

F. MILTON MANN, JR.

PCR

ATTORNEY AT LAW
LICENSED IN SC, GA & FL

August 30, 2013

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

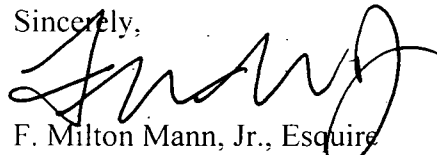
RE: Robert Lee Heydman, #330872, Appellant, v. State of South Carolina,
Respondent, Case No. 2011-CP-42-2966

Dear Mr. Shearouse:

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

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order which is to be challenged on appeal.
- (3) No filing fee is required as this is a post-conviction relief case, pursuant to Rule 240(d), SCACR.
- (4) This appeal is being filed with the Supreme Court pursuant to Rule 243(b), in conjunction with Rules 203 and 207 SCACR.

Sincerely,



F. Milton Mann, Jr., Esquire
151 Harold Fleming Court
Spartanburg, South Carolina 29303
(864) 608-5079
Attorney for Appellant

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SEP 3 - 2013

S.C. SUPREME COURT

cc: Suzanne H. White
Assistant Attorney General
PCR – 6th & 7th Judicial Circuits
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent
(864) 734-4127

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2011-CP-42-2966

Robert Lee Heydman,
#330872,

Appellant,

v.

State of South Carolina,

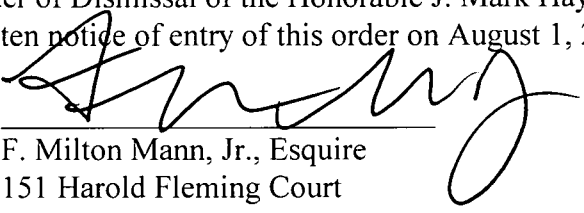
Respondent.

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S.C. SUPREME COURT

NOTICE OF APPEAL

Robert Lee Heydman appeals the Order of Dismissal of the Honorable J. Mark Hayes, II dated July 24, 2013. Appellant received written notice of entry of this order on August 1, 2013.

August 30, 2013



F. Milton Mann, Jr., Esquire
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(864) 680-50879
Attorney for Appellant

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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J. Mark Hayes, II, Circuit Court Judge

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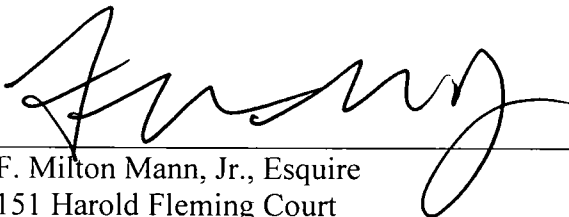
S.C. SUPREME COURT

PROOF OF SERVICE

I certify that I have served Notice of Appeal upon Respondent, State of South Carolina by depositing a copy in the United States Mail, postage pre-paid, on August 30, 2013, addressed to its attorney of record at the addresses listed below:

Suzanne H. White
Assistant Attorney General
PCR – 6th & 7th Judicial Circuits
PO Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

August 30, 2013



F. Milton Mann, Jr., Esquire
151 Harold Fleming Court
Spartanburg, SC 29303
(864) 680-5079
Attorney for the Appellant

COPY

Handwritten initials

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Robert Lee Heydman, #330872,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2011-CP-42-2966

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ORDER OF DISMISSAL - 2013

S.C. SUPREME COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 8, 2011. The Respondent made its Return on or about May 6, 2012. An evidentiary hearing into the matter was convened on April 4, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Franklin M. Mann, Jr., Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The transcript of a telephone deposition conducted with William McPherson, Esquire, ("Counsel") was submitted to the Court on behalf of the Respondent. This Court also had before it a copy of the records from the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, the trial transcript, and a Memorandum of Law submitted on behalf of Applicant.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the August 2007 term of the Spartanburg County Grand Jury for murder (07-GS-42-

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4087). He was represented by William H. McPherson, Esquire. On September 28, 2008, the Applicant proceeded to trial where he was found guilty of the charge by a jury. He was sentenced by the Honorable Paul M. Burch to confinement for life.

A timely notice of appeal was submitted and an Anders brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence.

State v. Heydman, Op. No. 2011-UP-269 (filed June 8, 2011). The Remittitur was returned on June 24, 2011.

ALLEGATIONS

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

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to adequately follow the trial proceedings because of a hearing impairment he suffered from during trial,
 - b. Counsel acted under a conflict of interest because Counsel represented a State's witness, who got a reduced sentence for cooperating,
 - c. Counsel failed to obtain necessary expert testimony
 - d. Counsel failed to object to improper jury charge, closing argument, judicial remarks regarding Applicant's religion, and hearsay testimony,
 - e. Counsel failed to request a jury charge on accessory after the fact when the evidence warranted such a charge
2. Ineffective assistance of appellate counsel, in that;
 - a. Appellate counsel failed to raise and present valid direct appeal issues;
3. Constitutional violations of the 6th and 14th amendments; and
4. Prosecutorial misconduct, in that;
 - a. Prosecution failed to disclose facts, agreements and evidence concerning the jailhouse witness' motivation for testifying.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony 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. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

This Court notes that the Applicant, at the beginning of the hearing, voluntarily waived all allegations except for his claim of ineffective assistance of counsel as a result of the alleged conflict of interest and chose to proceed only on that allegation. Therefore, all other allegations are deemed voluntarily abandoned.

