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S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

September 17, 2018

The Honorable Daniel E. Shearouse  
Clerk – South Carolina Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

**Re: John Lyndon Upson, Respondent v. State of South Carolina, Petitioner**  
**Case No. 2017-CP-02-00129**

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

Sincerely,

Julie A. Coleman  
Assistant Attorney General  
SC Bar #102214

JAC/ks  
Enclosures

cc:

Tommy A. Thomas, Esquire  
Barton J. Vincent, South Carolina Department of Corrections  
Robert J. Harte, Aiken County Clerk of Court  
J. Strom Thurmond, Jr., Solicitor, 2<sup>nd</sup> Judicial Circuit  
Robert M. Dudek, Chief Appellate Defender  
Victim's Advocacy Division

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

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Case No. 2017-CP-02-00129

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JOHN LYNDON UPSON,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

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**NOTICE OF APPEAL**

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The State of South Carolina appeals the order of the Honorable R. Scott Sprouse, dated August 7, 2018 and filed August 10, 2018, granting post-conviction relief to Respondent. The State filed a timely motion to reconsider, which was denied in an order dated August 24, 2018, filed August 29, 2018, and received by the State on September 10, 2018. A copy of the order on appeal is attached to this notice.

*[signature page to follow]*

**RECEIVED**

SEP 17 2018

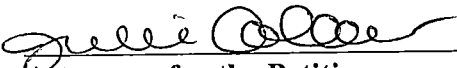
S.C. SUPREME COURT

Respectfully submitted,

ALAN WILSON  
Attorney General

JULIE A. COLEMAN  
Assistant Attorney General  
S.C. Bar #102214

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

By:   
Attorneys for the Petitioner

Columbia, South Carolina

September 17, 2018

*Other counsel of record:*

**Tommy A. Thomas, Esquire**  
**P.O. Box 88**  
**Irmo, SC 29063**

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM AIKEN COUNTY  
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R. Scott Sprouse, Circuit Court Judge

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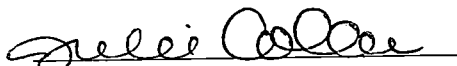
**PROOF OF SERVICE**

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I, Julie A. Coleman, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

**Tommy A. Thomas, Esquire**  
**P.O. Box 88**  
**Irmo, SC 29063**

I further certify that all parties required by Rule 243(b) to be served have been served this 17th day of September, 2018.

  
JULIE A. COLEMAN  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737  
**Attorney for the Petitioner**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )  
  
JOHN UPSON #229134 )  
 )  
Applicant, )  
 )  
v. )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
Respondent.)

IN THE COURT OF COMMON PLEAS  
DOCKET NO.: 2017-CP-02-0129

**ORDER GRANTING POST-  
CONVICTION RELIEF**

THIS MATTER is now before the Court pursuant to an Application for Post-Conviction Relief filed on January 23, 2017. The State filed their Return on May 16, 2017. Present before the Court is Julie Coleman, Esq. from the Office of the Attorney General representing the Respondent. The Applicant was present represented by his attorney Tommy A. Thomas. Witnesses for the Applicant, Tom Slovenski and for the Respondent, Second Circuit Public Defender De Grant Gibbons were also present.

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. In January 2014, the Aiken County Grand Jury indicted Applicant for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire represented Applicant. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Applicant proceeded to trial before the Honorable Donald B. Hocker. The jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

Applicant filed a timely notice of appeal. John H. Strom, Esq., of the Office of Appellate Defense perfected the appeal. The issue raised on Appeal was the trial court erred in denying Petitioner's directed verdict motion where the evidence presented at Appellant's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson. The South Carolina Court of Appeals affirmed Applicant's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the Circuit Court on June 17, 2016.

In the Application for Post-Conviction Relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
  - a. "Failure to fully cross-examine Jameshia Alston."
  - b. "Failure to ask for Neils v. Biggers hearing."
  - c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright and Brenda Smith."
  - d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant."
  - e. "Failure to object to Applicant being charged and standing trial for armed robbery when the 14<sup>th</sup> and 6<sup>th</sup> Amendments were violated by the confrontation clause."
  - f. "Failure to object to in-court identification."
  - g. "Failure to object to bolstering by the State during closing arguments."

### TESTIMONY

#### John Upson

The Applicant, John Upson, took the stand and testified that he was serving time for Armed Robbery and two counts of Kidnapping. That he received a twenty (20) year

concurrent sentence for two counts of kidnapping and one count of Armed Robbery.

