

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

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Apr 28 2020
SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Scott Sprouse, Circuit Court Judge

Case No.: 2017-CP-02-0129
Appellate Case No.: 2018-001674

John Upson #229134, Respondent

v.

State of South Carolina,Petitioner,

PETITION FOR APPEAL BOND

Respondent, through his undersigned counsel, respectfully petitions this Court for an Appellate Bond pursuant to Rule 240, SCACR, and Rule 243 (k), SCACR. Respondent is requesting an Appellate Bond during the pendency of the appeal of the Order Granting Post-Conviction Relief, which was signed by the Honorable R. Scott Sprouse on July 13, 2018 and attached hereto. This is a second request. The original request was denied on February 20, 2019. However, certain circumstances have changed since the first Petition. To wit:

- 1) The Coronavirus has significantly impacted the prison system. The Respondent is housed in a facility where the inmates are tightly confined without sufficient safeguards against the virus.

- 2) Thea the Appellant has been diagnosed with glaucoma and wishes to be able to obtain outside medical treatment for this condition. That corrections medical services are severely strained, and the appellant is fearful of the loss of his vision.

POST CONVICTION RELIEF PROCEDURAL HISTORY

The Respondent 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 Respondent for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire represented Respondent. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Respondent proceeded to trial before the Honorable Donald B. Hocker. The jury found Respondent guilty as indicted. Judge Hocker sentenced Respondent to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

Respondent 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 Respondent's directed verdict motion where the evidence presented at Respondent'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 Respondent'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, Respondent alleged 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 Respondent."
- e. "Failure to object to Respondent being charged and standing trial for armed robbery when the 14th and 6th 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."

This matter was before the Lower 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 was Julie Coleman, Esq. from the Office of the Attorney General representing the Respondent. The Respondent was present represented by his attorney Tommy A. Thomas. Witnesses for the Respondent, Tom Slovanski and for the Respondent, Second Circuit Public Defender De Grant Gibbons were also present.

An Order Granting Post Conviction Relief was signed by the Honorable R. Scott Sprouse on July 13, 2018. The Court found in part the basis for granting Post Conviction Relief was:

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 Respondent'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 Respondent 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 Respondent's

name. Counsel for the Respondent 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 Respondent'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 Respondent failed to challenge this on cross-examination.

a. The Court observed the Respondent at the evidentiary hearing and had the opportunity to personally study the Respondent's facial features. The Court found that the Respondent clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the Respondent's conviction.

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

a. At the evidentiary hearing, the Respondent 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 found and concluded that both prongs of Strickland have been met by the Respondent. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the Respondent.

GROUND AND SUPPORT OF REQUEST FOR BOND

That the Lower Court was very specific in its findings and conclusions. The court had the opportunity to review the entire record and heard the testimony and argument presented at the hearing. The court also noted that it had the opportunity to observe the witnesses and pass upon his credibility and that the Court was able to weight this testimony accordingly. The Court

also reviewed all of the records available from the Clerk of Court's Office and the South Carolina Department of Corrections.

The Court found and concluded that the identification of Respondent was a key issue at Trial. The court found that this identification issue there was testimony of a witness who had pulled a photograph from Facebook. When she spoke with law enforcement, she was presented with a list of names that included the Respondent's name. The Court found that Respondent failed to challenge this identification either by requesting a Neil v. Biggers hearing, or by objecting to the admission at trial.

The Court was particularly concerned about the testimony regarding Respondent's lazy eye. Testimony provided a significant basis upon which the State's witness relied upon in making her identification. Once elicited at trial, Counsel for Respondent failed to challenge this on cross-examination. The Court notes that it observed the Respondent at the evidentiary hearing and had an opportunity to personally study the Respondent's facial features. The Court found that the Respondent clearly did not have a lazy eye and the Court was concerned that this evidence is a misidentification that lead to the Respondent's conviction.

At the evidentiary hearing, the Respondent also presented testimony through an expert witness who was recognized by the Court as an expert in the field of forensic cell phone technology. This witness testified and created a significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness about the usage of a pie method for locating the Respondent regarding the times in question. Counsel for the Respondent would also assert that there were other points of testimony of the State's witnesses that were brought into doubt by the use of expert testimony at the evidentiary hearing.


The Lower Court specifically found that the Respondent had met his burden of proving both prongs of Strickland and that trial counsel's performance was deficient for the reasons contained in the Court's Order.

