

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM UNION COUNTY  
Court of Common Pleas  
THE HONORABLE Brooks P. Goldsmith

CA No. 2008-CP-44-269

DONNIE MACK MALPASS,  
  
APPELLANT,  
  
vs.  
  
STATE OF SOUTH CAROLINA  
  
RESPONDENT.

FILED FOR RECORD  
2013 JUN 21 PM 3 41  
WILLIAM F. GAULT  
CLERK OF COURT  
UNION, SC

NOTICE OF APPEAL

Appellant DONNIE MACK MALPASS, appeals from the Order of the Honorable Brooks P. Goldsmith, Circuit Court Judge clocked April 1, 2010.

Respectfully submitted,

**RECEIVED**

JUL 01 2013

*Caroline Horlbeck*  
Caroline M. Horlbeck, Esq.  
101 Whitsett St  
Greenville, SC 29601

S.C. SUPREME COURT  
Date: June 18, 2013

Other Counsel of Record: J. Rutledge Johnson, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

COUNTY OF UNION

C.A. No. 2008-CP-44-269

Donnie Mack Malpass,

Appellant,

-vs-

CERTIFICATE OF SERVICE

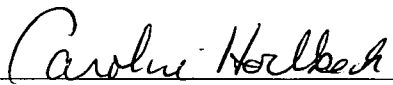
State of South Carolina,

Respondent.

This is to certify that I am an employee in the law office of Caroline M. Horlbeck, attorneys for Appellant, and that I have this day caused to be served upon the person(s) named below Appellant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French  
S.C. Office of Appellate Defense  
P.O. Box 11433  
Columbia, SC 29211

J. Rutledge Johnson, Esq.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

  
Caroline M. Horlbeck

Greenville, South Carolina

June 27, 2013

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF UNION )  
 )  
 Donnie M. Malpass, )  
 S.C.D.C. No. 164744, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. No.: 2012-CP-44-0327

**ORDER OF DISMISSAL  
 GRANTING AUSTIN V. STATE  
 BELATED PCR APPEAL**

WILLIAM F. GAULT  
 CLERK OF COURT  
 UNION, SC

FILED FOR RECORD  
 2013 JUN 13 PM 2 50

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 2, 2012. An evidentiary hearing into the matter was convened on May 14, 2012 at the Moss Justice Center, York County South Carolina. The Applicant was present at the hearing and represented by Caroline M. Horlbeck, Esquire. J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

**PROCEDURAL HISTORY**

The Applicant is no longer confined in the South Carolina Department of Corrections. The Applicant was indicted at the September 3, 2003 term of the Union County Grand Jury for Lewd Act Upon A Child Under 16 (2003-GS-44-0772). William D. All, II, Esquire represented the Applicant on the charge. After the State called the case to trial on March 10, 2004, the Applicant was found guilty as indicted. The Honorable Lee S. Alford sentenced the Applicant to confinement for a period of ten (10) years, suspended upon the service of five (5) years confinement and five (5) years probation.

The Applicant did not appeal his conviction(s) or sentence(s).



The Applicant filed his first application for Post-Conviction Relief (PCR) on August 7, 2008. The Respondent made its Return and Motion to Dismiss on October 14, 2008. Pursuant to that Motion, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed October 31, 2008, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant then filed a document in response captioned "Opposition and Reply to the Respondent's Motion to Dismiss."

An evidentiary hearing was subsequently convened at the Moss Justice Center in York County, South Carolina on February 5, 2010. The Applicant was present and was represented by Melinda I. Butler, Esquire. Jennifer a Kinzeler, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

In his first PCR application, Respondent alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel;
  - a. Failure to adequately cross-examine witnesses
  - b. Failure to Investigate
  - c. Failure to provide Applicant with discovery
  - d. Failure to Appeal, and
2. 6<sup>th</sup> Amendment Violations

The Honorable Brooks P. Goldsmith denied and dismissed the Applicant's application by written Order on March 24, 2010.

