

July 23, 2012

Daniel E. Shearouse, Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

JUL 25 2012

S.C. Supreme Court

RE: Notice of Appeal – Appointed P.C.R. Matter  
Case Number: 2010-CP-07-00388; Adrian A. Allen v. The State of South Carolina  
Our File Number: 12-007

Dear Mr. Shearouse:

Enclosed please find an original and two (2) copies of my client's Notice of Appeal, along with an accompanying original and two (2) copies of a Certificate of Service verifying that I have copied the individuals/entities set forth therein on this communication with the Court. I kindly request that you file the originals and return the time-stamped copies in the enclosed self-addressed postage prepaid envelope.

This is a Post Conviction Relief matter, and I am appointed counsel pursuant to S.C.A.C.R. 608 for Mr. Allen, the Petitioner. As such, I have copied the Division of Appellate Defense on this filing as well, as noted on the enclosed Certificate of Service.

Please let me know if you have any questions, concerns, or comments regarding anything I have sent.

Thank you in advance for your assistance.

Sincerely,



Dustin Lee

Cc: Robert D. Corney, Esquire, of the South Carolina Attorney General's Office  
Client  
South Carolina Division of Appellate Defense  
File 12-007



RECEIVED

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

JUL 25 2012

S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Carmen T. Mullen, Circuit Court Judge

Case No.: 2010-CP-07-00388

Adrian A. Allen, # 244358, .....Petitioner,

v.

State of South Carolina, .....Respondent.

**NOTICE OF APPEAL**

Adrian A. Allen, # 244358, appeals the Honorable Carmen T. Mullen's July 2, 2012, Amended Order of Dismissal denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the order on July 23, 2012. A copy of the Amended Order of Dismissal, which is the order being appealed, is attached to this notice, as well as a copy of Petitioner's Notice of Motion and Motion for Reconsideration/Clarification, to Alter or Amend Judgment Pursuant to SCRPC Rule 59(e), filed with the Court of Common Pleas, Beaufort County, on June 22, 2012.

Respectfully submitted,



DUSTIN LEE, SC Bar No. 77428  
Lee Law Firm, LLC  
P.O. Box 4771  
Hilton Head Island, SC 29938-4771  
(843) 474-0614  
dustinlee@leelaw.ws  
ATTORNEY FOR PETITIONER  
ADRIAN A. ALLEN, # 244358

Submitted this 23<sup>rd</sup> day of July, 2012  
Hilton Head Island, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Carmen T. Mullen, Circuit Court Judge

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Case No.: 2010-CP-07-00388

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Adrian A. Allen, # 244358, .....Petitioner,

v.

State of South Carolina, .....Respondent.

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**CERTIFICATE OF SERVICE**

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I, Dustin Lee, hereby certify that on this 23<sup>rd</sup> day of July, 2012, I have caused the foregoing **NOTICE OF APPEAL** to be served upon Robert D. Corney, Esquire, by United States mail, postage prepaid, at his address:

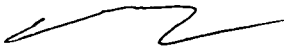
Robert D. Corney, Esquire  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, SC 29211

As well as upon the following, by United States Mail, postage prepaid, at:

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

Adrian A. Allen, #244358  
L.C.I. Stono-B-42  
Post Office Box 205  
Ridgeville, SC 29472

I further certify that all parties required by Rule to be served have been served this 23<sup>rd</sup> day of July, 2012.



---

DUSTIN LEE, SC Bar No. 77428  
Lee Law Firm, LLC  
P.O. Box 4771  
Hilton Head Island, SC 29938-4771  
(843) 474-0614  
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ATTORNEY FOR PETITIONER  
ADRIAN A. ALLEN, # 244358



2005, Applicant proceeded to jury trial before the Honorable Jackson V. Gregory. On July 19, 2005, Applicant was convicted of the charges as indicted and sentenced to thirty-two (32) years imprisonment for Murder, to be followed consecutively by five (5) years imprisonment for the Weapons charge.

Applicant filed a Motion for New Trial for which a hearing was convened before Judge Gregory on August 12, 2005. The motion was denied. Thereafter, a Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Following the receipt of an Anders brief submitted by Joseph Savitz, III, of the South Carolina Office of Appellate Defense, the South Carolina Court of Appeals dismissed the appeal by order dated February 27, 2009. The subsequent Motion for Rehearing was denied, and the Remittitur was issued March 2, 2009.

In the current application for PCR, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. Failure to Object to Court's Jury Instruction on Reasonable Doubt Where "Reasonable Doubt" Was Not Defined;
  - b. Failure to Object to an Improper Sentence; and
  - c. Failure to Object to an Erroneous Jury Instruction on the Inference of Malice from the Use of a Deadly Weapon

#### **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.

*Failure to Object to Court's Jury Charge on Reasonable Doubt*

Applicant first alleges counsel was ineffective for failing to pose an objection when the trial court failed to include the definition of "reasonable doubt" in its jury charge.

Gene Hood, Esquire (hereafter "counsel"), the current elected Public Defender for the Fourteenth Circuit, testified he represented Applicant on the charges as an Assistant Public Defender for Beaufort County at the time. He stated he had conducted roughly one-hundred murder trials prior to representing Applicant in 2005, including several trials before Judge Jackson Gregory who

ultimately presided at Applicant's trial. Counsel stated that because of his familiarity with Judge Gregory and his jury instructions, he did not prepare any proposed jury instructions to be considered by the court. Counsel went on to say, in his experience, Judge Gregory's jury charges came "right from the [Bench] Book", and he even had the opportunity to review the charges to be given with the judge and opposing counsel in chambers prior to their reading in court. Counsel stated he did not believe he objected to any portion of the jury charges given at trial, and the record before this Court reflects the same. Counsel additionally conceded that he did not see any definition of "reasonable doubt" given in the jury charge nor did he object to the court's failure to charge such.

Based on the testimony presented and a thorough review of the record, I find Applicant's claim to be without merit in this regard as counsel was not deficient in failing to pose such an objection, nor did Applicant suffer any prejudice as a result of that alleged deficiency. Applicant's claim that the jury charge failed to comply with the requirements set forth in State v. Manning, 305 S.C. 413 (1991), and was therefore objectionable is unfounded and unsupported by the case law. In State v. Johnson, 315 S.C. 485, 445 S.E.2d 637, the Supreme Court of South Carolina commented on the so-called "Manning charge" saying the reasonable doubt charge set forth in Manning was not intended to be mandatory and the Court even went on to say "the phrase 'beyond a reasonable doubt' without an explanation...is much more favorable to a defendant than when amplified by an explanation." Id. at 487, 445 S.E. 2d at 637. The Court in Johnson ultimately held no error existed where the trial judge failed to give a definition on reasonable doubt. The Supreme Court of the United States similarly held that a definition of reasonable doubt is not Constitutionally imposed, opining:

"[S]o long as the court instructs the jury on the necessity that a defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof."

Victor v. Nebraska, 511 U.S. 1, 5, 114 S.Ct. 1239, 1244 (1994). In reviewing the record, it appears the State's burden of proof beyond a reasonable doubt was directly stated by the trial judge numerous times throughout his instructions to the jury, in addition to both attorneys mentioning that burden in opening and closing arguments. Accordingly, I find counsel was not deficient in posing an objection to the charge on reasonable doubt as given.

Further, I find no resulting prejudice in this regard as counsel's objection, if contemporaneously made, would likely have been overruled based on the standards set forth above. Finally, even if the trial court sustained the objection and imposed a charge defining reasonable doubt, this Court cannot find any probability that the outcome of the trial would have been any different based on the testimony and evidence presented at trial. Therefore, I find counsel was not ineffective in his representation in this regard.

