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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2011-CP-40-0190

John J. Moore, Jr., #326455,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

The Appellant, John J. Moore, Jr., appeals the Order of Dismissal filed January 8, 2013, and the Order filed April 7, 2014 denying Appellant's motion to alter or amend the judgment, and any other rulings preserved for appeal. Copies of the referenced Orders/Judgments are attached hereto.

April 14, 2014

Rowland P. Alston III
The Sullivan Firm, LLC
907 Calhoun Street
Columbia, SC 29201
(803) 252-3663
Attorney for Indigent Appellant

Other Counsel of Record:
Megan E. Harrigan, Esq.
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 14, 2014, addressed to the attorney of record, Megan E. Harrigan, Esq., Post Office Box 11549, Columbia, South Carolina, 29211-1549.

April 14, 2014

Rowland P. Alston III
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907 Calhoun Street
Columbia, SC 29201
(803) 252-3663
Attorney for Indigent Appellant

FORM 4

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

JUDGM. IN A CIVIL CASE

CASE NUMBER: 2011CP4000190

John J #326455 Moore Jr

PLAINTIFF(S)

State of South Carolina

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RICHLAND COUNTY FILED 2013 JAN -8 PM 3:01 JEANETTE W. McBRIDE C.C.P. & G.S.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 8 January 2013 to attorneys of record or to parties (when appearing pro se) as follows:

John J #326455 Moore Jr

Rowland P. Alston III

Brian T. Petrano

John J #326455 Moore Jr

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
	)	**2011-CP-40-00190**
John J. Moore, Jr., #326455, Applicant, v. State of South Carolina, Respondent.	)	**ORDER OF DISMISSAL**

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for Post-Conviction Relief filed January 13, 2011. The Respondent made its Return on February 15, 2011. An evidentiary hearing into the matter was convened on Wednesday, May 23, 2012, at the Richland County Courthouse. The Applicant was present at the hearing with counsel, Rowland P. Alston, III, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying were Applicant's former trial counsel, Greg Collins, Esquire ("counsel"), and Applicant's former appellate counsel, Joseph Savitz, III, Esquire. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Richland County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections and the relevant documents from Applicant's direct appeal.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland

County Clerk of Court. The Applicant was true bill indicted at the April 2006 term of the Richland County Grand Jury for Murder, Use of a Firearm During the Commission of a Violent Crime and Unlawful Possession of a Pistol by a Person Under 21 Years of Age (2006-GS-40-02203,-11738, -11739). Doug Strickler, Esquire, and Greg Collins, Esquire, represented him on the charges. On January 28, 2008, Applicant proceeded to a jury trial before the Honorable William P. Keesley. After a five day trial, Applicant was found guilty of the two weapon charges as indicted, as well as the lesser included Voluntary Manslaughter. Judge Keesely sentenced Applicant to thirty (30) years imprisonment for Voluntary Manslaughter, five (5) years imprisonment to run concurrently for Possession of a Weapon During the Commission of a Violent Crime, and five (5) years imprisonment to run consecutively for Possession of a Pistol by a Person under 21.

A notice of appeal was filed and an appeal was perfected. Applicant was represented by Joseph Savitz, III, Esquire, of the South Carolina Office of Appellate Defense. After briefing, the South Carolina Court of Appeals reversed Applicant's conviction for Possession of a Pistol by a Person under 21. State v. Moore, Op. No. 2010-UP-409 (S.C. Ct. App. filed September 16, 2010). The Remittitur was issued October 5, 2010.

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

a. That public defender failed to convey to Applicant one or more plea offers prior to the verdict.

b. That public defender failed to adequately investigate the case before trial, and, as a consequence, failed to develop and present all available, relevant,

impeachable, and mitigating evidence that would have challenged the credibility and veracity of witnesses for the prosecution.

c. That public defender did not properly object or renew the motion for a mistrial given the exposure of four jurors to a mug-shot photograph of the Applicant.

d. That public defender never objected or moved for a mistrial given the prosecution's failure to provide exculpatory evidence under Rule 5, especially including, but not limited to, statements of witnesses Rhett Alger, Mike Lankford, Beth Lankford, Crime Stoppers, and an article from "The State" newspaper.

