STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

JOHN J. MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-000786

PETITION FOR WRIT OF CERTIORARI

JOHN J. MOORE

Petitioner

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Issues Presented

1. Is there any evidence of probative value which support the PCR courts conclusion that counsel was not ineffective for failing to request a jury instruction explaining how the jury must evaluate the "use of a vehicle as deadly weapon" in determining the weight of the evidence and credibility of the witnesses in evaluating each self-defense element previously charged to the jury by the trial judge under the beyond a reasonable doubt standard?

2. Is there any evidence of probative value which supports the PCR courts conclusion that counsel was not ineffective for failing to object and request voir dire to examine the jurors or otherwise move for mistrial on the basis that several jurors fell asleep during the course of the defendant's trial and in doing so compromised the defendant's right to impartial and mentally competent jurors to insure a fair trial?

3. Is there any evidence of probative value which supports the PCR courts conclusion that counsel was not ineffective for failing to properly investigate and prepare Applicant's case where the PCR court proffered Applicant's affidavit evidence into the record but did not consider Applicant's affidavit evidence in its determination of this ineffective assistance of counsel allegation?

4. Is there any evidence of probative value which supports the PCR court's conclusion that counsel was not ineffective for failing to object to the jury instruction given an accomplice liability and "jointly at fault in bringing on the difficulty" where there is no evidence in the record the defendant aided, abetted, or acted in concert with Kerwyn Phillips in any of the elements of his convictions?

Statement

The Petitioner John Joseph Moore, Jr. was indicted for the offenses of Murder, Possession of a firearm during commission of a violent crime and possession of a pistol by a person under the age of 21. Petitioner John Joseph Moore Jr. was convicted of Voluntary Manslaughter, possession of a firearm during commission of a violent crime and possession of a pistol by a person under the age of 21, by jury trial held during the January 2008 term of Richland County General Session Court before Judge William P. Keesley. Petitioner was sentenced 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 the age of 21. Petitioner was represented initially by Ms. April Sampson of the Richland County Public Defender's Office; she was subsequently removed as counsel. Petitioner was then represented by Ms. Elizabeth Franklin of the Richland County Public Defender's Office; she was subsequently removed as counsel. Petitioner was then represented by and proceeded to trail with counsel(s) Greg Collions and Doug Strickler of the Richland County Public Defender's Office, and solicitor(s) Heather Weiss, John Meadors and Joanna Mcduffie of the Richland County Solicitors office prosecuted the case. Petitioner appealed the conviction and sentence for possession of a pistol by a person under the age of 21 years and this offense was reversed by the SC Court Of Appeals, petitioners other convictions and sentences were not briefed on appeal by appellant counsel. Petitioner was represented on appeal by Joseph Savitz, III, ESQUIRE, of the South Carolina Office of Appellant Defense. State v. Moore OP.NO.2010-UP-409 (S.C.Ct.App. filed September 16, 2010).

On December 6, 2010, petitioner signed and mailed the original P.C.R. application with an original attachment of issues and the verification to Richland County Clerk of Court. On January 6, 2012 the petitioner filed a supplemental Amendment to the P.C.R application with a memorandum of law by and through his P.C.R counsel, Rowland P. Alston, III. On February 15, 2011, the state filed a Return to the P.C.R application filed by the petitioner. An evidentiary hearing was convened on May 23, 2012 at the Richland County Court House, before Judge L. Casey Manning. On January 7, 2013 Judge Manning issued an Order of Dismissal in this case. Petitioner timely filed a Rule 59 (E) motion to alter and the amend the judgment of Judge Manning's Dismissal Order on January 15, 2013. On April 1, 2014 Judge Manning signed a denial of petitioners 59(E) motion to alter and or amend judgment. Thereafter, the petitioner timely filed a Noticed of Appeal to contest Judge Manning's rulings on the P.C.R application, its attachments, its amends and the denial of the 59(E) motion. The petition for Writ of Certiorari follows.

Issue Presented

1. **Is there any evidence of probative value which supports the PCR court's conclusion that counsel was not ineffective for failing to request a jury instruction explaining how the jury must evaluate the "use of a vehicle as deadly weapon" in determining the weight of the evidence and the credibility of the witnesses in evaluating each self-defense element previously charged to the jury by the trial judge under the beyond a reasonable doubt standard.**

In this criminal case there is evidence that was produced at trial which established the necessity for the trial judge to instruct the jury of the current applicable law on self-defense. In instructing the jury with South Carolina applicable self-defense laws the trial judge instructed the jury of the below specific individual components of self-defense principles and how such specific individual components of self-defense principles may become interdependent upon each other and may interact with each other in whole or in part. Additionally, the trial judge instructed the jury of the requirement that the jury must determine beyond a reasonable doubt whether or not the interdependent and/or interactions of these specific individual components of self-defense principles as a whole entitle the defendant to the complete defense of self-defense. The below are excerpts of the trial transcript specifically referring to the multiple self-defense charges the trial judge instructed the jury:

1. **Self-defense is a complete defense.** The trial judge instructed the jury that "self-defense is a complete defense which means that if a defendant acts in self-defense, he is not guilty of murder or manslaughter." App. 749, lines 19-24; App. 752, lines 13-16.

2. **Taken a life is justified under self-defense.** The trial judge instructed the jury a defendant may take the life of an assailant and the taking of that life is justified under the self-defense principles. App. 750, lines 1-4.

3. **Party at fault in bringing difficulty.** The trial judge instructed the jury on the self-defense principle of determining the party at fault in bringing on the difficulty. App. 750, lines 5-12; lines 21-23.

4. **Restoration of self-defense right.** The trial judge instructed the jury on the self-defense principle of determining how and when one who is at fault in bringing on the difficulty can be restored to the full protection of self-defense rights. App. 750, lines 13-20; line 23-App. 751, line 1.