*Failure to Object to Improper Sentence*

Applicant's second contention is counsel was ineffective for failing to object to the sentence imposed on Applicant by the trial judge as it failed to conform with the statutory sentencing range under S.C. Code Ann. §16-3-20(A) (2003). Applicant alleges the thirty-two (32) year sentence imposed for the Murder charge was improper as the statute, at the time, read "a person who is convicted of...murder must be punished by...imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years". Therefore, Applicant argues, the trial court was bound to either impose a thirty year sentence or life sentence, not a thirty-two year sentence such as the one given.

Counsel testified he did not object to the sentence imposed on the Murder charge as he understood the trial court was able to impose a sentence of anywhere from the mandatory minimum thirty years all the way up to a life without parole sentence, with discretion to impose it anywhere

between the two. He went on to say that although he did not object to the sentence, he did file a motion for reconsideration of the sentence in an attempt to get Applicant's sentence reduced. He finished by stating he did not believe the sentence was objectionable, nor that it violated the statutory sentencing range, but noted his belief that any such allegation should have been raised by Applicant on direct appeal.

I find neither deficiency on counsel's part, nor resulting prejudice from that alleged deficiency in this allegation. First, I find counsel acted reasonably under professional norms in not objecting to the court's imposition of the sentence for the murder charge. As noted by counsel at the PCR hearing, an objection to the sentence on the grounds that thirty years and life are the only two sentencing options would have opened the door wide open to the imposition a life, a sentence Applicant was unquestionably hoping to avoid.

Further, counsel's interpretation of the language of the statute as allowing trial judges discretion in sentencing between thirty years and life was not unreasonable. The language of the statute specifically sets forth the minimum term of imprisonment as "a mandatory minimum term of...thirty years". Given the plain language of the statute, a judge is bound by a minimum sentence that he may not fall below, but is not required to solely impose a thirty year sentence. Had that been the legislature's intent, the statute would simply have read "mandatory term of thirty years", without the qualifying term "minimum" included. See State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language."). An interpretation of the statute to the contrary would render the word "minimum" both unnecessary and meaningless.

This reasonable reading of the statute is evidenced by language set forth in the case law of our state. Specifically, the South Carolina Supreme Court in past opinions has also interpreted the

statute as giving trial judge's the discretion to sentence convicted murderers to terms of imprisonment *at least* at the mandatory minimum thirty years *up to* a life sentence. See for example State v. Morgan, 367 S.C. 615, 626 S.E.2d 888 (2006)(Remanding a case to the trial court for sentencing on a murder conviction where lower court instructed to "decide on a sentence that ranges **from** a mandatory minimum imprisonment term of thirty years **to** life imprisonment". (emphasis added). Id. at 619). Therefore, counsel's interpretation of the statute was not unreasonable, nor was his failure to object to the sentence imposed.

Based on the above, I find counsel's performance in this regard was not unreasonable based on professional norms. Additionally, I find Applicant has failed to carry his burden in proving resulting prejudice based on counsel's lack of objection to the sentence. There has been nothing brought before this Court to prove that, had counsel made such an objection, the trial judge would have imposed the minimum thirty year sentence rather than the "other option" of a life sentence. In fact, based on the outcome of Applicant's post-trial motion for reconsideration the sentence, it seems the trial judge was not going to allow Applicant to receive the mandatory minimum thirty year term. Therefore, I find Applicant has failed to prove both deficiency and resulting prejudice. Accordingly, this allegation is denied and dismissed with prejudice.

#### *Failure to Object to Improper Malice Instruction*

Applicant's final contention raised at the PCR hearing is that counsel was ineffective for failing to object to an improper jury charge on the inference of malice to be inferred from the use of a deadly weapon.

Counsel testified, as stated above, that he was very familiar with Judge Gregory's typical jury charges as they came directly out of the Judge's "Bench Book", and further stated he reviewed the proposed charges in chambers prior to them being given to the jury. He also said he did not recall

making any objections to the jury charges given by the trial judge, which this Court has confirmed in reading the record. Regarding the specific malice instruction given, counsel noted that malice itself is an element of murder to always be charged as part of the crime, but the inference of malice based on the use of a deadly weapon jury charge set forth in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), has since been overturned by the ruling set forth in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Counsel stated he and Applicant had discussed presenting a self-defense theory at trial, but was unable to uncover and present sufficient facts to support such a defense and, therefore, was ultimately forced to abandon it. Counsel finished by stating he did not believe there was any reason to object to the inference of malice jury charge as this case was tried well before the decision in Belcher and there was no evidence that could be offered by Applicant to mitigate, excuse or justify the killing.

Based on a thorough review of the record before this Court and the testimony presented, I find counsel's performance was not deficient where he failed to pose an objection to the jury instruction on the permissive inference of malice arising from the use of a deadly weapon. "In general, the trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged to the jury must be determined by the evidence presented at trial." State v. Harris, 382 S.C. 107, 113, 674 S.E.2d 532, 535 (Ct. App. 2009). Further, the substance of the law is what must be instructed to the jury, not any particular verbiage. See State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980). The charge given by the trial judge was appropriate and in accordance with the relevant law at the time, and therefore was not objectionable. In fact, the language used in the charge was taken directly from the judge's "Bench Book" which is regularly used in charging juries across the state on the law to be applied in both civil and criminal cases. Applicant's contention that the charge given "constituted a

mandatory presumption” of malice rather than a permissive presumption is without merit as the language used by the judge clearly conveyed that the jury “may” presume such malice. Therefore, I find counsel exercised reasonable judgment based on professional norms in not objecting to the charge as given.

Applicant has also failed to prove how counsel’s failure to object to the jury charge given on the permissive inference of malice resulted in prejudice to his case. Had counsel made such an objection, the trial court would have overruled the objection and allowed the jury to continue to operate under the law as charged since it was a complete and accurate statement of the law regarding the permissive inference at the time. While Belcher set forth a drastic change in precedent in finding that a jury instruction on the permissive inference of malice from the use of a deadly weapon should not be given by a trial court where evidence is presented that would reduce, mitigate, excuse or justify the killing, Belcher was not decided until roughly three and a half years after Applicant’s trial, and eight months after Applicant’s direct appeal was dismissed.

Of little consequence to this decision is the application of Belcher, which this Court finds would not have made a difference to the outcome of Applicant’s trial even had it applied. There was no evidence presented at trial that would reduce, mitigate, excuse, or justify Applicant’s killing of the victim as required to invoke Belcher. Additionally, the Court in Belcher specifically noted that the ruling would “not apply to convictions challenged on post-conviction relief”. Belcher at 613, 685 S.E.2d at 811. Therefore, even in taking Applicant’s argument on its face and applying Belcher (which clearly does not apply), the allegation is without merit.

*Failure to Object to Instruction on State’s Burden of Proof*

Applicant contends trial counsel was ineffective in failing to object when the trial judge presented the jury with an instruction on reasonable doubt that did not set forth the State’s burden to prove “each and every element of the offense” beyond a reasonable doubt. This Court finds counsel was

not ineffective in this regard.

Counsel testified he did not object to any portion of the jury instruction in this regard and this Court's review of the record reflects the same. From a review of the record, it is clear that counsel was not deficient in posing no objection to the jury instructions as given on the State's burden of proof. In the opening remarks and charges to the jury, the trial judge plainly stated "[t]he State...has the burden of proving each of the essential elements of the indictment beyond a reasonable doubt." (Trial Tr. p. 24, ll. 6 – 8). From there, the Court went on to note the State's burden of proof five more times in its closing jury instructions, specifically noting "[t]he State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought" to find Applicant guilty of murder, and instructing the jury they "must determine whether the State has proven beyond a reasonable doubt that the [Applicant] was in possession of a firearm or visibly displayed what appeared to be a firearm during the commission of the crime of murder." (Trial Tr. p. 151, ll. 8 – 10; p. 153, ll. 10 – 14).