## ALLEGATIONS

In his current application for post-conviction relief, Applicant raised the following issues:

1. "Appointed counsel failed to file PCR appeal as requested by Applicant at the conclusion of the PCR hearing."

The Applicant filed his current PCR application on August 2, 2012. Respondent moved to dismiss all claims except for the Austin Review on grounds that all other claims are successive to the previous application for post-conviction relief. Therefore, at the evidentiary hearing, the Applicant proceeded solely on the allegation of ineffective assistance of PCR counsel in failing to file a notice of appeal from the Applicant's first PCR action.

## 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

The Applicant testified that he verbally requested that Ms. Butler file an appeal of the Court's Order denying and dismissing his PCR Petition (2008-CP-44-0269). PCR counsel testified that she was not aware that she could appeal an Order denying and dismissing a PCR Petition. Counsel also testified she did not review the appeal process with Applicant. Counsel further testified that her assistant mailed a cover letter and copy of Judge Goldsmith's Order to Applicant but she was unable to find a copy of the cover letter in her file.

This Court finds that any allegation other than the belated PCR appeal allegation is

successive and therefore denied. Successive applications for post-conviction relief are clearly disfavored. See S.C. Code Ann. § 17-27-90 (2003); Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980).

This Court also finds the Applicant's allegation that he is entitled to a belated appeal due to his prior PCR attorney's failure to perfect an appeal on his behalf is not procedurally barred and is meritorious. Where a post-conviction relief judge determines the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of post-conviction relief issues pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).<sup>1</sup> See also King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

This Court further finds the Applicant did not knowingly and voluntarily waive his right to appellate review and this therefore entitled to a belated review of the denial of his first PCR application. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). The Applicant's denial of an appeal can be remedied by a petition for belated review by his current PCR attorney pursuant to Austin v. State. See id.

### CONCLUSION

All allegations except the belated appeal pursuant to Austin v. State are barred because they are successive. The Applicant has proven by a preponderance of the evidence that he did not knowingly and voluntarily waive the direct appeal of the denial of his first PCR application. Any grounds for relief that are not specifically addressed in this Order are denied for failure to meet the requisite burden of proof.

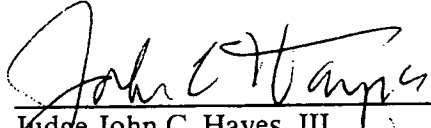
### **IT IS THEREFORE ORDERED:**

---

<sup>1</sup> Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the Applicant must petition the Supreme Court for a belated review. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

1. That the application for post-conviction relief be denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR for the appropriate procedure for a belated appeal.
1. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 3<sup>rd</sup> day of June, 2013.

  
\_\_\_\_\_  
Judge John C. Hayes, III  
Sixteenth Judicial Circuit *JH*

York, South Carolina.

FORM 4  
JUDGMENT ROLL # 2010-44-223

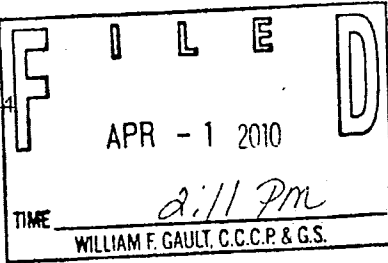
STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE  
COURT OF COMMON PLEAS  
CASE NO. 2008-CP-44-269

COUNTY OF UNION

Donnie M. Malpass, #164744

Plaintiff(s)



State of South Carolina

Defendant(s)

**CHECK ONE:**

- This action came before the court for 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.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b) SCRPC;  Rule 41(a) SCRPC (Vol. Nonsuit);  Rule 43(k) SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_

**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**

Dated at Lancaster, South Carolina, this 24th day of March 2010.

