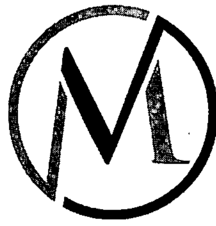


MAC | VANCE ATTORNEYS, LLC

October 23, 2018

RECEIVED

OCT 26 2018

S.C. SUPREME COURT

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

RE: **Marion Powell, #333610 v. State of South Carolina**
**2017-CP-07-00854**

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Powell.

Best regards,

Ashley A. McMahan

ASHLEY A. MCMAHAN
ATTORNEY AT LAW

AAM:krm
cc: Marion Powell
Christian A. Saville, Asst. Attorney General
Beaufort County Clerk of Court
Office of Appellate Offense

RECEIVED
OCT 26 2018
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2017-CP-07-00854

Marion Powell, #333610, .................................................... Petitioner,

v.

State of South Carolina,.................................................... Respondent.

# NOTICE OF APPEAL

Applicant, Marion Powell, appeals the order of the Honorable R. Lawton McIntosh, dated October 16, 2018, and filed October 18, 2018.

Oct. 23rd, 2018

Ashley A. McMahan
ASHLEY A. MCMAHAN, ESQUIRE
MAC | VANCE ATTORNEYS, LLC
PO Box 5501
West Columbia, SC 29171
803-219-1110
ashley@macvance.com
SC Bar No. 71676
ATTORNEY FOR APPLICANT

Opposing Counsel:
Christian A. Saville, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

RECEIVED
OCT 26 2018
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

---

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

---

Case No. 2017-CP-07-00854

---

Marion Powell, #333610, .................................................................. Petitioner,

v.

State of South Carolina,..................................................................Respondent.

---

## PROOF OF SERVICE

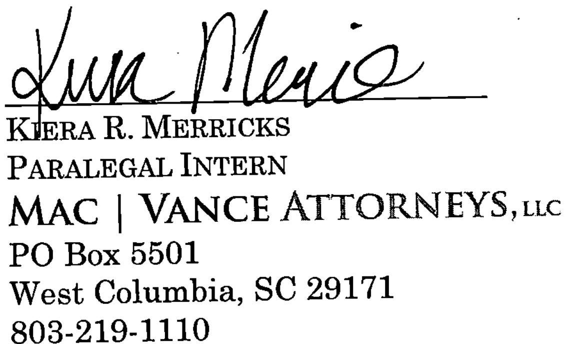
---

I, Kiera R. Merricks, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Christian A. Saville, Asst, Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

I further certify that all parties required by Rule to be served have been served.

Oct 23rd, 2018



KIERA R. MERRICKS
PARALEGAL INTERN
MAC | VANCE ATTORNEYS, LLC
PO Box 5501
West Columbia, SC 29171
803-219-1110

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP0700854

| Marion B Powell | South Carolina State Of |
|---|---|
| PLAINTIFF(S) | DEFENDANT(S) |
| Submitted by: | Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant |

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☒ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☒ **See attached order** ☐ Statement of Judgment by the Court:

**Order of Dismissal**

**ORDER INFORMATION**

**This order** ☒ ends ☐ does not end the case.
Additional Information for the Clerk: ____________

**INFORMATION FOR THE JUDGMENT INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| | | |
| | | |
| | | |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
**Note: Title abstractors and researchers should refer to the official court order for judgment details.**
**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

s/ R. L. McIntosh | 2155 | 10/19/2018

**Circuit Court Judge** | **Judge Code** | **Date**

## For Clerk of Court Office Use Only

This judgment was entered on **October 18, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **October 19, 2018**, to attorneys of record or to parties (when appearing pro sè) as follows:

**Marion B Powell** #333610 Mccormick C.I. F-5 B Side Cell 5 386 Redemption Way McCormick, SC 29899
**Ashley A. McMahan** PO Box 5501 West Columbia, SC 29169

**Christian Saville** PO Box 11549 Columbia, SC 29211

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

M.Kilby

**Court Reporter**

**Jerri Ann Roseneau - Clerk of Court**

**Court Reporter:**

**E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Marion Powell, #333610,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2017-CP-07-00854