Under In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970), the State must supply proof beyond a reasonable doubt of each element necessary to constitute the crime with which the accused is charged. "Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994). Further, "[t]he substance of the law is what must be instructed to the jury, not any particular verbiage." State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980). While counsel could have posed an objection to the Court's failure to present a direct quote from In Re Winship in its charge, he was not objectively unreasonable in withholding an objection as the instruction given, as a whole, sufficiently charged the jury with the State's burden of proving each essential element of the crimes. Therefore, I find no deficiency in this regard.

Further, I find no resulting prejudice from the alleged deficiency as there is no reasonable likelihood that the jury applied the law charged in any way that lessened the State's burden of proof. "The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991); Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990)). The jury was charged from the outset that the State had to prove every essential element of the crimes beyond a reasonable doubt. The state's burden of proof was thereafter mentioned by the State in its closing argument and five more times by the trial judge during the jury charge. (Trial Tr. p. 144, ll. 18 – 22; p. 148, ll. 16 – 17, ll. 24 - 25; p. 150, ll. 14 – 17; p. 151, ll. 8 – 10; p. 153, ll. 10 – 11). When taken as a whole, this Court cannot find any reasonable likelihood that the jury misapplied the law in any way to lessen the State's burden of proving each and every essential element of the crimes charged beyond a reasonable doubt.

*Failure to Object to Absence of Charge on Criminal Intent*

Applicant also alleges counsel was ineffective for failing to pose an objection on the trial judge's failure to charge the jury on the requirement of criminal intent. In reviewing the record and testimony before this Court, it is clear counsel did not pose any such an objection on the record. However, this Court finds counsel was not ineffective in this regard.

While a separate instruction was not given solely on criminal intent, the jury charges as a whole sufficiently conveyed the requirement of criminal intent and, therefore, counsel was not deficient in not posing an objection to the jury charge, nor did Applicant suffer resulting prejudice as the intent element was sufficiently covered. In the trial judge's charge on murder, he stated:

"One of the indictments in this case charges the defendant with murder. The State must prove beyond a reasonable doubt that the defendant killed

another person with malice aforethought. Malice is hatred, ill will or hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury or under circumstances that the law will infer an evil intent....Therefore, there must be a combination of the previous evil intent and the act.”

(Trial Tr. p. 151, ll. 7 – 21). Murder is defined as the “killing of any person with malice aforethought, either express or implied.” S.C. Code Ann. § 16-3-10 (2003). Accordingly, the statute sets forth that the required intent to be proven by the State is either express or implied malice aforethought. “‘Malice aforethought’ is defined as ‘the requisite mental state for common-law murder’ and it utilizes four possible mental states to encompass both specific and general intent to commit the crime.” State v. Kinard, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007) (citing Black’s Law Dictionary 969 (7th ed. 1999)). The Kinard Court went on to specifically note that “the definition of malice aforethought encompasses general intent to kill” and “malice aforethought undoubtedly has been established as the intent required in murder cases”. Kinard at 505, 646 S.E.2d at 170. Therefore, the absence of an independent instruction on general criminal intent was not necessary in this case and counsel was not objectively unreasonable for failing to request such. Further, the trial court went on to instruct the jury on the precise meaning of “malice aforethought”, thereby satisfying the requirement of charging on criminal intent and precluding Applicant from proving resulting prejudice in this regard. Therefore, this allegation is without merit.

Based on all of the reasoning set forth above, I find no resulting prejudice stemming from counsel’s failure to object to the jury charge given. Having found neither deficiency nor resulting prejudice in this regard, this allegation must also be 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 in its entirety.

## CONCLUSION

Based on 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 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.

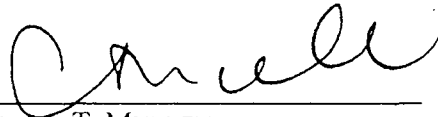
This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), 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

**IT IS SO ORDERED** this 27 day of June, 2012.

Beaufort, South Carolina

  
\_\_\_\_\_  
CARMEN T. MULLEN  
Presiding Judge  
Fourteenth Judicial Circuit



ALAN WILSON  
ATTORNEY GENERAL

June 26, 2012

2012 JUL -2 AM 10:10

The Honorable Carmen T. Mullen  
100 Ribaut Road  
Beaufort, SC 29901

RE: Adrian Allen, # 244358 v. State of South Carolina  
2010-CP-07 -00388

Dear Judge Mullen:

Enclosed please find a proposed **Amended Order of Dismissal** in the above-referenced case for your approval and signature. If this Order meets with your approval, please sign and forward it to the Beaufort County Clerk of Court for filing. Thank you for your time and consideration in this matter.

Sincerely,

Robert D. Corney  
Assistant Attorney General

RDC/arh  
Enclosure(s)

cc: Dustin Lee, Esquire

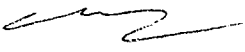
STATE OF SOUTH CAROLINA )  
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 COUNTY OF BEAUFORT )  
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 12 JUN 22 PM 3:41 )  
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Adrian Allen, #244358 )  
 )  
 vs. )  
 )  
State of South Carolina )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-07-00388

MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET

COPY

Plaintiff's Attorney: <u>Dustin Lee, Bar No. 77428</u> Address: <u>P.O. Box 4771, Hilton Head Island, SC 29938-4771</u> Phone: (843) 474-0614 Fax (888) 474-0614 E-mail: <u>dustinlee@leelaw.ws</u> Other: _____	Defendant's Attorney: <u>Robert D. Corney, Bar No. _____</u> Address: <u>P.O. Box 11549, Columbia, SC 29211-1549</u> Phone: (803) 734-5178 Fax (803) 734-4113 E-mail: _____ Other: _____
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: <u>For Reconsideration/Clarification, to Alter or Amend Judgment Pursuant to SCRCP 59(e)</u> Estimated Time Needed: <u>15 minutes</u> Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant	<u>June 20, 2012</u> Date submitted
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ <input checked="" type="checkbox"/> EXEMPT:	
(check reason) <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input checked="" type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
<b>JUDGE'S SECTION</b>	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 ADRIAN A. ALLEN, )  
 )  
 Plaintiff/Applicant, )  
 )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Defendant/Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOURTEENTH JUDICIAL CIRCUIT

Case No: 2010-CP-07-00388

NOTICE OF MOTION AND MOTION  
 FOR RECONSIDERATION/  
 CLARIFICATION, TO ALTER  
 OR AMEND JUDGMENT PURSUANT  
 TO SCRPC RULE 59(e)

12 JUN 22 PM 3:41  
 CLERK OF COURT  
 BEAUFORT COUNTY, SOUTH CAROLINA

**TO: THE HONORABLE CARMEN T. MULLEN, PRESIDING CIRCUIT COURT  
 JUDGE, AND ROBERT D. CORNEY, ATTORNEY FOR DEFENDANT/RESPONDENT:**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Adrian A. Allen, by and through his undersigned counsel, will move on the \_\_\_\_\_ day of \_\_\_\_\_, 2012, at \_\_\_\_\_ .m. before the Honorable Carmen T. Mullen, presiding Circuit Court Judge of the Fourteenth Judicial Circuit, 100 Ribaut Road, Beaufort, South Carolina 29902, pursuant to Rules of Civil Procedure Rule 59(e) for an Order Altering or Amending Judgment stemming from the Court's Order of Dismissal filed May 31, 2012 (hereinafter "Order"). A copy of said Order of Dismissal is attached hereto and incorporated herein as "Exhibit A."

Plaintiff's counsel was first provided written notice of entry of the order on Wednesday, June 13, 2012, when he received same via U.S. Mail to his post office box of record.