5. **Without fault or withdrawn from conflict.** The trial judge instructed the jury that a defendant who was without fault in bringing on the difficulty or who has withdrawn from the conflict, this defendant must meet the requirement that he actually believes he was in imminent danger or must actually been in imminent danger of death or serious bodily harm. App. 751, lines 2-10.

6. **Strike back of self defense right.** The trial judge instructed the jury that for situations where a defendant is in imminent danger, the circumstances facing the defendant must have been such to warrant a person of ordinary prudence, firmness, and courage to strike back in the manner the defendant allegedly did. App.751, lines 11-23.

7. **Avoiding the danger of death.** The trial judge instructed the jury that the defendant must have had no other probable means of avoiding the danger of death or serious bodily harm except to act as he did. App. 752, lines 9-12.

8. **Consider all the evidence of self-defense before determine innocent or guilt.** The trial judge instructed the jury that if they find "a reasonable doubt of the defendant's guilt after considering all the evidence, including the evidence of self-defense, then you are to

find the defendant not guilty on the charge of murder. And, again, you can't find him guilty of murder or manslaughter if the act was in self-defense because it is a lawful act." App. 752, line 19-App. 753, line 1.

9. **Perception of danger.** The trial judge instructed the jury that "in assessing the issue of self-defense, you look at all the facts and circumstances. In evaluating the defendant's perception of danger, a defendant may act on appearances and it is not required that a defendant actually have been in danger." App. 753, lines 6-11.

10. **Mistaken belief of threat.** The trial judge instructed the jury that "the defendant has the right to act on appearances even though the defendant's beliefs may have been mistaken." App. 753, lines 14-16.

11. **Means of escape.** The trial judge instructed the jury that "If the defendant has a means of escape, he is generally required to use it. He must leave if he has a means of escaping the danger unless by doing so the danger of being killed or suffering serious bodily injury would increase." App. 753, lines 17-23.

12. **One who is attacked by the use of a deadly weapon.** The trial judge instructed the jury that "one who is attacked by the use if a deadly weapon has no obligation to retreat." App. 753, lines 23-24.

13. **So much force as appeared necessary.** The trial judge instructed the jury that "the defendant has a right to use so much force as appeared to be necessary for complete protection and for which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm." App.754, lines 4-9.

14. **Continuing using force.** The trial judge instructed the jury that "once the defendant is justified in acting in self-defense to defend himself, he is justified in continuing using force until it is apparent that the danger of death or serious bodily injury has completely ended." App. 754, lines 9-13.

15. **No requirement to wait to be assaulted.** The trial judge instructed the jury that "where a defendant is operating under a reasonable belief of his impending death or serious bodily injury, he is not required to wait until the perceived assailant gets the drop on him before acting in self-defense." App. 754, lines 14-18.

16. **Follow instructions as explaining by trial judge.** The trial judge instructed the jury "if a defendant acts in self-defense, as I've explain all of those concepts to you, he is not guilty of murder or manslaughter." App.754, lines 19-22.

The jurors were instructed on the above specific principles of the components of the self-defense laws of South Carolina. The jurors were not instructed at all on the proper and permissible evaluations of Derrick's vehicle in this incident as a "deadly weapon." The trial counsels Collins and Strickler did not lodged objects nor did either request jury instructions from the trial judge on the legal evaluation the jury must undertake in determining the application of the "deadly weapon" instructions to the evidence presented at trial which involved the conduct, manner and circumstances with which Derrick operated his vehicle in relation to the vehicle occupied by the Defendant and the states witness Kerwyn Phillips. In any other case the significance of the failure to charge a jury instruction as to the use of a vehicle as a deadly weapon would be debatable. But, because of the specific facts and circumstances of this case which were presented to the jurors through trial evidence, coupled with the several interdependent and interactive specific individual components of self-defense principles which

were charged by the trial judge to the jury, this case presents a perfect storm and a stark example demonstrating why it is imperative a jury must be charged correctly and adequately to discharge its duty in determining the evidence constitutionally beyond a reasonable doubt.

In South Carolina, a jury charge which instructs the jury that an automobile is a deadly weapon and that the operator of the automobile holds the same liability as an operator who carelessly uses a firearm is held to be legally permissible and correct. The juries in South Carolina are allowed to treat the automobile driven by an assailing operator and the firearm discharged by an assailing operator as equivalent dangerous instrumentalities that must be placed in the same class of deadly weapon if the jury so finds. ("In South Carolina, an automobile is regarded as a dangerous instrumentality." State v. Wilds, 584 S.E.2d 138 (S.C. App 2003); Yaun v. Baldridge, 134 S.E.2d 248,251(1964); State v. Caldwell, 98 S.E.2d 259, 261 (1957); State v. Barnett, 63 S.E.2d 57; State v. Dixon, 186 S.E. 531; Stovall v. Sawyer, 187 S.E. 821; State v. Staggs 195 S.E. 130; State v. Sussewell, 146 S.E. 697, 703 (1929); In Re McFadden, 99 S.E 838, 839 (1919); see also State v. Hanahan, 96 S.E. 667 (S.C. 1918)). " In that by so charging he instructed the jury as a matter of laws that an automobile is a deadly weapon, or dangerous instrumentality, the careless use of which would subject the user thereof to the same liability as the careless use of firearms, whereas, he should have allowed the jury to say whether an automobile is such a dangerous instrumentality that should be placed in the class of deadly weapons", See also State v. Staggs, 195 S.E. 130 (S.C 1938). An instruction requiring jury to consider the character of the instrumentality was not equivalent to telling jury that automobile was a dangerous instrumentality, but properly left determination to jury. This is not a novel issue in South Carolina, it is a well established legally permissible jury instruction.