2018 OCT 18 PM 1:24

**ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 1, 2017. Respondent submitted its Return and Partial Motion to Dismiss on August 3, 2017. An evidentiary hearing was convened on January 31, 2018, at the Beaufort County Courthouse. Applicant was present at the hearing and was represented by Ashley McMahan, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from Scott W. Lee, Esquire ("Trial Counsel"), and Chris Moore, Esquire ("Appellate Counsel"). This Court had before it the records of the Beaufort County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial, Applicant's appellate records, Applicant's records for the Department of Corrections, and the pleadings. The Court finds as follows:

## I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In April 2011, the Beaufort County Grand Jury indicted Applicant for burglary,

first degree (2011-GS-07-0778), five counts of kidnapping (2011-GS-07-0779; -0780; -0781; -0782; -0783), armed robbery (2011-GS-07-0784), possession of a weapon during the commission of a violent crime (2011-GS-07-0786), and possession of a firearm or ammunition by a person convicted of a violent offense (2011-GS-07-0787). Scott W. Lee, Esquire, represented Applicant. Assistant Solicitors Benjamin Sheldon, Esquire, and Hon. Benjamin Coppage, Esquire, prosecuted the case. On November 18-22, 2013, Applicant proceeded to trial before the Honorable Brooks Goldsmith. The jury found Applicant guilty as indicted. Judge Goldsmith sentenced Applicant to imprisonment for concurrent terms of twenty-seven years for burglary, first degree, twenty-seven years for each count of kidnapping, and five years for possession of a weapon during the commission of a violent crime. The charge of possession of a firearm or ammunition by a person convicted of a violent crime was dismissed.

Applicant filed a timely notice of appeal. Robert Dudek, Esquire, of the Office of Appellate Defense, and Chris Moore, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 15, 2016. State v. Powell, Op. No. 2016-UP-297 (S.C. Ct. App. filed June 15, 2016). The remittitur was returned to the circuit court on July 1, 2016.

## II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Allegations of Unfairness
   a. "I was in fact placed in a unfair, unappropriate, and overly suggestive photo line up: the court and also my attorney allowed Pam Brown, the person who created the photo line up to not testify…in her own opinion that my line up was not done correctly or as should have been done…obvious and apparent framework of authorities…More importantly, prosecution says that I was placed in this line up because Northern Beaufort incidents were similar to this: both 2 incidents that I was charged with 2 incidents that were dropped due to obvious lies...was

allegedly tied up, robbed for drugs, and motion of discovery is full of a bunch of urban novel extortion ring story…K Bradshaw (who is not a relative of mine as said in court) allegedly that he was robbed, pistol whipped and shot at. Where is the similarity?"

b. "…Ben Shelton informs the court that the investigation was not complete. And also that he asked for a continuance…This trial took place in 2013. It's now 2017 and these "alleged" co-defendants still remain uncharged. Which in further proof and reason jail tapes between myself and Mr. Young should had never been able to be used. Because I have nothing to do with the matter at hand." (internal citations omitted)

c. "…Cleven Jones was asked where was he at the time of the alleged incident…Cleven Jones stated that he just left his job at Stokes Honda. Prosecution and also my attorney refused to point out this outright perjury (lie) to the court. Investigative in my Rule 5 Motion reveals that Stokes Honda officials made it very clear! That is that Cleven Jones has never…worked as a car broker there. Michael Coxwell at Stokes Honda nor other Stokes Honda reps were called to testify to this very important information. What type of prosecution or counsel would not want this lie and fabricated alibi presented to the court, to the jury? Not only does this man admit that this was his way to get back Kenya Hagood…Prosecution know and pin point outright lies in Eric Riley's original written statements. And still allowed his testimony by dissecting what they could use to aid them in a conviction. Furthermore, if a thorough investigation and honest effort of truth was being seeked. It would be known. That the only Kenya I know is Kenya Moultrie from where I was born and raised. Big Estate and Vick State as written in my transcript. [Eric Riley is nothing more than a hostile witness who made a mockery of the court for his own personal reasons]."