e. That public defender failed to properly object to and/or move for a mistrial regarding juror(s) who were sleeping during trial.

f. That public defender did not ensure Applicant's right under the Constitution to confront the witnesses against Applicant.

g. That public defender failed to object to and properly preserve for appeal the prosecution's bolstering the witness Kerwyn Phillips.

h. That public defender failed to effectively cross-examine the witness Kerwyn Phillips.

i. That public defender never objected to or moved to exclude the evidence of the recording between the Applicant and witness Delia Nix, who was the common law spouse of Applicant and thus entitled to common law spousal immunity.

j. That public defender failed to properly object to thereby preserve for appeal the prosecution's misrepresentation of the facts and evidence, unsupported by

the record, during closing arguments, especially regarding, but not limited to, the recording between Applicant and witness Kerwyn Phillips.

k. That public defender failed to object and properly preserve for appeal the prosecution's improper closing argument regarding malice.

l. That public defender failed to object to and properly preserve for appeal the prosecution's improper comment on the Applicant's lack of remorse during closing argument.

m. That public defender failed to request that the Court include in the jury charge that a vehicle can be considered a deadly weapon.

n. That public defender failed to request a jury charge regarding the intoxication of Eugene Derrick, in which the condition was relevant to the nature of the threat and the need of force.

o. That public defender for Applicant failed to object to and properly preserve for appeal the closing argument and jury charge regarding accomplice liability.

p. That public defender for Applicant failed to properly object to and properly preserve for appeal the jury charge regarding malice.

q. That public defender for Applicant failed to properly object to and properly preserve for appeal the burden-shifting jury charge regarding self-defense.

r. That public defender failed to object to and properly preserve for appeal the Court's voluntary manslaughter jury charge.

s. That public defender failed to properly take exception to the Court's comments on the facts of the case.

a. That appellate defender failed to appeal the principal conviction of voluntary manslaughter, where mistrial issue was preserved and Applicant's indictment was constructively amended.

b. That appellate defender did not properly review the record to determine all issues meriting appeal.

c. Any other particulars that may be demonstrated at trial.

14. That public and appellate defender's performance as counsel for the Applicant, as stated herein, was so deficient that the Applicant was prejudiced such that there is a reasonable probability that, but for public and appellate defender's professional errors, the result of the criminal trial and/or conviction and/or appeal would have been different.

15. That public and appellate defender's conduct so undermined the proper functioning of the adversarial process that the criminal trial cannot be relied upon as having produced a just result.

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), SCRCP; 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.

Spousal Immunity

Applicant first alleges counsel was ineffective for failing to properly investigate Applicant's relationship with Delia Nix (hereafter "Nix"). Applicant contends he and Nix are common law married and, had counsel sufficiently investigated this relationship, he could have used a "spousal privilege" argument at trial to suppress the state's introduction of a taped

conversation between he and Nix recorded by the jail. Applicant noted Nix was directly outside of the courtroom the entire trial, but was never called as a witness.

Counsel testified he never asked Applicant whether he and Nix were married, as he believed Applicant would have disclosed that information during one of their many meetings if such were the case. For that reason, counsel said, he did not raise a challenge to the introduction of the audio tape on spousal privilege grounds at trial. Rather, counsel objected to its introduction on several other grounds including a violation of the Confrontation Clause as it presented impermissible testimony of an unavailable witness whom Applicant would not have the opportunity to confront and cross-examine at trial. Counsel readily admitted the audio tape was "damning" evidence, as Applicant essentially admitted to firing the fatal shots during the call, but said he was able to argue in closing that the state was entirely misrepresenting and misinterpreting Applicant's comments heard on the tape. Counsel also said in his conversations with Nix, she only categorized herself as the mother of Applicant's child and never made any reference to being Applicant's "wife". Further, counsel said, Applicant's codefendant (Kerwyn Phillips) referred to Nix repeatedly during his testimony as Applicant's "girlfriend" despite Phillips having been close friends with Applicant and known Applicant his entire life. Counsel also noted the conversation occurred from a jailhouse phone which clearly informs both parties involved the conversation is being monitored and recorded, so as to make any conversations between the two far from "confidential" in nature.

