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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Richland County
L. Casey Manning Circuit Court Judge

Appellate Case No. 2014-000786

John J. Moore,

Petitioner,

v.

State of South Carolina,

Respondent,

RECORD ON APPEAL

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

RICHLAND COUNTY FILED
2014 JAN -8 PM 2:58
JEANETTE W. McBRIDE C.C.C.P. & G.S.

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must

prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Spousal Immunity

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

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

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

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

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

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

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

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

Failure to Prepare/Investigate

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

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

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

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

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

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

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

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

Sleeping Jurors

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

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

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

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

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

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

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

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

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

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

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

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

Failure to Properly Request/Object to Jury Instructions

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

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

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

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

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

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

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

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

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

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

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

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

Ineffective Assistance of Appellate Counsel

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

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

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

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

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

CONCLUSION

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

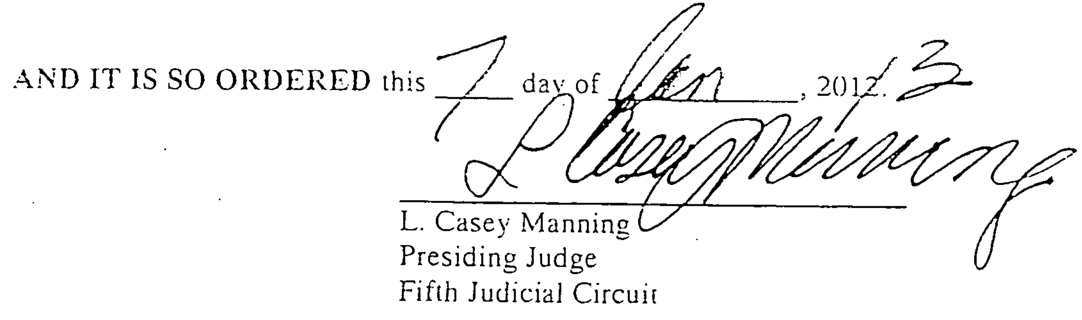
Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal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

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

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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



AND IT IS SO ORDERED this 7 day of Jan, 2013.

L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

C/A No.: 2011-CP-40-0190

John J. Moore, Jr., #326455,

Applicant,

vs.

State of South Carolina,

Respondent.

NOTICE OF MOTION AND MOTION TO ALTER OR AMEND A JUDGMENT

2013 JAN 15 AM 10:40
JEANETTE W. McBRIDE
C.C.P. & G.S.
FILED
RICHLAND COUNTY

PLEASE TAKE NOTICE that the Applicant, by and through his undersigned attorney, will move before the Presiding Judge of the Court of Common Pleas, Fifth Judicial Circuit, on the tenth (10th) day after service hereof or at such time and place as is convenient to the Court and counsel for an Order granting the Applicant's Motion to Alter or Amend a Judgment of the Order of Dismissal, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, as to the within action. The Court entered an Order of Dismissal, filed on January 8, 2013, denying and dismissing with prejudice the Applicant's application for post-conviction relief. This Order was received by the undersigned on January 11, 2013 (less than ten (10) days from the filing of this motion).

The undersigned asks this Court to rule upon/reconsider the argument made at the hearing, and in supporting memorandum, that the applicant's public defender failed to request a specific inquiry by the Court of jurors who appeared to be sleeping or somnolent, pursuant to *State v. Hurd*, *325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996)*.

The undersigned asks this Court to rule upon/reconsider the following grounds, which were pled and not waived and, upon information and belief, not addressed in the order:

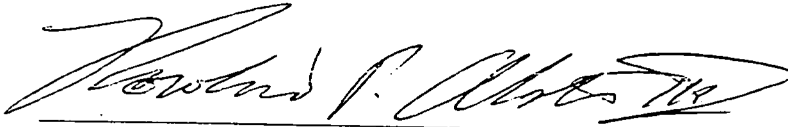
a. That public defender never objected to or moved for a mistrial given the prosecution's failure to provide exculpatory evidence under Rule 5, especially including, but not limited to, statements of witnesses Rhett Alger, Mike Lankford, Beth Lankford, Crime Stoppers, and an article from "The State" newspaper;
b. That public defender did not ensure Applicant's right under the Constitution to confront the witnesses against the Applicant;
c. That public defender failed to object to and properly preserve for appeal the prosecution's bolstering the witness Kenwyn Phillips;
d. That public defender failed to effectively cross-examine the witness Kenwyn Phillips;
e. That public defender failed to request a jury charge regarding the intoxication of Eugene Derrick, the driver of the other vehicle, in which condition was relevant to the nature of the threat and the need of force;
f. That public defender failed to object to and properly preserve for appeal the Court's voluntary manslaughter charge;

g. That public defender failed to properly take exception to the Court's comments on the facts of the case; and
h. Any other particulars demonstrated at the hearing.

The undersigned also asks this court to reconsider all rulings contained in the Order.

This motion is based upon the pleadings, any memorandum previously or subsequently submitted, the common and statutory laws of the State of South Carolina, and any other matter considered by the Court.

