and

therefore, he did not believe any such experts would have been beneficial to his case. Moreover, Applicant has failed to present any such experts at the evidentiary hearing. I

This Court finds this allegation must be denied and dismissed because Applicant failed to present either such expert. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 776-77 (2008) ("First, Lorenzen failed to present evidence that would show a reasonable probability that, but for counsel's failure to call expert witnesses, the result of his trial would have been different. Aside from his testimony and his trial counsel's testimony, Lorenzen did not offer any other witnesses to testify on his behalf at the PCR hearing. Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense."); See also Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."). Therefore, this Court finds Applicant has failed to meet his requisite burden of proof and this allegation must be denied and dismissed with prejudice.

Allegation: Trial counsel failed to strike a juror who knew the victim

Applicant asserts trial counsel was ineffective for failing to strike a juror who knew the victim. Counsel testified he did not recall any juror indicating they knew the victim and that if a member of the jury pool had indicated he or she knew the victim, he would have struck the potential juror. This Court finds counsel's testimony to be credible to this issue and finds Applicant's testimony not credible as to this issue. The record supports counsel's testimony, as

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there is no indication any member of the jury pool knew the victim and no member of the panel responded when the trial court inquired as to whether anyone knew the victim. This allegation is denied and dismissed with prejudice.

Allegation: Trial counsel failed to address the destroyed tools or move for a spoliation charge

Applicant asserts trial counsel was ineffective for failing to address the destroyed tools or request a spoliation charge. This Court finds this allegation is without merit, as such an instruction is improper and would not have been given. See State v. Reaves, 414 S.C. 118, 128, 777 S.E.2d 213, 218 (2015), cert. denied, 136 S. Ct. 855, 193 L. Ed. 2d 754 (2016) (“Heretofore, an adverse inference charge based on missing evidence, sometimes referred to as a spoliation of evidence charge, has been limited to civil cases in South Carolina.”) (citing Stokes v. Spartanburg Reg’l Med. Ctr., 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct.App.2006) (holding spoliation instruction was warranted in medical malpractice action where two pieces of evidence initially collected by hospital were missing); Kevin R. Eberle, Spoliation in South Carolina, 19 S.C. Law. 26 (2007) (“The courts of South Carolina have long recognized that a party is entitled to favorable presumptions [in civil cases] about the contents of missing evidence when an opponent is responsible for the destruction of evidence that might otherwise be expected to have been relevant.”)). Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for is denied and dismissed with prejudice.

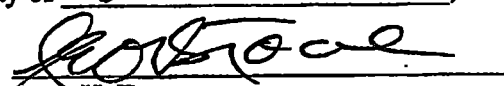
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This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant Marvin Porcher shall remain in the custody of the State.

AND IT IS SO ORDERED this 22^o day of Jan., 2018


JEAN H. TOAL
Presiding Judge
Ninth Judicial Circuit

Columbia, South Carolina

#15

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

MARVIN PORCHER, #315900

Applicant,

v.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

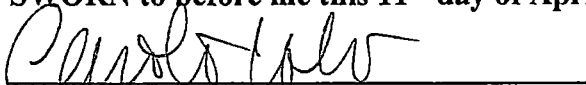
**Christopher L. Murphy, Esquire
Murphy Law Offices, LLC
234 Seven Farms Drive, Suite 128
Charleston, SC 29492**

This 11th day of April, 2018.



Jennifer Jennison
Legal Assistant for Respondent

SWORN to before me this 11th day of April, 2018.



Notary Public for South Carolina.
My Commission Expires: 5/20/2025



ALAN WILSON
ATTORNEY GENERAL

April 6, 2018

The Honorable Julie J. Armstrong
Charleston Clerk of Court
100 Broad St Ste 106
Charleston, SC 29401-2210

Re: Marvin Porcher, #315900 v. State of South Carolina
2015-CP-10-2045

Dear Ms. Armstrong:

Enclosed please find the original Order of Dismissal signed by the Honorable Jean Toal, in the above-captioned case, for filing in your office.

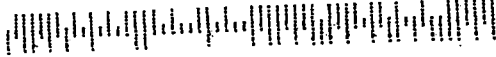
Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRCP."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

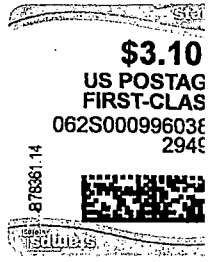
Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

MHJ/jaj



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**The Honorable Daniel E. Shearhouse
Clerk of South Carolina Supreme Court
Supreme Court Building
Post Office Box 11330
Columbia, SC 29211**