2. Ineffective Assistance of Trial Counsel
   a. "My trial counsel was indeed ineffective due to him not calling to the stand. Stokes Honda Staff, Det. John Gobel & numerous other narcotic law enforcement that were on trial list and in my rule 5. Most importantly Shawn Byron Young and Kenya Hagood to take the stand.
   b. "My trial counsel didn't even find it important to bring the court's attention about the illegal activity the Jones' were under investigation for. In my trial brief it even speaks of 2 million in cash found in one of their their properties. Meaning it is very possible they were puppets for law enforcement and prosecution to escape their own legal trouble."
3. Ineffective Assistance of Appellate Counsel
   a. For failing to challenge the court's jury instructions
   b. For failing to challenge the court's denial of a directed verdict

Additionally, on January 22, 2018, Applicant filed an amended post-conviction relief application, listing the following allegation:

1. Ineffective Assistance of Counsel as to Scott W. Lee, Esquire:
    a. Failed to call Jarvis Watson as an alibi witness.

At the outset of the evidentiary hearing, Respondent moved to dismiss all direct appeal allegations. This Court granted the motion to dismiss, and Applicant proceeded on his other allegations. Following the hearing, the Court allowed Applicant to hold the record open for thirty days to allow him to provide additional testimony from his alleged alibi witness. However, after a period of time, Applicant informed the Court it would not be able to submit further testimony.

## III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

*Applicant's testimony*

At the evidentiary hearing, Applicant testified that he turned himself into law enforcement in March 2011 when he came back from North Carolina. He stated he had two alleged co-defendants who have never been charged to this day, Kenya Hagood and Shawn Byron Young. Applicant testified that he has an alibi witness, Jarvis Watson, who he has known all his life. He stated he told Trial Counsel that he was with Watson during the time of the crime and Trial Counsel got in contact with Jarvis through his sister but did not call him as a witness at trial. Applicant testified that Trial Counsel told him the photo lineup was the main issue in his case, but there were also issues about aiding and abetting and the fact that Applicant was on the run. He testified that he was in North Carolina for several months during the time of the crime, but he does not remember what he was doing on the specific day of the crime. He testified that he was offered a fifteen year plea deal, but he chose not to take the offer.

*Trial Counsel's testimony*

At the evidentiary hearing, Trial Counsel testified that this case involved a home invasion where three black men, armed with guns and some wearing masks, entered a home where children were present. Trial Counsel stated Applicant did not admit to being there and that he

and Applicant had some discussion about an alibi. Trial Counsel testified his concern was that no one could pinpoint that Applicant was in North Carolina on that date and at that time, which Trial Counsel opined could have destroyed an entire case. Trial Counsel testified that he investigated Jarvis Watson as a potential alibi witness, but Watson did not really want to help. Trial Counsel further testified that he made a strategic decision not to call Watson as an alibi witness because he would not have been a helpful witness.

Trial Counsel testified his general trial strategy was to attack the identification of Applicant and suppress the photo lineup by arguing it was overly suggestive. He stated the photo lineup was extremely damaging to Applicant because both the mother and the ten-year-old child who were victims of the home invasion picked Applicant out of the photo lineup. Trial Counsel stated that he had an expert testify at trial about the suggestive nature of the photo lineup. He testified that he does not know what weight the jury gave the evidence, but he thought the lineup was very, very harmful and was the victims' identification was believable to the jury.

Trial Counsel testified that he did not talk to Kenya Hagood, but she would not have been a helpful witness for Applicant. He testified that if he had called Shawn Young as a witness, it would have taken away his ability to argue the State's lack of witnesses and evidence. Trial Counsel stated he made a motion to reveal the deal for Eric Riley, the "jailhouse snitch." He stated he never spoke to Cleven Jones, but his investigation showed that Jones was an independent car broker and he sold some cars to Stokes Honda. He stated the backstory was that some Stokes Honda people were involved with drugs, and Trial Counsel wanted to avoid that coming in at trial, so he chose not to call Jones at trial.