Respectfully submitted,



Rowland P. Alrton III
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1314 Lincoln Street, Suite 214
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January 15, 2013

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	C/A No.: 2011-CP-40-0190

John J. Moore, Jr., #326455,

Applicant,

vs.

State of South Carolina,

Respondent.

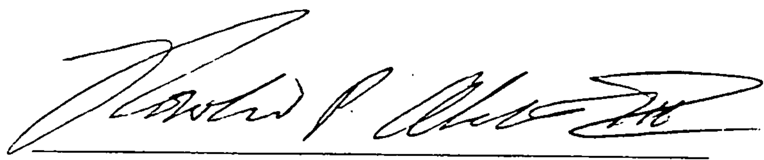
CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2013 JAN 15 AM 10:48
JEANETTE W. McBRIDE
C.C.P. & G.S.

I, the undersigned, do hereby certify that I have served the **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND A JUDGMENT** in the above-captioned case, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, with the return address clearly visible, postage prepaid, addressed to the Court and attorney(s) of record as indicated below:

The Hon. L. Casey Manning
P.O. Box 192
Columbia, SC 29202

Robert Corney, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549



Rowland P. Alston III
Attorney for the Applicant

January 15, 2013

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

John J. Moore, #326455,)
Applicant.) Case No. 2011-CP-40-0190

v.) **ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND A JUDGMENT**

State of South Carolina,)
Respondent.)

RICHLAND COUNTY FILED
2014 APR -7 AM 10:56
JEANETTE W. McBRIDE C.C.P. & G.S.

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

I.

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

III.

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

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

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

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

L. CASEY MANNING
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

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

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RECEIVED
APR 14 2014
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

FILED
2014 APR 14 AM 11:55
JEANETTE W. McBRIDE
C.C.P. & G.S.

Case No. 2011-CP-40-0190

John J. Moore, Jr., #326455,

Appellant,

v.

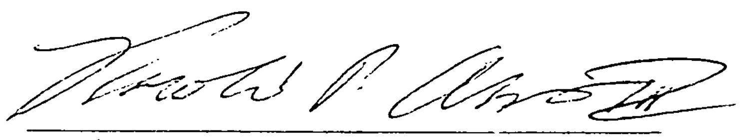
State of South Carolina,

Respondent.

PROOF OF SERVICE

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

April 14, 2014



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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	C/A No.: 2011-CP-40-0190
John J. Moore, Jr., # 326455 Applicant, vs. The State of South Carolina, Respondent.	)	**MEMORANDUM IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF**

STATEMENT OF FACTS

The Applicant, John J. Moore, Jr ("Applicant"), an indigent criminal defendant, was indicted and tried for murder, possession of a firearm by a person under the age of 21, and possession of a firearm during the commission of a violent crime in the Richland County Court of General Sessions. On February 1, 2008, Applicant was convicted of voluntary manslaughter and the other two charges. Applicant was sentenced to thirty years for voluntary manslaughter, five years consecutive for possession of a firearm during the commission of a violent crime, and five years concurrent for possession of a firearm by a person under the age of 21 by the Hon. William P. Keesley (the "Court"). The State was represented by John P. Meadors. The Applicant was represented by Richland County public defenders Douglas Strickler and Gregory Collins (collectively "Counsel").

The Applicant appealed his conviction. Applicant's counsel for the appeal was Joseph Savitz. The conviction as to possession of a firearm by a person under the age of 21 was reversed on or about September 16, 2010, and was remitted to the lower court on October 5, 2010.

On January 13, 2011, the Applicant timely filed an Application for Post-Conviction Relief ("PCR").

On January 6, 2012, the Applicant filed a First Supplemental Application for Post-Conviction Relief.

In his applications, the Applicant states as grounds for relief, *inter alia*, that Counsel did not properly object to and/or move for a mistrial regarding jurors who were sleeping during trial, that Counsel did not properly prepare for trial, that Counsel did not properly investigate the case, that Counsel did not assert the right of the Applicant to confront witnesses against him, and that appellate counsel did not properly appeal the convictions. *See 01/06/12 Supplemental Application, p. 3, 4.*

The Applicant argues that Counsel's performance was so deficient that it constitutionally deprived him of effective assistance of counsel for the reasons set forth herein, and asks for a new trial.

DISCUSSION/ARGUMENT

I. Counsel's failure to object, demand an inquiry, and/or move for a mistrial in regards to jurors who may not have been lucid during trial was deficient performance and prejudicial.

Upon review of the Transcript of Record for the trial ("Record"), there were at least three incidents where a juror may not have been lucid during the trial of the case.

In the first incident, a juror's apparent inattention in turn commanded the attention of the Court to the extent the Court was monitoring the juror's behavior rather than the testimony.

THE COURT: ...I had one juror over there who kept shutting her eyes and I kept watching rather intently because I had to stop if she was going asleep. She never did. She eventually opened her eyes up completely and that's why I'm afraid I might have missed something. I'm looking back through here.

MR. MEADORS: I noticed that juror on the second row far left and it seemed like some of the jurors were noticing her, too. And I was trying to watch to see if she was sleeping, but I did not see her doze off.

See Record, at pp. 325-26, lines 20-25, 1-6.