No jury charge of Derrick's automobile being a "deadly weapon" was requested nor instructed, even though such a charge is permissible and legal. The failure to object and or request a jury instruction to evaluate the use of Derrick's vehicle as a deadly weapon in determining the Defendant's self-defense, defense of others, right to act on appearance defenses, and other defenses beyond a reasonable doubt is ineffective assistance of counsel in the clearest sense. (See Battle v. State, 409 S.E.2d 400 (1991) ineffective assistance of counsel for failing to request additional specific self-defense instruction on appearances and also on retreat as it relates to self-defense; also Brightman v. State, 520 S.E.2d 614 (1999) (ineffective assistance for failing to request jury charge for lesser included offense)). The failure to have a jury instruction on Derrick's vehicle as a deadly weapon impacted this trial such that the Defendant was not given a fair trial as mandated by the U.S. Constitution and the S.C. Constitution.

The need to have the jury properly instructed on the legally permissible manner under which to evaluate Derrick's vehicle as a "deadly weapon" or not is exacerbated by the factual underpinnings of this case. The lack of a jury charge on this point prejudiced the defendant such that he lost the ability to put forth a complete defense to rebut these criminal allegations. For example, the trial judge instructed the jury that one who is attacked by the use of a deadly weapon has no obligation to retreat. (See App. 753, lines 23-24). The State's witness Kerwyn Phillips, who was an occupant in the vehicle in which the Defendant was also a occupant, testified that the witnessed Derrick use his vehicle to swerve into the Defendant's vehicle to force it into the concrete wall of the highway at speeds exceeding 70 m.p.h. (See App. 364, lines 8-10). The trial counsel Collins testified at the PCR hearing that he asked for a self-defense charge in this case "Because that was one of the defenses we were going to try to go forward with." (See App. 855, line 24-App. 856, line 5). The trial counsel Collins went further to explain

that he based his self-defense and request for self-defense charge on the fact Derrick was driving his car towards and swerving his car at the truck occupied by Defendant and the fact Derrick reached under the seat, possibly for a gun. (App. 858, line 20). The Defendant Moore testified extensively at the evidentiary hearing where he testified that Derrick was the aggressor in this case and displayed behavior which defendant described as "a guy that's out of his mind" which was never brought out at trial. (App. 892 line 16 – 19). The Defendant also testified that victim Ms. Dover was the initial driver and then the vehicle pulled over near the golf course where Derrick swapped seats to the driver position to pursue the Defendant's truck aggressively. (App. 892, line 24-App. 893, line 4). The Defendant further testified, with clarity, the permissibility to charge a vehicle as a "deadly weapon" under South Carolina law and the subsequent deficiency and prejudice he suffers from counsel Collins failure to request a jury instruction explaining how the jury must evaluate the use of a vehicle as a "deadly weapon" in determining the weight of the evidence and the credibility of the witnesses in evaluating each self-defense element previously charged to the jury by the trial judge under the beyond a reasonable doubt standard. (App. 898, line 2-App. 899, line 10).

In analyzing and in determining the denial of this issue the PCR judge found as a matter of law and fact that there is no sanctioned jury charge existing nor relevant case law in South Carolina jurisprudence upon which trial counsel Greg Collins could have based a jury instruction request to support the legality of a charge to have the vehicle driven by Derrick evaluated as a deadly weapon by the defendant's jury (See PCR Dismissal App. pg. 933 paragraph 2). This PCR court finding is not supported by any evidence of probative value in the record, and actually is contrary to established South Carolina jurisprudence. (State v. Wilds, 584 S.E.2d 138 (S.C. App 2003), State v. Hanahan, 96 S.E 667 (S.C, 1918), and State v. Staggs, 195 S.E. 130 (S.C.

1938)). Additionally, the PCR judge determined denial is warranted on this issue because trial counsel testified at the evidentiary hearing that it was trial strategy because he kept in mind that the defense pursued a defense strategy throughout trial that defendant Moore was not the shooter and requesting this charge would create inconsistencies in this trial defense strategy. (See PCR Dismissal App. pg. 928 paragraph 2). This finding is not supported by any evidence of probative value in the record. In fact, trial counsel testified that he argued for and strategized his defense around self-defense based on Derrick swerving his car into the truck occupied by defendant and based on Derrick reaching under the seat, possibly for a gun. (App. 855, line 24-App. 856, line 11).

The PCR courts findings of fact and conclusions of law that the two-prong standards of Strickland v. Washington, 104 S.Ct. 2052 are not met in this PCR application on this issue, are legally erroneous and are not supported by any evidence of probative value in the record. This PCR denial must be reversed and the defendant Moore be granted relief. (See Simuel v. State, 701 S.E.2d 738, 739 (2010), "On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." Id at 739. "However, if there is no evidence to support the PCR court's ruling the appellate court will reverse." Id. J; also Lounds v. State, 670 S.E.2d 646 (S.C 2008) and Pauling v. State, 565 S.E.2d 769)). Bell v. State, 765 S.E.2d 4(S.C. App. 2014)).

The Applicant has shown that counsel Collins' conduct has fallen below an objective standard of reasonableness under the facts of this case and the Applicant has demonstrated a reasonable probability, which is sufficient to undermine confidence in the outcome, that but for counsel unprofessional errors the result of Applicant's trial would have been different. (See

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 and Lee v. Clarke, 2015 WL 1275344, 4th cir. (March 20th, 2015)).

