

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-002650

Johnny Earl Mahaffey,
v.
State of South Carolina, Respondent.

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S.C. Supreme Court

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Is Certiorari necessary to review whether the PCR Judge's finding that Petitioner failed to meet his burden to prove his attorneys were ineffective for failing to properly preserve the motion for a mistrial made pursuant to the spectator-victim's conduct during closing arguments?

STATEMENT OF THE CASE

The Anderson County Grand Jury indicted Petitioner at the November 2006 term of General Sessions for murder (2006-GS-04-3508). **App.p.713**. Robert Gamble, Esq., Druanne White, Esq., and Scott Thomason, Esq. represented Petitioner.

After the State called the case to trial on September 4, 2007, Petitioner was found guilty as indicted. The Honorable J.C. Nicolson, Jr. sentenced Petitioner to a term of life imprisonment. **App.pp.1-711**.

A notice of appeal was filed at the South Carolina Court of Appeals. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Mahaffey, Op. No. 2011-UP-494 (S.C. Ct. App. filed November 7, 2011).

Petitioner filed an application for post-conviction relief (PCR) on April 20, 2012. **App.pp.717-27**. A hearing was convened at the Anderson County Courthouse on September 18, 2013. **App.pp.736-90**. Petitioner was present and represented by Hugh Welborn, Esq. Walt Whitmire, Esq., Esquire of the Attorney General's Office represented Respondent. The Honorable R. Lawton McIntosh denied relief in an order dated December 3, 2013. **App.pp.790-99**.

STATEMENT OF THE TRIAL FACTS

On August 17, 2006, shortly after 10:30 p.m., victim Ryan Cox was walking home along a road in Anderson County after completing his late night shift at a local restaurant. Victim was gunned down. His body was found in a pool of blood by the side of the road surrounded by eight spent shell casings. The forensic pathologist, Dr. Brett Woodard, testified that victim was shot eight times – three shots to the head and face, two

shots to the left side of the body, and three shots to the back. Either the shot to the left of the back, or one of the shots to the head, could have been fatal. Dr. Woodard recovered three small caliber bullets that “suggested a .9 millimeter handgun” was used. There was no gunshot powder or stippling on victim’s body that would indicate a close contact shot. **App.pp.118-42.**

Petitioner denied owning a gun. **App.p.173.** Skyler Andrews was the victim’s girlfriend at the time of the murder. Andrews and Petitioner had been in a relationship prior to her relationship with victim. She and Petitioner had a child together. At the break-up of their relationship, Andrews testified that appellant “went completely crazy, like he’d follow me around. I had to call the law several times because of harassment. ... he would come to my work, and then there was several reports filed from just miscellaneous stuff that would go on between us. ...” **App.p.341, ln.16-25.** Andrews testified that she and victim began dating after victim had intervened in a fight she had with Petitioner. Andrews testified that Petitioner was victim’s only enemy. **App.pp.342-55.**

Cell phone records confirmed that appellant’s phone was used at 10:48 in the area of the murder. **App.pp.577-79.** A search of the car yielded a 9mm Winchester shell casing from the hood on the passenger side – the same kind as found at the murder scene. **App.pp.253-62; p.527.**

Petitioner’s wife, Jamie Mahaffey, testified that Petitioner admitted “getting” the victim after the murder. **App.p.376; p.393.** She noted that Petitioner was expressed jubilation and satisfaction over killing the victim. **App.p.394.** Petitioner instructed her to discard evidence. She further testified to the correspondence she received from Petitioner

after the murder that directed her destroy further evidence. In another letter, In another letter, he asked her to pay someone to provide an alibi for him, complete with suggested testimony, which, incidentally, tended to implicate Andrews. **App.pp.402-03**. Also, while in the detention center, Petitioner confessed to fellow inmate, Johnny Gambrell, who testified: "He said he pulled up, the guy said he shot him and left him on the road." **App.p.456, ln.11-12**.

After Petitioner's arrest, he gave a statement to police and admitted his guilt. Petitioner further confessed that he disposed of the murder weapon in Lake Hartwell. **App.pp.559-70**. Going by Petitioner's directions, the police recovered the gun in 30 feet of water. Ricky Ivey testified that he sold a .9 mm handgun in the summer of 2006. He identified appellant as the individual who purchased the gun. **App.pp.145-47**. The police matched the gun to the same gun Ricky Ivey sold to Petitioner, according to make, model and serial number. **App.pp.572-75**. Forensic testing matched the eight shells at the scene, the three bullets recovered at autopsy, and the shell recovered from Petitioner's car, and confirmed that all had been fired by the .9 mm gun that had been located in Lake Hartwell. **App.p.501**.