Second, the Court determined that a juror was apparently in such a condition that a glass of water was necessary for her to properly pay attention to the testimony.

THE COURT: Mr. Bailiff, get that juror some water for me please. Do you need a break, ma'am?

JUROR: No.

THE COURT: Just let me know if you need to stop, okay?

JUROR: Okay.

THE COURT: I'm sorry, Mr. Meadors. Go ahead.

MR. MEADORS: Thank you.

See Record, at p. 374; lines 8-16.

Third, the Court noted that, during closing arguments, another juror was fighting sleep.

THE COURT: All right. We've got to stop. Ladies and gentlemen, step in the jury room. Don't discuss the case. If you need a drink of a Coca-Cola or Pepsi or something, get it.

(The jury retires to the jury room.)

THE COURT: All right. I've got one juror fighting sleep. He hasn't gone to sleep, but he's fighting it pretty bad. So let's give them a break. We're at ease.

***

THE COURT: All right. Bring the jury in, please. And while we're waiting, one of the jurors sent out a note, I <u>assume</u> it was the same young man. He was just explaining he has a sinus infection and his face is swollen and it may cause his eyes to appear to be closed at times. He said he's fine to serve. And I've had that shown to the attorneys. I don't think that's an issue. We'll mark it as a Court's Exhibit. [Emphasis added.]

MR. MEADORS: It certainly makes me feel better, too.

MR. STRICKLER: My apologies. Your Honor. I do have something nagging at me relating to the charge…

See Record, at pp. 692-93: lines 13-25. 1-14.

In *State v. Hurd. 325 S.C. 384. 480 S.E.2d 94 (Ct. App. 1996)*, Hurd was convicted of criminal conspiracy to commit burglary. During the trial, Hurd's counsel brought to the Court's attention that one of the jurors appeared to be sleeping during most of the Court's charge, and asked that the Court remove and replace the juror, or, in the alternative, question the juror. The Court refused the request. *Id., at 97.*

On appeal, the Court of Appeals held that:

> 'it is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified,' and 'the court must not speculate…but must ascertain the juror's state of mind and must place its reasons for excusing or retaining the juror on the record.'
> *Id., quoting People v. Valerio. 141 A.D.2d 585. 529 N.Y.S.2d 350. 351 (1988).*

The Court of Appeals then expounded on the present facts before them.

> Just because a juror closed his eyes does not necessarily mean that he was asleep, but a trial judge should at least attempt to make this determination wherever a juror appears to be asleep. The trial judge committed reversible error by refusing defense counsel's request to question the juror as to whether he heard all of the charge.
> *Id.*

Here, there were three instances where a juror may not have been lucid during the trial. In none of the instances did the Court conduct any inquiry as to whether or not the juror was listening. In one instance the Court assumed that a note given explained the appearance of a sleeping juror, but nothing was done to confirm the assumption. Of supreme importance to this action, at no time did Counsel request that the Court conduct any inquiry in any of these instances.

In criminal cases, the right of trial by jury is preserved inviolate. *See S.C. Const. Art. I, § 14.* Regardless of whether the Applicant's constitutional right to a twelve-member jury was violated, the record is replete with potential juror misconduct. Counsel, as a protector of the Applicant's constitutional rights and a right to a trial by all twelve jurors, had the paramount obligation to ensure that the jurors were fair to Applicant, and request an inquiry or move for a mistrial if he thought they were not. Counsel also had the obligation to demonstrate prejudice by a "sleeping" juror. *See State v. Smith, 338 S.C. 66, 73, 525 S.E.2d 263, 267 (Ct. App. 2000).* In accepting any finding of the Court and in failing to ask the Court conduct a voir dire of the jurors or further inquiry, Counsel also waived the issue on appeal. *Id., at 75, 268.*

Both prongs of the ineffective assistance of counsel inquiry, deficient performance and prejudice, are manifest. Counsel's failure to request an inquiry of jurors who may not have been lucid during trial was deficient performance and prejudicial.

II. Counsel's preparation for the trial of the case was inadequate, and was deficient performance and prejudicial.

The Applicant was tried for voluntary manslaughter. The Applicant asserts that Counsel met with the Applicant only two or three times prior to the trial of the case. That is an entirely inadequate amount of time to prepare for this felony criminal trial. This lack of preparation was deficient performance and was prejudicial to the Applicant. There is a reasonable probability that, but for this error of Counsel, the result would have been different.

III. Counsel's investigation of the case was inadequate, and was deficient performance and prejudicial.

Counsel had a duty to perform a reasonable investigation, which included interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. *See Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008).* A "reasonable

investigation" also includes discovery of "all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." See *McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).*

The Applicant asserts that Counsel did not try to obtain any data as to the state of intoxication of the driver of the other car involved in the incident, or seek the opinion of a forensic toxicologist one that data had been obtained. This evidence would have been most relevant to the self-defense defense of the Applicant. The Applicant also asserts that Counsel did not make a reasonable investigation of potential witnesses, of the facts and circumstances of the case, of mitigating evidence, and evidence rebutting aggravating evidence of the State. The failure to perform a reasonable investigation was deficient performance and was prejudicial to the Applicant. There is a reasonable probability that, but for this error of Counsel, the result would have been different.