After reviewing the testimony presented and entirety of the record, this Court finds Applicant has failed to satisfy his burden in proving counsel was ineffective in this regard. As a preliminary note, this Court finds Applicant's testimony in this regard to be wholly **not** credible, while conversely finding counsel's testimony to be credible and pursuasive. Counsel's failure to

investigate spousal privilege against forced testimony as a basis for challenging the jailhouse phone call was not objectively unreasonable based on his pretrial conversations with Applicant. See Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. at 2066 (1984)("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements...[as] [c]ounsel's actions are usually based, quite properly, on...information supplied by the defendant. In particular what investigation decisions are reasonable depends critically on such information."). At no point during counsel's representation did Applicant ever indicate he and Nix were common law married. In fact, the trial record is replete with testimonial references to Nix as Applicant's "girlfriend", but at no point did Applicant ever bring this alleged mischaracterization to counsel's attention. In sum, this Court finds counsel's performance was not deficient in failing to conduct some further investigation into the alleged common law marital status of Applicant and Nix, as he had no reason to believe such was the case.

Further, this Court finds Applicant has failed to carry his burden in proving resulting prejudice, as Applicant has failed to produce any credible evidence supporting the allegation he and Nix were in fact common law married. "A common-law marriage is formed when two parties contract to be married." Callen v. Callen, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005). "No express contract is necessary; the agreement may be inferred from the circumstances." Id. "The fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party's intent." Id. Further, the "circumstantial evidence typically relied upon to establish a common-law marriage includes evidence establishing that the parties have lived together for an extended period of time and have publicly held themselves out as husband and wife." Barker v. Barker, 330 S.C. 361, 367, 499 S.E.2d 503, 507 (Ct. App. 1998). Applicant's self-serving and unsupported testimony in this regard is wholly **not** credible. Further,

Applicant did not produce any evidence or testimony to support the allegation that he and Nix lived as husband and wife, or otherwise publicly held themselves out to the community as husband and wife. Rather, the record before this Court conclusively refutes Applicant and Nix were common law spouses. Therefore, this Court finds no resulting prejudice.

Finally, this Court finds no reasonable probability that had a motion to suppress been presented on grounds of spousal privilege *and* been successful in suppressing the recorded phone call, the outcome at trial would have been any different. The record reflects substantial evidence presented by the state at trial to firmly convince the jury of Applicant's guilt beyond a reasonable doubt regardless of the introduction of the tape recorded phone call. Therefore, Applicant cannot satisfy the second prong of Strickland v. Washington.

Failure to Prepare/Investigate

Applicant also alleges counsel was ineffective for failing to properly investigate and prepare Applicant's case. Specifically, Applicant contends counsel should have more thoroughly investigated the victim's husband, Gene Derrick's ("Derrick"), alleged methamphetamine ("crystal meth") use and retained a private toxicology expert to help bolster the self-defense theory.

First, counsel was not ineffective for failing to properly investigate Derrick's methamphetamine use, nor in failing to retain an expert toxicologist to assist in the defense. Applicant alleges a toxicologist could have helped develop a background on the effects of crystal meth use for the jury, including potential side effects such as aggressiveness. Applicant alleges such testimony would have helped bolster the theory that his exercise of deadly force was reasonable based on Derrick's erratic and aggressive driving. Applicant testified counsel also

should have sought to introduce the statements of Mike and Beth Langford at trial to support the contention that Derrick was a known drug user.

Counsel testified he and Applicant were aware of Derrick's alleged history of methamphetamine use prior to trial because their private investigator was able to obtain statements from Mike and Beth Langford referencing such. Counsel said although he never retained an expert to help prepare for trial or to testify at trial as to methamphetamine use, he was able to elicit testimony throughout trial as to alcohol consumption just prior to the incident, including Derrick's own testimony admitting to having consumed several beers and a margarita prior to the shooting. Counsel went on to say with the benefit of hindsight, perhaps he should have "played up" Derrick's alleged drug use at trial, but thought he did an effective job of highlighting Derrick's potential intoxication throughout the course of the trial. He also noted he did not attempt to introduce the Langfords' statements or any other documents obtained by his private investigator at trial as he wanted to retain the right to last closing argument before the jury and did not believe the introduction of the statements would be more beneficial than having last closing argument.

