



 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

APR 23 2012

\_\_\_\_\_  
Certiorari to Kershaw County  
L. Casey Manning, Circuit Court Judge  
\_\_\_\_\_

S.C. Supreme Court

JOHNNY A. GAINEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
PETITION FOR EXTENSION TO FILE  
PETITION FOR WRIT OF CERTIORARI  
AND ACCOMPANYING APPENDIX  
\_\_\_\_\_

The undersigned counsel respectfully requests a **final one day extension, until April 24, 2012**, in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The petition for writ of certiorari and accompanying appendix in this case are due to be served and filed today.
2. Counsel is filing the return to petition for writ of certiorari in Randy Lee Hill v. State with this Court today, April 23, 2012. Counsel filed the brief of petitioner in the death penalty case of Brad Keith Sigmon v. State with this Court on April 20, 2012. Counsel is on the public defender's conference planning committee and a meeting was called Wednesday, April

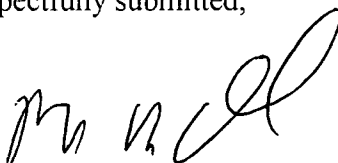
18, 2012, that was unplanned that counsel had to attend. Counsel filed the initial brief of appellant and designation of matter in State v. David Lewis with this Court, April 13, 2012. Counsel filed the initial brief of respondent in State v. Robert Jolly #2 with the Court of Appeals on April 6, 2012. Counsel filed the brief of petition in State v. David M. Rocquemore with this Court on April 4, 2012. Counsel had an oral argument on March 29, 2012, in State v. Randy Vickery before the Court of Appeals. Counsel filed the initial reply brief in the death penalty case of State v. Stephen Christopher Stanko with this Court on March 26, 2012. Counsel filed the initial brief of respondent and designation of matter in State v. Robert Jolly #2 with the Court of Appeals on Friday, March 23, 2012. Counsel is currently working on the death penalty case of Richard Bernard Moore v. State with co-counsel Susan B. Hackett. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

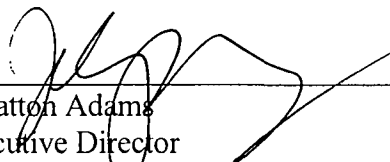
4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a **final one day extension, until April 24, 2012**. Counsel respectfully requests that the time limits for filing the return to petition for writ of certiorari and accompanying appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,



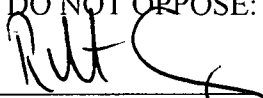
Robert M. Dudek  
Chief Appellate Defender



T. Patton Adams  
Executive Director  
J. Hugh Ryan, III  
General Counsel

April 23, 2012

I DO NOT OPPOSE:



*for* Brian Petrano, Esquire



 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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MAR 21 2012

S.C. Supreme Court

\_\_\_\_\_  
Certiorari to Kershaw County

L. Casey Manning, Circuit Court Judge  
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JOHNNY A. GAINEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

(3)

\_\_\_\_\_  
PETITION FOR EXTENSION TO FILE  
PETITION FOR WRIT OF CERTIORARI  
AND ACCOMPANYING APPENDIX  
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The undersigned counsel respectfully requests a **final thirty day extension, until April 23, 2012**, in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The petition for writ of certiorari and accompanying appendix in this case are due to be served and filed Friday, March 23, 2012.
2. Counsel plans to file the initial brief of appellant and designation of matter in State v. Matthew Hinton with the Court of Appeals on Friday, March 23, 2012. Counsel also plans to file the initial brief of respondent and designation of matter in State v. Robert Jolly #2 with the Court of Appeals on Friday, March 23, 2012. Counsel filed the petition for writ of

