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October 4, 2017

Via U.S. Mail:

Ms. Margaret A. Woods, Court Reporter
P.O. Box 80243
Simpsonville, S.C. 29680

**RE: Christopher Paul Mahaffey, #00338083 vs. The State of South
Carolina**
Case Number: 2015-CP-42-4267

Dear Ms. Woods:

On, March 23, 2017, an Evidentiary Post Conviction Relief Hearing was heard by Judge Robin B. Stilwell in Spartanburg, South Carolina in regard to the above referenced case. My records indicate that you were the Court Reporter for this case.

I respectfully request that you provide me with a transcript of the proceedings. Please transcribe the entire record.

I agree to pay the per page charge for the transcript as provided by Rule 607, SCACR.

If you should have any questions, please feel free to contact my office.

Very truly yours,


Melissa D. Spivey
Attorney and Counselor at Law

MS/ims

cc: South Carolina Court Administration
1015 Sumter Street
Columbia, SC 29201

Valerie Giovanoli
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211

South Carolina Commission on Indigent Defense, Appellate Division
Attention: Paula Murdoch
P.O. Box 11589
Columbia, S.C. 29201-1589

Inmate Christopher Paul Mahaffey
Inmate Number: 00338083
Perry Correctional Institution
430 Oakland Road
Pelzer, SC 29669

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October 4, 2017

Via Federal Express Overnight:

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, S.C. 29211

RECEIVED

OCT 05 2017

S.C. SUPREME COURT

RE: Christopher Paul Mahaffey, #00338083 vs. The State of South
Carolina
Case Number: 2015-CP-42-4267

Dear Mr. Shearouse:

This is to advise of my representation of Mr. Mahaffey was limited in nature solely in regard to the Post Conviction Relief Evidentiary Hearing and filing a Motion to Alter or Amend Order Pursuant to Rule 59(e). Mr. Mahaffey has advised both my office and the South Carolina Commission on Indigent Defense that Mr. Mahaffey wants the South Carolina Commission on Indigent Defense to represent him in regard to the Appeal. In order to insure that Mr. Mahaffey's interest is protected in this matter, I am filing the Notice of Appeal on his behalf. It is my understanding that the South Carolina Commission on Indigent Defense will be assuming representation of Mr. Mahaffey in regard to this Appeal.

Please find enclosed the following documents:

- (1) The original and six (6) copies of the Notice of Appeal;
- (2) The Order of Dismissal with Prejudice, dated May 24, 2017;
- (3) The Order Denying Motion to Alter or Amend Pursuant to Rule 59(e) dated August 29, 2017, clocked-in on September 13, 2017 and written Notice of the Order was received on 9/15/2017;

- (4) The Letter to Court Reporter Margaret A. Woods, requesting the transcript of the Post Conviction Relief Evidentiary Hearing, with the document being provided to the Office of the Court Administration;
- (5) The original Proof of Service on M. Hope Blackley, Clerk of Court for Spartanburg County;
- (6) The original Proof of Service on Valerie Giovanoli, Assistant Attorney General for The South Carolina Attorney General's Office, Attorney for Respondent;
- (7) The original Proof of Service on the South Carolina Commission on Indigent Defense, Appellate Division, Attention Paula Murdoch;
- (8) The original Proof of Service on your office; and
- (9) Check in the amount of \$100.00 to cover the filing fee associated therewith.

If you should have any questions or should you require anything further, please contact my office in that regard.

Very truly yours,


Melissa Spivey
Attorney and Counselor at Law

MS/ims

Enclosures: (As noted above)

cc: Valerie Giovanoli
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211

South Carolina Commission on Indigent Defense, Appellate Division
Attention: Paula Murdoch
P.O. Box 11589
Columbia, S.C. 29201-1589

Inmate Christopher Paul Mahaffey
Inmate Number: 00338083
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

THE HONORABLE ROBIN B. STILWELL
CIRCUIT COURT JUDGE

Case No: 2015-CP-42-4267

The State of South Carolina.....Respondent

v.

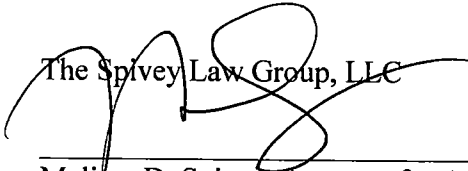
Christopher Paul Mahaffey, #338083.....Appellant.

NOTICE OF APPEAL

NOTICE is hereby given that the undersigned, as attorney for Appellant, Christopher Paul Mahaffey, #338083, does hereby appeal the Order of Dismissal With Prejudice of The Honorable Robin B. Stilwell, dated May 24, 2017 and the Order Denying Motion to Alter or Amend Order Pursuant to Rule 59(e) of the Honorable Robin B. Stilwell dated August 29, 2017. The Order Denying Motion to Alter or Amend Pursuant to Rule 59(e), was clocked-in on September 13, 2017 and received on September 15, 2017.

October 4, 2017.

The Spivey Law Group, LLC



Melissa D. Spivey, Attorney for Appellant
P.O. Box 809
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Telephone: (864) 288-6503
Facsimile: (864) 288-0351

Other Counsel of Record:

Valerie Giovanoli, Assistant Attorney General
South Carolina Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, S.C. 29211

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Christopher Paul Mahaffey, #338083,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2015-CP-42-4267

**ORDER OF DISMISSAL
 WITH PREJUDICE**

2017 JUN 26 PM 4:50
 M. CLARE HALL, CLERK

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Christopher Paul Mahaffey (Applicant) on October 15, 2015. The State (Respondent) made its return on April 1, 2016, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 23, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by H. Michael Spivey and Melissa D. Spivey, Esquires. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Paul Mahaffey (“Mahaffey”), Applicant’s father, also testified. M. Claire Hall (“Counsel”), Clay T. Allen (“Allen”), and Jennifer Jordan (“Jordan”), Esquires, testified for the State. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant’s records from the South Carolina Department of Corrections, the PCR application, Respondent’s return, the trial transcript, and Applicant’s direct appeal records.