Issue Presented

2. **Is there any evidence of probative value which supports the PCR Courts conclusion that counsel was not ineffective for failing to object and request examination of the jurors or otherwise move for mistrial on the basis that several jurors fell asleep during the course of the defendant's trial and in doing so compromised the defendant's right to impartial and mentally competent jurors to insure a fair trial.**

In evaluating this issue the PCR court made several factual determinations which are unsupported and actually refuted by the post-conviction relief evidentiary record, which in turn erroneously restricted the body of law applicable to the true factual posture of the Applicant's case with regard to the sleeping jurors. The PCR court made the following specific finding of facts in this case in his order of Dismissals which are clearly refuted by the PCR evidentiary hearing's transcribed record:

> The PCR Court Manning made findings of facts that trial counsel testified at the PCR hearing that "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 State's closing argument which would not have been harmful to Applicant's case. (See Order of Dismissal, App. pg. 929, paragraph 3). The PCR court Manning also made finding of facts that no juror actually fell asleep during the course of the trial. (See Order of Dismissal App. Pg. 930, paragraph 1).
>
> The findings of facts as determined by PCR Court Manning are clearly and completely refuted by the PCR record and trial record of this case. The record of this case demonstrates there were more than one juror sleeping, who were in fact sleeping. The record of this case demonstrates the jurors were sleeping at different intervals of the trial, specifically during presentation of evidence and the State's closing arguments. The record of this case demonstrates that no voir dire nor examination of the scope of the jurors' inattentiveness was conducted to assess their competence, impartiality, or attentiveness with regard to their ability to

insure the defendant a fair trial. To illustrate these points, under direct-examination at the PCR evidentiary hearing the following exchange occurred between PCR Counsel Roland Alston and trial Counsel Greg Collins:

Question by Alston: During the trial, did you – was there ever any discussion about jurors who were sleeping or drowsy or otherwise inattentive during the course of the case?

Answer by Collins: "Yeah, there was one juror in particular that said he had a cold and was kind of in and out of it throughout and actually completely fell asleep during the Solicitor's closing argument." (See App. Pg. 853, line 16-23).

also,

Question by Alston "Did you ever ask the Court to conduct any voir dire, any inquiry or any examination of a juror who appeared to be sleeping or drowsy during the trial?"

Answer by Collins: "I didn't because he was awake when we were going forward and was dosing during the prosecution."

Question by Alston: "You did?"

Answer by Collins: "We didn't because he was not sleeping when we were putting up- - when we were up. He was sleeping when the prosecution was going." (See App. pg. 853, line 24 - pg. 854, line 7)

Under direct cross-examination at the PCR evidentiary hearing the following exchange occurred between Attorney General Corney and trial counsel Greg Collins:

Question by Corney: "About these jurors sleeping, I think you said that you- - during the closing you didn't make a motion for mistrial or any objections to that because it was during the Solicitor's closing argument and not yours?"

Answer by Collins: "As far as the juror actually falling asleep, yes, it was during the Solicitors' Closing argument." (See App. pg. 872, line 7-13).

also,

Question by Corney: "Throughout the rest of the trial with these jurors falling asleep, I think that they're noted by the Judge each time it happens on the record and they're addressed on the record, is that your recollection?"

Answer by Collins: "As far as I recall yes." (See App. pg. 872, line 20-24).

also,

Question by Alston: "Okay. Well in that regard, I - - my client argues that there were arguable three instances where a juror was not paying attention to the testimony from being drowsy or asleep or whatever condition the juror was in. Do you recall that in the transcript?"

Answer by Appellate Counsel Savitz: "I didn't remember reading that at the time. I don't remember that being an issue at the time I read the transcript. I've heard people talk about it here today and I understand that it is, so.

Question by Alston: "A sleeping, jurors, would that be a good issues to raise on appeal?"

Answer by Appellant Counsel Savitz: You know, it depends on the context in which it occurred. If jurors were sleeping during the trial, generally yes, that's a real good issue to raise on appeal." (See App. pg. 879, line 11- pg. 880, line 1).

First, the Appellant respectfully urges this honorable Court to take judicial notice pursuant to S.C.R.C.P Rule 201 that the trial counsel Collins did in fact testify at the PCR evidentiary hearing, that he in fact witness more than one juror sleeping during Applicant's trial during critical stages. ("Our Supreme Court took judicial notice that, generally, Baptist churches are governed by their own congregations.) Bowen v. Green, 275 S.C at 434, 272 S.E. 2d at 435; and, South Carolina Dept. of Social Services v. Janice C. 383 S.C. 221, 678 S.E. 2d 463, (S.C. Court of Appeals allowed judicial notice of acceptances and affidavits of services where these documents were part of the record of the family court); also, Sloan v. Greenville County, 380 S.C 528, 670 S.E. 2d 663 (S.C. App. 2009) ("Court of Appeals could take the judicial notice of its own docket")).

Additionally, it should also be judicially noticed by this honorable Court that the Respondent's Attorney Corney conceded at the PCR evidentiary hearing that there were

sleeping jurors during Applicant's trial. (See App. pg. 872, line 7-11; line 14-18; and line 20-23). A party is bound by its' pleading and representation made in court. (It is well settled that parties are judicially bound by their pleading unless withdrawn, altered, or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleading and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action, Elrod v. All, 243 S.C. 425, 134 S.E. 2d 410 (1964); and Postal v. Mann, 308 S.C. 385, 418 S.E. 2d 322).

Because sleeping jurors are at issue in this case, the South Carolina precedent State v. Hurd, 480 S.E. 2d 94 (S.C. App, 1996) is exclusively controlling in this Applicant's allegations. There were more than one sleeping juror as evident by the trial transcript referring to one juror as "her" and another juror as "he." (See App. 325, line 20-25; 692, line 18-21, where Judge Keesley referred to the juror as "shutting her eyes" and "kept watching her rather intently"). There were at least two jurors who displayed threshold conduct during Applicant's trial which triggers a voir dire examination under Hurd's precepts. Had trial counsel properly objected and requested the voir dire examination the trial court would have been obliged to conduct at least two separate and distinct Hurd examination on each one of these sleeping jurors on the record to insure the Applicant's Constitutional rights to impartial and mentally competent jurors are uninfringed. Trial counsel did not object to nor request vior dire on these jurors under Hurd, although he personally witnessed these jurors actually sleeping. The trial counsel representation is both deficient and prejudicial in this regard because there is a reasonable probability the Applicant convictions resulted from a jury panel that was mentally incompetent and partial to

sleeping more than examining the State prosecutor's burden of proof to prove each and every element of the indicted offense before a conviction may be handed down.