*Appellate Counsel's testimony*

Appellate Counsel testified he came to represent through the Appellate Practice Project and he took the case pro bono. He stated he does not usually do criminal appeals, and this was his first and only criminal appeal case. He stated that, because it was his first case, when he received the case, he met with the head of Appellate Defense and a senior practitioner, went through an instructional program, and spoke with both Trial Counsel and the Solicitor who prosecuted the case. Appellate Counsel testified he did extensive legal research on the issues in the case, including the photo lineup issue and the jury instructions. He stated his strategy was to raise the identification issue as his only issue on appeal, as he believed it was the most meritorious. Appellate Counsel stated he did not challenge the trial court's denial of the directed verdict motion because it was the same as the issue he raised—the identification of Applicant. He stated he was not aware of any issues that Trial Counsel failed to preserve for appellate review that he would have raised on appeal. Appellate Counsel testified he chose not to petition for certiorari to the Supreme Court and that he advised Applicant it was unlikely they could change the court's ruling. Appellate Counsel testified that he informed Applicant that if he wanted to continue the appeal, Applicant could contact the Office of Indigent Defense to do so. Appellate Counsel stated he sent a copy of the appellate materials to Applicant and his sister.

## IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that 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 (1985). 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.

## V. 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 hearing. 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).

## "ALLEGATIONS OF UNFAIRNESS"

This Court finds all of Applicant's allegations concerning "allegations of unfairness" should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

These claims are not cognizable under the act. Applicant is not collaterally attacking his guilty plea or sentence, but rather seeks to argue issues best suited for direct appeal. Applicant's contention that such a ground is impliedly created by S.C. Code Ann. § 17-27-90 is meritless, as that section does not pertain to *what* may be raised, but *how* valid grounds must be raised.

Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). These issues are improper for post-conviction relief

because they could have been raised on direct appeal and are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised these issues at trial or on appeal. In fact, his first claim was raised and ruled upon on direct appeal. His failure to do so for the remaining claims has waived those allegations as grounds for relief.

Furthermore, Applicant's first claim is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; *see also* Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981). Because it was raised and ruled upon in his prior litigation, this allegation is dismissed.

For these reasons and pursuant to Rule 12(b)(6), SCRCP, this Court finds these allegations are denied and dismissed for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Trial Counsel was ineffective in his representation before and during his trial. This Court finds Applicant has failed to meet his burden of proving any of his allegations and that Trial Counsel was not ineffective in any of his actions or inactions. Applicant alleges Trial Counsel was ineffective for failing to call specific witnesses at trial. However, Trial Counsel testified that he investigated each of these witnesses, and he articulated

valid strategical decisions in choosing not to call them.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Trial Counsel testified that he did not talk to Kenya Hagood, but he chose not to do so because she would not have been a helpful witness for them. He articulated that he chose not to call Shawn Young as a witness because having him there would have taken away his ability to argue the State's lack of witnesses and evidence. Trial Counsel testified that he never spoke to Cleven Jones because his investigation showed he was part of the drug involvement at Stokes Honda, and he did not want to bring any of that into the trial, as it would have harmed Applicant. Finally, Trial Counsel credibly testified that he did investigate and attempt to speak to Jarvis Watson as a potential alibi witness, but Watson did not really want to help. Trial Counsel further testified that he could not accurately pinpoint Applicant as being in North Carolina on the date of

the crime, so he made a strategic decision not to call him as a witness.

To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

This Court finds Trial Counsel's decision not to call Jarvis Watson as an alibi witness was not deficient, as he was unable to get Watson to cooperate and Watson's testimony would not have qualified as an alibi regardless. Most importantly, Applicant cannot meet his burden of proving prejudice because he failed to present the testimony of Watson as an alibi witness. This Court cannot speculate the contents or credibility of his testimony. Therefore, Applicant has failed to meet either prong of the Strickland test on any of his allegations, and they are denied and dismissed with prejudice.

## INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court finds Applicant's allegations of ineffective assistance of appellate counsel are meritless and are denied and dismissed with prejudice.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State,

302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Here, Applicant alleges Appellate Counsel was ineffective for failing to brief the trial court's jury instructions and the denial of his directed verdict motion. However, the meritorious issue Appellate Counsel raised on direct appeal essentially is the same as the issue of the denial of a directed verdict, as the directed verdict motion was made to argue the victim's identification from the photo lineup was not competent evidence to create substantial circumstantial evidence of Applicant's guilt. ROA 184. Appellate Counsel's meritorious issue on direct appeal was:

i. The photo array was unduly suggestive which created a substantial likelihood of irreparable misidentification in violation of Appellant's right to due process.
   a. The photo array selected by law enforcement to identity Appellant was highly suggestive.
   b. Under the totality of the circumstances, the identification based on the unnecessarily suggestive identification process was unreliable and should be excluded.

Brief of Appellant. Appellate Counsel's issue on appeal was a challenge to the photo lineup evidence and subsequent identification which was the subject of the directed verdict motion. The Court of Appeals found in its opinion that the trial court did not abuse its discretion in allowing the photo lineup, as it was not unduly suggestive and there was no substantial likelihood of misidentification. State v. Powell, Op. No. 2016-UP-297 (S.C. Ct. App. filed June 15, 2016). Even if Appellate Counsel had attacked this evidence by raising this issue as one of error in denying the directed verdict motion, it would not have been successful based on the appellate court's ruling on the admissibility of this evidence. Accordingly, there can be no prejudice from his failure to do so. Additionally, Appellate Counsel testified that he thoroughly researched the jury instruction issue and chose not to raise this issue, as he did not believe it would be as successful as the issue he raised could be. This Court finds Appellate Counsel was not deficient in choosing not to raise either of these issues, and there is no resulting prejudice from his decision not to do so, as the issues would not have changed the outcome of the appeal. Accordingly, these allegations are denied and dismissed with prejudice.

*[signature page to follow]*

## VI. CONCLUSION

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

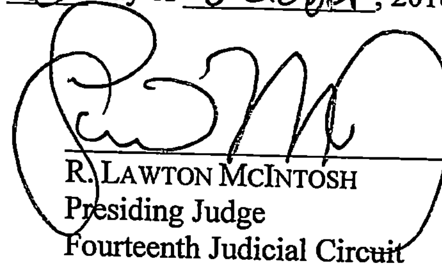
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that 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. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent.

**AND IT IS SO ORDERED** this 16 day of October, 2018.



R. LAWTON MCINTOSH
Presiding Judge
Fourteenth Judicial Circuit

Anderson, South Carolina

# State of South Carolina
# The Circuit Court of the Tenth Judicial Circuit

R. Lawton McIntosh
Judge

Post Office Box 8002
100 South Main Street
Anderson, SC 29622-8002
Phone: (864) 260-4059
Fax: (864) 224-6320
lmcintoshj@sccourts.org

October 16, 2018

Honorable Jerri Ann Roseneau
Clerk of Court for Beaufort County
Post Office Box 1128
Beaufort, South Carolina 29901-1128

2018 OCT 18 PM 1:
JERRI ANN ROSENEAU
BEAUFORT COUNTY
CLERK OF COURT

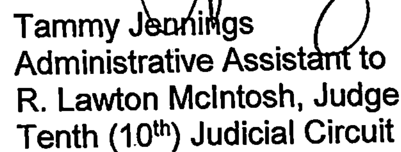
Dear Madame Clerk:

Please find enclosed an original Order which has been signed by Judge McIntosh in the following case:

Marion Powell #333610 v. State of SC
CA No. 2017-CP-070-00854

Please file this in your office and provide certified copies to the attorneys of record pursuant to your customary procedure. Thank you for your assistance in this matter.

Sincerely,



Tammy Jennings
Administrative Assistant to
R. Lawton McIntosh, Judge
Tenth (10th) Judicial Circuit

tlj

Enclosure

MAC | VANCE ATTORNEYS, LLC
PO Box 5501
West Columbia, SC
29171

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