IV. Counsel failed to ensure that Applicant had the right to confront a witness against him at trial, which was deficient performance and prejudicial.

The prosecution offered into evidence a recorded conversation between Delia Nix, the Applicant's former girlfriend, and the Applicant at trial. During an *in camera* hearing, the Court ruled that the conversation was admissible under *S.C.R.E. 901*. See *Record, at p. 544.* Applicant contends that the conversation was testimonial in nature, as it was recorded by a government entity and the recording's purpose was for use at a future trial. Applicant did not have the opportunity to cross-examine Nix on the meaning and context of her statements.

In *Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)*, the United States Supreme Court held that, under the 6th Amendment confrontation clause, admission of out-of-court testimonial evidence requires the unavailability of the witness and a prior opportunity for cross-examination. *Id., at 68, 1374.* Further, the Supreme Court noted that "[w]here testimonial

statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability'." *Id., at 61, 1370.*

Here, the Court admitted the recording on the basis of reliability under the authentication provisions of *S.C.R.E. Rule 901*. Crawford had been the law of the land for almost four years, and Counsel made no objection under the 6th Amendment. The failure to object on this fundamental basis was deficient performance and was prejudicial to the Applicant.

V. Appellate counsel's appeal of the case was inadequate, and was deficient performance and prejudicial.

Appellate counsel only appealed the conviction for possession of a firearm by a person under the age of 21. *See 07/27/09 Final Brief of Appellant.* There were numerous issues that could have been appealed, given the Applicant's conviction for voluntary manslaughter, and the exceptions to the Court's rulings that were taken by trial counsel. Because they were not made, they were waived, and prevented any chance of Applicant from having his conviction for voluntary manslaughter reversed.

The failure to appeal the other convictions was deficient performance and was prejudicial to the Applicant. There is a reasonable probability that, but for this error of appellate counsel, the result would have been different.

CONCLUSION

Counsel committed a multitude of grievous errors before and during the criminal trial. These errors constituted deficient performance that was prejudicial to the Applicant. There is a reasonable probability that, but for these errors of Counsel, the result would have been different.

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For the foregoing reasons, the Applicant has established ineffective assistance of counsel. The Applicant's request for post conviction relief should be granted, and the matter should be remanded to the Court of General Sessions for a negotiation of a plea bargain, or, a new trial.

Respectfully submitted,

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Attorney for the Applicant

May 22, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

John J. Moore, Jr., #326455
Applicant,

vs.

The State of South Carolina
Respondent

IN THE COURT OF COMMON PLEAS
C/A No.: 2011-CP-40-0190

AFFIDAVIT OF DR. ROBERT BENNETT

THE AFFIANT, AFTER BEING DULY SWORN, DEPOSES AND SAYS AS FOLLOWS:

1.) Affiant: I, Dr. Robert Bennett, am a Forensic Toxicologist providing forensic laboratory testing service and toxicology consultation in South Carolina as a full time profession. I possess a Ph.D. degree in drug science and also a Pharmacy degree, both from the Medical University of South Carolina. I provide DNA testing and testing for substances of abuse (illegal drugs and prescription drugs) and alcohol for Courts in South Carolina and have been qualified as an Expert Witness in drug and alcohol testing and Forensic Toxicology in South Carolina courts.

2.) Purpose: The purpose of this Affidavit is documentation of the known adverse behavior and cognitive reactions of alcohol, cocaine, and methamphetamine, alone and in combination.

3.) Establishment of Drug/Alcohol use by Grover Derrick: According to the sworn statement of Mike Lankford, on March 16, 2005, to a Richland County Sherriff's Officer, Grover Derrick and he left a cookout (sponsored by Mr. Lankford) and reports that on the way to the store, that "Grover and I smoked a small, sociable amount [of

methamphetamine]. "We pulled off of a side road and finished it off." In his sworn statement, Mr. Lankford was also questioned as to any other drugs that Grover has been using. Mr. Langford reported that, he "had a small amount of cocaine that Grover and Stephanie (victim) used with [him]; and that Grover was always involved in cocaine, even after Stephanie passed." When Mike was asked if Grover got the meth from him, he reported that "he got it from Kimberly (Mike's girlfriend). In the investigation, Beth Lankford, the wife of Mike Lankford, reported that the night of the incident (cookout) that "Grover was so drunk that he fell on Ian (her 12 year-old son), as he was trying to walk out of the door (to leave)." According to Ian, Grover could not have driven, he was too drunk, he could hardly walk." In his sworn statement, Mike said that Grover drove anyway because Stephanie had a headache. This testimony establishes that Grover Derrick was under the influence of methamphetamine, cocaine, and alcohol at the time of the incident.

4.) Effects of Cocaine: Cocaine is a powerfully addictive drug, with a high relapse rate. Cocaine causes intense changes in brain chemistry. Cocaine can cause bizarre and violent behavior such as anger, aggressiveness, delusions, and paranoia. (Prim Care Companion J Clin Psychiatry. 1999 Aug;1(4):109-113). Cocaine use produces a state of hyper alertness in which users are more likely to perceive the actions of other as hostile which can evoke a violent response. In rare cases, sudden death can occur on the first use of cocaine or unexpectedly thereafter. Cocaine effects can vary between individuals and can even vary within the same person at various times. (Source: National Institute on Drug Abuse). Research has shown even modest cocaine use may cause brain changes, that could contribute to or lead to addiction. (Journal of Neuroscience 20(18):7109-7115, 2000). There is no safe level of cocaine use.

