

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

**RECEIVED**

DEC - 9 2013

**S.C. Supreme Court**

2012-CP-04-1524

JOHNNY EARL MAHAFFEY #323863

APPELLANT,

vs

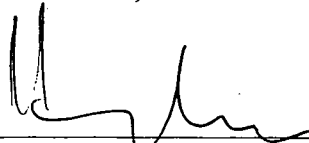
STATE OF SOUTH CAROLINA,  
RESPONDENT.

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**NOTICE OF APPEAL**

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Johnny Earl Mahaffey 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 18, 2013, and Order of Dismissal issued on November 20, 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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(864) 226-5787  
Attorney for Johnny Earl Mahaffey

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  
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JOHNNY EARL MAHAFFEY\_ #323863

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

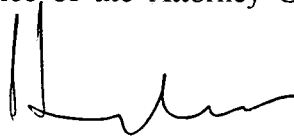
RESPONDENT.

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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  
Attorney for the Appellant  
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(864) 226-5787  
Attorney for Johnny Earl Mahaffey

Anderson, South Carolina

December 4, 2013

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS  
COUNTY OF ANDERSON FOR THE TENTH JUDICIAL CIRCUIT

FILED - CLERK'S OFFICE  
ANDERSON SC

2013 DEC -3

A 9: 32

Case No. 2012-CP-04-1524

Johnny Earl Mahaffey,  
S.C.D.C. No. 323863,

COMMON PLEAS AND  
GENERAL SESSIONS

**A TRUE COPY**  
DEC - 3 2013  
*Richard X. Buley*  
CLERK OF COURT

Applicant,

v.

**ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

~~This matter comes to the Court by way of an Application for Post-Conviction Relief filed~~

April 20, 2012. The Respondent filed its Return. An evidentiary hearing into the matter was scheduled on September 18, 2013 at the Anderson County Courthouse. Applicant was present and was represented by Hugh Welborn, Esq., and Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant's three trial attorneys testified at the hearing.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the November 2006 term of the Anderson County Grand Jury for murder (2006-GS-04-3508) and possession of a firearm during the commission of a violent crime (2006-GS-04-3508). Applicant was represented by Robert Gamble, Esq. "counsel," Druanne White, Esq. "co-counsel" and Scott Thomason, Esq. On September 4-7, 2006 the Applicant proceeded to trial and was found guilty. The Honorable J.C. Nicholson sentenced the Applicant to life imprisonment for murder and five years imprisonment for the weapons offense. The sentences were to be served concurrently.

The Applicant filed a timely notice of appeal. The South Carolina Court of Appeals affirmed his conviction by written order filed November 7, 2011. State v. Mahaffey, Op. No. 2011-UP-494 (S.C. Ct. App. Filed November 7, 2011). Applicant proceeded on the following allegations at his PCR hearing:

1. Ineffective Assistance of Counsel
  - a) failure to investigate
  - b) failure to obtain plea offer
  - c) failure to renew motion for mistrial

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#### SUMMARY OF TESTIMONY

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At the hearing, Applicant testified counsel did not consult him in preparation nor gave ~~him a copy of discovery. Applicant claimed his attorneys neglected to investigate his past history~~ of animosity with the victim. Applicant testified that if counsel's representation was adequate, then the state would have made a favorable plea offer to thirty years imprisonment. Last, Applicant testified he was precluded full appellate review because his attorneys failed to renew the motion for mistrial based on misconduct from the gallery during the trial.

At the hearing, counsel testified he met with Applicant on numerous occasions prior to trial and that Applicant was difficult client. Counsel pleaded with Applicant to refrain from waiving his Sixth Amendment right to have counsel in seeking out the police for post-arrest interviews. However, Applicant sought out Detective Reeves on three occasions to discuss the murder. On the third occasions Applicant unambiguously waived his right to counsel and told the Detective that he did not want counsel present. As a result of the interview with the Detective, Applicant gave a three page statement where he confessed to the murder and provided the exact location of where he hid the Counsel testified the statement "killed him." Prior to the statement and discovery of the murder weapon, counsel testified the State's case against Applicant was circumstantial. Counsel testified Applicant continued to hurt his defense. While in pre-trial

detention, the State obtained evidence of Applicant's attempts to purchase an alibi witness. Applicant further made numerous inculpatory phone calls to his wife while in detention. Close to the trial date, Applicant moved to have counsel relieved and specifically requested to have Druanne White appointed on his case. The motion hearing judge partially granted the motion and by appointing White as co-counsel. Counsel's theory of the case was reevaluated in light of Applicant's direct and incidental pre-trial admissions. The attorneys made strategic decisions in light of Applicant's conduct. Counsel made efforts to enter plea negotiation that were rejected by the solicitor. Last, counsel testified he never noticed the gallery member, the victim's mother, holding a picture up a picture of the victim during co-counsel's closing argument. Counsel recalled the trial judge dismissing the two jurors who noticed the picture after conducting separate voir dire of each juror on the panel. Counsel thought the trial judge's denial of the motion for mistrial was preserved for appellate review.

