

*Hugh W. Welborn*

Attorney at Law  
Post Office Box 173  
913 Carolina Circle  
Anderson, South Carolina 29622

Office (864) 226-5787  
Fax: (864) 224-3738

email to:  
hughwelborn@bellsouth.net

July 17, 2015

**RECEIVED**

JUL 20 2015

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

**S.C. SUPREME COURT**

In RE: Henry J. Galloway, #236967 vs. State of South Carolina  
Case #: 2013-CP-04-1628

Dear Sir/Madam:

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, 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/sba

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 J. CORDELL MADDOX, JR

2013-CP-04-1628

HENRY GALLOWAY #236967

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

RECEIVED

JUL 20 2015


S.C. SUPREME COURT

---

**NOTICE OF APPEAL**

---

Henry Galloway, #236967 appeals the denial of her Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable J. Cordell Maddox, Jr., Circuit Court Judge on February 18, 2014, and Order of Dismissal issued on July 15, 2015, and filed on July 16, 2015. The Appellant received Order of Dismissal on July 17, 2015.



---

Hugh W. Welborn  
Attorney for the Appellant  
Post Office Box 173  
Anderson, South Carolina 29622  
(864) 226-5787  
Attorney for Henry Galloway, #236967

Other Counsel of Record:  
Walt Whitmire  
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 J. CORDELL MADDOX, JR.

2013-CP-04-1628

RECEIVED

HENRY GALLOWAY, #236967

JUL 20 2015

APPELLANT,

S.C. SUPREME COURT

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

**PROOF OF SERVICE**

---

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 July 17, 2015, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



---

Hugh W. Welborn  
Attorney for the Appellant  
Post Office Box 173  
Anderson, South Carolina 29622  
(864) 226-5787  
Attorney for Henry Galloway, #236967

Anderson, South Carolina

17 July, 2015

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON ) TENTH JUDICIAL CIRCUIT

Henry Galloway,  
S.C.D.C. No. 236967,

**A TRUE COPY**  
**JUL 16 2015**  
*Richard W. Kinley*  
CLERK OF COURT

C.A. No. 2013-CP-04-1628

COMMON PLEAS AND  
GENERAL SESSIONS

2015 JUL 16 AM 10:02

FILED-CLERK'S OFFICE  
ANDERSON SC

v.

State of South Carolina,

Respondent.

**ORDER OF DISMISSAL  
(with prejudice)**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 9, 2013. Respondent filed its responsive pleadings. An evidentiary hearing into the matter was convened on February 18, 2014 at the Anderson County Courthouse. Applicant was present at the hearing and was represented by Hugh Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General.

**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 December 2010 term of the Anderson County Grand Jury for burglary, second-degree violent (2010-GS-04-2543) and burglary/safecracking (2010-GS-04-2544). Applicant was represented by Aaron Angel, Esq. On March 12, 2012, the State called its case to trial. Applicant proceeded to a jury trial before the Honorable R. Lawton McIntosh and was found guilty as indicted. Applicant was sentenced to fifteen (15) years imprisonment for burglary, second-degree, and fifteen (15) years imprisonment for burglary/safecracking. The sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert Pachak, Esq., of the Office of Appellate Defense pursuant to Anders v. California. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Henry Galloway Jr., No. 2012-UP-103 (S.C. Ct. App. filed on March 13, 2013). The Remittitur was issued on April 5, 2013.

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

1. Ineffective Assistance of Counsel:
  - a. failure to interview Henry Gates as a potential trial witness;
  - b. failure to consult an expert in safe cracking;
  - c. failure to investigate the State's lack of forensic evidence limited to fingerprints and D.N.A.;
  - d. failure to inform Applicant of the State's plea offer;
  - e. failure to object to the Trial Judge's decision to revoke Applicant's bond;
  - f. failure to continue the representation when Applicant instructed counsel that he desired to have counsel relieved during the middle of trial;
  - g. failure to make a directed verdict motion;
  - h. failure to make a double jeopardy motion;
  - i. failure to request a jury instruction on mere presence.