5.) Effects of Methamphetamine: Methamphetamine is a powerfully addictive drug, with a high relapse rate. Methamphetamine causes intense changes in brain chemistry. (J Neurophysiol. 2012 May 16). Even in small amounts, psychological effects include aggressiveness, irritability, confusion, and anxiety. (Arch Gen Psychiatry. 2006 Jan;63(1):90-100). Substances with psychotomimetic properties such as cocaine and amphetamines [e.g. methamphetamine], are widespread, and their use or abuse can provoke psychotic reactions resembling a primary psychotic disease. (Curr Drug Abuse Rev 2011 Dec;4(4):228-40). Habitual use of methamphetamine may result in a toxic psychosis characterized by paranoia, delusions, hallucinations and bizarre violent behavior. (Am J Psychiatry, 158(3): 377-382, 2001). Commonly, the methamphetamine user feels invincible and indestructible, and thus engages in risky, potentially deadly, behavior and activities that normally would be avoided. (Drug Alcohol Rev. 2008 May;27(3):253-62). In rare cases, sudden death can occur on the first use of methamphetamine or unexpectedly thereafter. Methamphetamine effects can vary between individuals and can even vary within the same person at various times. Behavior is unpredictable. Methamphetamine can cause damage to the brain similar to that caused by Alzheimer's disease, stroke and epilepsy. (Eur J Pharmacol. 2004 Jun 28;494(2-5):183-9). Research has shown even modest methamphetamine use may cause brain changes that could contribute to or lead to a seemingly uncontrollable addiction. (Subst Abus. 2008;29(3):31-49). There is no safe level of methamphetamine use.

6.) Effects of Alcohol: Alcohol is a depressant that is widely used and abused, often leading to alcohol dependence. The consumption of alcohol leads to a state of intoxication impairing brain function and motor skills. It causes clumsiness, delayed

reflexes, irritability, and impaired judgment. It affects the part of the brain responsible for controlling inhibition, which often leads to extreme behaviors such as violence and aggression. A study was conducted on the relationship between alcohol consumption and road rage. It provided evidence that the odds of a road-rage incident occurring are greatly increased when the perpetrator or victim had recently consumed alcohol. (J Stud Alcohol. 2004 Mar;65(2):161-8).

7.) Use in combination: The abuse of cocaine, alcohol, and methamphetamine have been shown to cause cognitive difficulties that impair judgment and decision making and each has been associated with the inability to inhibit hostile or dangerous impulses. Cocaine, alcohol, and methamphetamine each have their own mind-altering side effects; the combining of any of these drugs increases the likelihood of users engaging in risky or violent activities. One study (Biology Psychiatry. 1998 Aug 15;44(4):250-9) showed that cocaine concentrations were greater in persons following cocaine-alcohol administration. Alcohol actually increased the levels of cocaine in the body. Also, when taken together, cocaine and alcohol interact to produce a third drug called Cocaethylene, an active metabolite with a half-life three times that of cocaine. The combined use of the two substances results in a more intense effect on the brain. This interaction prolongs the effects of both cocaine and alcohol. Cocaine offsets the sedating effects of alcohol and the alcohol enhances the euphoric effects of cocaine. Cocaethylene itself has a profound effect on brain function. (Biology Psychiatry. 1998 Aug 15;44(4):250-9). The use of alcohol, drugs, and illicit substances causes suppression of psychomotor inhibition, which leads to major behavioral disorders. The behavioral disinhibition induced by either use or misuse can cause humans to behave inappropriately according to a given environmental situation. Affected persons tend to lose restraint over their social

behavior and exhibit increased aggression and violent behavior. People that have problems with substance misuse have an established role as a risk factor for violence and have been related to aggressive driving and violence on the road. (Butters, J. E., Smart, R. G., Mann, R. E. and Asbridge, M. 2005. Drug and Alcohol Dependence , 80: 169–175).

8.) Opinion: It is my opinion, to a reasonable degree of scientific and toxicological certainty, that each of these substances can cause profound mind-altering effects. These effects may not be dose-dependent or consistent, even within the same individual, especially with methamphetamine. Therefore, even a small dose of methamphetamine, in the right circumstances, can result in an unpredictable occurrence of violent behavior or aggression. It was noted in the Court transcripts that Mr. Derrick admitted to chasing after the pick-up truck after shots were fired at him. Mr. Derrick also admitted to not having access to any gun. So essentially, this creates a scenario where an unarmed man is chasing after a man with a gun, who is shooting at him. This is a classic example of behavior of a person under the effect of methamphetamine, exhibiting the well-known reaction of feeling invincible. It is my opinion that a typically, an unarmed person not under the influence of methamphetamine, would not chase after a person shooting at them, as this would most likely create a confrontation resulting in escalated violence, possibly requiring the original shooter to be forced to take a self-defensive action.