The grounds for this Motion are that the trial Judge failed to make a ruling as to two (2) of the five (5) grounds that Plaintiff raised seeking relief at his hearing on Tuesday, April 3, 2012. The Order addresses and rules upon only three (3) of Mr. Allen's grounds raised at the hearing.

The first ground Mr. Allen sought relief on that was not ruled upon by the trial Judge was a briefed issue set forth as “Mr. Allen's Fourth Argument – Beyond a Reasonable Doubt,” by and through his counsel, which was submitted to the Court on April 3, 2012. A copy of Mr. Allen's submitted brief entitled “Memorandum in Support of Plaintiff's Grounds” is attached hereto as “Exhibit B.” This issue was also raised via Mr. Allen's counsel's questions to Gene Hood, Esquire, and reference at the hearing. Mr. Allen's “fourth argument” is and was that his counsel was ineffective for failing to object when the Judge presented the Jury with an instruction as to reasonable doubt that did not set forth that each and every element of the offense must be proven beyond a reasonable doubt. It is Mr. Allen's contention that *In Re Winship*, U.S. Supreme Court (1970), and its progeny have clearly established that in order for a criminal defendant to be found guilty, he must be found guilty of each and every element of the charged offense(s) beyond a reasonable doubt. As the Jury must follow the Judge's instructions on the law, a jury without this instruction may improperly find a defendant guilty at a level/burden lower than that required. Mr. Allen contends that the jury may not have analyzed each element of each offense to the necessary standard of beyond a reasonable doubt due to the lack of an instruction. The record speaks for itself, in that Mr. Hood as trial counsel failed to object to this omission. Mr. Allen contends that a jury without a proper instruction as to such an essential part of the criminal burden is likely to find a criminal defendant guilty at a lower standard, which is fundamentally prejudicial. Mr. Allen requested a new trial based on this defect and its prejudicial impact upon him.

The second issue raised by Mr. Allen at his hearing that was not ruled upon relates to the element of “criminal intent” present in criminal offenses. Mr. Allen submitted a Notice and

Motion to Amend Post Conviction Application to this Court file-stamped June 23, 2011, initially putting the Defendant on notice of same. a copy of which is attached hereto as "Exhibit C." Though this particular issue was not briefed by Mr. Allen's counsel, Mr. Allen's counsel informed the Court on April 3, 2012, on the record that one additional issue not briefed would be presented, and further raised this issue via questioning directed to Gene Hood, Esquire. Mr. Allen's argument was and still is that his trial counsel, Mr. Hood, was deficient/ineffective when he did not object when the trial Judge failed to instruct the jury that a criminal charge is made up of an act plus the necessary element of "criminal intent." Mr. Allen contends that the record is clear that the element of "criminal intent" was never presented to the Jury nor was it defined. The record speaks for itself, in that Mr. Hood as trial counsel failed to object to this omission. Mr. Allen contends that a jury without a proper instruction as to such an essential element of the criminal charge is more likely to find a criminal defendant guilty without each and every element proven beyond a reasonable doubt, which is fundamentally prejudicial. Mr. Allen requested a new trial based on this defect and its prejudicial impact upon him.

Therefore, in the interests of clarification, fairness, and judicial economy, the Plaintiff would request that the Honorable Carmen T. Mullen grant Plaintiff's Motion to Alter or Amend Judgment pursuant to South Carolina Rule of Civil Procedure 59(e).

This motion is made pursuant to the statutory and common laws of the State of South Carolina, the South Carolina Rules of Civil Procedure, and the pleadings heretofore filed on the date herein and hereon.

Respectfully submitted,



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DUSTIN LEE, SC Bar No. 77428  
Lee Law Firm, LLC  
P.O. Box 4771  
Hilton Head Island, SC 29938-4771  
(843) 474-0614  
dustinlee@leelaw.ws  
ATTORNEY FOR PLAINTIFF  
ADRIAN A. ALLEN

Submitted this 20<sup>th</sup> day of June, 2012  
Hilton Head Island, South Carolina

# EXHIBIT A

STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )

Adrian Allen, #244358, )  
Applicant, )

vs. )

State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS )  
FOR THE FOURTEENTH JUDICIAL CIRCUIT )

2010-CP-07-00388 )

ORDER OF DISMISSAL )

CLERK OF COURT )  
BEAUFORT COUNTY, S.C. )  
ROSENEAU )  
MAY 31 PM 3:40 )

This matter comes before the Court by way of a Post-Conviction Relief (PCR) application filed January 28, 2010, and amended March 27, 2012. The Respondent made its Return to the application on May 24, 2010. An evidentiary hearing into the matter was convened Tuesday, April 3, 2012, at the Beaufort County Courthouse. The Applicant was present at the hearing represented by counsel, Dustin Lee, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant's trial counsel, Gene Hood, Esquire, testified. This Court had before it a copy of the transcript of the proceedings against Applicant, the records of the Beaufort County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

**PROCEDURAL HISTORY**

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. Applicant was true bill indicted at the December 2004 term of the Beaufort County Grand Jury for Murder and Possession of a Weapon During the Commission of a Violent Crime (2004-GS-07-01921/1963). He was represented by Gene Hood, Esquire, on the charges. On July 18, 2005, Applicant proceeded to jury trial before the Honorable Jackson V. Gregory. On July 19, 2005,

Applicant was convicted of the charges as indicted and sentenced to thirty-two (32) years imprisonment for Murder, to be followed consecutively by five (5) years imprisonment for the Weapons charge.

Applicant filed a Motion for New Trial for which a hearing was convened before Judge Gregory on August 12, 2005. The motion was denied. Thereafter, a Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Following the receipt of an Anders brief submitted by Joseph Savitz, III, of the South Carolina Office of Appellate Defense, the South Carolina Court of Appeals dismissed the appeal by order dated February 27, 2009. The subsequent Motion for Rehearing was denied, and the Remittitur was issued March 2, 2009.

In the current application for PCR, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. Failure to Object to Court's Jury Instruction on Reasonable Doubt Where "Reasonable Doubt" Was Not Defined;
  - b. Failure to Object to an Improper Sentence; and
  - c. Failure to Object to an Erroneous Jury Instruction on the Inference of Malice from the Use of a Deadly Weapon

#### **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.

*Failure to Object to Court's Jury Charge on Reasonable Doubt*

Applicant first alleges counsel was ineffective for failing to pose an objection when the trial court failed to include the definition of "reasonable doubt" in its jury charge.

Gene Hood, Esquire (hereafter "counsel"), the current elected Public Defender for the Fourteenth Circuit, testified he represented Applicant on the charges as an Assistant Public Defender for Beaufort County at the time. He stated he had conducted roughly one-hundred murder trials prior to representing Applicant in 2005, including several trials before Judge Jackson Gregory who ultimately presided at Applicant's trial. Counsel stated that because of his familiarity with Judge Gregory and his jury instructions, he did not prepare any proposed jury instructions to be considered

by the court. Counsel went on to say, in his experience, Judge Gregory's jury charges came "right from the [Bench] Book", and he even had the opportunity to review the charges to be given with the judge and opposing counsel in chambers prior to their reading in court. Counsel stated he did not believe he objected to any portion of the jury charges given at trial, and the record before this Court reflects the same. Counsel additionally conceded that he did not see any definition of "reasonable doubt" given in the jury charge nor did he object to the court's failure to charge such.