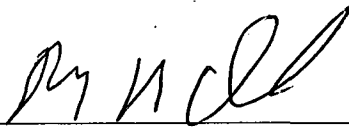
certiorari to the Court of Appeals and accompanying appendix in State v. Terrell McCoy on March 16, 2012. Counsel had an oral argument in State v. Christopher Heller before the Court of Appeals on March 13, 2012. Counsel will file the petition for rehearing in State v. Garvin Duvall with the Court of Appeals on March 15, 2012. Counsel also plans to file the initial brief of appellant and designation of matter in State v. Donald Petty with the Court of Appeals on March 15, 2012. Counsel and co-counsel are also having a further meeting on State v. Richard Gagnon on March 15, 2012. Counsel filed the return to the petition for writ of certiorari in Michael A. Hough v. State with this Court on March 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Charles Berlin Pennell with the Court of Appeals on March 5, 2012. Counsel also filed the brief of petitioner in State v. Miama Kromah with this Court on March 5, 2012. Counsel is currently working on the death penalty case of Richard Bernard Moore v. State with co-counsel Susan B. Hackett. Counsel filed the five issue death penalty brief in the case of State v. Steven Barnes on February 22, 2012, with this Court. Counsel argued part of the case of State v. Kathy Salley along with Matt Bogan of the Nelson-Mullins firm before this Court on February 22, 2012 after the Court of Appeals sought certification. On February 23, 2012, counsel argued part of the case of State v. Chris Anthony Liverman before this Court, also along with Matt Bogan. Counsel is reading the state's brief in the death penalty case of State v. Steven Stanko where he anticipates filing a reply brief. Counsel also is working on the brief of petitioner with co-counsel in the death penalty case of State v. Brad Sigmon. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

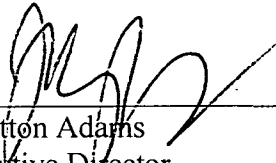
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Respectfully submitted,



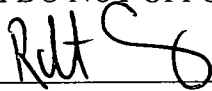
Robert M. Dudek  
Chief Appellate Defender



T. Patton Adams  
Executive Director  
J. Hugh Ryan, III  
General Counsel

March 21, 2012

I DO NOT OPPOSE:



*For* Brian Petrano, Esquire



ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Kershaw County  
L. Casey Manning, Circuit Court Judge  
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RECEIVED  
FEB 22 2012  
S.C. Supreme Court

JOHNNY A. GAINEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

(2)

\_\_\_\_\_  
PETITION FOR EXTENSION TO FILE  
PETITION FOR WRIT OF CERTIORARI  
AND ACCOMPANYING APPENDIX  
\_\_\_\_\_

The undersigned counsel respectfully requests a thirty day extension in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

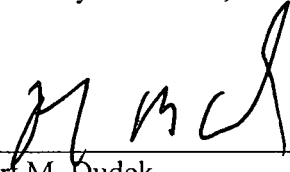
1. The petition for writ of certiorari and accompanying appendix in this case are due to be served and filed today.
2. Counsel will argue part of the case of State v. Kathy Salley along with Matt Bogan Nelson-Mullins firm before this Court today, February 22, 2012 after the Court of Appeals sought certification. Tomorrow, February 23, 2012, counsel will argue part of the case

of State v. Chris Anthony Liverman before this Court, also along with Matt Bogan. Counsel filed a petition of for writ of certiorari with the United States Supreme Court in the death penalty case State v. William O. Dickerson on February 15, 2012. Counsel argued State v. Gavin Duvell before the Court of Appeals on February 16, 2012. Counsel argued part of, along with Reid Sherard of the Nelson-Mullins firm, the murder case of State v. Richard Bill Niles, Jr. with the Court of Appeals on Tuesday, February 14, 2012. Counsel is also preparing his presentation for the Best Practices Seminar sponsored by the South Carolina Commission on Indigent Defense and the Charleston Law School to be given in Charleston on February 24, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Jason Will Williams with the Court of Appeals on February 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Stephania Murray with the Court of Appeals on February 2, 2012. Counsel is working on the five issue death penalty brief in the case of State v. Steven Barnes wherein that brief will be filed today, February 22, 2012, with this Court. Counsel is also planning to file the petition for rehearing in State v. Rodney Galimore with the Court of Appeals on February 24, 2012. Counsel also is reading the state's brief in the death penalty case of State v. Steven Stanko where he anticipates filing a reply brief. Moreover, two other major cases have just arrived in this office that require attention: Marion Lindsey v. State, a death penalty PCR case, and Steven Beckham v. State, which originally was a death penalty case at the trial level. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and accompanying appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