9.) Certification: I certify that the foregoing is true and accurate to the best of my knowledge and recollection and my opinions are to a reasonable degree of scientific and toxicological certainty.

FURTHER THE AFFIANT SAYETH NOT.

Dr. Robert Bennett

Robert Bennett, R.Ph., Ph.D.

Subscribed and sworn before me on this 21st day of May, 2012.

Eleanor G Bennett

Eleanor G. Bennett, Notary Public, State of South Carolina

My Commission expires: October 31, 2015

CURRICULUM VITAE
Robert M. Bennett

BIOGRAPHICAL SUMMARY

Dr. Bennett holds two degrees from the Medical University of South Carolina: a Ph.D. (Doctorate) in Pharmaceutical Sciences (drug science/incl. toxicology) and a Pharmacy degree. He is a Registered Pharmacist and medical review officer for non-federally regulated drug and alcohol testing. Dr. Bennett is a full-time practicing Forensic Scientist and has testified in many cases in various Courts as an Expert Witness and has been admitted as a qualified expert in Forensic Toxicology, drug testing, alcohol testing, and DNA testing. Dr. Bennett has provided numerous SC BAR-approved Continuing Legal Education (CLE) seminars.

As a Forensic Toxicologist, Dr. Bennett's specialty is the application of the effects of substances on the human body in legal cases. Dr. Bennett has been affirmed by Court Order as an Expert Witness in Toxicology. Services provided include: Illegal drug trade and drug abuse such as detection in the environment and detection in the human body (drug and alcohol testing in urine, hair, etc.); Pharmacy/Pharmaceutical Toxicology such as prescription errors, dispensing errors, drug withdrawals from market, adverse drug reactions, allergic reactions, drug interactions, drug overdoses, herbals & dietary supplements, drug withdrawal syndrome, hospital errors, laboratory test result/procedure challenges; Environmental Toxicology such as mold, fungus, lead paint, pesticides, herbicides, latex, insect bites, and animal bites; Occupational (Industrial) Toxicology such as chemical exposure, solvent exposure, vapors, asbestos and other carcinogens, industrial gases, heavy metal exposure to cadmium, lead, manganese and chromium, drug testing in the workplace; Criminal Forensics such as poisonings, drugs/alcohol and driving (DUI, DWI), blood alcohol back calculations, sexual assault analysis, semen/sperm analysis, microscopic hair and fiber comparisons, DNA mapping, handwriting analysis/forgery (Questioned Document Examination), fingerprinting, gun shot residue, and forensic evidence re-examination.

Dr. Bennett's extensive experience is in DNA testing, drug and alcohol testing, and testing for toxic substances, chemicals, medicines and abusable substances for civil, criminal, domestic, DSS, and federal cases. He founded Charleston's first drug and alcohol testing company over 18 years ago and has directed, performed, and/or reviewed over 29,000 drug and alcohol tests. Dr. Bennett has provided numerous DNA tests for Criminal cases, Paternity, Grandpaternity, Siblingship, other genetic relationships, DNA mapping for Estates (Probate), and Ancestry testing (determination of racial mix). Dr. Bennett is the Toxicology Advisor to Charleston County Drug Court. Dr. Bennett was the Toxicologist overseeing the 5-year construction of the largest cable-stayed bridge in North America (2001-2005 Charleston, SC). Dr. Bennett introduced Carbohydrate Deficient Transferrin (CDT) testing for legal use (to detect heavy alcohol use) and is the only forensic provider in the state.

CONTACT DATA

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Phone:	(843) 571-7488
Fax:	(843) 769-5338
E-mail:	RobertBennettPhD@Gmail.com

EDUCATION

1985-1991	Ph.D. in Pharmaceutical Sciences (drug science/incl. toxicology) Medical University of South Carolina Charleston, South Carolina
1977-1980	B.S. in Pharmacy (Pharmacist) Medical University of South Carolina Charleston, South Carolina
1975-1977	Psychology Major College of Charleston Charleston, South Carolina

CURRICULUM VITAE
Robert M. Bennett

PROFESSIONAL EXPERIENCE

1991-present
President, Director, and Founder
Medical-Legal Services Independent Laboratory Services
(Forensic laboratory service and Forensic consulting service)
Charleston, South Carolina

1991-present
Vice-President and Founder
American Drug Testing
(Workplace drug testing laboratory service provider and administrator)
Charleston, South Carolina

1993-1996
Vice-President and Co-Founder
Pharmaceutical Marketing Alliance
(A nationwide pharmacy provider for specialty pharmaceuticals)
Charleston, South Carolina

1985 - 1993
Vice-President and Co-Founder
Serotonin International Industries, Inc.
(A development stage pharmaceutical R&D company)
Charleston, South Carolina

1988 - 1992
Director of Pharmacy and Sterile Products
I.V. Therapy Associates
(A medication infusion therapy provider)
Charleston, South Carolina

1981 - 1985
Research Pharmacist II
The Upjohn Company (now Pfizer)
(A Fortune 500 worldwide pharmaceutical company)
Kalamazoo, Michigan

1981
Faculty Pharmacist
Medical University Family Practice Pharmacy
Medical University of South Carolina
Charleston, South Carolina

1980 - 1981
Hospital Pharmacist
Medical University Hospital
Medical University of South Carolina
Charleston, South Carolina

1980 - 1981
Manufacturing Pharmacist
Pharmaceutical Development Center
Medical University of South Carolina
Charleston, South Carolina

1979
Research Chemist
College of Pharmacy
Medical University of South Carolina
Charleston, South Carolina

ADDITIONAL TRAINING

2008 Laboratory Training, Detection in Hair of a Single Exposure to Drugs. Dr. Pascal Kintz, of ChemTox Laboratories, Strasbourg, France.

