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August 29, 2013

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

RE: Barry Allan Evans, #331032 v. The State of South Carolina
Case No. 2012-CP-04-2912
ENE File No. CR12-2280

Dear Mr. Shearhouse:

Enclosed for filing is a notice of appeal in the above case. Also are enclosed the following:

(1) Proof of service of the notice of appeal on the respondent.
(2) A copy of the order which is to be challenged on appeal.
(3) This appeal is being filed with the Supreme Court because the Notice of Appeal is from an Order of Dismissal from Petitioner's Application for Post Conviction Relief pursuant to Rule 243, SCACR.

With kindest regards, I am

William Norman Epps III
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2012-CP-04-2912

Barry Allan Evans, # 331032.....Petitioner,

v.

The State of South Carolina.....Respondent.

NOTICE OF APPEAL

The Petitioner, Barry Allan Evans, pursuant to Rule 243, SCACR, hereby appeals the order of the Honorable R. Lawton McIntosh dated July 23, 2013 which dismissed Petitioner's application for post-conviction relief (PCR) filed September 5, 2012. Petitioner received written notice of entry of this order on August 1, 2013.

Respectfully submitted,

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August 29, 2013

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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
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APPEAL FROM ANDERSON COUNTY
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The State of South Carolina.....Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 29, 2013 addressed to its attorney of record, J. Walter Whitmire, Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549.

August 29, 2013

W. Norman Epps III
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(864) 224-2111
Attorney for Appellant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
	)	**Case No. 2012-CP-04-2912**
Barry Allan Evans, S.C.D.C. No. 331032,	)	
	)	
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 5, 2012. The Respondent made its return on January 25, 2013. An evidentiary hearing into the matter was convened on May 8, 2013 at the Anderson County Courthouse. The Applicant was present at the hearing and represented by W. Norman Epps, III, Esquire. J. Walter Whitmire, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Fletcher N. Smith, Esquire. The Court had before it the trial transcript, the Anderson County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application and subsequent amendment, the return, the appellate records, and Court's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Anderson County Clerk of Court. The Applicant was indicted at the November 2007 term of the Anderson County Grand Jury for assault with intent to kill

(AWIK) (2007-GS-23-3493) possession of a weapon during commission of a violent crime (2007-GS-04-3496) and at the July 2008 term for assault and battery with intent to kill (ABWIK) (2008-GS-04-1541). He was represented by Fletcher N. Smith, Esquire.

After the State called the case to trial, the Applicant was found not guilty of AWIK and guilty of the other two charges. On October 8, 2008, the Applicant was sentenced by the Honorable J.C. Nicholson, Jr. to concurrent terms of five (5) years for possession of a weapon during commission of a violent crime and twenty (20) years suspended on the service of fourteen (14) years and five (5) years probation for ABWIK.

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Evans, Op. No. 2011-UP-147 (S.C. Ct. App. filed April 11, 2011). The South Carolina Supreme Court denied the subsequent petition for writ of certiorari by order dated July 13, 2012.

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

1. Ineffective assistance of counsel:
   a. "Failed to research case properly."
   b. "Failed to present agreement which was written from detective division."
2. "Judical error":
   a. "Judge failed to strike 911 tapes."
   b. "Judge failed to strike pictures."
   c. "Judge failed to strike pictures due to the fact witnesses were present, as same as 911 tapes, this inflamed the jury.

In a document captioned "Amendments to Application for Post-Conviction Relief" and dated February 25, 2013, the Applicant raised the following allegations:

1. Ineffective assistance of trial counsel:

a. "[F]ailed to research case properly and was ineffective in telling the jury during opening statements that they were going to prove certain aspects of Applicant's defense, such as that false charges were brought against the applicant and that the defense would prove that Applicant acted in self-defense."
b. "[F]ailed to object to the hearsay statements of Linda Evans 'He's killing him' on pages 58, 73, 75 and 81 of the transcript."
c. Failed "to request a competency evaluation of Linda Evans who was under the State's subpoena power or otherwise call her as a witness."
d. Failed "to object to the admittance of two (2) 911 tapes on the grounds of improper foundation and authentication."
e. Failed "to object to Billy Craft's testimony that Applicant previously beat him with an iron rod and jabbed it in him on page 120 of the transcript.
f. Failed "to object to Deputy Holbrooks hearsay testimony that Applicant ran into the backyard and jumped the fence on page 156."
g. Failed "to object to charge malice may be an afterthought on page 241 of the transcript, which was incorrect and confusing to jury."
h. Failed "to object to malice may be inferred from the use of a deadly weapon and general intent charge on page 242 of the transcript."
i. Failed "to object that ABHAN could give rise to malice charge and failed to object to the recharge of ABWIK on page 257 of the transcript."
j. Failed "to object to mutual combat and self defense charge pursuant to *State v. Taylor*, 589 SE 2d 1 (2003)."
k. Failed "to object to the ABWIK or ABHAN jury charge."
l. Failed "to argue that Applicant receive credit for time served on his sentence."