After the jury was charged and excused to the jury room, Attorney White moved for a mistrial:

I'd like to note for the record, the victim's mother or relative apparently is facing the jury with a picture of Ryan Cox, apparently coughed through the argument and showed a picture to the jury. I am moving at this time for a mistrial....

(R. p. 669, lines 7-11).

The prosecutor did not see the picture at all. **App.p.669**. Attorney Gamble apparently did not see the picture either. **App.p.669**. Attorney White only saw the photograph during the charge. **App.p.670**. Apparently, the spectator-victim, Mrs. Jones, who was sitting in the second row (approximately, in defense counsel's estimation, 20 feet from the jury), in the audience, held the picture on her lap throughout the trial, and only held it near her chest during the charge. **App.pp.670-79**.

The Trial Judge asked the two alternates if either could see the picture. One responded "the podium blocks my view," but the second alternate responded she could see it, and had noticed it before it was brought to her attention. **App.p.670**. The Trial Judge also inquired whether the victim's advocate from the solicitor's office knew Mrs. Jones was holding the picture, and she responded she did not. **App.p.672**. The Trial Judge then sent the alternates into the grand jury room and brought the jury back out. The Trial Judge asked if anyone looked at the lady in the second row during the charge. Two jurors responded affirmatively. The Trial Judge sent the other ten jurors back out and questioned the remaining two. Juror number 72 "noticed she was holding a picture," but did not know who the woman was or who was in the picture. The second juror, number 58, noticed the woman was holding a picture, and he "assume[d] it was a picture of Ryan Cox" but did not know for certain. He did not know who the woman was either. He admitted to looking at the picture "three, maybe two times." The juror stated, even assuming the photograph was of the victim, knowing that would not affect his consideration of the evidence. **App.p.673**. The juror offered, however, an explanation of why he thought it was the victim in the photograph:

My wife and I lost a child last year in a motorcycle accident, and we would probably do something similar if we lost a child.

App.p.677, lines 21-23.

The trial judge excused Juror number 58, and replaced the juror with the alternate, juror number 102, who had not seen the picture. Based on the thorough inquiry, and the juror's responses, the trial judge determined that mistrial was not warranted and denied the motion. **App.p.678.**

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

Certiorari is not warranted where the PCR correctly found Petitioner failed to meet his burden to prove his attorneys were ineffective for failing to preserve the motion for mistrial pursuant to the spectator-victim's conduct during closing arguments because the motion lacked substantive merit to necessitate the reversal of the Trial Judge's denial of motion upon appellate review.

At the PCR hearing, Petitioner testified that assistant of Attorney White informed the defense team that a spectator had held up a picture during State's closing argument. **App.p.770.** Petitioner alleged his attorneys were ineffective for failing to properly preserve their mistrial motion for appeal. **App.p.772.**

At the PCR hearing, Attorney Gamble testified to his course of conduct during the

representation. He testified that the defense moved for a mistrial after a spectator made a gesture during closing arguments. The matter was raised and ruled upon. Attorney Gamble thought the motion was properly preserved for further review. **App.p.751.** Attorney Gamble further opined that “he did all he could do. And once [Petitioner] gave his statement to [police], we were shot down. There was nothing else we could co.” **App.p.756, ln.21-23.**

Attorney Thomason testified to his efforts on the defense team. He noted that he would aid Attorney Gamble at trial in his most serious cases. Attorney Thomason stated, “I would go as far as to say I think of [Attorney Gamble] as a second daddy to me.” **App.p.784, ln.14-15.** Attorney White testified to circumstances surrounding her appointment and her efforts on Petitioner’s defense team. Judge Nicholson appointed a month prior to the trial because Petitioner’s peculiar conduct. App.p.681. Attorney White stated, “There was no continuance. But in all honestly, if I had thirty years, it wouldn’t have changed the result of this. I mean, really and truly, it wouldn’t have.” **App.p.781, ln.22-24.**

Effective Assistance of Counsel

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s

unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Counsel has an obligation to understand the law. Joseph v. Coyle, 469 F.3d 441, 460 (6th Cir. 2006). “[T]here is no deficiency where even a brilliantly researched motion would have lost so no prejudice.” U.S. v. Booker, 981 F.2d 289, 294 (7th Cir. 1992).

It is not deficient for a team of attorneys to divide workload so that the failure of one attorney to interview was not deficient where another did. Bucklew v. Luebbbers, 436 F.3d 1010, 1019 (8th Cir. 2006).