PROCEDURAL HISTORY

Christopher Paul Mahaffey (“Applicant”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of

Court. Applicant was indicted at the February 2012 term of the Spartanburg County Grand Jury for burglary, first degree (2012-GS-42-0730) and petit larceny (2012-GS-42-0731). Applicant was subsequently indicted at the June 2012 term of the Spartanburg County Grand Jury for possession of cocaine base (2012-GS-42-2836) and possession of oxycodone (2012-GS-42-2837). M. Claire Hall, Esquire, and Clay T. Allen, Esquire, represented Applicant. On August 27, 2012, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. On August 28, 2012, the jury convicted Applicant as indicted. Judge Cole sentenced Applicant to imprisonment for concurrent terms of 25 years for burglary, 10 years for petit larceny, three years for the possession of cocaine base, and two years for the possession of oxycodone.

A timely Notice of Appeal was filed on Applicant's behalf, and David Alexander, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on December 10, 2014. State v. Mahaffey, Op. No. 2014-UP-449 (S.C. Ct. App. filed December 10, 2014). The remittitur was returned on January 8, 2015.

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to negotiate a plea deal;
 - b. Counsel failed to obtain a shorter sentence;
 - c. Counsel failed to properly investigate the case and interview witnesses;
 - d. Counsel allowed the trial to occur within seven months of Applicant's arrest;
 - e. Counsel only met with Applicant twice before trial for short period of time;
 - f. Counsel failed to prepare for trial;
 - g. Counsel failed to review the jury pool and properly pick a jury;
 - h. Counsel failed to make a motion to continue the trial;
 - i. Counsel failed to ask the court to charge the jury on the lesser offense of second degree burglary;
 - j. Counsel failed to make a Motion to Suppress the pocket

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- knife;
- k. Counsel failed to request a charge be given to the jury in regards to what constituted a deadly weapon;
 - l. Counsel failed to object to the prosecutor's false or misleading statements;
 - m. Counsel failed to attack the credibility of witnesses;
 - n. Counsel failed to file any pre-trial motions;
 - o. Counsel failed to file a notice of representation;
 - p. Counsel failed to make a motion pre-trial motion to dismiss the burglary charge;
 - q. Counsel failed to call witnesses for Applicant;
 - r. Counsel failed to make a motion for directed verdict;
 - s. Counsel failed to keep in contact with Applicant.
2. The elements of first degree burglary were not met

At the evidentiary hearing, Applicant proceeded on his claims of ineffective assistance of trial counsel contained in his application.

SUMMARY OF TESTIMONY

I. Applicant testified to the following:

Ms. Terry was first appointed to represent Applicant. When she moved, M. Clair Hall ("Counsel") took over his case. Counsel represented him for 3-4 months before trial. Counsel also represented him on a probation revocation. Counsel met with Applicant twice prior to trial and the meetings totaled 20-30 minutes. Applicant requested a bond hearing, but Counsel never requested one. Applicant was not arraigned on two of his four charges. Applicant does not know what an arraignment is or what is done in an arraignment. Applicant testified that Counsel waived his arraignment and never explained to him what it was. Had Applicant known about arraignment, he would have pled guilty.

Counsel told Applicant that he was her first trial and she did not know how to draw a jury. Counsel needed help and asked for Applicant's help in drawing the jury. She told him she had been on vacation the week before. She also told him she was overwhelmed because she had 137

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H. HOFFER, CLERK

cases and could not talk to every client. Had Applicant known of this prior to the day of trial, he would have asked for another attorney. Applicant never met or talked to Clay Allen.

Counsel met with Applicant on Saturday before his trial and told him she had received some last minute discovery that day. The discovery consisted of numerous jail phone calls and one 911 call. Counsel tried to listen to the recordings with Applicant, but she could not get the audio recordings to play and told Applicant she would bring them back on Sunday to listen to them. Counsel did not return Sunday. After Applicant received the phone calls through PCR counsel, they could not open the recordings. Applicant even requested help from a computer expert who could not open the recordings.

Applicant introduced Applicant's Exhibit 1, a transcript of the 911 call made by the victim in this case, into evidence. Applicant read page 2 beginning at line 23 of the transcript into the record, which consisted of the victim stating, "He is unarmed. I have checked him. I have him held with a friend of mine that was here. This man passed three no trespassing signs coming down my driveway and I come around the corner and he's coming out of my house and I'm missing my gun and I want his vehicle searched because he has stolen from me." Applicant continued reading at page 5, line 15:

911:

Okay. Does he have any weapons on him?

Mr. Sustare:

Not that I can see. I won't let him back to his vehicle. I made him lift his shirt up. I don't see anything on him.

Counsel never listened to or allowed the jury to hear the 911 tape where the victim stated that Applicant was not armed. Counsel never made a motion to suppress the pocket knives that were found in his pockets by law enforcement or a motion for directed verdict based on the pocket knives.