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 and arguments presented at the PCR hearing along with briefs related to inference of malice jury charge at issue. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by

S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The 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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

Initially, this Court notes trial counsel testified he was retained to handle the charges in this case. Trial counsel testified he received discovery materials and was aware of the facts and circumstances of the case. Trial counsel testified the Applicant would sometimes come into his office to discuss the charges and defense case but would also often miss appointments. Trial counsel testified he investigated any witnesses the Applicant mentioned to him. Trial counsel testified he discussed strategy and defenses with the Applicant and that the defense strategy was to argue self-defense. Trial counsel testified he spoke to potential defense witnesses. This Court finds trial counsel's testimony is credible. This Court further finds trial counsel adequately

conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

A.

The Applicant stated trial counsel should not have told the jury in his opening statement that he would prove self-defense (and that the Applicant was not guilty of ABWIK) because it shifted the burden of proof to him.

Trial counsel testified he did not shift the burden of proof in his opening statement. Trial counsel testified he learned the technique he employed in his opening statement in a University of Virginia seminar. Trial counsel testified his opening statement did not prejudice the case because the trial judge instructed the jury that arguments are not evidence and issued the self-defense jury charge.

This Court finds the Applicant failed to meet his burden of proving trial counsel was deficient in his opening statement to the jury. In his opening statement, trial counsel said "[w]e're going to prove to you in this case that [the Applicant] acted in self defense on that day." (App.p.50). This Court finds this statement did not operate to shift the burden of proof to the defense. Rather, this Court notes trial counsel's testimony that he learned this technique at a seminar and finds he employed it as part of his trial strategy in this case. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel); see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) ("Counsel's strategy will be reviewed under an objective standard of reasonableness.") (internal citation omitted). This Court also notes the trial judge properly charged the jury that the burden was on the State to prove the Applicant's guilt and disprove the Applicant's defense of self-

defense. (App.p.233; p.246). As such, this Court finds the Applicant failed to meet his burden of proving either that trial counsel's representation was deficient in his case or that he was prejudiced as a result.

B.

The Applicant stated Linda Evans did not testify for physical and mental reasons but that trial counsel did not ask to have her evaluated. The Applicant stated Linda would have been a helpful witness. The Applicant stated trial counsel should have objected when Kevin and Janice Lavoie testified Linda said, "he's killing him."

Trial counsel testified he spoke to Linda often in preparation for trial. Trial counsel testified they did not want her as a defense witness – because she would have done more to damage the case – and that the Applicant understood this. Trial counsel testified he did not request Linda be evaluated because she was not going to be a defense witness. Trial counsel testified he did not object to testimony that Linda said "he's killing him" because they would have been admitted as excited utterances.

This Court finds the Applicant failed to meet his burden of proving trial counsel improperly handled issues relating to his ex-wife, Linda Evans. Trial counsel testified he met with Linda several times in preparation for trial and that she would not have been a beneficial witness for the defense. Trial counsel testified the Applicant was aware of this. This Court finds trial counsel's testimony is credible, particularly because the evidence and testimony at trial indicated Linda hit the Applicant with her car that night. (App.p.75; p.184; p.196). Further, as the Applicant did not present Linda as a witness at the PCR hearing, this Court finds it cannot speculate as to what she may have testified about at trial. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR

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.") (emphasis in original). Similarly, as the Applicant failed to present documentation or expert testimony about Linda's mental state, this Court cannot speculate as to any potential impact that an evaluation of Linda would have had on the Applicant's trial. See id.; cf. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

This Court finds trial counsel was not deficient in failing to object to Kevin and Janice Lavoie's testimony at trial that Linda said "[h]e's killing him." (App.p.58; p.73; p.75; p.81). Trial counsel testified there was no basis to object to this testimony because they were excited utterances. This Court agrees. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE; State v. Stahlnecker, 386 S.C. 609, 622, 690 S.E.2d 565, 572 (2010). "Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." State v. Stahlnecker, 386 S.C. at 623, 690 S.E.2d at 573 (citation omitted). In the instant case, Linda said "[h]e's killing him." while the Applicant was stabbing the ABWIK victim. As this Court finds Linda's statement clearly satisfied Rule 803(2), SCRE, trial counsel did not err in not objecting to either Kevin or Janice Lavoie's testimony.