February 22, 2012

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Kershaw County  
L. Casey Manning, Circuit Court Judge

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JOHNNY A. GAINNEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

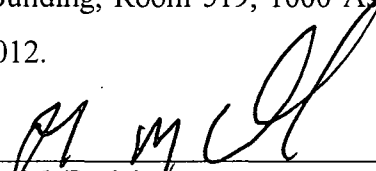
RESPONDENT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the petition for extension to file petition for writ of certiorari and accompanying appendix in the above referenced case has been served upon Brian Petrano, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 22nd day of February, 2012.



---

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 22nd day of February, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: May 16, 2021.





# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

 ORIGINAL

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

January 23, 2012

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

JAN 23 2012

S.C. Supreme Court

Re: Johnny A. Gainey v. State

Dear Mr. Shearouse:

The petition for writ of certiorari and accompanying appendix is due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing Brian Petrano, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Robert M. Dudek  
Chief Appellate Defender

RMD/cms

cc: Brian Petrano, Esquire

LAW OFFICE OF



PCR

**TARA DAWN SHURLING, PA**

Attorneys and Counselors at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

(803) 738-8622

Fax (803) 738-1600

E-Mail: [tdslaw@shurlinglaw.com](mailto:tdslaw@shurlinglaw.com)

Christina Dixon Parnall

Associate Attorney

October 18, 2011

The Honorable Daniel E. Shearouse  
South Carolina Supreme Court Clerk  
Post Office Box 11330  
Columbia, South Carolina 29211-1330

Re: Johnny A. Gainey, 284181 v. State of South Carolina; 04-CP-28-377.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal on behalf of the above-captioned Post-Conviction Relief client. I would appreciate your returning two (2) clocked copies to me in the envelope provided. Inasmuch as I was court-appointed in this matter, I will now be turning this file over to the South Carolina Commission on Indigent Defense, Office of Appellate Defense for perfection of this appeal. With my thanks for your assistance in this matter, as always, I remain,

Sincerely yours,

A handwritten signature in cursive script that reads "Tara D. Shurling".

Tara Dawn Shurling  
Attorney and Counselor at Law

TDS/sm

Enclosures

cc: Brian T. Petrano, Assistant Attorney General  
Sharon Graham, South Carolina Office of Appellate Defense

**RECEIVED**

OCT 19 2011

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas  
L. Casey Manning, Presiding Judge

---

04-CP-28-377

---

JOHNNY A. GAINY, 284181,

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

---

NOTICE OF APPEAL

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**NOW COMES** the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal denying his Post-Conviction Relief filed January 25, 2010, and the Order Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e) SCRPC which was filed with the Kershaw County Clerk of Court on October 14, 2011.



Tara Dawn Shurling  
Attorney and Counselor at Law

3614 Landmark Drive, Suite D  
Columbia, South Carolina 29204  
(803)738-8622  
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 18<sup>th</sup> day of October, 2011.

Other Counsel of Record:  
Brian T. Petrano, Assistant Attorney General  
P. O. Box 11549  
Columbia, SC 29211  
Attorney for Respondent  
(803) 734-3737

**RECEIVED**

OCT 19 2011

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas  
L. Casey Manning, Presiding Judge

---

04-CP-28-377

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JOHNNY A. GAINEY, 284181,

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

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CERTIFICATE OF SERVICE

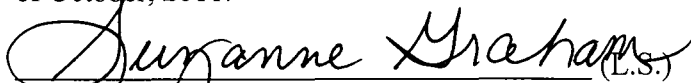
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The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Brian T. Petrano, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 18<sup>th</sup> day of October, 2011.