### **SUMMARY OF EVIDENCE AND TESTIMONY PRESENTED**

#### ***(a) Applicant's testimony***

Applicant alleged counsel was ineffective for failing to interview and present the alleged witness "James Grate." Applicant testified that "Grate" was a person he knew that worked at Moon Tower. He further stated that "Grate" hired him on a project that involved laying tile at night in Clemson. He testified that "Grate" would have testified at Applicant's trial that he directed Applicant to enter the victims' store at 2 a.m. to retrieve a work document. Applicant acknowledged that he was aware video surveillance captured him and his co-defendant using a knife to break into the store's side door. He now testified that the knife did not belong to him. Applicant also testified counsel was ineffective for failing to consult an expert in "safe-

cracking.” He speculated that an expert would have proven that he did not have the tools to break into the safe during the time the victims placed him in the room with the safe. He testified that he only met with counsel once prior to trial. He claimed counsel never reviewed victim statements with him. Last, he alleged counsel was ineffective for failing to investigate the State’s lack of D.N.A. or fingerprint evidence.

Applicant alleged counsel was ineffective for failing to properly advise Applicant on the terms of the solicitor’s plea offer. He testified that he would have accepted the offer that included an aggregate term of five years imprisonment had he known the solicitor agreed to not prose the safe cracking charge. He stated that by the time counsel apprised him of the necessary information, the offer had terminated.

Applicant alleged counsel was ineffective for failing to object to the trial judge’s order to revoke Applicant’s bond after the first day of the trial. He testified that the trial judge improperly stereotyped him with an inmate in a prior trial that absconded in the middle of the trial. Applicant explained his displeasure with counsel at this juncture. Applicant alleged counsel was ineffective for not relieving himself during the middle of trial.

Applicant alleged counsel was ineffective for failing to make a double jeopardy argument at trial. Applicant testified that he was under the opinion that his constitutional rights had been violated here when the State simultaneously pursued both burglary, second-degree, and safecracking charges at trial. Applicant alleged counsel was ineffective for failing to request a jury instruction on mere presence. Last, Applicant alleged counsel was ineffective for failing to make directed verdict motions despite being informed counsel had in fact made the motions in question.

***(b) Counsel’s testimony***

Counsel testified to his course of conduct during the representation. Counsel's primary area of practice is criminal law. Upon counsel's appointment on Applicant's case, he filed a letter of representation, scheduled his first consultation with Applicant among other things. Applicant's version of the facts that led to his arrest was that he entered the store to get money. Applicant's entry into the store was rendered unlawful where he did not have a legitimate purpose for being on the property. Applicant did not request counsel interview any witnesses prior to trial. Counsel reasoned that based upon Applicant's version of the facts and the circumstances of the case, a request that the trial judge instruct the jury on "mere presence" completely lacked merit. As the case progressed, counsel met with Applicant numerous times, independently investigated the State's evidence when he received discovery disclosures, apprised Applicant of the State's evidence and developments in the case, visited the crime scene, and followed development in the co-defendant's case. Counsel was unequivocal that Applicant never mentioned the alleged beneficial witness "Grate" during the course of his representation. Nor did Applicant explain his "current" the version of the facts that he adopted for this hearing to counsel. Counsel reasoned that an expert in the field of safecracking would have not been particularly useful in the context of the victims' statements and testimonies.

As a result of the above mentioned efforts made by counsel, it was his opinion that State had compiled overwhelming evidence of Applicant's guilt. Counsel explained that burglary, second-degree, charge was not even in dispute. He further explained that the safecracking charge turned on whether the jury found the victim Randall Moon's statement and subsequent trial testimony credible. He apprised Applicant of the strength of the State's case and advised him to pursue favorable guilty plea negotiations. When the original solicitor on the case made the plea offer, counsel conveyed it to Applicant and benefits and detriments of entering a guilty plea.

Counsel advised Applicant on the matter. Furthermore, counsel cautioned Applicant that the solicitor had full discretion to revoke the offer.

Counsel believed an objection to the trial judge's decision to not renew Applicant's bond to be wholly unmerited and reasoned that the trial judge's posture was prototypical for a circuit court judge presiding over a multi-day general sessions trial. Counsel made directed verdict motions at the end of trial but was of the opinion that the trial judge properly denied the motions. Last, counsel explained that a double jeopardy argument here was wholly without merit.