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K. HOFF CLERK

Counsel told Applicant that she would not call Applicant's father to testify because the phone call recordings would be used to impeach him. However, Applicant claimed that Counsel never listened to the 911 call recording or the others. Applicant claimed that his whole family was there at court, but that Counsel never talked to any of his witnesses. His family was present at his father's house prior to the incident, where Applicant had left with a man named Ronald Kaiser, the son of his ex-girlfriend. Applicant's contention was that Kaiser had committed the crime and set him up because Applicant was not on good terms with Kaiser's mother. Had Counsel called all of his family members, they could have testified to him leaving with Kaiser.

Additionally, Applicant claimed that Kaiser knew the victim and Counsel never brought that to the jury's attention. Applicant informed Counsel that Kaiser wanted to stop by the victim's home because the victim owed Kaiser money for some work he had done, but that Counsel never brought that to the jury's attention either. Applicant also got a flat tire prior to arriving at the victim's home and called his father to ask him how to get to the spare tire. Applicant's father would have testified to this call as well, had Counsel called him to testify. Applicant would not have gone to the victim's house to rob him with a flat tire.

Applicant testified that he never went in the victim's home nor did he take anything from the victim's home. Applicant was set up by his ex-girlfriend who had threatened him she would get even with him. Kaiser was Applicant's ex-girlfriend's son. Counsel never put Applicant's ex-girlfriend or Kaiser on the stand to testify in Applicant's trial. There was an accusation that Applicant had stolen jewelry from the victim, which was included in the face of the warrant. However, no jewelry was ever recovered and no evidence was offered at trial that jewelry was taken. The arrest warrant and indictment also valued the amount stolen at less than \$2,000 and Counsel did not move to quash either based on that value.

Counsel failed to object to the hand of one, hand of all jury instruction. Counsel did not make an argument that a pocket knife was not a deadly weapon. Counsel told the jury that sometimes it is and sometimes it is not. Counsel made no objection about the pocket knife being a deadly weapon and thus did not preserve the issue for the appellate court to review. Counsel did not provide the Court with any case law for second degree burglary. Counsel did not provide the Court with Clyde Timothy Bunkley vs. Florida, 123 S.Ct. 2020, where the Court said that a pocket knife with a blade of 4 inches or less is a common pocket knife.

No gun was found on Applicant, either. Counsel did not insist that State present a gun as evidence. There were no fingerprints found anywhere at the scene. Counsel also failed to adequately cross examine the State's witnesses. Counsel did not even ask two witnesses any questions. The victim changed his story when he testified that he saw Applicant walking out of his front door. Counsel did not adequately cross examine the victim based on his previous statement to law enforcement that he was in the back of his house. Counsel did not ask him how he could have seen Applicant exiting the front door if he was in the back yard of his house. Counsel did not make any objections to any exhibits entered into evidence at trial. Applicant has already served five years of his sentence and has two sons who depend on him for support.

On cross examination, Applicant claimed he was not aware of what an arraignment was and during the brief break in his trial, indicated in the transcript at page 10, lines 6-10, Counsel did not discuss arraignment with him and he did not know he was waiving arraignment. Applicant admitted that the victim did not search in his pant pockets, but that law enforcement did and that is where he had two pocket knives. Applicant also confirmed that he got a flat tire while traveling down the road, but was still able to drive his vehicle all the way down the victim's 600 foot driveway to the very end at the front of the victim's house.

Applicant also admitted that although a gun was never found on his person, a gun was found in the console of his vehicle. Applicant also recalled that a picture of that gun in his vehicle's console was admitted into evidence at his trial. Applicant testified that he worked at a pallet yard, but he does not own gloves. Applicant recalled the victim's testimony was that he was working in his back yard, but walked around to the front when he saw Applicant's vehicle parked in his driveway and saw Applicant walking out of his front door.

On redirect examination, Applicant offered Applicant's Exhibit 3, a Spartanburg County Sheriff's Office Motor Vehicle Tow & Inventory Report, as evidence. The tow report indicated that Applicant's vehicle had a flat tire at the time of the tow and inventory report. Applicant also stated that the victim went to Applicant's car and placed his property inside and said to Applicant, "I got your ass now." Applicant told Counsel this and she never cross examined the victim with regard to this set up.

II. Mahaffey testified to the following:

Mahaffey is the father of Applicant. Mahaffey tried to listen to jailhouse calls with PCR counsel and could not open the files because there was no auto-run. He later listened to them when they received operable files from the Solicitor's Office. Counsel was supposed to call Mahaffey to testify, but Counsel told him a few minutes before trial that the State had recordings that could use to impeach him. Mahaffey heard nothing in the calls that could impeach him. Some of the recordings did not pertain to Applicant's case.

Mahaffey elaborated on the testimony that he could have offered if called at trial. He could testify to the fact that Applicant and Keiser were at his family cookout. He could testify that Keiser was the son of Applicant's girlfriend and that Applicant and his girlfriend were having problems.

137

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H. PROCTER & KENNEDY

Mahaffey would have testified that Applicant called him about a flat tire and asked about spare tire. Mahaffey would have testified that Applicant was not a violent person.

Mahaffey also claimed that Counsel never asked for a lower sentence and never tried to get burglary, second degree.

III. Counsel testified to the following:

Counsel was appointed to represent Applicant when she first began working with the Spartanburg County Public Defender's Office and took over all of Ms. Terry's cases. Counsel did not think this was her first case, but it was one of her first and early in her career. Counsel could not recall the specific number of meetings she had with Applicant, but recalls there were a few. Counsel recalls that she reviewed the discovery with Applicant and discussed the charges against him and his version of the facts. Counsel's general practice was to always inform clients of all of their Constitutional rights and does not recall Applicant being any different. Counsel never received an offer from the State nor did she advise her client to plead open to the court. Counsel believes she approached the assistant solicitor to attempt to negotiate a plea, but does not recall the specifics of that discussion. Regardless, Counsel could not recall Applicant ever expressing a desire to plead guilty.