Sharon McCollister  
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 18<sup>th</sup> day  
of October, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 3/12/2013

STATE OF SOUTH CAROLINA )  
 COUNTY OF KERSHAW )  
 )  
 Johnny A. Gainey, #284181 )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

2004-CP-28-0377

ORDER

FILED IN AM 11:31  
 CLERK OF COURT  
 KERSHAW COUNTY, S.C.

This matter comes before the Court by way of the Applicant's motion to alter or amend pursuant to Rule 59, SCRCP. This matter originally came before the Court by way an Application for post-conviction relief (PCR) filed May 21, 2004. A hearing was held at the Richland County Courthouse on December 5, 2006. The Applicant was present and represented by Tara Dawn Shurling, Esquire. The Respondent was represented by Assistant Attorney General Robert L. Brown. By Order dated January 25, 2010, this Court dismissed the Application.

This Court had the opportunity to to view the witnesses and their testimony at the PCR hearing and to pass upon their credibility. This Court finds that the testimony of Stephen Taylor, Vanessa Taylor, Ray Jordan, Cecil Gainey, and the Applicant himself, was not credible, and that the testimony of trial counsel was credible. This Court finds that trial counsels representation was within the spectrum of reasonableness in not presenting witnesses to the "peacefulness" of the Applicant. This Court pointed out at the hearing that the central issue in the case was, why had Applicant fired 14 shots at the victim, 5 of those shots being fired from outside the home, and hit the victim with 7 of those shots from a considerable distance, not a question of the Applicant's character. (Trans. pp. 42-43). This Court is not persuaded that testimony that the Applicant was "peaceful" would have made a difference at trial. Further, Applicant's trial

ATTEST True, Correctly Certified  
 Clerk of Court  
 Kershaw County

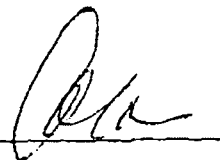
counsel testified that the sentencing court had indicated to him that the sentence would not have been different had Applicant presented more witnesses as to his physical condition or temperamental disposition. (Trans. p. 13, lines 1-5). Therefore, the Applicant failed the second prong of the Strickland test in that he was able to demonstrate no prejudice from trial counsel's failure to call witnesses to testify to the "peacefulness" of the Applicant.

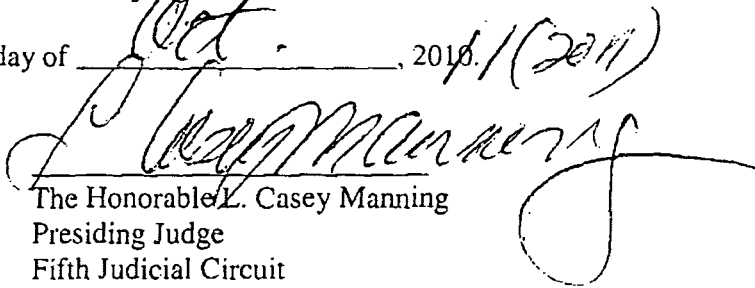
Based upon careful reconsideration of all of the evidence in this case and upon full consideration of the Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment. This Court further finds that oral argument would not aid in the reconsideration of the original judgment. The previous order fully comports with the requirements of Rule 52(a), SCRPC.

IT IS THEREFORE ORDERED:

1. That the Applicant's motion to alter or amend judgment is denied and dismissed.

AND IT IS SO ORDERED this 10 day of Oct., 2018 (2011)

 South Carolina

  
The Honorable L. Casey Manning  
Presiding Judge  
Fifth Judicial Circuit



County Clerk of Court. The Applicant was indicted at the March 2002 term of the Richland County Grand Jury for murder (02-GS-28-00432). On May 15, 2002, he underwent trial by jury and was convicted of voluntary manslaughter. He was represented by John Wells, Esquire. He was sentenced by the Honorable J. Ernest Kinard to confinement for a period of fifteen years. A timely notice of intent to appeal was filed and perfected on the Applicant's behalf. In an unpublished opinion, 04-UP-146, the Court of Appeals on March 1, 2004, affirmed the conviction.