2008 Manufacturer Training: HIV detection by oral fluid, blood, or plasma. E. Ramirez, of Ora-Sure Technologies Inc., Mt. Pleasant, SC.

2006 TeleSeminar: "State Drug-Testing Laws: Direct Answers to the Most Common Questions", William F. Current, Science and Technology Employer Solutions, of Quest Diagnostics. Charleston, SC.

2005 TeleSeminar: "Workplace Drug Testing: Beyond the SAMHSA-5", Dr. Barry Sample, Director of Science and Technology for Employer Solutions, of Quest Diagnostics. Charleston, SC.

2005 TeleSeminar: "How to Work With Your MRO", Robert Swotinsky, MD, of the Fallon Clinic, Charleston, SC.

2003 Classroom Training, five weeks: "S.C. Guardian *ad Litem* Program", Office of the Governor, State of South Carolina. Charleston, SC.

2002 Seminar: "Integrity and Ethics in Law Enforcement", U.S. Dept. of Justice, Charleston, SC.

2001 Seminar: "Judges and Attorneys Substance Abuse and Ethics", Medical University of South Carolina, Institute of Psychiatry, Charleston, SC.

1994 Short Course: "Implementing a Clinical Research Program", Annual AAPS Meeting, San Diego, CA

1993 Seminar: US Dept of Justice, "Violence in the Workplace", Charleston, SC.

1992 Factory Training: "Monoclonal Antibody Immunoassay Methodology for Drugs of Abuse Using a Robotic Clinical Chemistry Analyzer", Roche Diagnostic Systems, Walterboro, SC.

1989 Factory Training: "Dialog Systems Computer Searching", Dialog, Inc. Charleston, SC.

1987 Short Course: "The NDA Process", 2nd Annual American Association of Pharmaceutical Scientists Meeting, Boston, MA.

1985 Short Course: "Technical Writing", Upjohn Training Program, Kalamazoo, MI.

1985 Short Course: "Novel Drug Delivery Systems", 132nd Annual American Pharmaceutical Association Meeting, San Antonio, TX.

1984 Factory Training: "Theory and Pharmaceutical Applications of Thermal Analysis-TGA, DSC, DTA", Perkin-Elmer/American Chemical Society Short Course, Kalamazoo, MI.

1983 — Factory Training: "Quantitative Analysis (of Drugs) using HPLC", Waters Associates Liquid Chromatography School, Milford, MA.

1982 — Chemistry Short Course: "Polymer Chemistry", Virginia Polytechnic Institute, Blacksburg, VA.

PUBLICATIONS

Nelson KG, Smith SJ, Bennett RM. "Constant-Release Diffusion Systems", In Controlled Release Technology, PI Lee and WR Good, Eds., ACS Symposium Series 348, Washington, DC, 1987, pp. 324-340.

Roseman TJ, Biermacher JJ, Bennett RM, Tuttle ME, Spilman CH, Baker RW, Nelson KG. "Design Criteria for Controlled Release Delivery System of Carboprost Methyl", Journal of Controlled Release 3:25-37 (1986).

Spilman CH, Beuving DC, Forbes AD, Roseman TJ, Bennett RM. "Transdermal Administration of (15S)15-Methyl Prostaglandin F2 alpha Methyl Ester to Rhesus Monkeys", Journal of Pharmaceutical Sciences, 73(2):282-283 (1984).

Spilman CH, Beuving DC, Forbes AD, Roseman TJ, Bennett RM, Biermacher JJ, Tuttle ME. "Menses Induction in Rhesus Monkeys Using a Controlled Release Vaginal Delivery System Containing (15S)15-Methyl Prostaglandin F2 alpha Methyl Ester", Fertility and Sterility, 42(4):638-643 (1984).

Roseman TJ, Bennett RM, Biermacher JJ, Tuttle ME, Spilman CH. "Design Criteria for Carbopost Methyl Controlled Release Devices", Proceedings of 11th International Symposium on Controlled Release of Bioactive Materials., W.E. Meyers and R.L. Dunn, Eds., Ft. Lauderdale, FL, 1984, p. 80.

PRESENTATIONS

"Drug Testing and Results", Guardian *ad Litem* Continuing Legal Education Seminar, Children's Law Center, Columbia, SC, October 9, 2009.

"New Forensic Testing for Alcohol Detection", South Carolina Association for Justice 2009 Annual Convention, South Carolina Bar Continuing Legal Education Seminar, Hilton Head Island, SC, August 6, 2009.