Counsel vaguely recalled that she made some sort of bond reduction motion to have Applicant released to home detention. Counsel could not recall specifically discussing what an arraignment was with Applicant. However, she found it reasonable to conclude from the record that when she requested a moment to discuss arraignment with Applicant during his trial, and a brief pause followed, that she would have discussed Applicant's rights to be arraigned and waiver of those rights. Counsel also felt that the drug charges being tried in conjunction with the other

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charges would unfairly prejudice Applicant. As such, Counsel made a motion to sever the drug charges and argued that they were unduly prejudicial. The court denied that motion.¹

Counsel denied that she told Applicant she did not know how to draw a jury or that she needed his help, although she may have asked for his input which was usual practice. Counsel confirmed she was provided with late discovery which consisted of approximately 170 recorded calls. Counsel recalled the discovery being provided to her within a week of trial, but not the exact date. Counsel listened to about twenty of the calls. The assistant solicitor told Counsel she would only potentially use three of them. Counsel took the tapes to the jail to listen to them with Applicant, but does not recall having any trouble playing the recordings – only some problems hearing some of what was said. Counsel recalled that only one recording, the 911 call, was in fact admitted at trial. Counsel did not see the late discovery as a basis for requesting a continuance as the assistant solicitor specified the three calls they would potentially use. Counsel was prepared for trial and had she felt unprepared, she would have requested a continuance. Counsel did not believe a continuance would have been granted because she had previously requested Applicant be released from jail to home detention. Counsel could not recall being out the week before Applicant's trial, and if she was, for what reason. Regardless, Counsel would have prepped the case ongoing since the start of her representation and was ready for trial the day of.

Counsel did not recall what was in the recordings that would have impeached Applicant's father, but recalled that was why she did not call the father to testify. Furthermore, Counsel did call Applicant's brother, who testified to exactly the same thing the father would have, without the assistant solicitor's ability to impeach him with the phone calls. Counsel did not interview Kaiser because her office was unable to locate him. With regard to the jewelry accusations contained in

¹ That issue was taken up on appeal and affirmed by the Court of Appeals.

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cases, but rather a formality that is often waived. Allen was never aware of any desire on the part of Applicant to plead guilty. Even if Applicant had pled to the drug charges, the drugs would have still come in at trial.

In Allen's view, the aggravating circumstance of the case warranting a burglary, first charge was the gun found in Applicant's vehicle the State would use to prove that Applicant was armed or became armed during the commission of the burglary. Applicant never mentioned the allegation that he was set up by Kaiser prior to or at trial. Allen could not be sure if Counsel listened to the call recordings, but stated that his office's policy is for the solicitor to tell them which calls they intend to use and they, in turn, listen to only those.

V. Jordan testified to the following:

Jordan prosecuted Applicant's case. Jordan did not extend a plea offer and could not specifically recall if she had any negotiations with Counsel. Jordan did not extend an offer because she saw Applicant's case as a good case to try. Jordan believes she turned over the call recordings late because she made a late request to the jail for them, which occurs sometimes. Jordan did not have any auto-run or play problems with her copies of the calls. Jordan also recalled the Court would not permit the presentation of any information about Kaiser at the trial.

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 had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

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NOPE BLACK

As a matter of general impression, this Court finds the testimony of Counsels Counsel, Allen, and Jordan to be credible. This Court further finds that the testimony by Applicant and his father is not credible.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a 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 (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). 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.

This Court finds that Applicant has failed to meet his burden in proving either prong of Strickland and that Counsel Hall or Allen rendered effective assistance in their representation of

Applicant. Applicant's claim that Counsel failed to negotiate a plea deal lacks merit. Although the memory of both Counsel and Jordan is not crystal clear, Counsel believes she attempted to negotiate a plea with Jordan. Jordan testified that she did not extend a plea offer and was intent on trying the case. "The decision whether to offer a plea bargain is within the solicitor's discretion." State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996); see State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1994). Counsel could not require Jordan to negotiate a plea. Furthermore, neither Counsel nor Allen recalls Applicant ever expressing a desire to plead guilty to any of his charges, and this Court finds that assertion by Counsel and Allen to be credible. For that reason, Counsel, with the assistance of Allen, prepared his case for trial. Jordan's refusal to negotiate a plea was not the result of any deficiency on the part of Counsel, but rather Jordan exercising her discretion as the assistant solicitor assigned to Applicant's case. Id. Applicant has failed to demonstrate how Counsel's failure to negotiate a plea was not reasonable in light of prevailing professional norms.

Applicant has failed to prove by a preponderance of the evidence that the waiving of the arraignment was either deficient or prejudicial. Whether an arraignment is held or not becomes irrelevant when and if there is a true bill by the Grand Jury. Furthermore, the waiving of arraignments is a fairly regular and standard practice by many member of the defense bar.

Applicant's claim that Counsel failed to obtain a shorter sentence also lacks merit. "A trial judge is allowed broad discretion in sentencing within statutory limits." Brooks v. State, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). The record illustrates a thorough attempt at mitigation by Counsel. Trial Tr. p. 198 l. 10 - p. 199 l. 14. Applicant also had the opportunity to address the court prior to sentencing. Trial Tr. p. 199 l. 22-25. However, the sentencing judge was also permitted to consider all of the evidence presented at trial, Applicant's prior criminal record, the

victim's request for the maximum sentence, and whatever other factors the judge found relevant. In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010) ("A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant"). The judge was the sole decision-maker of the sentence given to Applicant. Applicant has failed to show any deficiency on the part of Counsel with regard to the sentence handed down by Judge Cole.