Co-counsel testified at the PCR hearing. Co-counsel testified she was appointed one month prior to trial. Co-counsel testified the motion hearing judge "had it" with Applicant's behavior after he attacked a bailiff. Co-counsel reviewed the State's evidence and did everything Applicant asked of her. Co-counsel testified if Applicant desired any additional investigation, she would have done it. Co-counsel testified the State's evidence of Applicant's guilt was overwhelming. Applicant wrote numerous inculpatory letters, made inculpatory phone calls, and gave a full confession. Co-counsel testified Applicant's worst enemy was himself.

Scott Thomason testified at the PCR hearing. Thomason testified he would sit second chair to counsel in trials that involved serious offenses. Thomason noted his role was to facilitate communication between Applicant and the two primary attorneys during the trial. Thomason

testified he relayed Applicant's communications to counsel. Thomason testified Applicant did not ask him to do anything during the trial.

#### 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.

I.

This Court denied Applicant's pro se motion to relieve counsel and pro se motion for a continuance. PCR counsel apprised this Court of his prior communications with Applicant. Respondent further apprised this Court of the case hearing of this Action. This Court finds PCR counsel has a wealth of experience in PCR actions and was prepared to present the merits Applicant's claims at the hearing.

As a matter of general impression, Applicant's testimony was entirely lacking of credibility in comparison to the very credible testimonies provided by his three attorneys. This Court notes Applicant was provided the unusual benefit of being represented by two of the most experienced criminal trial attorneys in this Circuit. In denying and dismissing this Application, this Court further notes the importance of considering a criminal defendant's conduct in evaluating an attorney's representation under Strickland's deficiency prong. See Strickland, 466 U.S. at 691. ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Here, the record shows that Applicant on numerous occasions elected to ignore the competent advice of counsel to his own detriment.

A.

This Court finds Applicant has failed to meet his burden to prove his attorneys were ineffective for failing to investigate. In the course of representation, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "Without a doubt, a criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Ard v. Catoe, 372 S.C.

318, 331, 642 S.E.2d 590, 597 (2007) (citing Thompson v. Wainwright, 787 F.2d 1447, 1450

(11th Cir.1986) (internal quotations and citations omitted)). Applicant testified his attorneys

declined to investigate evidence that showed the victim was the actual aggressor. Applicant

testified he purchased the handgun after the victim had attacked him. Applicant testified the

murder resulted from a love triangle and was not premeditated. However, this Court notes

contradictory testimony from Applicant that he confessed in order to protect his wife from

prosecution. Further Applicant stated he stated he was only guilty as an accessory. This Court

finds that the attorneys presented a valid theory of defense that influenced their strategic choices.

Furthermore, Applicant failed to produce witnesses or evidence at the hearing that would

have mitigated the State's evidence of malice in the murder. "Failure to conduct an independent

investigation does not constitute ineffective assistance of counsel when the allegation is

supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496

S.E.2d 415 (1998) Applicant testified he desired his attorneys meet with unnamed witnesses but

unable to produce their addresses because they were in jail. See Glover v. State, 318 S.C. 496,

458 S.E.2d 538 (1995) (prejudice from trial counsel's failure to interview or call witnesses could

not be shown where the PCR applicant failed to introduce evidence of what the uncalled

witnesses' testimony would have been and an applicant's mere speculation what a witness'

testimony would have been cannot satisfy the applicant's burden of showing prejudice.). All three attorneys testified they would have conducted any additional investigation of facts had Applicant requested.

**B.**

This Court finds Applicant's allegation that counsel was ineffective for failing to obtain a plea offer is without merit. "Counsel, counsel has duty to communicate to defendant formal plea offers that may have favorable terms and conditions." Missouri v. Fry, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1399 (2012). "A defendant does not have a constitutional right to plea bargain; a trial judge is not required to accept a plea bargain, and that ordinarily a plea offer is nothing more than an offer until it is accepted by the defendant by entering a court-approved plea of guilty." Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 38-39 (2007). This Court finds counsel's testimony that the State never made a plea offer credible. Furthermore, Applicant produced no evidence that showed a plea offer existed. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (Mere speculation cannot support a finding of prejudice.). Therefore, this allegation is denied and dismissed.

**C.**

This Court finds Applicant did not meet his burden to prove ineffective assistance of counsel for failing to preserve the motion for mistrial for appellate review. A defense attorney is not deficient where there is no legal or factual basis for an objection bottomed and premised. Brown v. State, 375 S.C. 464, 485, 652 S.E.2d 765, 776 (Ct. App. 2007). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "The granting or refusing of a motion for a mistrial lies within the sound

discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." This Court finds a motion for a mistrial was not warranted where the trial judge employed extraordinary remedial measures to cure any taint from the gallery member holding a small picture of the victim during the jury charge. Co-counsel made a motion for a mistrial outside the presence of the jury after noticing the victim's mother holding an unidentified and innocuous picture of the victim. This Court finds the trial judge acted soundly within his discretion in denying the motion for a mistrial. This Court further finds there was no evidence of State misconduct in an incident that was not inherently prejudicial. All officers of the Court were questioned by the trial judge. Only co-counsel saw the photograph.