In his current application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. The trial court lacked subject matter jurisdiction to enter judgment against the Applicant where his indictment for murder was fatally defective in that it failed to state the time and place of death of victim;
2. Trial counsel was ineffective for failing to challenge the sufficiency of the indictment against him for murder;
3. Trial counsel was ineffective for not impressing upon the Court that the deceased victim was a drug addict and alcoholic with a history of criminal activity and violence;
4. Trial counsel was ineffective for not bringing out Applicant's limited physical and mental capacities;
5. Trial counsel was ineffective for failing to obtain a forensic pathologist to review the victim's autopsy to determine whether the physical evidence supported the State's theory of the case; and
6. Trial counsel was ineffective in that he failed to adequately prepare and submit the Applicant's self-defense claim.

#### **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).

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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (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.

As to the allegation that the trial court lacked subject matter jurisdiction to enter judgment against the Applicant where his indictment for murder was fatally defective in that it failed to state the time and place of death of victim, this Court finds this claim is without merit. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); See also U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45, -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S.C. at 101, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside.

Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

As to the allegation that trial counsel was ineffective for failing to challenge the sufficiency of the indictment against him for murder, this Court finds this claim is without merit. The South Carolina Supreme Court has held that a murder indictment is sufficient "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and if an acquittal or a conviction thereon may be pleaded as a bar to any subsequent prosecution." Joseph v. State, 351 S.C. 551, 561, 571 S.E.2d 280, 285 (2002) (citing State v. Owens, 346 S.C. 637, 648, 552 S.E.2d 745, 751 (2001)). Additionally, a review of the indictment shows that the indictment states, "[t]hat Johnny A. Gainey did in Kershaw County on or about October 20, 2001, feloniously, willfully and with malice aforethought, kill one Stephen R. Price by means of shooting the victim several times with a rifle and that the said victim died as a proximate result thereof." A reading of the body indicates that Johnny A. Gainey killed Stephen R. Price in Kershaw County on or about October 20, 2001. See Winns v. State, 363 S.C. 414, 611 S.E.2d 901 (2005). Had Mr. Price died on a date other than the one in question or in some other location than Kershaw County, the indictment may be flawed. However, that is not the case here. The indictment is valid and was sufficient to place Applicant on notice. There was no question what the charge was and therefore Applicant has failed to meet his burden of proof in establishing that counsel was ineffective. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for not impressing upon the Court that the deceased victim was a drug addict and alcoholic with a history of criminal activity and violence, this Court finds this claim is without merit. Rule 404(a)(2) of the South Carolina Rules

of Evidence allows, “[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.” Additionally, our Supreme Court has held that a defendant has the right to introduce evidence attacking the reputation of a victim for violence; but it cannot be done by showing specific instances of violence. State v. Boyd, 126 S.C. 300, 119 S.E. 839 (1923). Trial counsel testified that he was familiar with the victim’s reputation in the community but did not believe he could prove anything other than victim’s possible alcohol and drug abuse. Counsel testified he was not aware of any criminal history that could have been presented. Additionally, the Applicant presented only one witness, Raymond Jordan, who stated he could have testified as to the victim’s character. A review of the record shows that trial counsel presented testimony from Laurie Shacker of the South Carolina Law Enforcement Division who performed toxicology tests on the victim. Ms. Shacker testified that victim’s blood alcohol content was well beyond the legal limit for driving and his blood showed cocaine usage within six hours prior to the incident. Based on the presentation of this testimony, counsel clearly was able to establish that the victim was intoxicated which is what character trial counsel testified he was familiar with. Based on the testimony presented at the post-conviction relief hearing and the evidence presented at trial, this Court finds that Applicant has failed to meet his burden of proof in establishing ineffective assistance of counsel. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for not bringing out Applicant’s limited physical and mental capacities, this Court finds that this claim is without merit. A review of the record shows that trial counsel presented the testimony from Dr. Alice Brooks who