Applicant's claim that Counsel failed to investigate the case is contradicted by the record of the trial. Counsel was well-prepared at trial. Her opening argument at the start of Applicant's trial coincided with the version of the facts as given to her by Applicant. Not only was Counsel aware of the evidence collected and presented at trial, she also drew the jury's attention to the evidence that was not collected, tests that were not done, and statements that were not made.

Applicant alleged that Counsel had not interviewed his witnesses, but this Court finds that this testimony is not credible. Counsel was aware of what both Applicant's brother and father would testify to and decided to call only the brother because the State had a jail recording between him and Applicant that they would use to impeach the father. Additionally, the brother testified to the same thing the father would have testified to, rendering the father's testimony cumulative. This Court finds Applicant's father's testimony at the hearing was not instructive to the Court as to the dispositive question of whether Counsel's conduct was deficient. Applicant has failed to demonstrate how the father's testimony could have been any more productive than the brother's and has failed to prove by a preponderance of the evidence that he was prejudiced by the failure to call the father. The substance of the father's testimony shed very little light on the facts to be determined by the jury at trial.

RP?

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M. D. B. J. COURT REPORTER

This Court finds not credible Applicant's allegation that his father would have also testified to his ex-girlfriend seeking revenge and his alleged flat tire. Counsel nor Allen had ever heard of the allegation that Applicant was set-up or that Applicant stopped because he had a flat tire. Lastly, Applicant insinuated that his whole family could have testified to (1) his presence at the family cookout and (2) that he left with Kaiser. This Court finds it reasonable that Counsel only prepared to call two of those family members and ultimately only called one, because of the potential of the father being impeached by the State. None of the family members were present at the victim's home and could only testify to the same two facts mentioned above. Applicant has failed to meet his burden that Counsel was deficient in her investigation or interviewing of witnesses.

Applicant's claim that Counsel allowed the trial to occur within seven months of Applicant's arrest lacks merit. There is no set time limit on how quickly a trial should occur after arrest or indictment. Counsel was prepared to try Applicant's case and the time in which it took her to become prepared is irrelevant.

Applicant's testimony that Counsel only met Applicant for two short periods of time is not credible. Although Counsel did not recall the specific number of meetings, she recalled there were a few. She was able to advise him of all of his constitutional rights, review all the discovery, including the three audio recordings that were provided later, discuss his version of the facts and potential defenses with him in her meetings with Applicant. Therefore, Applicant has failed to prove any deficiency with regard to Counsel's meetings with Applicant.

Applicant's claim that Counsel failed to review the jury pool and properly pick a jury is unsubstantiated. Other than incredible allegation that Counsel did not know how to draw a jury and had to rely on the assistance of Applicant in doing so, Applicant has failed to prove by a preponderance of the evidence that Counsel made any error during the selection of the jury.

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HOPE SULLIVAN

Furthermore, Counsel and Allen both testified that it is common practice to request a client's input during jury selection.

Applicant's complaint that Counsel did not object to the Trial Court failing to define a deadly weapon is without merit. The question of whether a pocketknife is a deadly weapon is quintessentially a question of fact for the jury. Furthermore, there was evidence of a gun in the record as well. A Trial Court is not allowed to comment on facts during the jury charge, and it would have been error for the presiding judge to tell the jury in his closing charge that a pocketknife or a gun was a deadly weapon. Counsel was correct, and indeed astute, not to request further clarification of a deadly weapon or object to the given charge.

The alleged lack of motions made by Counsel (failing to request a continuance, make a motion to suppress the pocketknife, file any pre-trial motions³, file a motion to dismiss the burglary charge, or make a motion for directed verdict⁴) is not instructive to this Court. Motions should be calculated to effect a practical end. In this matter, Counsel did not fail to make any motions that were relevant to the issues at hand, and Applicant was not prejudiced by any failure of Counsel to make impractical motions.

Applicant's complaint that Counsel failed to examine audio tapes is without merit. Counsel testified that she did review the tapes and acknowledges that she did have trouble hearing some.⁵ Applicant's assertion that Counsel did not review the tapes and could not open the same is an unsubstantiated allegation. In any event, the jailhouse tapes were never introduced at trial⁶ and there is no evidence in the record that the tapes contained relevant or exculpatory evidence.

³ Counsel did make a pre-trial motion to sever the drug charges from the burglary and petit larceny charges. Trial Tr. p. 10, l. 15 – p. 13, l. 19.

⁴ In fact, Counsel did make an initial motion for directed verdict at the close of the State's case, as well as a renewed motion for directed verdict at the close of the Defense's case. Trial Tr. pp. 131 & 142.

⁵ Counsel made this same assertion on the record to the Trial Court at trial.

⁶ Despite Applicant's claim to the contrary, the 911 audio recording was introduced at trial as State's Exhibit 15. Trial Tr. 72, ll. 5-11.

Applicant's claim that Counsel failed to ask the Trial Court to charge the jury on the lesser offense of second degree burglary is refuted by the record. Counsel did make a request for a charge of burglary in the second degree. Trial Tr. p. 143, l. 10 – p. 149, l. 20. After arguments by both the defense and the State were heard, the Trial Court denied the motion on the basis that no evidence was presented to support a charge of second degree burglary.