Rule 243 (k) SCACR, bail pending Appellate review specifically outlines the process in which the Respondent must make a request for Bail. In determining whether to exercise the discretion and the authority to admit an Applicant to Bail, the Court list the following factors to be considered:

1. The probability that the Respondent will prevail on Appellate Review. The Respondent would assert that the Lower Court's decision is based upon substantial fact and the law and therefore, he has a high likelihood of prevailing.
2. That the nature of the relief requested is that the conviction will be set aside.
3. The seriousness of the criminal offense committed. The Respondent admits that this is a serious crime. The Respondent asserts that he is not guilty of this crime. In addition, no one was physically injured in this robbery. There also appears to be no testimony in the Trial Court's transcript that any money was actually taken from the subject location.
4. The danger that the Respondent may pose to the community. The Respondent would assert that he is not a danger to the community. In fact there are a number of members of the community who would welcome him back. They would also be available to provide assistance to him should it become necessary while on bond. The Respondent is a life-long resident of Aiken County. He would be living with his father in Aiken County. While he was out on bond for these charges, he never missed a Court appearance and always reported as requested. He is 46 years old. He would

- have a job at Snazzy's Barber Shop in Aiken County. Danny Mack is the manager and is willing to provide employment for him. The Respondent has been to Barber School and he would be working while out on Bond under the direction of Mr. Mack.
5. He would also have a possible second job through Express Employment Solutions, working at John Deere. Therefore he has excellent opportunity for employment during this period of release.
 6. The likelihood that the Respondent may flee if released. The Respondent is a life-long resident of Aiken County and would be living with his father in Aiken County. An Affidavit from his father is attached hereto. All of the Respondent's contacts, including employment, would be in Aiken county and he has no history of bond forfeiture for not showing up for court. Therefore, there is no likelihood that the Respondent would flee.

The Respondent would respectfully request that this Court grant an Appeal Bond and impose any conditions of this Bond as the Court may deem fit.



Tommy A. Thomas
Attorney for Respondent
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

April 28, 2020

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Scott Sprouse, Circuit Court Judge

Case No.: 2017-CP-02-0129
Appellate Case No.: 2018-001674

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NOV 15 2018

S.C. SUPREME COURT

John Upson #229134,, Respondent

v.

State of South Carolina,Petitioner,

AFFIDAVIT

That the Affiant, Willie Upson, being duly sworn, would state as follows:

1. I am the Father of John Upson, the Respondent in the above captioned matter.
2. I reside at 324 Newberry St. NW, Aiken, SC 29801 and have lived there since September 15, 1946.
3. I served in the U.S. Military, Army Branch from 1951-1953.
4. I was employed with the Savannah River Site Plant for 34 years and 3 months.

While employed, I had top security clearance and worked on top secret data regarding weapons as well as working in a lab regarding tech analysis. I retired from that job on March 31, 1989.

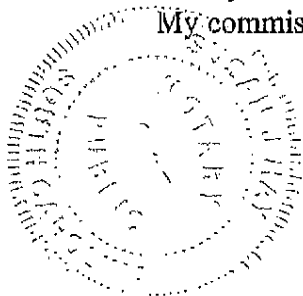
- 5. I worked as an electrical contractor after I retired until 2008.
- 6. Currently, I own several rental properties and handle all of the property management duties which include repairs and rent collection.
- 7. I am a member of Second Baptist Church of Aiken.

FURTHER AFFIANT SAYETH NOT.

Willie Upson
 Willie Upson

Sworn to before me this 30th day
 of October, 2018.

Susan J. Nay
 Notary Public for South Carolina
 My commission expires: 6/9/24



16 October 2018

RE: John Lyndon Upson

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NOV 15 2018

TO WHOM THIS MAY CONCERN:

S.C. SUPREME COURT

I have known *John L. Upson* all of his life and his family for almost the same amount of time. John was reared in my community (we are neighbors) and reared by outstanding parents.

Although John has made life choices in the past that were not the greatest, I powerfully believe that if given the opportunity to turn his life around, he will surely do so. If he is afforded bail/bond in /on his current criminal conviction(s), I steadily feel that he will adhere to those conditions.

If additional information is needed, I can be contacted at (803)649-4594.

Respectfully submitted,

Rev. Phillip Watson
Rev. Phillip Watson *Watson*

Reverend Troy A. Toney
258 East Boundary Ave. S.E.
Aiken, S.C. 29801

Dear your Honor:

I am writing this letter as a reference concerning an inmate, John F. Upson getting a bond or release while waiting on a decision for his permanent release from the courts. I have known John for thirty-five years; although, he has made some unwise decisions in his lifetime, he is a generous and free-hearted man. He will do anything to help his fellow man. He has been known to give away something he has to the less fortunate in order for the less fortunate to have whatever it is that he or she needs!