This court finds counsel was not ineffective in this regard. Counsel had his private investigator conduct a reasonable and diligent investigation into Derrick's alleged drug use, from which he was able to obtain the statements of Mike and Beth Langford. Counsel was fully aware of those statements at the time of trial, but made the reasonable strategic choice to focus his cross-examination on Derrick's self-admitted alcohol consumption on the night in question, and the theory that Applicant was not the shooter. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992)("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed

ineffective assistance of counsel."). Counsel was able to elicit testimony during trial from Officer Scott Faust that "there was some information brought up" in his investigation about Derrick's "dealings with crystal meth". Counsel sought to elicit testimony from Faust about Mike Langford's reputation as a "meth dealer" as well, but was prohibited from doing so by the trial judge upon objection by the state. With the main theory of defense in mind (Applicant not being the shooter), it is clear counsel made a reasonable decision not to present the statements of the Langfords as doing so would have created inconsistencies in Applicant's theory of defense and involvement in the case.

Further, this Court finds Applicant has failed to meet his burden in proving resulting prejudice. First, Applicant failed to produce a toxicology expert at the PCR hearing to present the alleged beneficial testimony he believes would have been given at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (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). Additionally, he failed to produce any admissible evidence as to what benefit hiring such an expert to assist in pretrial preparations would have produced.[1] See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (Failure to conduct independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only be mere speculation as to the result).

[1] Applicant attempted to introduce an affidavit of Dr. Robert Bennett into the PCR record regarding the potential effects of Methamphetamine and Cocaine, and Dr. Bennett's opinion in correlating those side effects to this case. Respondent posed a contemporaneous objection to the introduction of the affidavit, which this Court sustained finding the affidavit not admissible on grounds of hearsay, a violation of Respondent's right to cross-examine the witness, and as impermissible opinion testimony by a witness neither presented, nor qualified, as an expert by this Court. Accordingly, the affidavit was proffered into the record, but not considered by this Court in its determination of the current allegation.

Sleeping Jurors

Applicant alleges counsel was ineffective for failing to object or otherwise move for a mistrial based on several jurors allegedly falling asleep during the course of the trial.

Counsel testified he did recall discussions on the record about jurors potentially having fallen asleep during some points of the trial, but noted one of the jurors never actually fell asleep and the issue was ultimately addressed by the trial judge. Specifically, after the testimony of Investigator Stanley Richards, Judge Keesley noted outside of the presence of the jury he had seen one juror "shutting her eyes" during Richards' testimony. Judge Keesley went on to say he "kept watching her rather intently" because he would have had to stop the trial if she was going to sleep, but explicitly noted the juror never actually fell asleep. The solicitor said he also saw the juror close her eyes, but agreed she never fell asleep.

At the end of the trial, upon completion of the state's closing argument, Judge Keesley took the opportunity to caution the jury about keeping their eyes open before sending them to the jury room for a short break. After the jury retired, Judge Keesley said he had "one juror fighting sleep" during the state's closing argument, but again noted "he [hadn't] gone to sleep". Prior to the jury reentering the court, the judge stated he had received a note from "the same young man" he had ben referring to, in which the juror explained he was suffering from a sinus infection which caused his face to swell and eyes to appear closed, but that he was able to continue to serve as a juror. At the PCR hearing, counsel testified he did not see the juror ever actually fall asleep and believed the trial court effectively admonished the jury to cure the issue, but noted the alleged incident occurred during the state's closing argument which would not have been harmful to Applicant's case.

The record is clear in showing counsel was not ineffective in this record. The record of the trial is clear in showing no juror actually fell asleep during the course of the trial, and the trial judge effectively admonished the jury to ensure they were giving the trial their full attention. With this in mind, this Court finds counsel's failure to object or otherwise move for a mistrial to have been objectively reasonable. Further, Applicant has failed to prove resulting prejudice as he failed to establish that any juror actually ever fell asleep or missed any portion of the trial. Finally, as set forth by counsel, the juror alleged to have been sleeping was doing so during the *state's* closing argument in which the solicitor reviewed the entirety of the damaging evidence against Applicant and implored the jury to find Applicant guilty. The juror's alleged "absence" from that portion of the trial would have been beneficial, *not* damaging, to Applicant's case. Therefore, any alleged sleeping did not prejudice Applicant's case. Accordingly, this allegation is denied.