Based on the testimony presented and a thorough review of the record, I find Applicant's claim to be without merit in this regard as counsel was not deficient in failing to pose such an objection, nor did Applicant suffer any prejudice as a result of that alleged deficiency. Applicant's claim that the jury charge failed to comply with the requirements set forth in State v. Manning, 305 S.C. 413 (1991), and was therefore objectionable is unfounded and unsupported by the case law. In State v. Johnson, 315 S.C. 485, 445 S.E.2d 637, the Supreme Court of South Carolina commented on the so-called "Manning charge" saying the reasonable doubt charge set forth in Manning was not intended to be mandatory and the Court even went on to say "the phrase 'beyond a reasonable doubt' without an explanation...is much more favorable to a defendant than when amplified by an explanation." Id. at 487, 445 S.E. 2d at 637. The Court in Johnson ultimately held no error existed where the trial judge failed to give a definition on reasonable doubt. The Supreme Court of the United States similarly held that a definition of reasonable doubt is not Constitutionally imposed, opining:

"[S]o long as the court instructs the jury on the necessity that a defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof."

Victor v. Nebraska, 511 U.S. 1, 5, 114 S.Ct. 1239, 1244 (1994). In reviewing the record, it appears the State's burden of proof beyond a reasonable doubt was directly stated by the trial judge numerous times throughout his instructions to the jury, in addition to both attorneys mentioning that

burden in opening and closing arguments. Accordingly, I find counsel was not deficient in posing an objection to the charge on reasonable doubt as given.

Further, I find no resulting prejudice in this regard as counsel's objection, if contemporaneously made, would likely have been overruled based on the standards set forth above. Finally, even if the trial court sustained the objection and imposed a charge defining reasonable doubt, this Court cannot find any probability that the outcome of the trial would have been any different based on the testimony and evidence presented at trial. Therefore, I find counsel was not ineffective in his representation in this regard.

*Failure to Object to Improper Sentence*

Applicant's second contention is counsel was ineffective for failing to object to the sentence imposed on Applicant by the trial judge as it failed to conform with the statutory sentencing range under S.C. Code Ann. §16-3-20(A) (2003). Applicant alleges the thirty-two (32) year sentence imposed for the Murder charge was improper as the statute, at the time, read "a person who is convicted of...murder must be punished by...imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years". Therefore, Applicant argues, the trial court was bound to either impose a thirty year sentence or life sentence, not a thirty-two year sentence such as the one given.

Counsel testified he did not object to the sentence imposed on the Murder charge as he understood the trial court was able to impose a sentence of anywhere from the mandatory minimum thirty years all the way up to a life without parole sentence, with discretion to impose it anywhere between the two. He went on to say that although he did not object to the sentence, he did file a motion for reconsideration of the sentence in an attempt to get Applicant's sentence reduced. He finished by stating he did not believe the sentence was objectionable, nor that it violated the statutory sentencing range, but noted his belief that any such allegation should have been raised by

Applicant on direct appeal.

I find neither deficiency on counsel's part, nor resulting prejudice from that alleged deficiency in this allegation. First, I find counsel acted reasonably under professional norms in not objecting to the court's imposition of the sentence for the murder charge. As noted by counsel at the PCR hearing, an objection to the sentence on the grounds that thirty years and life are the only two sentencing options would have opened the door wide open to the imposition a life, a sentence Applicant was unquestionably hoping to avoid.

Further, counsel's interpretation of the language of the statute as allowing trial judges discretion in sentencing between thirty years and life was not unreasonable. The language of the statute specifically sets forth the minimum term of imprisonment as "a mandatory minimum term of...thirty years". Given the plain language of the statute, a judge is bound by a minimum sentence that he may not fall below, but is not required to solely impose a thirty year sentence. Had that been the legislature's intent, the statute would simply have read "mandatory term of thirty years", without the qualifying term "minimum" included. See State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language."). An interpretation of the statute to the contrary would render the word "minimum" both unnecessary and meaningless.

This reasonable reading of the statute is evidenced by language set forth in the case law of our state. Specifically, the South Carolina Supreme Court in past opinions has also interpreted the statute as giving trial judge's the discretion to sentence convicted murderers to terms of imprisonment *at least* at the mandatory minimum thirty years *up to* a life sentence. See for example State v. Morgan, 367 S.C. 615, 626 S.E.2d 888 (2006)(Remanding a case to the trial court for sentencing on a murder conviction where lower court instructed to "decide on a sentence that ranges **from** a mandatory minimum imprisonment term of thirty years **to** life imprisonment". (emphasis

added). *Id.* at 619). Therefore, counsel's interpretation of the statute was not unreasonable, nor was his failure to object to the sentence imposed.

Based on the above, I find counsel's performance in this regard was not unreasonable based on professional norms. Additionally, I find Applicant has failed to carry his burden in proving resulting prejudice based on counsel's lack of objection to the sentence. There has been nothing brought before this Court to prove that, had counsel made such an objection, the trial judge would have imposed the minimum thirty year sentence rather than the "other option" of a life sentence. In fact, based on the outcome of Applicant's post-trial motion for reconsideration the sentence, it seems the trial judge was not going to allow Applicant to receive the mandatory minimum thirty year term. Therefore, I find Applicant has failed to prove both deficiency and resulting prejudice. Accordingly, this allegation is denied and dismissed with prejudice.

*Failure to Object to Improper Malice Instruction*

Applicant's final contention raised at the PCR hearing is that counsel was ineffective for failing to object to an improper jury charge on the inference of malice to be inferred from the use of a deadly weapon.

Counsel testified, as stated above, that he was very familiar with Judge Gregory's typical jury charges as they came directly out of the Judge's "Bench Book", and further stated he reviewed the proposed charges in chambers prior to them being given to the jury. He also said he did not recall making any objections to the jury charges given by the trial judge, which this Court has confirmed in reading the record. Regarding the specific malice instruction given, counsel noted that malice itself is an element of murder to always be charged as part of the crime, but the inference of malice based on the use of a deadly weapon jury charge set forth in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), has since been overturned by the ruling set forth in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). Counsel stated he and Applicant had discussed presenting a self-defense theory

at trial, but was unable to uncover and present sufficient facts to support such a defense and, therefore, was ultimately forced to abandon it. Counsel finished by stating he did not believe there was any reason to object to the inference of malice jury charge as this case was tried well before the decision in Belcher and there was no evidence that could be offered by Applicant to mitigate, excuse or justify the killing.

Based on a thorough review of the record before this Court and the testimony presented, I find counsel's performance was not deficient where he failed to pose an objection to the jury instruction on the permissive inference of malice arising from the use of a deadly weapon. "In general, the trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged to the jury must be determined by the evidence presented at trial." State v. Harris, 382 S.C. 107, 113, 674 S.E.2d 532, 535 (Ct. App. 2009). Further, the substance of the law is what must be instructed to the jury, not any particular verbiage. See State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980). The charge given by the trial judge was appropriate and in accordance with the relevant law at the time, and therefore was not objectionable. In fact, the language used in the charge was taken directly from the judge's "Bench Book" which is regularly used in charging juries across the state on the law to be applied in both civil and criminal cases. Applicant's contention that the charge given "constituted a mandatory presumption" of malice rather than a permissive presumption is without merit as the language used by the judge clearly conveyed that the jury "may" presume such malice. Therefore, I find counsel exercised reasonable judgment based on professional norms in not objecting to the charge as given.

Applicant has also failed to prove how counsel's failure to object to the jury charge given on the permissive inference of malice resulted in prejudice to his case. Had counsel made such an objection, the trial court would have overruled the objection and allowed the jury to continue to

operate under the law as charged since it was a complete and accurate statement of the law regarding the permissive inference at the time. While Belcher set forth a drastic change in precedent in finding that a jury instruction on the permissive inference of malice from the use of a deadly weapon should not be given by a trial court where evidence is presented that would reduce, mitigate, excuse or justify the killing, Belcher was not decided until roughly three and a half years after Applicant's trial, and eight months after Applicant's direct appeal was dismissed.