testified that she treated Applicant in August and September of 2000. Dr. Brooks testified that Applicant had suffered from an acute stroke. She testified that his symptoms were blurred vision and that she had recommended vocational rehabilitation based on Applicant's inability to drive because of his condition. Additionally, trial counsel put the best witness on the stand to demonstrate Applicant's limited physical and mental condition—the Applicant himself. Applicant testified at the trial that he had three or four mini strokes and that he drew disability because of his inability to work. There is no indication that Applicant was mentally ill or otherwise incompetent to stand trial or be convicted for this crime. Additionally, the question in this trial was not whether Applicant was unable to defend himself at all but rather how much force was necessary. Additionally it was important for the jury to see the amount of shots fired and the location that the shots came from. The evidence at trial showed that the victim was by his truck in the driveway. Applicant fired approximately fourteen shots at the victim of which nine came from inside the home and several more were fired outside the home. In support of his position, Applicant presented testimony from several witnesses who could have attested to Applicant's frail nature and disability. This Court is not persuaded that this testimony would have made a difference in the trial. The testimony presented was merely cumulative to testimony presented at the trial by Dr. Brooks and by the Applicant. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for failing to obtain a forensic pathologist to review the victim's autopsy to determining whether the physical evidence supported the State's theory of the case, this Court finds that this claim is without merit. Trial counsel testified that he retained the services of and subpoenaed Dr. Yakoub. Counsel testified that he visited Dr. Yakoub in Newberry to discuss the scientific findings. Counsel testified that

Dr. Yakoub was seated at counsel table and able to tell counsel what questions to ask the State's pathologist. Counsel testified that he chose not to seek testimony from Dr. Yakoub because Dr. Yakoub would have had to agree with much of the State's findings. Additionally, Applicant failed to present testimony from an independent pathologist to show that counsel was somehow deficient in failing to present testimony from a pathologist. Our Appellate Court's have repeatedly held that prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Without testimony from a pathologist, this Court cannot speculate that the independent testimony would have had any benefit to the Applicant's case. It is certainly plausible that the testimony could have damaged the Applicant's case by solidifying the State's presentation of evidence. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective in that he failed to adequately prepare and submit the Applicant's self-defense claim, this Court finds this claim is without merit. Counsel demonstrated at the post-conviction relief hearing that he understood that self-defense was the defense and of the utmost importance in this case. It is clear from the evidence presented at the trial through witnesses and opening and closing arguments that self-defense was

the defense presented at trial. As counsel testified, the important issue at trial was at what point Applicant should have quit shooting. Counsel testified he was aware that Applicant had the right to continue shooting until he no longer felt in danger. However, it is clear that shots were fired from two locations. Additionally, the pathologist testified that the seven shots which hit the victim were fired from some distance. There has been no evidence presented to show that counsel was anything less than adequately prepared and he rendered service beyond the professional norms required of a criminal defense attorney. Accordingly, this allegation is denied and dismissed. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

### CONCLUSION

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

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

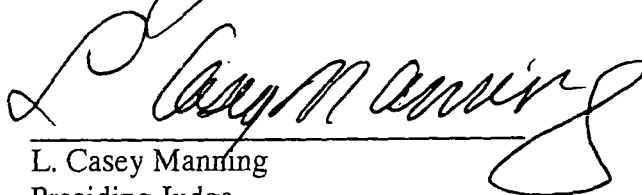
intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 13 day of Jan., <sup>2010</sup>2007. 2010



L. Casey Manning  
Presiding Judge  
Fifth Judicial Circuit

Cola, South Carolina.

LAW OFFICE OF



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Christina Dixon Parnall

Associate Attorney

October 18, 2011

Brian T. Petrano  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

RE: Johnny A. Gainey, 284181 v. State of South Carolina; 04-CP-28-377.

Dear Mr. Petrano:

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. I was court-appointed in this matter and will forward the file to the South Carolina Office of Appellate Defense in the next few days. Therefore, please direct any further questions to that office after this date. Thank you. I remain,

Sincerely yours,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is written in a cursive, flowing style.

Tara Dawn Shurling  
Attorney and Counselor at Law

TDS/sm

Enclosure

cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina

FIRST CLASS



COLUMBIA SC 29202  
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RE: Johnny A. Gainey