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December 4, 2013

South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**RECEIVED**

DEC - 9 2013

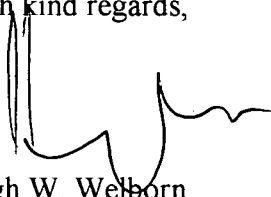
**S.C. Supreme Court**

Dear Sir/Madam:

In Re: Jeffrey S. Evans #220077 vs State of South Carolina (PCR)  
Case No. 2013-CP-04-0430

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Esquire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/bmg

cc: Office of the Appellate Defense  
cc: Office of the Attorney General

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY  
COURT OF COMMON PLEAS

HONORABLE R. LAWTON McINTOSH

**RECEIVED**

2013-CP-04-430

DEC - 9 2013

JEFFREY S. EVANS #220077

**S.C. Supreme Court**

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

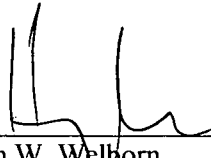
RESPONDENT.

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**NOTICE OF APPEAL**

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Jeffrey S. Evans appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable R. Lawton McIntosh, Circuit Court Judge on September 17, 2013, and Order of Dismissal issued on November 26, 2013, and filed on December 3, 2013. The Appellant received Order of Dismissal on December 4, 2013.



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Attorney for the Appellant  
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Attorney for Jeffrey S. Evans

Other Counsel of Record:  
Walt Whitmire, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM ANDERSON COUNTY  
COURT OF COMMON PLEAS  
HONORABLE R. LAWTON McINTOSH

2013-CP-04-430

JEFFREY S. EVANS #220077

APPELLANT,

vs

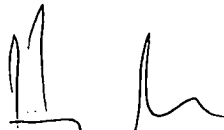
STATE OF SOUTH CAROLINA,  
RESPONDENT.

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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on December 4, 2013, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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Hugh W. Welborn  
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Attorney for Jeffrey S. Evans

Anderson, South Carolina

December 4, 2013

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DEC - 9 2013

**S.C. Supreme Court**



unpublished opinion. State v. Evans, Op. No. 2010-UP-464 (S.C. Ct. App. filed October 25, 2010). A Petition for a Writ of Certioari. The Supreme Court affirmed the conviction and sentence in an unpublished memorandum opinion. State v. Evans, Op. No. 2012-MO-037 (S.C. Supreme Court, filed October 10, 2012). The Remittitur soon followed.

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

1. Ineffective Assistance of Trial Counsel;
  - a. "failure to argue
  - b. "Failure to properly argue mental state."
  - c. "Failure to move to strike testimony."

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#### ~~SUMMARY OF TESTIMONY~~

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At the PCR hearing, Applicant testified counsel was ineffective for failure to argue Applicant's mental state to have the statement suppressed; failure to object and move to strike hearsay testimony from the lead investigator; failure to object to testimony regarding information obtained from a third party source in the investigation that violated Applicant's right to confront his accusers; and failure to present Applicant as a witnesses in his defense.

At the PCR hearing, trial counsel testified to his course of conduct in the representation of Applicant. Trial counsel inherited the case and reviewed the previously obtained discovery. Applicant had rejected plea negotiations and was served with the State's notice to seek life imprisonment without the possibility of parole. Trial counsel reviewed discovery and discussed the State's case with Applicant. Trial counsel reviewed the surveillance recordings from the offense, eyewitness statements, Applicant's statement, and possible defenses with Applicant. Trial counsel noted the lack of forensic evidence and inconsistent eyewitness descriptions of the assailant. Applicant failed to

provide trial counsel with a plausible alibi defense. Trial counsel reviewed Applicant's right to testify or not testify with him. Trial counsel testified to his manner and strategy in objecting to questionable testimony.

Trial counsel mounted a defense to have Applicant's statement suppressed by attacking the lack of a recording during the interview and argued Applicant's pre-arrest drug abuse rendered the statement involuntary. Trial counsel had Applicant undergo a mental evaluation and presented the results to the trial court. Trial Counsel also made a motion to quash the indictment, made a successful motion to redact prejudicial information from Applicant's statement, employed thorough cross-examinations, made numerous objections at trial, renewed his objections and made a motion for a directed verdict.

#### APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064; (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The

Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

##### A.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failing to present Applicant's mental state at trial. Applicant acknowledged the trial judge reviewed the findings from the evaluation report during the preliminary

hearing where Applicant was found to be competent and criminally responsible. This Court finds trial counsel's testimony more credible than Applicant's testimony. This Court finds trial counsel's performance here reasonable. Court finds trial counsel argued Applicant's alleged incapacity at the Denno hearing. Additionally, Applicant testified at the Denno hearing. This Court finds Applicant failed to present credible evidence to show his mental condition rendered his statement involuntary. The allegation rests solely upon mere speculation. See Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant's mere speculation as to what the witnesses' testimony would have been cannot, by itself, satisfy the burden of showing prejudice). Therefore, this allegation is denied and dismissed.

**B.**

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failing to object to Detective Matheson's testimony at trial. This Court finds that Applicant failed to prove that trial counsel performed deficiently during performance Detective Matheson's testimony. 'Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Rule 801(c), SCRE. "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Simpkins v. State, 303 S.C. 364, 367, 401 S.E.2d 142, 143 (1991). "[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct.App.2003). This Court finds trial counsel properly objected when the witnesses investigatory testimony became

questionably impressive hearsay testimony. (Trial Tr. p.165). The trial judge sustained the objection and stated,

we that would be fine if he did, when he received the information from which he relied, and if he knew something in reliance on that information... but not just as to the source of the information or what might be the specifics of it that relates to what somebody else told him. All right.