Of little consequence to this decision is the application of Belcher, which this Court finds would not have made a difference to the outcome of Applicant's trial even had it applied. There was no evidence presented at trial that would reduce, mitigate, excuse, or justify Applicant's killing of the victim as required to invoke Belcher. Additionally, the Court in Belcher specifically noted that the ruling would "not apply to convictions challenged on post-conviction relief". Belcher at 613, 685 S.E.2d at 811. Therefore, even in taking Applicant's argument on its face and applying Belcher (which clearly does not apply), the allegation is without merit.

Based on all of the reasoning set forth above, I find no resulting prejudice stemming from counsel's failure to object to the jury charge given. Having found neither deficiency nor resulting prejudice in this regard, this allegation must also be 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 in its entirety.

### **CONCLUSION**

Based on 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 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), 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

IT IS SO ORDERED this 8 day of May, 2012.

Beaufort, South Carolina

  
CARMEN T. MULLEN  
Presiding Judge  
Fourteenth Judicial Circuit

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

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2010CP0700388

Adrian A Allen	South Carolina State Of
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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**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), SCRPC;       Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);       Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**       Rule 40(j) SCRPC;       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:

**Order Of Dismissal (with prejudice)**

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk:

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**INFORMATION FOR THE JUDGMENT 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 (List amount(s) below)

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.**

s/ C.T. Mullen  
Circuit Court Judge

2142  
Judge Code

5/8/2012  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on **31st day of May, 2012**, and a copy mailed first class or placed in the appropriate attorney's box on **7th day of June, 2012**, to attorneys of record or to parties (when appearing pro se) as follows:

**Adrian A Allen #244358**  
Lieber C.I.-Stono B-42  
P.O. Box 205 Ridgeville, SC 29472

**Dustin Lee, Esq.**  
PO Box 4771 Hilton Head Island, SC 2993847

**Ashleigh Rayanna Wilson, Esq.**  
PO Box 11549 Columbia, SC 29211

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Trena Patterson/staff

**Jerri Ann Roseneau - Clerk of Court**

**Court Reporter**

# EXHIBIT B

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 ADRIAN A. ALLEN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOURTEENTH JUDICIAL CIRCUIT

Case No: 2010-CP-07-00388

MEMORANDUM IN SUPPORT  
 OF PLAINTIFF'S GROUNDS

COPY

COMES NOW the Plaintiff, Adrian A. Allen, by and through his undersigned counsel, and submits this Memorandum in Support of his grounds for Post Conviction Relief.

**GENERALLY APPLICABLE LAW**

A defendant has the right to the effective assistance of counsel under the Sixth Amendment. *U.S.C.A. Const. Amend. 6; Von Dohlen v. State*, 602 S.E.2d 738 (S.C. 2004), reh'g. denied, (Oct. 6, 2004). The proper measure of counsel's performance is whether he has provided representation within the range of competence required of attorneys in criminal cases.

A claim of ineffective assistance of counsel may be raised in a post-conviction relief (PCR) action because, if the applicant proves his case, his conviction or sentence will be overturned. *U.S. Const. Amend. 6; S.C. Code Ann. Section 17-27-20(a)* (1976); *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000).

In deciding the issue of prejudice in post-conviction relief actions, the South Carolina Supreme Court noted that before a constitutional deprivation will be declared harmless, the court must find it harmless beyond a reasonable doubt, that is, that the error did not contribute to the verdict. *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992). This means that the court must find the error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record. *Id.*

**ALLEN'S FIRST ARGUMENT – REASONABLE DOUBT CHARGE:**

Mr. Allen's first argument is that his counsel failed to object to the trial Judge's failure to give a "Manning" charge defining reasonable doubt, which gets its name from *State v. Manning*, 305 S.C. 413 (1991). The *Manning* charge is perhaps best set forth as:

“What is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.” Ralph King Anderson, Jr., *South Carolina Request to Charge – Criminal*, 2007, Section 1-5 Reasonable Doubt.

It is Mr. Allen's contention that without defining the term reasonable doubt, the jury was not properly informed as to how to apply the Judge's instructions. Because trial counsel failed to object to the lack of a *Manning* charge, the jury proceeded unaware as to how to properly apply an otherwise likely unfamiliar term of art utilized primarily by criminal law practitioners, and not laypeople. But for a proper instruction, Mr. Allen contends, there is a reasonable probability that the jury may have in fact hesitated, and found him not guilty of murder. Mr. Allen believes that this raises a “reasonable probability” sufficient to undermine confidence in the outcome. Just as “reasonable probability” has been defined by the appellate courts for use by the lower courts, it is Mr. Allen's contention that those not familiar with legal terminology should have these words defined such that one without a formal legal education may properly apply the standard, thereby guaranteeing a fair trial and verdict.

### MR. ALLEN'S SECOND ARGUMENT – IMPROPER SENTENCE

Mr. Allen's second argument is that the trial Judge exceeded his statutory authority and power when he sentenced Mr. Allen to thirty-two (32) years for the crime of murder, when S.C. Code Ann. Section 16-3-20(A) set forth at the time that if the Judge did not punish him by death or life imprisonment, that Mr. Allen must be punished “by a mandatory minimum term of imprisonment for thirty years.” Trial counsel failed to object to this sentence, which has clearly prejudiced Mr. Allen to the extent of two (2) years of incarceration.

Black's Law Dictionary defines a “mandatory sentence” as “A sentence set by law with no discretion for the judge to individualize punishment.” *Black's Law Dictionary, Third Pocket Edition* under “Sentence” heading at 645, Bryan A. Garner, Editor in Chief (2006). “Minimum sentence” is thereafter defined as “The least amount of time that a defendant must serve in prison before becoming eligible for parole.” *Id.*

Section 16-3-20(A) further sets forth in relevant part, “No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is...” There is no doubt that a criminal statute for the crime of murder setting forth potential punishments is penal in nature. The South Carolina Supreme Court has already set forth that the words in a statute are important, as there is a difference in regards to parole eligibility when a statute sets forth a “mandatory minimum term of 25 years,” versus a “mandatory term of 25 years.” *Kerr v. State*, 345 S.C. 183, 547 S.E.2d 494 (2001). When a statute is penal in nature, it must be construed strictly against the state and in favor of the defendant.” *Id.*

The Judge did not punish Mr. Allen by death or by life imprisonment. As such, it had one choice left, which was a “mandatory minimum term of imprisonment for thirty years.” The statute later references this exact sentence time/length in the same part (A). If the legislature desired to allow a range of sentences, it could have easily added in the language “at least” before thirty years.

Instead, a plain reading, or one utilizing Black's law dictionary and referencing *Kerr*, in which a twenty-five year sentence was indeed given for a mandatory twenty-five offense by/per the statute, it is Mr. Allen's contention that the legislature meant to remove discretion from a sentencing trial judge by ensuring that one convicted of murder be sentenced to thirty (30) years exactly if not sentenced to death or life imprisonment.

In *State v. De La Cruz*, 302 S.C. 13 (1990), the South Carolina Supreme Court noted that, "The Congressional trend towards less discretion and more determinate sentencing was designed, as explained by the United States Supreme Court in *Mistretta* [*v. United States*] to alleviate the twin problems of: (1) the great variation among sentences imposed by different judges upon similarly situated offenders; and (2) the uncertainty as to the time the offender would spend in prison. *Mistretta*, 488 U.S. at ----, 109 S.Ct. at 651, 102 L.Ed.2d at 727 (1989).

When the terms of a statute are clear and unambiguous, the court must apply them according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *See Kerr v. State*.

Mr. Allen contends that if his other grounds for a new trial are denied, that he is still entitled to be re-sentenced to a term of thirty (30) years, as the trial Judge exceeded his statutory power when he sentenced Mr. Allen to thirty-two (32) years, and his trial counsel was ineffective prejudicially when he failed to object to same.