Failure to Object/Renew Motion for Mistrial Based on Exposure to Mugshot

Applicant alleges counsel was ineffective for failing to properly object to and renew his mistrial motion based on three jurors' exposure to an alleged "mugshot" picture of Applicant displayed on the local news after the first day of trial, and therefore the issue was not preserved for appeal.

The record before this Court and testimony presented at trial reflect counsel was not ineffective in this regard. At the start of the second day of trial, counsel brought to the trial court's attention the issue of potential juror exposure to media reports about the case. Upon inquiry of the jury, three jurors stated they had seen a photograph of Applicant on the news, but each noted they had turned their television off upon seeing the picture alone without any exposure to the associated commentary. Additionally, each stated seeing the picture would not

affect their ability to be a fair and impartial juror in the case. The court declined to question the jurors as to the nature of the picture they saw as requested by counsel. After having the opportunity to independently question each juror, counsel requested the trial judge exclude the jurors from participating in the trial, and additionally motioned the court for a mistrial. The court, finding "beyond a reasonable doubt that there [was] absolutely nothing about [the jurors'] exposure to that media coverage that would in any way affect their ability to be a fair and impartial juror", denied counsel's motions.[2]

At the PCR hearing, counsel credibly testified he did recall several jurors advising the court they had seen a picture of Applicant on the news, but stated the motions to exclude the three jurors and for mistrial were denied by the trial judge after each juror was independently questioned in-camera on the issue. At the close of the state's case, counsel renewed all previous motions and objections made throughout the course of the trial, which was promptly denied.

This Court would first note counsel *did* in fact pose a motion for mistrial based on a lack of qualified jurors due to pollution of the jury pool by exposure to pretrial publicity, i.e. Applicant's picture on the news. Therefore, his actions were not deficient in failing to present such a motion. Further, counsel timely posed the motion for mistrial and set forth the grounds for the motion specifically, after which the trial judge specifically referenced the mistrial motion after denying counsel's request to excuse the jurors on the same grounds. Accordingly, the motion was preserved for appeal. See State v. Sweet, 342 S.C. 342, 536 S.E.2d 91 (2000) (issue preserved for appeal where counsel makes timely objection, despite trial judge not ruling upon that motion immediately thereafter, where trial judge made clear on the record he understood the motion).

[2] There was, however, a fourth juror who had briefly discussed the case with friends at the gym who was excluded by the court. His exclusion was not based on the media outlet's display of Applicant's picture and, therefore, not relevant to this analysis.

Further, Applicant has failed to prove resulting prejudice from counsel's alleged failure to preserve the mistrial motion for direct appeal. Applicant has failed to prove he would have been successful in having the convictions overturned on appeal based on the court's denial of the mistrial motion. Mere exposure to pretrial publicity does not automatically disqualify a prospective juror. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). "When the trial judge bases his ruling upon an adequate voir dire examination of the jurors, his conclusion that the objectivity of the jury panel has not been polluted by outside influence will not be disturbed absent extraordinary circumstances." State v. Kelsey, 331 S.C. 50, 68, 502 S.E.2d 63, 71 - 72 (1998); see also State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997). Further, "whether or not a mistrial should be granted is a matter resting within the trial court's sound discretion." State v. McDaniel, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980). This court finds no reasonable probability the issue would have been successful if raised on direct appeal and, therefore, Applicant cannot prove resulting prejudice.

Failure to Properly Request/Object to Jury Instructions

Applicant next alleges counsel was ineffective for failing to request the jury be charged with "use of a vehicle as a deadly weapon" in support of his self-defense theory, as well as in failing to object to the use of the words "at fault or jointly at fault in bringing on the difficulty" in the actual self-defense charge given.

This Court finds counsel was not ineffective in either instance. Counsel testified he requested the self-defense instruction on the basis that the victims' car was swerving at Applicant's truck, as well as on the basis that Applicant believed the driver of the car was pulling a gun out from under his seat at the time. No instruction on the use of a car as a deadly weapon was requested or given at trial, but counsel was able to present Applicant's position in closing

argument that any shots fired from his truck were in self-defense as a result of Victim's erratic and dangerous driving.