This Court grants Respondent's motion to dismiss with regard to Applicant's claim that the elements of first degree burglary were not met. This is not an appropriate claim for PCR because this is a direct appeal issue. As such, it is procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). Not only could Applicant have raised this issue on appeal, but in fact, Applicant did raise the issue of the Trial Court's failure to charge the lesser included offense of second degree burglary. Furthermore, the Court of Appeals affirmed the circuit court's denial of Applicant's request to charge second degree burglary. State v. Mahaffey, Op. No. 2014-UP-449 (S.C. Ct. App. Filed December 10, 2014). This allegation is denied and dismissed with prejudice.

The remainder of Applicant's allegations are without merit. Applicant essentially questions each and every action or inaction of trial counsel. A Post-conviction relief application is not a venue for second-guessing decisions of trial counsel. Applicant has the burden of proving by a preponderance of the evidence that Counsel was deficient and that the deficiency was prejudicial. Applicant has failed to do so.

This Court finds that Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove any prejudice from any alleged deficiencies in Counsel's

representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations 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 also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

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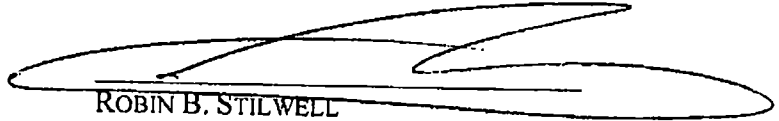
2017 MAY 26 PM 4:59
M. HOPE WLAOMLEY

RA

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 24 day of May, 2017.


ROBIN B. STILWELL
Presiding Judge
Seventh Judicial Circuit

Colemanville, South Carolina

2017 MAY 26 PM 4:51
M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court

May 30, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Christopher Paul Maloffy
Applicant #338083

CASE # *2015 CD 42 4367*

CERTIFICATE OF SERVICE

VS
State
Respondent

I certify that, on this date, I served a copy of the *Order of Dismissal w/ Prejudice*
In this action dated *5-24-2017* on *5-30-17*

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Ashley Harwell
Alvin Cree
H. Michael Pate

5-30-17
(Date)

Carrie Sef
(Signature)

FILED
2017 MAY 26 PM 4:00
CLERK OF COURT
SPARTANBURG, SC



Rec'd 9/15/17
ms

ALAN WILSON
ATTORNEY GENERAL

September 13, 2017

H. Michael Spivey, Esquire
The Spivey Law Group, LLC
Post Office Box 809
Mauldin, South Carolina 29662

Re: Christopher Paul Mahaffey, # 338083 v. State of South Carolina
2015-CP-42-4267

Dear Mr. Spivey:

Enclosed please find a copy of the signed and filed **Order Denying Motion to Alter or Amend Order Pursuant to Rule 59(e)** in the above mentioned Post Conviction Relief case.

Sincerely,

Valerie Garcia Giovanoli
Assistant Attorney General

VGG/lm
Enclosure(s)

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Christopher Paul Mahaffey,)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

**ORDER DENYING MOTION TO
ALTER OR AMEND ORDER
PURSUANT TO RULE 59(E)**

C. A. No.: 2015-CP-42-4867

CLERK OF COURT
SPARTANBURG COUNTY
2017 SEP 13 AM 11:50
M. HOPE BRACKLEY

This matter comes before the Court pursuant to the Applicant's Motion to Alter or Amend the Court's Order of Dismissal with Prejudice dated on or about May 24, 2017, and filed on or about May 26, 2017, pursuant to Rule 59(E) of the South Carolina Rules of Civil Procedure. After having had the opportunity to carefully review the Motion, this Court respectfully denies the same.

Specifically, the Court finds as follows:

1. The Applicant failed to prove by a preponderance of the evidence that trial counsel failed to properly, adequately, and fully argue the issue of whether the Appellant's drug charges should be severed;
2. The Applicant failed to prove by a preponderance of the evidence that trial counsel was deficient in failing to properly, adequately, and fully argue the issue and demand on the record that the trial judge clearly define what constituted a deadly weapon;
3. The Applicant failed to prove by a preponderance of the evidence that trial counsel was deficient in waiving the arraignment;
4. The Applicant failed to prove by a preponderance of the evidence that trial counsel was deficient in failing to call the Applicant's father, Paul Edward Mahaffey, to the stand;



10/2 PM 5

5. The Applicant failed to prove by a preponderance of the evidence that trial counsel failed to introduce evidence and/or testimony in regard to the flat tire on Applicant's vehicle; and
6. The Applicant failed to prove by a preponderance of the evidence that trial counsel was deficient in failing to bring a Motion to Dismiss or to bring to trial Court's attention that there was no evidence and/or proof presented that the Appellant stole the jewelry and/or two hundred dollars.

AND IT IS SO ORDERED.


ROBIN B. STILWELL

August 22, 2017
Greenville, South Carolina

CLERK OF
SPRINGFIELD COUNTY
2017 SEP 13 AM 11:50
M. HOPE BLACKLEY

2017

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court

August 31, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Paul Maroff
Applicant

CASE # *2015CPD-4267*

Applicant

CERTIFICATE OF SERVICE

vs
State
Respondent

I certify that, on this date, I served a copy of the *Order Concerning Motion to Alter or Amend*
In this action dated *8-29* *2017* on *Debra Purdum & Kelle*
59e
8-31-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Valerie Giovanoli
H. Michael Spivey

CLERK OF COURT
SPARTANBURG COUNTY
2017 SEP 13 AM 11:50
M. HOPE BLACKLEY

8-31-17
(Date)

Carrie Self
(Signature)

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court

Gail Moffitt
Assistant Clerk of Court

CLERK OF COURT
SPARTANBURG COUNTY
2017 SEP 13 AM 11:50
M. HOPE BLACKLEY

Affidavit

This is an affidavit to attest the Order Denying Motion to Alter or Amend Order Pursuant to Rule 59)e.