Discussion

The PCR Judge correctly ruled that Petitioner failed to prove he was deprived effective assistance of counsel the motion lack substantive merit to warrant a mistrial.

“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.” State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000), citing State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). “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), quoting State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct.App. 2005). Here, the extreme measure of granting a mistrial

was not necessary.

The record clearly supports that the Trial Judge carefully questioned the jurors. Only two of the jurors even noticed the photograph. See State v. Paige, 375 S.C. 643, 649, 654 S.E.2d 300, 303-304 (Ct.App. 2007) (noting lack of prejudice where “there is absolutely no evidence or record that the jurors in this matter were ever exposed to these button” with victim’s photograph or “if they were, whether they could perceive that they depicted the victim.”); James v. State, 513 S.E.2d 207, 210 (Ga. 1999) (“No abuse of discretion in denial of mistrial where “the trial court ascertained that no juror had seen the message on the pins”). Respondent notes that the photograph is not excessively large, (it does not fill an 8 1/2 by 11 inch sheet of copy paper, which appears contrary to defense counsel’s assertion the photograph was some 12 inches by 12 inches, **App.p.679**, and there are no labels or other identifying marks, though victim’s tattoos, on both arms, are visible. See Trial Exhibit 3.

The Trial Judge inquired as to possible juror taint. The questions were not summary in any form or fashion. Rather, the Trial Judge carefully questioned the jurors, keeping the clearly untainted jurors far away from the delicate questioning. The Trial Judge determined that only one juror had any possible taint based upon the responses he received and accepted, and he removed that juror, replacing him with the alternate who had not seen the picture. The Trial Judge’s credibility determinations are entitled to great deference on appeal. Harris, 340 S.C. at 63, 530 S.E.2d at 628 (“The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue.”). Moreover, his determinations are supported by the facts

of the event – that the picture was only held near the chest (indicating a lack of flamboyancy or attempt to intentionally grab attention), and that the podium blocked at least some of the jurors from physically being able to see the picture held close to the chest some twenty feet away in the second row in the audience.

At any rate, the Trial Judge, in an abundance of caution, removed the one juror who could have possibly felt empathy (more from his own loss alone) for the victim and victim's family, and cured any possibility of prejudice from the brief incident.¹ Consequently, there is neither error nor prejudice in the trial judge's denial of the defense motion for mistrial.

State v. Anderson, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996), is instructive to the present case. In Anderson, a witness, the victim's sister, identified the defendant then addressed him personally, asking why he had committed the murder. 322 S.C. at 90, 470 S.E.2d 104. The Supreme Court of South Carolina, noting the brevity the incident, found no error in the trial judge's refusal to grant a mistrial. 322 S.C. at 93, 470 S.E.2d at 105. Moreover, the court noted that the witness' "outburst was, in large part, an expression of grief over the death of her sister, and the jury likely understood it as just that." Id. Here, the action was simply much less volatile, not directed specifically at the defendant, and certainly understandable as a simple expression of grief. By comparison, if the action in Anderson did not necessity a mistrial, the action here certainly did not. At any rate, the "inherently prejudicial actions by the state" test is clearly not applicable in

¹ Respondent also notes that the trial judge instructed the jury: "... you must decide the issues in this proceeding without bias or prejudice to any parties. You cannot be allow yourself to be governed by sympathy, passion, prejudice, public opinion, or any other arbitrary factor." **App.p.666**. It was clear that the jury knew that they must notbe swayed by emotion.

this case. In sum, the record fully supports the trial judge did not abuse his discretion in denying the mistrial.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that his attorneys failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by the performance of his attorneys.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

Nov 9th, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2013-002650

JOHNNY E. MAHAFFEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,


RESPONDENT.

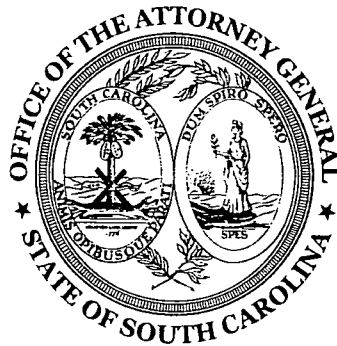
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Ms. Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
1330 Lady St., Ste.401
Columbia, SC 29201**

This 4th day of November, 2014


Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent



ALAN WILSON
ATTORNEY GENERAL

November 4, 2014

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

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S.C. Supreme Court

RE: Johnny Earl Mahaffey v. State of South Carolina
Appellate Case No: 2013-002650

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/lg
Enclosures

cc: Kathrine H. Hudgins, Esquire