### **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).

As a matter of general impression, this Court finds Applicant's action is lacking in credibility as a matter of global concern. Applicant makes numerous allegations that are entirely supported by his incredible testimony. The State's case against Applicant was simple and straight forward. Applicant found himself in a grave predicament to the common burglar: he got caught in the heist. This Court notes that Applicant makes numerous allegations that counsel failed to investigate matters that would have presumably been instrumental in contesting guilt; yet Applicant also opines that he would have accepted a plea. He simply cannot have it both ways. See State v. Barnes, Op No. No. 2014-001966 (S.C. Ct. filed July 1, 2015) (Toal, C.J. dissenting) (Respondent's conduct here should be examined for what it is: an effort to manipulate the system and pollute the administration of justice). Furthermore, this Court finds Applicant's other

allegations constitute one frivolity layered upon additional frivolity. In comparison, this Court finds counsel's testimony to be compelling. His testimony was the product of clear diligence and preparation as it evidenced his full attention to the PCR process. This Court finds counsel's PCR testimony further evidenced the competency of his representation concerning the allegations at issue.

### **EFFECTIVE ASSISTANCE OF COUNSEL**

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; 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, (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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.

This Court finds Applicant entirely failed to meet his burden of proof, let alone his burden of production on the following three allegations: (a) ineffective assistance of counsel -- failure to interview Henry Gates as a potential trial witness; (b) ineffective assistance of counsel -- failure to consult an expert in safe cracking; ineffective assistance of counsel; (c) ineffective assistance of counsel -- failure to investigate the State's lack of forensic evidence limited to fingerprints and D.N.A.

This Court has stated previously that criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citation omitted).

This Court finds counsel's testimony dispositive. Regardless, Applicant has failed to produce any relevant and credible testimony or evidence concerning these three allegations. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("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"). Therefore, these allegations is readily denied and dismissed with prejudice.

B.

This Court finds Applicant has failed to meet his burden to prove: (d) ineffective assistance of counsel -- failure to inform Applicant of the State's plea offer.

“The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to “all ‘critical’ stages of the criminal proceedings.” Missouri v. Frye, ---- U.S. ----,----, 132 S.Ct. 1399, 1402 (2012).

“The question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.” Id., ---- U.S. at ----, 132 S.Ct. at at 1408.

In light of counsel’s compelling testimony that he informed Applicant of the offer and advised Applicant on its terms and conditions among others things, Applicant has produced no credible evidence in rebuttal. This Court notes that Applicant’s current post-hoc PCR representations appear to be the product of buyer’s remorse post the return of the guilty verdicts. In light of this Court’s credibility finding, further analysis is unnecessary. Therefore, this allegation is denied and dismissed with prejudice.

C.

This Court finds Applicant’s allegation (e) ineffective assistance of counsel -- failure to object to the Trial Judge’s decision to revoke Applicant’s bond is entirely without merit. Judge McIntosh made a sound pre-trial ruling that as a matter of course is virtually per se unchallengeable on either direct appeal or in this forum. Counsel is simply under no duty to make futile objections. Therefore, this allegation is denied and dismissed with prejudice.

Similarly, this Court finds Applicant’s allegation (f) ineffective assistance of counsel -- failure to continue the representation when Applicant instructed counsel that he desired to have counsel relieved during the middle of trial is without merit.

This Court finds that Applicant had no valid basis to even make a prima facie showing that a motion to have counsel relieved held merit. Far too commonly seen in this forum,

*Hugh W. Welborn*

Attorney at Law  
Post Office Box 173  
913 Carolina Circle  
Anderson, South Carolina 29622

Office Telephone:  
(864) 226-5787

Fax:  
(864) 224-3738

July 17, 2015


South Carolina Office of Appellate Defense  
P. O. Box 11589  
Columbia, South Carolina 29211-1589

In RE: Henry J. Galloway, #236967 vs. State of South Carolina  
Case #: 2013-CP-04-1628

Dear Sir or Madam:

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 and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,



Hugh W. Welborn

HWW/sba  
Enclosures

cc: Court of Appeals  
Office of Attorney General

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



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

2921101330 8089