The PCR court's finding that the defendant received a benefit from a Hurd examination not taking place and the sleeping jurors being allowed to continue to sleep through the prosecution presentation of its case is ludicrous and is contrary to the fundamental dictum of the American jurisprudence. (See Order of Dismissal App. pg. 930 paragraph 1, "The juror's alleged "absence" from that portion of the trial would have been beneficial, not damaging, to Applicant's case."). In the American judicial system the prosecution carries the full burden to prove each and every element of the indicted offense before a defendant can suffer conviction and deprivation of liberty and property, this is absolute as defined by the U.S Constitution, S.C. Constitution and numerous case laws. (See U.S. Constitution Amendment V and U.S. Constitution Amendment XIV, and Sullivan v. Louisiana, 508 U.S. 275, 277-278, 113 S.Ct. 2078, 2080, 124 L.ED. 2d 182(1993) "the prosecution bears the burden of proving all elements of the offense charged and must persuade the fact finder "beyond a reasonable doubt" of the facts necessary to establish each of these element."; also Sandstrom v. Montana, 442 U.S. 510, 512, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979).

This being so, it is imperative that the prosecution proves its case against a defendant during its presentation its case. If the prosecution fails to meet its burden of proof beyond a reasonable doubt the jury must return a verdict of not guilty. What the PCR Court proposes by its ruling is that it is a thing of benefit to a defendant for a juror to be totally absent from portions of the prosecution's presentation of proof of each of the critical elements of the indictment and then have this same juror render a decision on whether the prosecution demonstrated proof of each of the critical elements of the indictment beyond a reasonable doubt.

What the PCR court proposes is contrary to the Constitution's safeguard and is contrary to the facts of this case in that more than one juror missed critical portions of this trial especially the prosecution's presentation of proof of each and every critical element of the allegations of the indictment. The jurors were mentally incompetent and impaired such that the Applicant was denied a fair trial. The sleeping jurors' were left to only guess whether the prosecution carried their burden of proof beyond a reasonable doubt, or worse, the sleeping jurors' relied on the other jurors' assessment of the prosecution's presentation of carrying their burden of proof beyond a reason doubt because they missed it on account they were sleeping. Either way, the trial is infected with unfairness because in actuality the prosecution's burden of proof was presented to less than twelve competent jurors to determine by beyond a reasonable doubt standard and this practice is prohibited by the Constitution of South Carolina and the United States. (See S.C. Constitution Article V, 22 and U.S. Constitution Fourteenth Amendment and SCRCrimp rule 14).

Further, it was not reasonable trial strategy for the trial counsel Collins to fail to object and request a Hurd voir dire examination of the jurors but allow the jurors to sleep through the prosecution's case presentation of its burden of proof to every element of the indictments. Any purported trial strategy advanced by a trial counsel must be "reasonable" as a matter of law. Based upon the aforementioned facts of this case and the controlling case laws applicable to the facts of this case, trial counsel Collins is ineffective and his decisions were unreasonable. (See Bailey v. State, 392 S.C. 422, 709 S.E. 2d 671 (S.C. 2011) (Ineffective for failing to object to jury instruction and also acquiesced in the judge's erroneous interpretation. Counsel failure to objective did not constitute a valid trial strategy;) Ard v. Catoe, 372 S.C. 318, 642 S.E. 2d 590 (S.C. 2007) (Ineffective for failing to investigate, and failure to challenge gunshot residue

evidence. Counsel's strategic decisions were unreasonable), also Sanchev v. State, 351 S.C 270, 569 S.E. 2d 363 (S.C. 2002) (Ineffective for failing to object to the police officers hearsay testimony. Trial Counsel strategy was not reasonable)).

Trial counsel Collins is ineffective in failing to object to and request a Hurd voir dire examination on the sleeping jurors or otherwise move for a mistrial. This ineffectiveness also resulted in the Applicant's being deprived of direct appellate review of the competency of the sleeping jurors. The Applicant's case is indistinguishable from Hurd. In Hurd, the defense counsel reported that he actually saw the juror sleeping, and the trial judge agreed there was cause for concern- declaring specifically that he "noticed[the juror] nodding off a couple of times" but that the juror "was alert during most of the charge." 325 S.C. at 388-89, 480 S.E. 2d at 97. There is no evidence of probative value which supports the PCR court's conclusion that counsel was ineffective, the PCR court decision must be reversed and Applicant granted a new trial. (See Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010), "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law.").

The Applicant has shown that counsel Collins' conduct has fallen below an objective standard of reasonableness under the facts of this case and the Applicant has demonstrated a reasonable probability, which is sufficient to undermine confidence in the outcome, that but for counsel unprofessional errors the result of Applicant's trial would have been different. (See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 and Lee v. Clarke, 2015 WL 1275344, 4th cir. (March 20th, 2015)).