C.

The Applicant stated trial counsel should have objected when the 911 tapes were admitted at trial because they were admitted through witnesses and not the 911 operators.

Trial counsel testified that, while he did object to the admission of the first 911 tape, he did not object based on an improper foundation. Trial counsel testified that, while the 911 operator did not testify, the witnesses identified the voices on the 911 tapes.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the admission of the 911 tapes at trial because they were not authenticated by the 911 operators. Trial counsel objected to the admission of the first 911 tape at trial but the objection was overruled. (App.p.59). Janice Lavoie identified her voice as that on the first 911 tape and the tape was admitted into evidence over trial counsel's objection. (App.pp.59-61). Christopher Durham identified his voice as that on the second 911 tape and the tape was admitted into evidence subject to trial counsel's objection. (App.pp.102-03). This Court finds that, as both Janice Lavoie and Christopher Durham identified their voices on the 911 tapes, they were properly authenticated. See Rule 901, SCRE; State v. Aragon, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003). As such, this Court finds there was no reason for trial counsel to have objected because the 911 operators did not testify.

D.

The Applicant stated trial counsel should have objected when Billy Craft testified to a prior beating from the Applicant, who used an iron rod. The Applicant stated trial counsel should have objected when Deputy Craig Holbrooks testified that he jumped the fence because it looked like evidence of flight.

Trial counsel testified he did not object when Deputy Holbrooks testified the Applicant jumped over the fence. Trial counsel stated, however, that it was not evidence of flight because

the Applicant was looking for the police.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to testimony from both Billy Craft and Deputy Holbrooks. At trial, Craft (the ABWIK victim) stated the Applicant had previously "beat me with an iron rod and jabbed it in me." (App.p.120). This Court finds trial counsel did not err in failing to object to this testimony. Craft's testimony did not qualify as a prior bad act because it did not prove the Applicant's guilt for the crime charged. See Rule 403, SCRE. Further, this Court finds Craft's testimony did not prejudice the Applicant, as the State presenting overwhelming evidence of the Applicant's guilt through the testimony of numerous eyewitnesses. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). At trial, Deputy Holbrooks stated he was advised the Applicant was at the incident location and responded to that address. Deputy Holbrooks stated he was told "that [the Applicant] had jumped – ran into the backyard and jumped the fence" and that he found the Applicant in the car with a third party. (App.pp.156-57). The Applicant later testified that he was in the car with his sister when Deputy Holbrooks arrested him and that he was on his way to turn himself in. (App.pp.196-97). This Court finds there was neither error nor prejudice in the admission of this testimony at trial, as the Applicant explained during his trial testimony that he was not evading police but was actually looking for them so that he could turn himself in. See, e.g., State v. Shaw, 258 S.C. 236, 188 S.E.2d 186 (1972) (holding no prejudice resulted from the admission of evidence where defendants admitted their presence at the time of the offense).

E.

The Applicant stated trial counsel should have objected to the portion of the jury charge

that said malice may be an afterthought. The Applicant stated trial counsel should have objected to the portion of the jury charge that said malice could be inferred from the use of a deadly weapon. The Applicant stated trial counsel should have objected to the portion of the jury charge that said assault and battery of a high and aggravated nature (ABHAN) could give rise to malice. The Applicant stated trial counsel should have objected to the portion of the ABWIK jury charge that noted there must be a general intent to injure. The Applicant stated trial counsel should have objected to the trial judge's re-charge to the jury for both ABWIK and ABHAN.

Trial counsel testified the portion of the jury charge that said malice may be an afterthought must be a typographical error both because the trial judge was meticulous in his jury charges and because he would have objected to this. Trial counsel testified he did not believe there was an error in the ABWIK and ABHAN jury charges. Trial counsel testified he did not believe there was a problem with the portion of the jury charge that said ABHAN could give rise to malice – especially since the trial judge later instructed that the presence or absence of malice alone would not determine guilt. (App.p.244). Trial counsel testified he did not believe Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002) was applicable because it noted there was a presumption of malice from the use of a deadly weapon and not an inference of malice. Trial counsel testified he did not object to the "general intent" language in the ABWIK jury charge because it was not an error.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the jury charges involving malice, ABWIK, and ABHAN. The trial judge charged the jury that "malice afterthought may be express or implied." (App.p.241). This Court finds trial counsel did not err in failing to object to this language because it is clearly a typographical error in the transcript and the correct phrase should have read "malice

aforethought." The trial judge charged the jury that "the circumstances that make an assault and battery aggravated can also give rise to any inference of malice." (App.p.244). As our Supreme Court has recognized this concept, there was no reason for trial counsel to have objected to this language. See State v. Fennell, 340 S.C. 266, 275, 531 S.E.2d 512, 517 (2000).