First, Applicant has failed to prove counsel was deficient in failing to request a jury charge on the "use of a vehicle" constituting a "deadly weapon" as he has failed to establish that any sanctioned jury charge exists for counsel to have requested. Further, Applicant has failed to establish the relevant case law upon which such a jury charge could be founded, or to support the legality of such a charge. Applicant produced no example of a hypothetical charge counsel could have drafted and submitted to the court in support of the request either. Therefore, he has failed to prove counsel how counsel was deficient in failing to pose such a request to the trial judge, or that such a charge would have in fact been given had it been requested. Additionally, this Court finds no reasonable probability the outcome at trial would have been different had such a charge been given as the jury was provided with a self-defense instruction, as well as the testimony and arguments about victim's alleged menacing driving, but opted not to find Applicant acted in self-defense.

Turning to the second portion of the charge complained of, this Court finds, when taken as a whole, the charge is a correct statement on the law of self-defense as it stood at the time of Applicant's trial. "The trial court is required to charge only the current and correct law of South Carolina." Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). Accordingly, this Court finds counsel was not objectively unreasonable in failing to pose an objection to the charge, nor was Applicant prejudiced by the alleged deficiency as the charge was proper.

Failure to Object to Improper Closing Argument and Jury Charge on Inferred Malice

Applicant alleges counsel was ineffective in failing to pose objections to the solicitor's improper commentary and the Court's erroneous charge on the permissible inference of malice from the use of a deadly weapon.

This Court finds counsel was not ineffective for failing to pose an objection to either reference as, at the time of Applicant's trial, such a permissible inference was proper. In 1981, the South Carolina Supreme Court in State v. Mattison, 276 S.C. 235, 277 S.E.2d 598 (1981), found "an appropriate instruction on implied malice would not deal with the evidentiary nature of the presumption and that the implication does not *require* the jury to infer malice but only *permits* it", in accordance with the United States Supreme Court's ruling in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979). Id. at 238, 277 S.E.2d at 600 (emphasis added). Two years later, in State v. Elmore, the South Carolina Supreme Court set forth the appropriate jury charge to be given on the inference of malice from the use of a deadly weapon, which the Court felt complied with the Due Process requirements that Sandstrom was concerned with. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). The Elmore Court noted that "only slight deviations from [the] charge [set forth therein] [would] be tolerated." Id. at 421, 308 S.E.2d at 784. Such was the legal standard for the permissible inference of malice from the use of a deadly weapon in South Carolina until the October 12, 2009, decision of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

In Belcher, the Court held, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." Id. at 612, 685 S.E.2d at 810. The Belcher Court held the new precedent would not apply retroactively, nor would it "apply to convictions challenged on post-conviction relief." Id.

The charge given at the time of Applicant's trial was the sanctioned charge on the law as it stood in South Carolina under State v. Elmore. Therefore, it was not objectionable and counsel was not ineffective for failing to object. Further, attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 765 (1993); see also Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 91 (1992) (finding counsel not ineffective for failing to assert defense not yet recognized by the Court). Therefore, counsel's failure to object was not unreasonable, and there is no reasonable probability that such an objection would have been successful if made.

Additionally, the solicitor's comments in closing argument as to the permissible inference of malice were not objectionable as they, too, were appropriate statements on the law as it stood at the time. Further, a successful objection to the solicitor's comments would not have reasonably affected the outcome of the trial. For those reasons, this Court finds the allegation as to plea counsel to be without merit.

Regarding appellate counsel's failure to raise the decision in Belcher on direct appeal, this Court finds the allegation to be equally without merit and improperly raised herein. In Belcher, the Court set forth because their "decision represents a clear break from modern precedent, [the] ruling is effective in this case and for all cases which are pending on direct review or not yet final *where the issue is preserved.*" Id. at 612, 685 S.E.2d at 810. The legality of the charge given was not preserved for appeal at trial; further, Belcher expressly prohibits challenges based on its ruling through post-conviction relief, according to the Court's opinion. Therefore, these claims are hereby denied and dismissed.