Presiding Judge  
 Clerk of Court

This judgment was entered on the 1st day of April 2010 and a copy mailed first class this 22nd day of April 2010 to attorneys of record or to parties (when appearing pro se) as follows:

Melinda I. Butler  
Attorney at Law  
PO Box 248  
Union, SC 29379

Attorney(s) for Plaintiff(s)/Plaintiff(s)

Jennifer A. Kinzeler  
Assistant Attorney General  
PO Box 11549  
Columbia, SC 29211

Attorney(s) for Defendant(s)/Defendant(s)

JUDGEMENT SIGNED AND  
ENTERED UP 4-1-10

Clerk of Court

CLERK OF COURT

JUDGEMENT ROLL NO. 2010-44-223

STATE OF SOUTH CAROLINA )

COUNTY OF UNION )

Donnie M. Malpass, #164744, )

Applicant. )

v. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
Case No. 2008-CP-44-0269

2010-11-11

**ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for Post-Conviction Relief filed August 7, 2008. Respondent made its Return and Motion to Dismiss on October 14, 2008. Pursuant to that motion, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed October 31, 2008, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant then filed a document in response captioned "Opposition and Reply to the Respondent's Motion to Dismiss."

An evidentiary hearing was subsequently convened at the Moss Justice Center in York County, South Carolina on February 5, 2010. The Applicant was present and was represented by Melinda I. Butler, Esquire. Jennifer A. Kinzeler, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. At the hearing, the Applicant testified on his own behalf. William D. All, III also testified. This Court also had before it the records of the records of the Union County Clerk of Court regarding the subject convictions; the Applicant's records from the South Carolina Department of Corrections, and the trial transcript.

## PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. The Applicant was indicted in September 2003 by the Union County Grand Jury for Lewd Act Upon A Child Under 16 (2003-GS-44-0772). William D. All, II, Esquire represented him on the charge. On March 10, 2004, Applicant proceeded to trial and was found guilty as indicted. The Honorable Lee S. Alford sentenced him to confinement for a period of ten (10) years, suspended upon the service of five (5) years confinement and five (5) years probation. The Applicant did not appeal his conviction or sentence.

## ALLEGATIONS

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

1. Ineffective Assistance of Counsel;
  - a. Failure to adequately cross-examine witnesses,
  - b. Failure to investigate,
  - c. Failure to provide Applicant with discovery,
  - d. Failure to Appeal, and
2. 6<sup>th</sup> Amendment Violations.

## 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).

At the hearing, the Respondent moved to dismiss all of the allegations regarding ineffective assistance of counsel and Sixth Amendment Violations as procedurally barred by the statute of limitations, except for the Applicant's allegation regarding counsel's alleged failure to appeal. S.C. Code Ann. §17-27-45(a). The parties agreed that the only issue the Applicant was proceeding on at the hearing was his allegation that he is entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Accordingly, this Court finds any and all claims raising allegations of ineffective assistance of counsel or allegations of Sixth Amendment violations are dismissed with prejudice for failure to file within the time mandated by statute. S.C. Code Ann. §17-27-45(a). See also McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994).

#### **Failure to Appeal**

In his application, the Applicant claims that he was denied effective assistance of counsel because trial counsel did not appeal his conviction. 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.

The United States Supreme Court has held that counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (U.S., 2000). When the question is whether counsel was ineffective in failing to file a direct appeal from the conviction and sentence following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White, supra. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). Id.

The Applicant testified that he went to trial on the charges for which he is now incarcerated, and that a jury found him guilty. He testified that he told trial counsel in the courtroom to file an appeal because he was innocent. The Applicant stated he always maintained his innocence, and that he learned seven to eight months after his trial ended that trial counsel did not file an appeal. He stated it was not until one year later that someone told him he could file a PCR action.

On cross-examination, the Applicant conceded that even though he knew within seven to eight months after his trial ended that trial counsel did not appeal his conviction and sentence, he waited three more years before filing this PCR action alleging he is entitled to a belated direct appeal. The Applicant explained that the reason he waited so long was because he was "ignorant of the law."