Issue Presented

3. **Is there any evidence of probative value which supports the PCR courts conclusion that counsel was not ineffective for failing to properly investigate and prepare Applicant's case where the PCR court proffered Applicant's affidavit evidence into the record but did not consider Applicant's affidavit evidence in its determination of this ineffective assistance of counsel allegation?**

In evaluating this issue the PCR court allowed the Applicant to offer his opinion in to the record of the of the PCR evidentiary hearing on methamphetamine aka "crystal meth", cocaine, and alcohol drugs and the effects methamphetamine aka "crystal meth", cocaine and alcohol have on a user when used separately and in combination by the said user. The Applicant testified the resulting effects of this drug combination usage are delusions, hallucinations, aggression, and psychosis. The Applicant also testified to what a retained private toxicology expert would have concluded had counsel properly investigated and prepared his case (App pg. 891 line 9- pg. 892 line 9). The Applicant further testified Grover "Gene " Derrick actions, body language and exhibited behavior the night of the incident were step in line with the effects of an individual ".... Out of his mind on – under the influence of alcohol, cocaine and meth, being the aggressor which was never brought out at trial." (App. Pg. 892 line 10- line 19; pg. 893 line 2-line 4). The Applicant answered these segments of the PCR transcript under direct examination from PCR counsel Alston. The attorney general Corney did not cross-examine the Applicant nor did he offer rebuttal evidence nor testimony to rebut or refute the opinion testimony the Applicant testified to substantiating the proof of his ineffective assistance of counsel testimony on this point. The Respondent's attorney did object to the court accepting as proof the opinion testimony of the Applicant (App. Pg. 891 line 21-pg. 892 line 1). The PCR Court Manning noted the objection and allowed the Applicant to proceed with his opinion evidence testimony and develop the record on this point through his testimony (App. Pg. 892 line 2-line 7). The Respondent did

not file a 59(e) motion to alter or amend PCR Court Manning's ruling nor did the Respondent file notice to appeal this ruling by PCR Court Manning. This ruling in allowing Applicant to give his opinion testimony and also Applicant's testimony on what a retained private toxicologist would have concluded had counsel properly investigated and prepared for trial therefore is law of the case and requires affirmance. (See Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E2d 788, 778 (2013), An unappeal ruling is the law of the case and requires affirmance.).

The opinion testimony introduced into the PCR record as evidence by the Applicant Moore through his own testimony are opinions derived from Moore's own personal interactions with information about people afflicted with drug dependence of crystal meth, cocaine, and alcohol drug dependence, his interactions with Derrick's wild behavior the night of the incident and direct consultations with Dr. Robert Bennett. Dr. Robert Bennett consulted with Applicant Moore regarding the potential effects of methamphetamine aka "crystal meth", cocaine and alcohol drug combination and the correlating side effects on the behavior exhibited by Grover "Gene" Derrick as described Kerwyn Phillips at trial, the behavior exhibited by Grover "Gene" Derrick as described by Beth Lankford and Mike Lankford and Ian Lankford, and the behavior exhibited by Grover "Gene" Derrick as described by Applicant Moore. The Applicant Moore's testimonial opinion is reflective of the substance of Dr. Bennett testimonial opinion as outlined in the proffered affidavit evidence of Dr. Robert Bennett's affidavit which was later introduced into the record of this PCR case. The affidavit of Dr. Robert Bennett is introduced into the PCR record as Plaintiff's Exhibit Number 3. (See App. Pg. 851, line 17-line 19).

The Respondent objected to the introduction on one specific ground, that the Respondent "don't have an opportunity to cross-examine him (Dr. Robert Bennett) on this affidavit or where

this information came from, what investigation he did, how he came up with these findings." (See App. Pg. 857, line 8-line 11). The PCR Court noted this one specific objection by the Respondent, yet did not issue a clear ruling on this specific objection. (See App. Pg. 857 line 12). The Respondent did not obtain a specific ruling from PCR Court Manning on this specific objection before the close of the record in this case, therefore the objection is not reviewable because it was not contemporaneously objected to during the actual proceedings. (See Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515, The defendants were not entitled to review of the admission of evidence where they failed to contemporaneously object to such evidence at its introduction; rules did not obviate requirement of objecting to evidence when it was presented to preserve issue.).

Although the PCR Court Manning outlines in Footnote 1 of his Order of Dismissal (App. Pg. 928, footnote 1) that Respondent posed a "contemporaneously 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," this characterization of the Respondent's objections and the PCR Court's sustaining rulings are flatly contradicted by the transcribed record of the PCR evidentiary hearing. (See South Carolina State Highway Dept. v. Meredith, 241 S.C. 306, 128 S.E.2d 179, "Transcript of record is source of Supreme Court's information as to what occurred in the trial, its very objective being to inform the Court authoritatively of legal question contested below and of facts pertaining thereto.").

The Respondent did not articulate objections to the admission of Plaintiff's Exhibit Number 3 on the bases of inadmissible hearsay, nor impermissible opinion testimony by a witness neither presented, nor qualified as an expert by the PCR Court Manning. The

Respondent simply did not advance these objections at all challenging Plaintiff's Exhibit Number 3, "Affidavit of Dr. Robert Bennett," and the PCR Court did not issue sustaining rulings on these ground at all during the PCR proceedings. The record of this PCR evidentiary hearing substantiates this. Because, the Plaintiff's Exhibit Number 3 was not challenged on these grounds, the PCR Court cannot legally exclude the admission of Dr. Robert Bennett's affidavit on these grounds as he states he does in Footnote 1 of App. Pg. 928.

It is an error of law and abuse of discretion on the part of PCR Court Manning to accept Plaintiff's Exhibit Number 3 into the PCR record yet not consider it in his determination of the allegations on the grounds of Respondent's aforementioned objections where these said objections are non-existent in the transcribed record of this case. (See State v. Garrett, 567 S.E.2d 523, 350 S.C. 613, "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law," also Robinson v. Redgate, 317 S.E.2d 474, 282 S.C. 243)). The action of the PCR Court in doing so is equivalent to excluding proffered testimony without giving a reason at all, and doing so is clearly an abuse of discretion. (See South Carolina Property and Cas. Guar. Ass'n. v. Yensen, 548 S.E. 2d 880, "Trial judge abused discretion by excluding proffered testimony without giving a reason.").

Should this Court find that the objection by Respondent on the grounds the affidavit is inadmissible because Dr. Robert Bennett is not present for the opportunity to be cross-examined by Respondent is indeed a contemporaneously objected to argument, this Applicant asserts the PCR Court Manning still committed errors of law and made decisions unsupported by the evidence which rises to the level of abuse of discretion by not considering the affidavit at all in determining the allegations outlined in Applicant's PCR application.