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The gallery member sat on the second row some twenty feet from the jury box and held a small photograph to her chest during the jury charge. (Trial Tr. p.679). Subsequently, the trial judge carefully questioned each juror individually regarding the brief incident. (Trial Tr. pp.671-679). Juror number 72, number 58, and one alternate juror noticed the picture. The trial judge dismissed the only juror number 58 who assumed the picture was of the victim. This Court notes the trial judge was in the best position to determine the credibility of the jurors. See State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

This Court further notes the trial judge's ruling was supported by the record which shows: picture was innocuously held only near the spectator's chest; the podium blocked some of the jurors from seeing the spectator in gallery; none of the attorneys except co-counsel noticed the indictment. This Court notes the present scenario was substantial more harmless than the incident that occurred at trial in State v. Anderson, where the South Carolina Supreme Court held a mistrial was not merited. See State v. Anderson, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996). Therefore, this allegation is denied and dismissed.

## II.

This Court finds Applicant also failed the second prong of Strickland – that he was prejudiced by the performance of his attorneys. This Court finds there was overwhelming evidence of Applicant's guilt for murder. "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, 552 S.E.2d 718, 722 n. 3 (2001). Applicant made a detailed confession that led to the recovery of the gun he had intentionally hid from police. Applicant additionally confessed to his wife and to fellow inmate at the Anderson County Detention Center. Shell casings from the scene and bullets from the autopsy of the victim matched the Applicant's gun. Applicant's cell phone records at the time of the murder showed use in close proximity of the scene. The State presented evidence of Applicant's attempts to destroy evidence and manufacture an alibi.

## 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



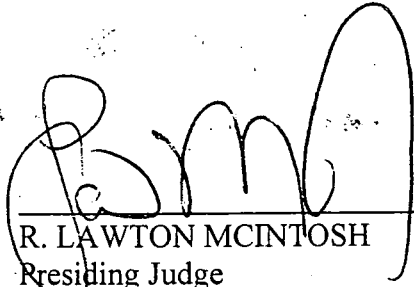
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed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

Anderson, South Carolina

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 ANDERSON, SC  
 2013 DEC -3 A 9:32  
 IN RELEAS AND  
 GENERAL SESSIONS

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December 4, 2013

South Carolina Supreme Court  
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Columbia, South Carolina 29211

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DEC - 9 2013

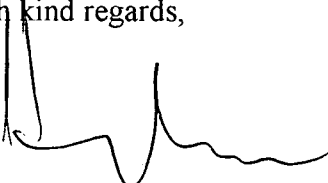
**S.C. Supreme Court**

Dear Sir/Madam:

In Re: Johnny Earl Mahaffey #323863 vs State of South Carolina (PCR)

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

*Hugh W. Welborn*

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December 4, 2013

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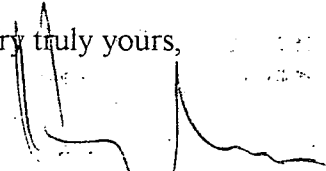
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Dear Sir or Madam:

In Re: Johnny Earl Mahaffey #323863 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

*Hugh W. Welborn*

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December 4, 2013

Johnny Earl Mahaffey #323863  
BRCI – Moultrie 2091 (A-Side)  
4460 Broad River Road  
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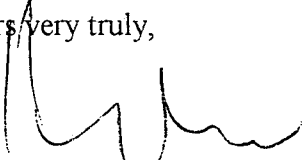
Dear Mr. Mahaffey:

In RE: Johnny Earl Mahaffey #323863 vs State of South Carolina (PCR)  
Case No. 2012-CP-04-1524

In connection with the foregoing matter, please find enclosed herewith copies of the Notice of Appeal and Proof of Service. These copies are for your records. This concludes my representation of you in this matter.

The South Carolina Appellate Defense Office will now assign an attorney to represent you in the Appeal. Any questions you may have should be directed to the Appellate Defense Office.

Yours very truly,

  
Hugh W. Welborn

HWW/bmg  
Enclosures

*Hugh W. Welborn*

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December 4, 2013

Walt Whitmire, Esquire  
Office of Attorney General  
State of South Carolina  
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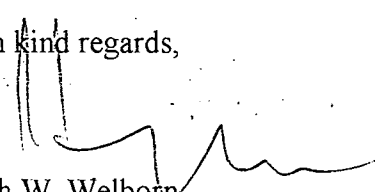
Dear Mr. Whitmire:

In Re: Johnny Earl Mahaffey #323863 vs State of South Carolina (PCR)  
Case No. 2012-CP-04-1524

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

Hugh W. Welborn  
Attorney at Law  
P. O. Box 173  
Anderson, SC 29622



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