The Applicant testified that he did not commit this crime and that his theory of defense in this case was an alibi. That he was not present at the scene of the incident. The Applicant further testified that this case revolved around a misidentification. That he was identified by the witness, Jameshia Austin, who was in the back of the restaurant at the time. That she found him on the internet after she left work and identified him as one of the individuals involved in the Robbery. (Trial Tr. p. 56, lines 5-25). That Ms. Austin testified at Trial that one of the things that helped her to identify the applicant was that he had a "lazy eye". (Trial Tr. p. 58, lines 1-3) He stated that he felt there was confusion and confliction in statements she had given to the police. That she recognized one of the individuals involved in the Robbery but didn't know his name. (Trial Tr. p. 64, lines 4-8) She discovered the name of this individual after she got home and looked on Facebook. (Trial Tr. p. 61, lines 11-21). Ms. Austin testified that she was shown a list of names. (Trial Tr. p. 33, lines 22-24) and that the Applicant believed that this was suggested by the Police. Ms. Austin found the name of the Applicant through one of her co-workers, William Keels and that she found the Applicant through Mr. Keel's friends on Facebook. (Trial Tr. p. 65, lines 13-25) The Applicant pointed out that the police did not conduct a photo lineup. The Applicant testified that trial counsel did not file a Pre-Trial Motion to Suppress the identification and that there was no cross-examination of the testimony of this witness regarding the identification of the "lazy eye". (Trial Tr. p. 77, lines 14-17)

In addition, the Applicant testified that there was a discrepancy in the described height of the suspect. The Applicant is 5 feet 7 inches tall. The witness testified that the suspect was 6 feet tall. (Trial Tr. p. 87, lines 5-7)

Regarding the alibi defense, the Applicant testified that he was at a comedy show at the Aiken Center for the Arts and the show was scheduled to start at 8:00 p.m. After the show, he attended a party at a local bar that started at 11:00 p.m.

The Applicant stated that the State attempted to place him at the scene of the Robbery through the use of his cell phone data. He believed that the testimony given by ATF (alcohol, tobacco and firearms) regarding cell phone information was misleading. (Trial Tr. p. 136-163) The Applicant testified that he thought that his Defense Attorney was ineffective for no cross examination to point out discrepancies in this cell phone information. That had counsel conducted a proper investigation, it could have shown that the State's evidence did not place him at the location at the time of the incident.

The Applicant also stated that the Directed Verdict Motion was raised and that the issue was that there was no testimony that any money was taken from the scene. The Applicant finally testified that he thought it was important that Devin Johnson did not come to Court and that he did not testify (Trial Tr. p. 170, lines 1-5, p. 175-179)

**Tom Slovenski**

Testimony was then presented from Tom Slovenski, of Cellular Forensics. Mr. Slovenski was qualified by the Court as an expert in the field of mobile phone forensics. Mr. Slovenski testified that he had obtained copies of the raw data that was provided to ATF by Verizon Wireless. That this was the same data that had been provided to the Aiken County Sheriff's Department and that this was the same data that had been testified to in Court. Mr. Slovenski stated that he had examined the data and the maps that were given to him from Aiken County. That one peculiarity that he noticed in the data and maps was that there were no reference point, creating concerns and question

with the data. That these maps had been generated by an older software product called Pin Link and that there are certain problems that can be associated with the use of Pin Link. One problem is that they are very susceptible to human error. Mr. Slovenski testified that as a result the data did not match the testimony in Mr. Upson's case. It appeared that there was an over estimate of coverage regarding the cell phone towers in question.

He was able to accomplish a more accurate coverage identification than the older use of Pin Link. Upon running his data, none of the data encompassed the location of Captain D's. That contrary to the testimony and presentation at Mr. Upson's trial, there was no data that showed him in the specific area of Captain D's. In fact, he identified a cell phone tower that was closer to the location in question than that used by the ATF expert. That the data revealed no pings off that tower. Mr. Slovenski testified that had he been called as a witness in this trial, that he could have raised serious doubt and question as to the validity of the State's cell tower evidence.

Mr. Slovenski further testified that a cell phone tower operate more like a cloud, rather than directional wedges aka Pie method. That it is inaccurate to draw a wedge from a cell phone tower that would potentially encompass a location. Data received or sent from a certain tower, does not necessarily mean that it is being sent or received from the side of the tower from which the wedge is drawn. This is all a matter of capacity and not just location. That the only way to have been able to exactly locate where a cell phone is, would be through PCMD (Per Call Measurement Data) records and that these are kept only for a short period of time. This data was never obtained by law enforcement in this case.