### MR. ALLEN'S THIRD ARGUMENT – IMPROPER MALICE INSTRUCTION

Mr. Allen's third argument is that his trial counsel failed to object to the trial Judge's improper malice element jury charge. To be clear, Mr. Allen contends that the trial judge's instruction on the presumption of malice from the use of a deadly weapon constituted a mandatory presumption or inference rather than a permissive inference, and it did not properly instruct the jury as to its ability to accept or reject same. This is clearly against the South Carolina Supreme Court's directive from *State v. Elmore*, 279 S.C. 417, where the Court set forth:

We suggest the following charge:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

The Court concluded by immediately thereafter stating, "We caution the bench, that *hereafter only slight deviations from this charge will be tolerated.*" (Emphasis Added). Mr. Allen's trial occurred over a decade after the South Carolina Supreme Court issued this ruling, which is reflected verbatim in a portion of Judge Ralph King Anderson, Jr's *South Carolina Requests to Charge – Criminal*, 2007, Section 1-18, Implied Malice – Use of Deadly Weapon – Permissive

Inference. As of 2007 it seems that the law had not changed to warrant a modification or alteration in a widely used jury charge text in South Carolina. It is Mr. Allen's contention that his trial counsel was ineffective for failing to object to this charge, that prejudice is established by prior case law among other factors, and that he should therefore be entitled to a new trial.

#### MR. ALLEN'S FOURTH ARGUMENT – BEYOND A REASONABLE DOUBT

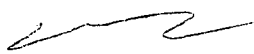
It is Mr. Allen's fourth argument that his counsel was ineffective for failing to object when the Judge presented the Jury with an instruction as to reasonable doubt that did not set forth that each and every element of the offense must be proven beyond a reasonable doubt. It is Mr. Allen's contention that *In Re Winship*, U.S. Supreme Court (1970) , and its progeny have clearly established that in order for a criminal defendant to be found guilty, he must be found guilty of each and every element of the charged offense(s) beyond a reasonable doubt. As the Jury must follow the Judge's instructions on the law, a jury without this instruction may improperly find a defendant guilty at a level/burden lower than that required. Combined with an allegedly improper malice inference that may have improperly shifted the burden upon Mr. Allen, Mr. Allen contends that the jury may not have analyzed each element of each offense to the necessary standard of beyond a reasonable doubt due to the lack of an instruction. The record speaks for itself, in that Mr. Hood as trial counsel failed to object to this omission. Mr. Allen contends that a jury without a proper instruction as to such an essential part of the criminal burden is likely to find a criminal defendant guilty at a lower standard, which is fundamentally prejudicial.

"The 'requirement that harmless error be clear beyond a reasonable doubt embodies [a] standard requiring reversal if there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " *Arnold v. State*, 309 S.C. 157, ----, 420 S.E.2d 834, 838 (1992) (quoting *Yates v. Evatt*, 500 U.S. 391, ----, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432, 448-49 (1991)).

Mr. Allen has requested a new trial based on this defect and its prejudicial impact upon him.

WHEREFORE, the Plaintiff's Adrian A. Allen respectfully prays for relief as set forth in his original and Amended Petitions, as supported by this Memorandum and the law set forth herein.

Submitted this 4<sup>th</sup> day of April, 2012  
Beaufort, South Carolina



---

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Hilton Head Island, SC 29938-4771  
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dustinlee@leelaw.ws  
ATTORNEY FOR PLAINTIFF  
ADRIAN A. ALLEN

# EXHIBIT C

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF BEAUFORT ) C/A NO 2010-CP-07-388  
 ADRIAN A. ALLEN, #244358 )  
 vs ) NOTICE AND MOTION TO  
 ) POST CONVICTION APPLICATION  
 STATE OF SOUTH CAROLINA )  
 RESPONDENT )

---

2011 JUN 23 PM 1:43  
 JEREMY B. ROSENEAU  
 CLERK OF COURT  
 BEAUFORT COUNTY, S.C.

Comes now Adrian A. Allen, #244358, now moves this court through his undersigned attorney to amend his Post Conviction Application pursuant to rule 15(a) of South Carolina Rules of Civil Procedure and S.C. Code Ann. §17-27-90, which state all grounds for relief available to an applicant under post conviction procedure act must be raised in his original, supplemental, or amended application.

Wherefore, having set-forth this motion to amend and propose amendment, applicant prays an Order to amend be issued.

Dated

*June 22* 2011

*[Signature]*  
 Attorney for Adrian A. Allen

STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )  
ADRIAN A. ALLEN #244358 )  
Applicant, )  
vs, )  
STATE OF SOUTH CAROLINA )  
RESPONDENT. )

---

IN THE COURT OF COMMON PLEAS

C/A NO: 2010-CP-07-388

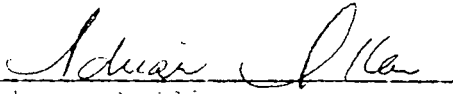
PROPOSE AMENDMENT TO POST  
CONVICTION APPLICATION

1. The applicant contends that counsel was ineffective during the jury charge to the jury, in as much as, counsel fail to object to the unconstitutional jury charge because the Judge failed to instruct the jury on the element of Criminal Intent in violation of the Due Process Clause of the 14th Amendment of the United States Constitution.

2. The applicant contends that counsel was ineffective during the jury charge to the jury, in as much as, counsel fail to object to the unconstitutional jury charge, because the Judge failed to charge the jury on the element of Reasonable Doubt in violation of the 14th Amendment of the United States Constitution.

Respectfully submitted

May 31 2011

  
Adrian A. Allen

1 Sum and total. And now the State wants you to convict  
2 Adrian Allen of murder based on that evidence. I think  
3 that after you've had a chance to evaluate it all, you're  
4 going to find that you cannot believe beyond a reasonable  
5 doubt the witnesses who have testified concerning this  
6 event; and that you will come back with a proper verdict  
7 and that verdict being not guilty. Thank you.

#### 8 JURY CHARGE

9 THE COURT: Madame Forelady, members of the  
10 jury, the State of South Carolina charges the defendant,  
11 Adrian Allen, in two separate indictments with the offense  
12 of murder and with the offense of possession of a firearm  
13 during a violent crime. These two indictments have been  
14 explained to you and you will have them in the jury room  
15 with you during your deliberations. The defendant has pled  
16 not guilty to the indictments and that plea puts the burden  
17 on the State to prove a defendant guilty.

18 ① A person charged with committing a criminal  
19 offense is never required to prove himself innocent. I  
20 charge you that it is an important rule of law that the  
21 defendant in a criminal trial, no matter what the  
22 seriousness of the charge, may be, will always be presumed  
23 to be innocent of the crime for which the indictment was  
24 issued unless guilt has been proven by evidence satisfying  
25 you, the jury, of that guilt beyond a reasonable doubt.

1 This presumption of innocence does not end when you begin  
2 your deliberations. It accompanies throughout the trial  
3 until you reach a verdict of guilt based upon evidence  
4 satisfying you of that guilt beyond a reasonable doubt.

5 The presumption of innocence is like a robe of  
6 righteousness placed upon the shoulders of the defendant  
7 which remains with him until it has been stripped of him by  
8 evidence satisfying you of the defendant's guilt beyond a  
9 reasonable doubt. The presumption of innocence is not mere  
10 legal theory, it's not just a legal phrase, it is a  
11 substantial right to which every defendant is entitled  
12 unless you the jury are satisfied from the evidence of the  
13 defendant's guilt beyond a reasonable doubt.