He is not a flight risk to the state; if, he is given bond. I have never known him to run from any court hearing or date that he has had in his past court dealings. For him not to show up if the state called him to show, would be embarrassing and hurtful to his elderly father and mother; to whom, John does not want to embarrass or hurt again. His family is well known and respected in the Aiken County community!

Therefore, I am respectfully asking the state of South Carolina and you your Honor to grant inmate brother John F. Upson a bond or bail release while the state deliberates on whether to grant Mr. John Upson his rightful overturned conviction of the crime that the judge deemed that he did not do; but, was a case of mistaken identity. Not only would John and his parents, Mr. Willie and Mrs. W. Upson appreciate the bond while waiting, it would be fair.

Thank you for at least reading my letter and considering my request. I hope by no means that I did not write anything disrespectful or harmful to John's bond release. I only want what is fair to John and the state of South Carolina. Thank you again.

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NOV 15 2018

S.C. SUPREME COURT

Sincerely yours in Christ,
Rev. Troy A. Toney
Reverend Troy A. Toney, D. MIN.

16 October 2018

RE: John Lyndon Upson

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NOV 15 2018

TO WHOM THIS MAY CONCERN:

S.C. SUPREME COURT

I have known John for several years. I am currently the manager at Snazzy's Beauty and Barber Shops located in Aiken, South Carolina.

John has obtained his Barbering degree from Southern Barber College, Augusta, Georgia. He is trained in the art of cutting hair. If he is given bail/bond on the current criminal convictions, I have an opportunity for him at Snazzy's to advance his skill ongoing.

I am of the opinion that John will abide by the conditions of his release, if granted.

Should additional information be needed, I can be contacted at (803)649-3855.

Kind regards,

Danny Mack

Danny Mack
This is my cell #
803-998-8149
Thank You

CPC 1054139

SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING AND REGULATION

Board of Barber Examiners

LICENSE TYPE
Barber Instructor

LICENSE NUMBER
6818



DANNY MACK

EXPIRATION DATE
06/30/2019

Board Members
Paul Elliott Robinson, Chairman
Edwin C. Barnes
Frederick M.G. Evans
Renee Patton
Patricia C. Durkin

Theresa N. Richardson, Administrator
Paul E. Robinson Jr.
Paul E. Robinson Jr., Chairman

THIS LICENSE MUST BE DISPLAYED IN A CONSPICUOUS PLACE IN THE FACILITY
THIS LICENSE CANNOT BE COPIED OR REPRODUCED IN ANY FORM

Jackie Miller

From: Jackie Miller
Sent: Tuesday, April 28, 2020 12:34 PM
To: mfarthing@scag.gov
Subject: John Upson
Attachments: upson.appealbond.pdf

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Apr 28 2020
SC Court of Appeals

Jackie Miller

Paralegal to Tommy Thomas, Esq.
Tommy A. Thomas, PC
803 732 5507 Main | 803 781 4226 Fax
Mailing Post Office Box 88 | Irmo SC 29063 Physical 7588 Woodrow St | Irmo SC 29063

-----Original Message-----

From: jackie@paroleme.com <servicesharp104@gmail.com>
Sent: Tuesday, April 28, 2020 12:38 PM
To: Jackie Miller <jackie@paroleme.com>
Subject: John Upson

Reply to: jackie@paroleme.com <jackie@paroleme.com> Device Name: Not Set Device Model: MX-3070V
Location: Not Set

File Format: PDF MMR(G4)
Resolution: 300dpi x 300dpi

Attached file is scanned image in PDF format.
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April 28, 2020

VIA FACSIMILE

V. Clare Allen, Deputy Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

FAX NO.: 803-734-1839

RE: John Upson #229134 v. State
Appellate Case No.: 2018-001674

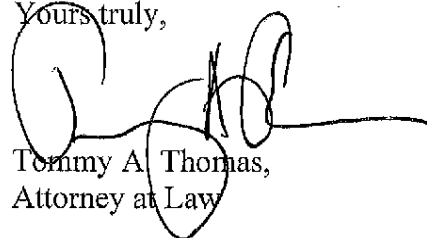
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Dear Sir or Madam:

Attached please find an Petition for Appeal Bond and a Certificate of Service by email for filing in the above referenced matter.

Thank you. Should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,



Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Mark R. Farthing, Esq.
John Upson #229134

TOMMY A. THOMAS, P.C.
803 732 5507 | FAX 803 781 4226 | INMATE LINE 803 732 6542
HARRINGTON BUILDING, 7588 WOODROW STREET, IRMO, SC 29063
MAIL: P.O. BOX 88, IRMO, SC 29063