In case Christopher Paul Mahaffey vs. State. The documents were received On August 31, 2017. At the time the documents were received And were mistakenly not clocked. It was brought to the attention of Affiant on September 13, 2017 and the documents were Then clocked. The correction has been made by Connie Seay on September 13, 2017. "See affidavit" is handwritten under the Clock date, as suggested by Court Administration pursuant to Rule 60 (a) Clerical Mistakes.

Sworn before me this

13 day of September, 2017

Maile Y. Hartung
Notary Public of South Carolina

Connie Seay
Affiant

My Commission Expires 4-14-2021

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

CHRISTOPHER PAUL MAHAFFEY, # 338083

Applicant,

v.

STATE OF SOUTH CAROLINA,

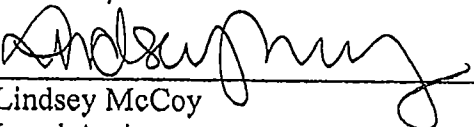
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Order Denying Motion to Alter or Amend Order Pursuant to Rule 59(e)** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**H. Michael Spivey, Esquire
The Spivey Law Group, LLC
Post Office Box 809
Mauldin, South Carolina 29662**

This 13th day of September, 2017.



Lindsey McCoy
Legal Assistant

SWORN to before me this 13th day of September, 2017.



Notary Public for South Carolina.

My Commission Expires: 5/20/2025

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

THE HONORABLE ROBIN B. STILWELL
CIRCUIT COURT JUDGE

Case No: 2015-CP-42-4267

The State of South Carolina.....Respondent

v.

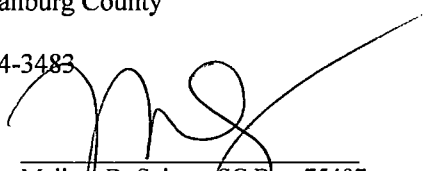
Christopher Paul Mahaffey, #338083.....Appellant.

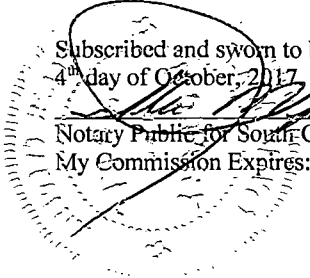
PROOF OF DELIVERY

PERSONALLY appeared before me, Melissa D. Spivey of The Spivey Law Group, LLC, who being duly sworn deposes and states that she did serve one (1) copy of the Notice of Appeal and Proof of Service upon the Supreme Court, Proof of Service on M. Hope Blackley, Clerk of Court for Spartanburg County, Proof of Service on Valerie Giovanoli, Assistant Attorney General for the South Carolina Attorney General's Office, Proof of Service on the South Carolina Commission on Indigent Defense, Appellate Division, Paula Murdoch, Order of Dismissal of Prejudice and Order Denying Motion to Alter or Amend Order Pursuant to Rule 59(e) and Letter to Margaret A. Woods, Court Reporter requesting transcript, upon the below listed individual on the 4th day of October, 2017, by first class mail, postage prepaid to the following address:

M. Hope Blackley
Clerk of Court for Spartanburg County
P.O. Box 3483
Spartanburg, S.C. 29304-3483

October 4, 2017
Greenville, South Carolina.


Melissa D. Spivey, SC Bar: 75407
Attorney for Appellant
The Spivey Law Group, LLC
Post Office Box 809
Mauldin, S.C. 29662
Telephone: (864) 288-6503
Facsimile: (864) 288-0351
hmichaelspivey@bellsouth.net

Subscribed and sworn to before me this
4th day of October, 2017

Notary Public for South Carolina
My Commission Expires: 2-25-2020

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

THE HONORABLE ROBIN B. STILWELL
CIRCUIT COURT JUDGE

Case No: 2015-CP-42-4267

The State of South Carolina.....Respondent

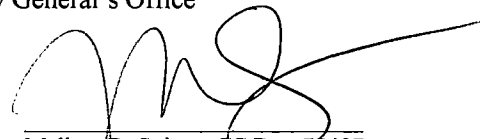
v.

Christopher Paul Mahaffey, #338083.....Appellant.

PROOF OF DELIVERY

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Valerie Giovanoli
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211



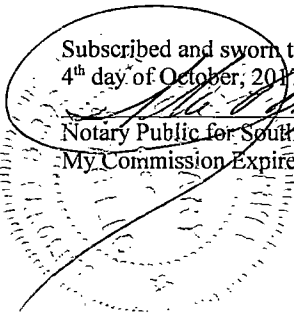
Melissa D. Spivey, SC Bar: 75407
Attorney for Appellant
The Spivey Law Group, LLC
Post Office Box 809
Mauldin, S.C. 29662
Telephone: (864) 288-6503
Facsimile: (864) 288-0351
hmichaelspivey@bellsouth.net

October 4, 2017
Greenville, South Carolina.

Subscribed and sworn to before me this
4th day of October, 2017

Notary Public for South Carolina

My Commission Expires: 2-25-2020



THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

THE HONORABLE ROBIN B. STILWELL
CIRCUIT COURT JUDGE

Case No: 2015-CP-42-4267

The State of South Carolina.....Respondent

v.

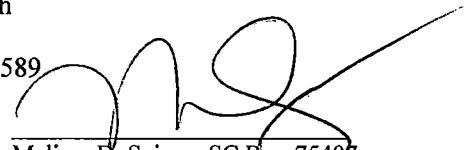
Christopher Paul Mahaffey, #338083.....Appellant.