Trial counsel testified that he has been practicing criminal law for over twenty (20) years. He testified that he was working as a public defender when he was appointed to represent the Applicant. Counsel testified that the Applicant was charged with two counts of lewd act upon a child under the age of sixteen years, and that the jury convicted him of one charge but acquitted him of the other charge. Counsel stated the Applicant was sentenced to ten (10) years confinement suspended upon the service of five (5) years and five (5) years probation.

Counsel testified that he and the Applicant discussed an appeal in the back room after the trial ended and after the Applicant was sentenced. Counsel stated he could remember having this discussion with the Applicant because he explained to the Applicant that at that time, he was convicted of one charge and acquitted of the other charge, but that if he won on appeal and were granted a new trial, he could face both charges again. This result would possibly subject him to more time if a jury convicted him of both charges, rather than one charge or neither charge. He testified that the Applicant told him he did not want to appeal because he did not want to take the chance of getting more time.

In response to the Applicant's testimony that he always maintained his innocence, counsel testified further that the Applicant told him prior to trial he could not remember what happened the night this incident occurred, and that he hoped he did not do what the victims said he did. He

testified the Applicant also gave a statement to law enforcement to that effect. Counsel stated the Applicant already had a prior lewd act conviction, so he was already required to register on the Sex Offender Registry before he was convicted of this offense. Counsel reiterated that the Applicant was aware of his right to appeal his conviction and sentence, and that the Applicant told him not to appeal. He also stated the Applicant and his family have hired him to do other legal work on their behalf since the Applicant was convicted of this charge.

This Court finds the Applicant's testimony is not credible while also finding trial counsel's testimony is credible. The Applicant has failed to carry his burden in this action. This Court further finds the Applicant knowingly and voluntarily waived his right to appeal. Therefore, this Court finds that this allegation is denied and this application must be denied and dismissed with prejudice.

#### CONCLUSION

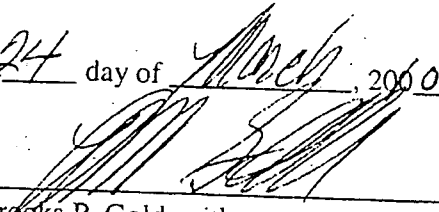
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) 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 PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

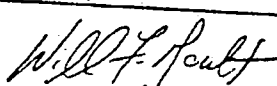
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 24 day of March, 2010.

  
\_\_\_\_\_  
Brooks P. Goldsmith  
Presiding Judge  
Sixteenth Judicial Circuit

Lancaster, South Carolina.

JUDGEMENT SIGNED AND  
ENTERED UP 4-1-10

  
\_\_\_\_\_  
CLERK OF COURT

CAROLINE M. HORLBECK

ATTORNEY AT LAW

101 WHITSETT ST.  
GREENVILLE, SOUTH CAROLINA 29601  
horlbecklawfirm@gmail.com

(864) 315-9919  
Fax(864) 232-4756

June 26, 2013

ps

**Via Regular Mail**

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re:** DONNIE MACK MALPASS v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

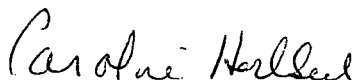
These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

**RECEIVED**

JUL 01 2013

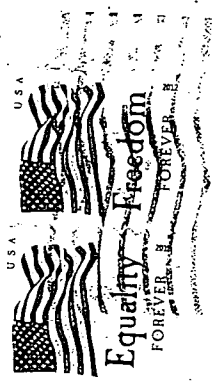
  
Caroline M. Horlbeck, Esq.

**S.C. SUPREME COURT**

Enclosure

cc: Office of the Attorney General  
Office of Appellate Defense

CAROLINE M. HORLBECK  
*Attorney At Law*  
101 WHITSETT ST.  
GREENVILLE, SOUTH CAROLINA 29601



Via Regular Mail  
Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