Ineffective Assistance of Counsel

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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).

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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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that at his trial, the State presented the testimony of John Fowler. Applicant testified that he met Fowler while in the detention center waiting for trial and had several conversations with Fowler on the recreation yard. Fowler testified at trial that he and Applicant had a conversation regarding the victim and that Applicant confessed to the murder. Applicant testified that Fowler's testimony was not truthful. However, Applicant testified that during trial Fowler also testified that certain charges against him had been dismissed. Applicant also testified that during jury deliberations, Counsel indicated to him that there could possibly be a conflict, but instead of Counsel presenting it to the court, Counsel advised Applicant to use the issue for a post-conviction relief action. Applicant also testified that Counsel did not inform him of when the conflict was discovered.

As it relates to a possible conflict, Counsel testified that he never represented Fowler, but believed that someone in the Office of the Public Defender may have represented Fowler. Counsel also testified that he was not aware of anything related to Fowler and his cases until time for Applicant's trial. In fact, Counsel testified that the initial form filled in by a potential client asks for co-defendants' names to address conflicts, but Fowler's name would not have

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appeared on that form. Counsel stated that he did try to challenge the credibility of Fowler's testimony by pointing out that the State had dismissed some charges against Fowler. However, Counsel testified that he did not receive any information from his office that any negotiations were taking place. Counsel also testified that he never reviewed Fowler's file from his office, nor did he know how the file was stored or have access to the file. Counsel testified that he could not recall exactly what time he realized that his office also represented Fowler, but he did acknowledge that he did not bring the information to the attention of the trial judge. However, Counsel also testified that based on his years of experience, if the potential conflict was an issue that was damaging to Applicant's case or was mistrial worthy, Counsel would have raised the issue to the court.

This Court, based upon review of the Applicant's testimony and documents presented, finds that the Applicant has failed to meet his burden of proof of establishing ineffective assistance of counsel. Even though the public defender's office represented both the Applicant and Fowler, the representation of each did not arise out of the same facts or circumstances. There is also nothing in the record to suggest that Fowler's attorney had any access to the Applicant's file or that Counsel was denied any information about Fowler. In fact, it appears that the only connection between Applicant and Fowler was the fact that they shared time together at the local jail.

This Court finds that the situation created in Applicant's case by the public defender's office representing Fowler does not create an automatic disqualifying event for Counsel. The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual

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conflict of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984). The Applicant must show that his attorney actually owed duties to a party whose interests were adverse to the Applicant. Id; Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). Additionally, the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction. Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993). Applicant failed to establish that Counsel's performance was adversely affected by his office's representation of Fowler.

Furthermore, this Court finds that there is nothing to indicate that had a motion for mistrial been made it would have been granted; or that Fowler's testimony would have changed at a second trial, and thus, the outcome would most likely be the same. This Court finds that the Applicant has failed to meet his burden of proof. Accordingly, this allegation is dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel as it relates to a possible conflict of interest, Counsel's testimony is more credible than Applicant's testimony. This Court further finds Counsel adequately conferred with Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not

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met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

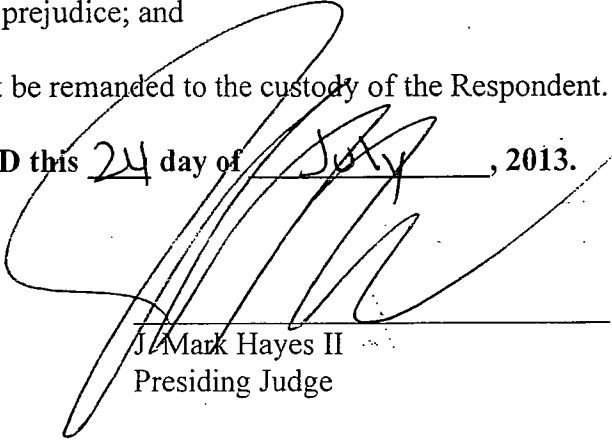
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions 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), SCRPC, 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 July, 2013.



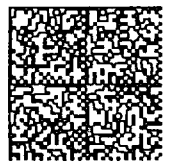
J. Mark Hayes II
Presiding Judge

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ATTORNEY AT LAW
LICENSED IN SC, GA & FL

151 HAROLD FLEMING COURT
SPARTANBURG, SOUTH CAROLINA 29303

The Honorable Daniel E. Shearouse
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