### Trial Counsel

Trial Counsel was unable to testify as he has relocated out of state. He was unable to travel back to South Carolina for testimony. The State made a Motion to allow testimony by trial counsel by telephone. Counsel for the Applicant objected to this on the basis that the telephone would not allow him to show counsel documents and effectively cross-examine counsel. This matter was brought before the Court and the Court ruled that testimony would not be allowed in this case by telephone. However, the record was left open for thirty (30) days to add Trial Counsel's testimony if necessary. The State elected not to submit additional testimony.

### De Grant Gibbons

Second Circuit Public Defender De Grant Gibbons was co-chair in the trial of this case. Mr. Gibbons testified that he met with the Applicant the day before trial. That Mr. Smith met with the Applicant on other occasions. That the theory of defense was alibi. Also that identification was an important issue. That there was a question as to whether Mr. Upson could have left the club at any given time and could have been involved in the robbery. He testified that that is why the cell phone records were important. He testified that it was not a bad Alibi Defense. That he did have another attorney in his office who had knowledge of cell phone data. This attorney reviewed this information as it was received from the State.

### DISCUSSION OF LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that “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, 104 S. Ct. 2052, 2064 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E. 2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. At 117, 386 S.E. 2d at 625. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, courts measure an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, any 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.” Id. At 117-18, 386 S.E.2d at 625.

#### CONCLUSIONS OF LAW

This Court has had the opportunity to review the entire record and has heard the testimony and arguments as presented at the hearing. This Court has also had the opportunity to observe each witness and pass upon his or her credibility. This Court has

weighed the testimony accordingly. Further, the Court has reviewed the Clerk of Court's records regarding the subject's convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the Application for Post Conviction Relief and the legal arguments made by counsel.

Therefore, this Court makes the following findings of fact based upon all of the evidence presented.

The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the Applicant's claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.

Therefore, based upon the foregoing, the Court finds and concludes:

1. The identification of the Applicant was a key issue at trial.
2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the Applicant's name. Counsel for the Applicant failed to challenge this by either requesting a *Neil v. Biggers* hearing or by objecting to its admission at trial.
3. The Court is particularly concerned with the testimony regarding Applicant's "lazy eye." The testimony provided a significant basis upon which the State's witness relied in making her identification. Once elicited at trial, Counsel for the Applicant failed to challenge this on cross-examination.

- a. The Court observed the Applicant at the evidentiary hearing and had the opportunity to personally study the Applicant's facial features. The

Court found that the Applicant clearly did not have a “lazy eye.” The Court is concerned that this evidences a misidentification that led to the Applicant’s conviction.

4. The Applicant also asserted an alibi defense that the State discredited through expert testimony that Counsel for the Applicant failed to challenge.

a. At the evidentiary hearing, the Applicant presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State’s expert witness and the usage of the “pie method.”


This Court specifically finds and concludes that both prongs of Strickland have been met by the Applicant. Trial Counsel’s performance is deficient for the reasons as set forth above and that trial counsel’s deficient performance has prejudiced the Applicant.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be granted and that the Applicant’s sentence be vacated; and
2. That the Applicant be released from the custody of SCDC and transferred to the custody of Aiken County pending the disposition of his case.
3. That any and all allegations not specifically addressed in this order are dismissed.

AND IT IS SO ORDRED this 13 day of July, 2018.

*Wadulla, SC*  
Aiken County

  
The Honorable R. Scott Sprouse  
Judge of the Second Judicial Circuit

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )  
  
JOHN UPSON #229134 )  
 )  
Applicant, )  
 )  
v. )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
Respondent.)

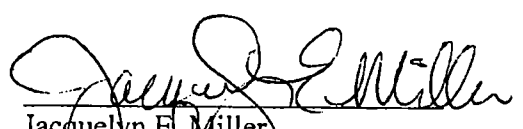
IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2017-CP-02-0129

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Secretary to Tommy A. Thomas, Esq., certify that I have served a copy of an Order Granting Post-Conviction Relief by depositing a copy of it in the United States Mail, postage prepaid and the return address clearly shown on said envelope to:

Julie Coleman, Esq.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549

  
Jacquelyn E. Miller  
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Irmo, S.C. 29063  
(803) 732-5507

July 18, 2018