14 (2) Ladies and gentlemen, under the law of South  
15 Carolina, you are the sole judges of the evidence presented  
16 in this trial. As the judge, I'm not allowed to suggest to  
17 you any opinion I may have regarding the facts or evidence  
18 presented. If you've gathered any inference whatsoever  
19 regarding any facts of this case from anything that I have  
20 said during this trial you are required to disregard this  
21 inference completely. You and you alone are the sole  
22 judges of the facts in the case, the credibility of the  
23 witnesses and the weight to be given the testimony and the  
24 evidence presented. In determining the credibility of any  
25 witness, you have the right to take into consideration the

1 interest of the witness, the bias of the witness and the  
2 demeanor of the witness upon the stand. As a jury, you  
3 have a right to believe one witness as against several or  
4 several as against one and you may choose to believe a  
5 portion of a witness's testimony and disbelieve another  
6 portion of it. And while you consider these matters,  
7 always bear in mind that you should give the defendant the  
8 benefit of every reasonable doubt.

9 (3) The defendant in the case has not testified.  
10 This is his constitutional right and is not a circumstance  
11 that you can take into your consideration or even allow in  
12 your discussion in your jury room. Under the Constitution  
13 of South Carolina and under the United States Constitution  
14 it is a person's constitutional right not to testify. The  
15 burden of proof is upon the State of South Carolina to  
16 establish his guilt by competent testimony beyond a  
17 reasonable doubt; and the fact that the defendant did not  
18 take the stand and testify in his own behalf does not  
19 create any inference against him. The jury must not permit  
20 this fact to weigh in the slightest degree against this  
21 defendant nor should this fact enter into the discussions  
22 or deliberations of the jury in any manner.

23 As the judge of the law, the State of South  
24 Carolina makes me the sole instructor of the law which  
25 applies in this case and I will instruct you on the law

1 which you are to apply to the facts as you determine them  
2 to be. And you are required to accept the law as I give it  
3 to you and you may not reject the law because you think it  
4 unwise or disagree with it or for any other reason. I  
5 can't tell you what the facts of the case are and you are  
6 required to apply the law as I give it to you.

7 (4) One of the indictments in this case charges the  
8 defendant with murder. The State must prove beyond a  
9 reasonable doubt that the defendant killed another person  
10 with malice aforethought. Malice is hatred ill will or  
11 hostility toward another person. It is the intentional  
12 doing of a wrongful act without just cause or excuse and  
13 with an intent to inflict an injury or under circumstances  
14 that the law will infer an evil intent.

15 (5) Malice aforethought does not require that  
16 malice exist for any particular time before the act is  
17 committed. But malice must exist in the mind of the  
18 defendant just before and at the time the fact is  
19 committed. Therefore, there must be a combination of the  
20 previous evil intent and the act. Malice aforethought may  
21 be expressed or inferred.

22 (6) These terms, expressed and inferred do not mean  
23 different kinds of malice, but merely the manner in which  
24 malice may be shown to exist. That is either by direct  
25 evidence or by inference from the facts and circumstances

1 which are proved. Express malice is shown when a person  
2 speaks words or express hatred or ill will for another or  
3 when the person prepared beforehand to do the act which was  
4 later accomplished. / For example lying in wait for a person  
5 or any other act of preparation, going to show that the  
6 deed was within the defendant's mind would be express  
7 malice /


8 Malice may be inferred from conduct showing a  
9 total disregard for human life. Inferred malice may also  
10 arise when the deed is done with a deadly weapon. A deadly  
11 weapon is any article, instrument or substance which is  
12 likely to cause death or great bodily harm. Whether an  
13 instrument has been used as a deadly weapon depends upon  
14 the facts and circumstances of each case. The following  
15 are examples of instruments which may be a deadly weapons,  
16 a pistol a shotgun, a rifle, a dagger, a knife, a  
17 slingshot, metal knuckles, razor, gasoline, matov cocktail.

18 The second indictment, ladies and gentlemen,  
19 charges the defendant with the violation of code section  
20 16-23-490 which provides as follows, in relevant part, I'm  
21 not going to read the whole thing to you. If a person is  
22 in possession of a firearm or visibly displays what appears  
23 to be a firearm or visibly displays a knife during the  
24 commission of a violent crime and is convicted of  
25 committing or attempting to commit a violent crime as

Handwritten note: Malice may be inferred from conduct showing a total disregard for human life.

1 defined by our code sections, he must be imprisoned for an  
2 additional period of time provided for the principal crime.

3 And I charge you, ladies and gentlemen, that  
4 the offense of murder is classified as a violent crime.  
5 For you to find the defendant guilty of this second  
6 indictment which is a separate statute for the offense of  
7 possession of a firearm during a violent crime, you must at  
8 first have found the defendant guilty of the crime of  
9 murder. If you find the defendant guilty of murder in the  
10 case, then you must determine whether the State has proven  
11 beyond a reasonable doubt that the defendant was in  
12 possession of a firearm or visibly displayed what appeared  
13 to be a firearm during the commission of the crime of  
14 murder. As I say again, unless you find the defendant to  
15 be guilty of murder, you cannot find the defendant guilty  
16 of possession of a weapon during a violent crime.

17  As fair and impartial jurors, you are sworn to  
18 impartially try and determine the facts of this case. When  
19 you comply with your oath, no one will have a right to  
20 criticize your verdict and you'll have discharged your  
21 duties as jurors. You must not be influenced by any  
22 opinions about this case which you may have heard on the  
23 outside. You must decide this case from the testimony that  
24 you have heard from sworn witnesses along with the evidence  
25 introduced in the trial. There are two verdicts which you

1 may find as to each indictment, one of guilty the other of  
2 not guilty. There is no significance whatsoever in the  
3 order in which I state these possible verdicts to you, it's  
4 simply that one must be stated first. Your verdict must be  
5 a unanimous one; that is it must be the verdict of each and  
6 every one of you.

7 Madame Forelady, when the jury agrees on a  
8 verdict, you will write it on the back of each indictment  
9 and on the back of each indictment there's a lot of things,  
10 but there is the word verdict printed with several lines  
11 under that and so you would write the verdict of the jury  
12 and then sign your name. There's also a line for the  
13 forepersons signature.

14 If during your deliberations, ladies and  
15 gentlemen, you need to communicate with me about some  
16 question that you have about your deliberations, please  
17 write a note, give it to the bailiffs and they will get it  
18 to me and we will come back in here to discuss the matter  
19 with you. All of the matters that have been introduced  
20 into evidence will, of course, be brought into the jury  
21 room for you to use during your deliberations as you see  
22 fit.

23 Are there any exceptions or additions?

24 MR. KNIGHT: None from the State.

25 MR. HOOD: None, Your Honor.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 ADRIAN A. ALLEN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOURTEENTH JUDICIAL CIRCUIT

Case No: 2010-CP-07-00388

CERTIFICATE OF SERVICE

COPY

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 BEAUFORT COUNTY, S.C.  
 CLERK OF COURT

I, Dustin Lee, hereby certify that on this 20th day of June, 2012, I have caused the foregoing **NOTICE OF MOTION AND MOTION FOR RECONSIDERATION/CLARIFICATION, TO ALTER OR AMEND JUDGMENT PURSUANT TO SCRPC RULE 59(e)** to be served upon Robert D. Corney, Esquire, by United States mail, first-class postage prepaid, at his address:

Robert D. Corney, Esquire  
 South Carolina Attorney General's Office  
 Post Office Box 11549  
 Columbia, SC 29211

As well as upon The Honorable Carmen T. Mullen, by United States Mail, first-class postage prepaid, at her address:

The Honorable Carmen T. Mullen  
 P.O. Drawer 1128  
 Beaufort, SC 29901



DUSTIN LEE, SC Bar No. 77428  
 Lee Law Firm, LLC  
 P.O. Box 4771  
 Hilton Head Island, SC 29938-4771  
 (843) 474-0614  
 dustinlee@leelaw.ws  
 ATTORNEY FOR PLAINTIFF  
 ADRIAN A. ALLEN

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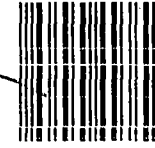
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