The trial judge charged the jury that malice could be inferred by the use of a deadly weapon. (App.pp.241-42). Based on case law at the time, trial counsel was not deficient. Tate said presumption not inference. On October 12, 2009, the South Carolina Supreme Court announced the jury charge that malice may be inferred from the use of a deadly weapon was improper. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Belcher Court held "[the Court] is firmly convinced that "malice may be inferred by the use of a deadly weapon" is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." Id. at 612, 685 S.E.2d at 810. The Belcher Court held its ruling did not apply retroactively in PCR. Id. at 613, 685 S.E.2d at 810. Because Applicant's trial occurred October 8, 2008 a year prior to the Belcher, Judge Nicholson charge that malice may be inferred with the use of a deadly weapon was valid. (Tr. 242). At the time of trial, an objection to the charge lacked merit. Reasonable assistance of counsel under the prevailing norms does not necessitate clairvoyance. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Additionally, this Court finds the Applicant failed to prove appellate counsel was ineffective. "An appellate attorney cannot be found ineffective for failing to present an issue that has not been preserved for the appellate court's review." Legge v. State, 349 S.C. 222, 224, 562 S.E.2d 618, 620 (2002). The argument was not properly preserved for reasons stated above.

The trial judge charged the jury on the law of both ABWIK and ABHAN. (App.pp.240-45). This Court finds trial counsel did not err in failing to object to these jury instructions

because they were correct and proper charges. See Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) (holding a trial court is required to charge only the current and correct law of South Carolina). After a jury question, the trial judge re-charged the jury on ABWIK, and reasonable doubt. (App.pp.257-60). This Court finds trial counsel did not err in failing to object to the re-charge because it was a correct and proper statement of the law. See id.; see State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996) (holding a trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence).

F.

The Applicant stated trial counsel should have objected to the trial judge charging both mutual combat and self-defense to the jury.

Trial counsel testified he thought mutual combat could conflict with self-defense and did not mention mutual combat in his closing argument. Rather, trial counsel testified he told the jury he had proven the Applicant acted in self-defense.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the jury charges. The trial judge charged the jury on the law of self-defense and mutual combat. (App.pp.246-49). This Court, however, does not find trial counsel was ineffective in failing to object to these charges under State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). These charges were not mutually exclusive because there were two different victims in this case – Kevin Lavoie (the AWIK victim) and Billy Craft (the ABWIK victim). As such, self-defense could apply to one charge and mutual combat could apply to the other. This Court finds the totality of these charges were correct and proper and trial counsel did not err in not objecting to their being charged to the jury. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394

(2001) (holding the law to be charged must be determined from the evidence presented at trial).

G.

The Applicant stated he was in jail for five months before being released on bond but that he has not received this credit for time-served.

This Court finds the Applicant failed to meet his burden of proving he was entitled to five months' worth of credit for time-served. Aside from two matters specifically mentioned in the statute, post-conviction relief is a proper avenue of relief only when the Applicant mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000). A credit-related claim or challenge to other conditions of confinement are administrative matters and, thus, cannot be raised in a post-conviction relief proceeding. Id. at 369, 527 S.E.2d at 750. The Applicant complains the South Carolina Department of Corrections is not properly calculating his sentence or is otherwise withholding rightfully earned credits from him. The statutory right to sentence related credits is a protected "liberty" interest under the Fourteenth Amendment, entitling an inmate to minimal due process to ensure the state-created right was not arbitrarily abrogated. See Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963 (1974). Because the Department of Corrections' disciplinary and grievance procedures are consistent with the standards delineated in Wolff, inmates may seek review of such claims under the Administrative Procedures Act. Al-Shabazz, 338 S.C. at 369, 527 S.E.2d at 750. As such, this Court finds this is not a cognizable post-conviction relief issue and must be handled administratively.

H.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under

prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Claims

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

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule

203, SCACR; Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 23 day of July, 2013.

R. LAWTON MCINTOSH
Resident Judge
Tenth Judicial Circuit

Anderson, South Carolina

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