It is permissible under the laws of South Carolina that evidence which may be incompetent with respect to certain things can still be competent and admissible as to other aspects of the evidentiary presentation, and as such, the total exclusion of this type of evidence by a trial judge would be erroneous and an abuse of discretion. (See Neal v. Clark, 19 S.E.2d 473, "Paper may be incompetent with the respect to certain things and competent as to others"; also Jones v.Massingale, 163 S.E.2d 217, "Evidence admissible on one issue but inadmissible as to another need not be excluded.).

It is clear from the PCR record that the Applicant Moore was allowed to give his opinion testimony regarding the effects of the drug combination of methamphetamine aka "crystal meth", cocaine and alcohol on a user in general and on Derrick's behavior in particular. This allowance of Applicant Moore to testify on this scope of his opinion implicates the body of South Carolina law which entitles a person giving opinion testimony the ability to also reveal the source of his knowledge to remove any perception that the opinion is mere conjecture. (See Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610, "If person giving his opinion as to values of real property is someone other than owner of property, source of his knowledge must be revealed to remove his opinion from realm of mere conjecture; bare declaration of his knowledge of value of property is insufficient.").

This being so, if Dr. Robert Bennett's affidavit is deemed inadmissible because Dr. Robert Bennett was not physically present at the PCR evidentiary hearing to be cross-examined by the Respondent, the affidavit is clearly competent admissible evidence to substantiate the source of Applicant Moore's knowledge is indeed grounded in reputable information and perspectives and not mere conjecture or superfluous nonsense. (See Arnold v. Life Ins.Co.of Ga, 83 S.E.2d 553, "The affidavit was placed in evidence by Plaintiff without qualification or

restriction, although offered to substantiate one point, would be treated as admitted generally, as applicable to any issue it tended to prove, and contents thereof were available to either party").

The entire exclusion of the affidavit in the analysis of the ineffective assistance of counsel claim is an abuse of discrection and deprived Applicant Moore of procedural due process. Once the affidavit of Dr. Robert Bennett was admitted into evidence as Plaintiff Exhibit Number 3, it was required to be treated as admitted generally and as such it is allowable to be applied to prove Applicant Moore's source of knowledge as well as establish hearsay exceptions to the testimony given. The exclusion of the affidavit warped the PCR Court Manning's findings of facts and conclusions of law in such a way that the PCR Court did not conduct a proper Strickland v. Washington analysis of this claim as a whole, especially when it comes to the "reasonableness" of any strategic decisions advanced by trial counsel in explaining his actions and inactions. The PCR Court could have pursed other alternatives to total exclusion of an admitted PCR exhibit to resolve the Respondent's assertion that it needs Dr. Robert Bennett's physical presences in order to cross-examine him - such as phone deposition, written interrogatories, written stipulations, or holding the record open and supplementing the record with the cross-examination of Dr. Robert Bennett at a later date. All of these options are permittable under the Uniformed Post-Conviction Act and applicable case law. It should be noted that the passage of 8 months elapsed from the time the PCR evidentiary hearing was held to the time PCR Court Manning signed the Order of Dismissal, it is more than enough time to have held the record open to receive Dr. Robert Bennett's cross-examination instead of exercising the extreme measure of excluding the affidavit exhibit in its entirety.

The PCR Court findings of facts and conclusion of law that the two-prong standards of Strickland v. Washington, 104 S.Ct. 2052 are not met in this PCR application on this issue are

legally erroneous and are not supported by any evidence of probative value in the record. This PCR denial must be reversed and the defendant Moore be granted relief. (See Simuel v. State, 701 S.E.2d 738, 739 (2010) and Lounds v. State, 670 S.E.2d 646 (S.C. 2008).).

Issue Presented

4. **Is there any evidence of probative value which supports the PCR court's conclusion that counsel was not ineffective for failing to object to the jury instruction given an accomplice liability and "jointly at fault in bringing on the difficulty" where there is no evidence in the record the defendant aided, abetted, or acted in concert with Kerwyn Phillips in any of the elements of his convictions?**

At the trial of this case the trial counsel Collins placed the trial court on notice the defense opposes any jury instructions which instructs the jurors to evaluate accomplice liability on defendant Moore's part as culpability for Kerwyn Phillip's actions in this case should the juror find that Phillips criminally cause the death of the decedent and not defendant Moore. (See App. Pg. 640 line23-pg. 641 line 1).

The trial judge then put counsel Collins and Strickler on notice that he will instruct the jury on accomplice liability, and that if the jury believes the passenger (Kerwyn Phillips) is the shooter then defendant Moore can be held criminally liable for the killing of the decedent. (See App. Pg. 665 line 3-line 11). The trial judge then gave defense counsels Collins and Strickler an opportunity to object to any portions of his proposed jury instructions. (See App. Pg. 669 line 11-line 19; App. Pg. 671 line 10-line 15).

The defense counsel Collins and Strickler did not object to the trial court's proposed jury instruction of accomplice liability nor the trial court's reasoning for this charge at all during the proposed jury instruction review phase of the trial. The defense counsel only challenge the

heading of the charge document concerning the failure of the defendant to testify and the heading of confessions. (See App, pg. 671 line 16- line 21; App. Pg. 671 line 23-line 24).

The trial court gave the jury the instruction on accomplice liability which charge that defendant Moore could be found guilty in this case even if the jurors have a reasonable doubt that Moore was the person who actually fired the weapon that killed Ms. Dover under the hand of one is the hand of all recognition, and it doesn't matter who actually fired the weapon and killed Ms. Dover, because all of the accomplices are guilty. (See App. Pg. 748 line 4-pg. 749 line 18). The trial counsel Collins nor Strickler made any contemporaneous objections to this accomplice liability charge whatsoever. (See App. Pg. 762 line 21- pg. 764 line 20).