(Trial Transcript 166, lines 1-9). This Court further finds that trial counsel's decision not to make a motion to strike was sufficient in light of the judge's precise ruling made in the presence of the jury.

~~As a result of the trial judge's instruction, the Detective generically testified to~~ obtaining information that led to further investigation in the case. The Detective carefully qualified his description of the information he received as follows: "the reason I say possible is because this stuff is happening fast, a lot of things are going on, and sometimes witnesses are looking at things they're not sure they're gonna have to testify to later or tell anyone about." (Trial Tr. p.167, lines 2-6). Furthermore, trial counsel thoroughly cross-examined the Detective on his inability to discover physical evidence and obtain precise eyewitness identifications. (Trial Tr. pp.190-191). Trial counsel attacked referenced the weaknesses in the Detective's testimony during his closing argument. (Trial Tr. pp.220-221). Therefore, this allegation is denied and dismissed.

This Court also finds the allegation that trial counsel was ineffective for failing to object to the Detective's testimony based on upon an alleged infringement of the Fifth Amendment, right to confront one's accusers, is without merit. Applicant testified the Detectives unidentified source of information came from Margaret Pearle who did not testify at trial. For reasons announced above, this allegation is denied and dismissed. This

Court notes the Detective's testimony served to justify the investigation that resulted in Applicant's arrest. This Court further notes the Detective's testimony question was ancillary in light of the eyewitness testimony and statement given by Applicant.

C.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failing to offer Applicant as a defense witnesses during the trial. This Court finds trial counsel's testimony more credible than Applicant's testimony. Applicant alleged his testimony was need to show the jury his statement was involuntary. Trial Counsel testified he reviewed the right to testify with Applicant. This Court notes the trial judge entered thorough colloquies with Applicant at both the Denno hearing and at when the State rested its case. Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 381 (Ct. App. 2012 ("Further, the record shows the trial judge informed petitioner of his right to testify or not testify, and petitioner agreed with the trial judge that he had discussed this right with trial counsel.")). This Court finds Applicant failed to present any credible evidence of probative value to show he desired to testify at the time of trial but was chose not to pursuant to the advice of trial counsel. Furthermore, This Court notes that any benefit to testifying to alleged accentuating circumstances would ran the risk of opening the door to Applicant's drug use. See State v. Faulkner, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980) ("[w]hile State may not attack a criminal defendant's character unless he has placed it at issue, relevant evidence admissible for other purposes need not be excluded merely because it incidentally reflects upon the defendant's reputation.")). Trial counsel successfully had Applicant's admissions of drug use redacted from his statement. This Court notes that any benefit to testifying to alleged accentuating circumstances would

have required Applicant to testify to his drug use at the time of the arrest and interview. Trial counsel attacked the statement during cross-examination. The potential risk ran contrary to trial counsel's strategy to keep bad character evidence outside the purview of the jury. Therefore, this allegation is denied and dismissed.

## II.

This Court finds Applicant also failed the second prong of Strickland – that he was prejudiced by trial counsel's performance. "Overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial." Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001). Applicant confessed to police, admitting he went to the retail store to snatch a purse and ended up robbing the woman at the cash register with a knife. The details provided by Applicant were corroborated by the surveillance video, which included Applicant dropping the knife in flight. Furthermore, Applicant admitted his guilt during sentencing phase of the trial.

## III.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the

hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

### CONCLUSION

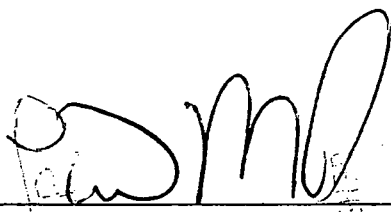
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

### IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 26 day of Nov, 2013.

  
R. LAWTON MCINTOSH  
Presiding Judge  
Tenth Judicial Circuit

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GENERAL SESSIONS

Anderson, South Carolina

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ATTORNEYS AND  
GENERAL SESSIONS

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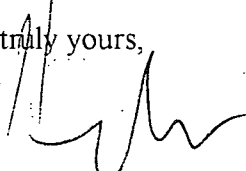
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Dear Sir or Madam:

In Re: Jeffrey S. Evans #220077 vs State of South Carolina

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order of Dismissal and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,



Hugh W. Welborn

HWW/bmg  
Enclosures

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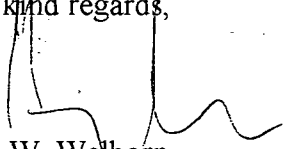
Dear Mr. Whitmire:

In Re: Jeffrey S. Evans #220077 vs State of South Carolina (PCR)  
Case No. 2013-CP-04-0430

Please find enclosed herewith a copy of the Appellant's Notice of Appeal and Proof of Service in connection with the foregoing matter. I also enclose copies of correspondence to the Appellate Defense Office and the Supreme Court. I have also forwarded copies of all documents to my client.

If you have any questions, please do not hesitate to contact my office.

With kind regards,

  
Hugh W. Welborn

HWW/bmg

cc: Office of the Appellate Defense  
cc: South Carolina Supreme Court

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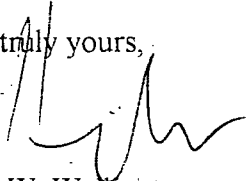
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Very truly yours,



Hugh W. Welborn

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