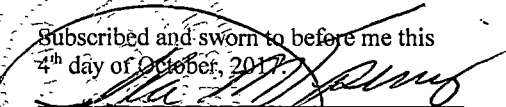
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South Carolina Commission on Indigent Defense, Appellate Division
Attention: Paula Murdoch
P.O. Box 11589
Columbia, S.C. 29201-1589

October 4, 2017
Greenville, South Carolina.


Melissa D. Spivey, SC Bar: 75407
Attorney for Appellant
The Spivey Law Group, LLC
Post Office Box 809
Mauldin, S.C. 29662
Telephone: (864) 288-6503
Facsimile: (864) 288-0351
hmichaelspivey@bellsouth.net

Subscribed and sworn to before me this
4th day of October, 2017.

Notary Public for South Carolina
My Commission Expires: 7-25-2020

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

THE HONORABLE ROBIN B. STILWELL
CIRCUIT COURT JUDGE

Case No: 2015-CP-42-4267

The State of South Carolina.....Respondent

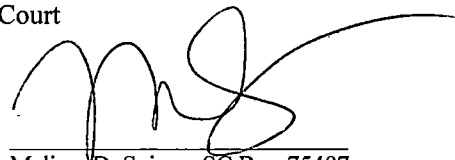
v.

Christopher Paul Mahaffey, #338083.....Appellant.

PROOF OF DELIVERY

PERSONALLY appeared before me Melissa D. Spivey of The Spivey Law Group, LLC, who being duly sworn deposes and states that she did serve (1) original and six (6) copies of the Notice of Appeal and the Proof of Service upon the Supreme Court, Proof of Service on M. Hope Blackley, Clerk of Court for Spartanburg County, Proof of Service on Valerie Giovanoli, Assistant Attorney General for the South Carolina Attorney General's Office, Proof of Service on the South Carolina Commission on Indigent Defense, Appellate Division, Paula Murdoch, Order of Dismissal of Prejudice and Order Denying Motion to Alter or Amend Order Pursuant to Rule 59(e) and Letter to Margaret A. Woods, Court Reporter requesting transcript, on the below listed individual on the 4th day of October, 2017, by Federal Express Overnight prepaid to the following address:

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, S.C. 29211



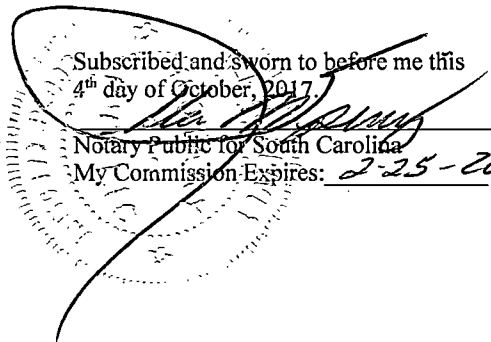
Melissa D. Spivey, SC Bar: 75407
Attorney for Appellant
The Spivey Law Group, LLC
Post Office Box 809
Mauldin, S.C. 29662
Telephone: (864) 288-6503
Facsimile: (864) 288-0351
hmichaelspivey@bellsouth.net

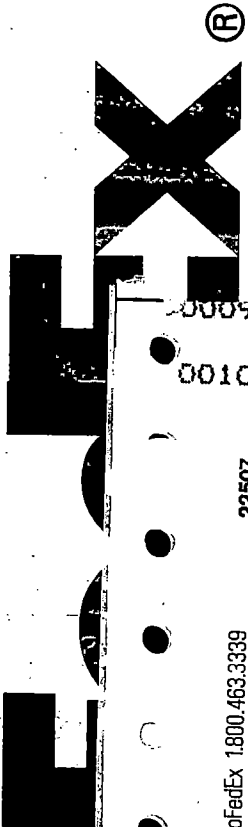
October 4, 2017
Greenville, South Carolina.

Subscribed and sworn to before me this
4th day of October, 2017.

Notary Public for South Carolina

My Commission Expires: 2-25-2020





Express

RT 104
FZ 105
15:00
5380
10.05

00096
00100

FedEx Package
Express US Airbill

FedEx Tracking Number 8120 1013 5380

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fedex.com 1.800.GoFedEx 1.800.463.3339

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1 From
Date 10-4-17
Sender's Name Melissa J. Spivey Phone 804 266 6503
Company H MICHAEL SPIVEY
Address 224 ADLEY WAY
City GREENVILLE State SC ZIP 29607-4511

2 Your Internal Billing Reference
Miss McHaffey vs. State of SC

3 To
Recipient's Name Daniel E. Shavano, Clerk of Court
Company Supreme Court Building
Address 1331 CORVAIS Street
City Greenville State SC ZIP 29611

Dept./Floor/Suite/Room
Dept./Floor/Suite/Room

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REQUIRED. Available ONLY for
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Recipient's Copy

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<input type="checkbox"/> FedEx First Overnight Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless Saturday Delivery is selected.	<input type="checkbox"/> FedEx 2Day A.M. Second business morning.* Saturday Delivery NOT available.
<input type="checkbox"/> FedEx Priority Overnight Next business morning.* Friday shipments will be delivered on Monday unless Saturday Delivery is selected.	<input type="checkbox"/> FedEx 2Day Second business afternoon.* Thursday shipments will be delivered on Monday unless Saturday Delivery is selected.
<input checked="" type="checkbox"/> FedEx Standard Overnight Next business afternoon.* Saturday Delivery NOT available.	<input type="checkbox"/> FedEx Express Saver Third business day.* Saturday Delivery NOT available.

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6 Special Handling and Delivery Signature Options Fees may apply. See the FedEx Service Guide.

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