To be guilty under the accomplice liability theory a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. Additionally, one accused of accomplish liability must have joined with another to accomplish an illegal purpose before said person can be held criminally liable for everything done by his confederate incidental to the execution of the common design and purpose. (See State v. Mattison, 388 S.C. 469, 479, 697, S.E.2d 578, 584 (2010); and State v. Reid, 408 S.C. 461, 472-73, 758 S.E.2d 904 (2010).).

There is no evidence adduced at trial which identifies the purported overt act defendant Moore did in aiding, abetting or assisting Kerwyn Phillips in shooting Ms. Dover to death to warrant the accomplice liability instruction. The record is absolutely void of any evidence of defendant Moore performing any overt act in rendering assistance, or aiding, or abetting Kerwyn Phillips in shooting Ms. Dover to death to warrant the accomplice liability jury instruction. The prosecution presented no evidence of any common design nor purpose to which defendant

Moore joined Kerwyn Phillips and executed with Kerwyn Phillips which resulted in the shooting death of Ms. Dover to warrant the accomplice liability jury instruction.

It was error for the trial court to instruct the jury on accomplice liability when the evidence developed during the trial is void of evidence of defendant Moore's conduct which meet the prerequisite conduct of aiding, abetting, or assisting a confederate to accomplish an illegal purpose and common design to warrant an accomplice liability charge. (See Wilds v. State, 756 S.E.2d 387 (Feb. 5, 2014)). Although the trial counsel Collins and Strickler put the trial court on notice they would oppose any jury instruction on accomplice liability, when the time arose to place an objection on the record according to the S.C. Rules of Court both defense lawyers failed to make a contemporaneous objection to properly preserve this for appellate review. (Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515).

The PCR courts finding of facts and conclusions of law that two-prong standards of Strickland v. Washington, 104 S.Ct.2052 are not met in the PCR application on this issue are legally erroneous, and are not supported by any evidence of probative value in the record. The PCR denial must be reversed and the defendant Moore be granted relief. (See Pauling v. State, 565 S.E.2d 769, "On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. However, if there is no evidence to support the PCR court's ruling the appellate court will reverse.").

The Applicant has shown that counsel Collins and Stricker conduct has fallen below an objective standard of reasonableness under the facts of this case and the Applicant has demonstrated a reasonable probability, which is sufficient to undermine confidence in the outcome, that but for counsel's unprofessional errors the result of Applicant's trial would have

been different. (See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 and Lee v. Clarke, 2015 WL1275344, 4th Cir. (March 20, 2015)).

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

John J. Moore Jr.

Petitioner

PRO SE

This 23 day of May, 2015

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STATE OF SOUTH CAROLINA

IN THE SUPREME COUNT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

JOHN J. MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPLENATE CASE NO. 2014-000786

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari in this case has been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Daniel E. Shearouse, Clerk of the Supreme Court of S.C. P.O. Box 11330, Columbia, S.C., 29211 this 7th day of May, 2015.

John J. Moore Jr.

Petitioner

PRO SE

SWORN AND SUBSCRIBE TO ME BEFORE ME this day

7th of May 2015

(L.S.)

My Commission Expires: 11/14/2023

Notary Public for South Carolina

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

L. Casey Manning, Circuit Court Judge

APPELLATE CASE NO. 2014-000786

JOHN J. MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

DESIGNATION OF MATTER

TO BE INCLUDED IN THE RECORD ON APPEAL

Petitioner proposes the following be included in the Record on Appeal:

1. Order of Dismissal from PCR date January 7, 2013.
2. Applicant's notice of Motion and Motion to Alter or Amend Judgment filed January 15, 2013.
3. Order Denying Applicant's Motion to Alter or Amend a Judgment filed April 7, 2014.
4. Plaintiff's Exhibit Number 3, "Affidavit of Dr. Robert Bennett."
5. Plaintiff's Exhibit Number 4, "Statement of Mike Lankford and Grover "Gene" Derrick."
6. Plaintiff's Exhibit Number 5, "Info, Inc. Report outlining Beth Lankford and Ian Lankford Statements."
7. Plaintiff's Exhibit Number 6, "Court of Appeals Brief."
8. Plaintiff's Exhibit Number 7, "Letter Dated April 8, 2009."

9. Plaintiff's Exhibit Number 8, "Letter Dated June 25, 2009."

10. Plaintiff's Exhibit Number 1, "Memorandum in support of PCR."

I certify that this designation contains no matter which is irrelevant to this appeal.

May 25, 2015

John J. Moore

Murray 125

4460 Broadriver Rd.

Columbia, S.C. 29210

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

L. Casey Manning, Circuit Court Judge

APPELLATE CASE NO. 2014-000786

JOHN J. MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICITE OF COUNSEL

The undersigned certifies that this Designation of Matter contains no matter which is irrelevant to the appeal.

May 28, 2015

Sworn and Subscribed to me

this 28 day of May, 2015

Notary Public for South Carolina

NOV 04 2017

John J. Moore

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PRO S

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

L. Casey Manning, Circuit Court Judge

APPELLATE CASE NO. 2014-000786

JOHN J. MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PROOF OF SERVICE

I certify that a true copy of the designation of matter to be included in the record on appeal in this case had been served on Meagan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, S.C. 29201 and Daniel E. Shearouse, clerk of the Supreme Court of S.C. P.O. Box 11330, Columbia, S.C. 29211 this 7th day of May, 2015.

May 7th, 2015

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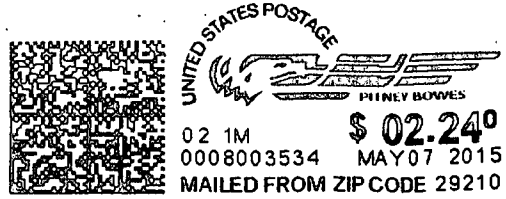

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, S.C. 29211