Ineffective Assistance of Appellate Counsel

Applicant finally alleges appellate counsel was ineffective in his representation for failing to challenge the voluntary manslaughter conviction on direct appeal based on a constructively amended indictment and the trial court's denial of counsel's motion for mistrial.[3]

Appellate counsel testified he worked as an appellate defender for the South Carolina Commission on Indigent Defense, Office of Appellate Defense, for twenty-six (26) years, during which he served as appellate counsel on "thousands" of criminal appeals. He noted his work focused a great deal on murder appeals. Appellate counsel stated he spoke with Applicant's father during the course of the appeal. He said the case was "very fact intensive" and that there were not many legal issues to be raised on direct appeal because many of them were "fact bound". Appellate counsel testified he read through the entire record in deciding which issues to raise, and picked what he thought was the strongest issue for appeal. In doing so, he said, he decided to raise a challenge to only the "Possession of a Weapon By a Person Under the Age of 21" conviction as he believed that was the strongest and most meritorious issue he saw. Appellate counsel noted he did not see any specific, strong issues to be raised challenging the Voluntary Manslaughter conviction and, therefore, opted to focus on challenging the weapon charge. He stated he believed the appeal was a success in that Applicant's weapon charge, the sentence for which was set to run consecutively, was reversed by the Court of Appeals.

Based on the record and testimony, this Court finds appellate counsel was not ineffective in his representation of Applicant. Appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal and there is no constitutional duty imposed on appellate counsel that every non-frivolous issue requested by a defendant be raised. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where

[3] Of interesting note is Applicant's contention in the application that counsel's mistrial motion was properly preserved for direct appeal , where he previously alleged counsel was ineffective for failing to properly preserve the mistrial motion.

the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Appellate counsel, as a very experienced and skilled appellate attorney, conducted a thorough review of the record and ultimately made the reasonable strategic decision to raise the issue he did on appeal. Clearly the issue raised on direct appeal was a very strong issue, as the conviction was reversed, thereby eliminating a five year consecutive jail term from Applicant's sentence. Further, Applicant has failed to convince this Court appellate counsel overlooked any meritorious issue that would have been successful on appeal, thereby failing to meet the prejudice requirement. Accordingly, this Court finds appellate counsel was not ineffective.

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 all additional allegations raised 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 any other 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.

This Court notes Applicant 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), SCRCP, 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 243 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 7 day of Jan, 2013.

L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

FORM 4

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

JUDGME IN A CIVIL CASE

CASE NUMBER: 2011CP4000190

John J #326455 Moore Jr
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RICHLAND COUNTY FILED 2014 APR -7 AM 8:08 JEANETTE W. McBRIDE C.C.P. & G.S.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 7 April 2014 to attorneys of record or to parties (when appearing pro se) as follows:

John J #326455 Moore Jr Rowland P. Alston III Robert Daniel Corney

John J #326455 Moore Jr
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
John J. Moore, #326455, Applicant, v. State of South Carolina, Respondent.	Case No. 2011-CP-40-0190 **ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND A JUDGMENT**

This matter comes before this Court by way of Applicant's "Motion to Alter or Amend a Judgment" asking this Court to alter or amend its Order of Dismissal denying Applicant post-conviction relief.

I.

An evidentiary hearing was convened before this Court on May 23, 2012, at the Richland County Courthouse, at which Applicant was present with counsel, Rowland P. Alston, III. The state was represented by Robert D. Corney of the South Carolina Attorney General's Office. By order filed January 8, 2013, this Court denied Applicant's request for relief with prejudice. On January 15, 2013, Applicant filed a motion to alter or amend, asking this Court to alter or amend, and reconsider its ruling. Respondent made a Return to this motion, asking that said motion be denied and dismissed.

III.

This Court's Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds that there is no basis for altering or amending its prior ruling.[1] Therefore, this Court hereby denies the Applicant's Motion in its entirety, and affirms the previous Order of Dismissal.

[1] The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction

This Court notes that if the Petitioner desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served within thirty days of the service of this Order. Petitioner is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 1 day of April, 2014

L. CASEY MANNING
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

relief file, since oral argument will not aid the Court in reaching its decision. See Rule 59(f), SCRCP.