"Drug Litigation in South Carolina-Forensic Drug Testing: Regulatory and Ethical Aspects of Drug and Alcohol Testing", South Carolina Bar Continuing Legal Education Course No.:09-29, Columbia, SC, May 8, 2009.

"Blood, Sweat, and Tears – What to test when drug and alcohol testing is needed." Continuing Legal Education seminar, Women's Lawyer Association, Charleston, SC, October 16, 2008.

"Children's Issues in Family Court, Drug Testing-Effectively using available testing in custody cases", South Carolina Bar Continuing Legal Education Course No.:0108-10, Columbia, SC, March 28, 2008.

"Meth Mess", CBS News Affiliate WSPA, Television Channel 7, Investigative Report, 6 o'clock News, Spartanburg, SC, Air date: February 18, 2008.

"Advances in Forensic Science", Charleston School of Law student body, Moderator: Theresa M. Wozniak, Charleston, SC, February 13, 2008.

"New Forensic Tests for Domestic Cases", Dorchester County Guardian *ad Litem* Program, Continuing Education, Summerville, SC, April 24, 2007.

"Panel Discussion on Drug Testing for Family Court Cases", Charleston County Family Court Bar, S.C. Continuing Legal Education Course No.: 263578, Charleston, SC, November 17, 2006.

"Forensic and Medical Experience with %CDT (Carbohydrate Deficient Transferrin): A New Blood Test for Heavy Alcohol Use. Judges and Attorneys Substance Abuse and Ethics Seminar, Continuing Legal Education Course, Medical University of South Carolina, Charleston, SC, December 2, 2005.

"Forensic Toxicology – How to use Toxicology in Workers' Compensation Cases", Continuing Legal Education Course. South Carolina Trial Lawyers Association 2005 Annual Convention, Hilton Head, SC. August 4, 2005.

"The Truth About Drug Testing", Dorchester County Guardian *ad Litem* Program, Continuing Education, Summerville, SC, February 2. 2005.

"The Truth About Drug Testing", Charleston County Department of Social Services, Charleston, SC, January 18, 2005.

"Alcohol and Substance Abuse Testing", Judges and Attorneys Substance Abuse and Ethics Seminar, Continuing Legal Education Course, Medical University of South Carolina, Charleston, SC, December 3, 2004.

"The Truth About Drug Testing", Charleston County Family Court Bar Continuing Legal Education Seminar, Jury Assembly Room, Charleston County Courthouse, Charleston, SC, November 19, 2004.

"Forensic Drug Testing", Charleston Association of Legal Assistants (CALA), Charleston, SC, November 17, 2004.

"Supervisor Training: Recognizing Drug and Alcohol Abuse in the Workplace", Palmetto Bridge Constructors, Inc., Charleston, SC, September 23. 2004.

"Carbohydrate Deficient Transferrin (CDT) Protein Testing for Heavy Alcohol Use", Charleston County Family Court Bar Liason Meeting, Charleston, SC, June 23 2004.

"Urine Drug Testing, Hair Drug Testing, and DNA Testing for Forensic Cases", Task Force Meeting, Lowcountry Children's Center, Charleston, SC, April 16, 2003.

"DNA Testing, Drug Testing, and Forensic Analysis", Women Lawyers Association (WLA), Charleston, SC, May 15, 2002.

"The True Benefits of Drug Testing in the Workplace", Tri-County Human Resource Management Association, Charleston, SC, February 17, 1997.

"Implementing a Drug Testing Program for County Government Employees", Colleton County Council Meeting, Walterboro, SC, September 3, 1996.

"Understanding the Consequences of Drug and Alcohol Abuse in the Workplace", Walterboro City Government, Walterboro, SC, July 30, 1996.

"Supervisor Training: Recognizing Drug and Alcohol Abuse in the Workplace", James Island Public Service District Charleston, SC, May 21, 1996.

"Understanding the Consequences of Drug and Alcohol Abuse in the Workplace", James Island Public Service District, Charleston, SC, April 10, 1996.

CURRICULUM VITAE
Robert M. Bennett

SAMPLE CASE LISTINGS OF DR. BENNETT
(CONFIDENTIAL)

- DNA Paternity determination from deceased Alleged Father Autopsy DNA, Tommy J., Probate Court, Charleston, SC, August 2009 (Trustee).

- DNA Paternity determination from deceased Alleged Father Autopsy DNA, Kip B., Probate Court, Charleston, SC, May 2009 (Trustee).

- Cognitive impairment & subsequent death related to Methylene Chloride exposure, WCC, Elton E. Greenville, SC April 2009 (Plaintiff)

- Testing of drug paraphernalia to identify drug residue, Roger T., Walhalla, SC, March 2009 (Plaintiff)
- Wrongful death, Cocaine overdose, Whittlesby v. LODGIAN,LLC Charleston, SC, March 2009 (Defense)
- Murder trial of State v. Derek Maner, Allendale, SC, Feb. 2009 (Defense)
- DNA detection from children's toys, Kidnapping, Jerome R., San Miguel, CA, Feb. 2009 (Plaintiff)
- Detection of Lead poisoning in house painters, Joe G, Supervisor., Charleston, SC, Jan. 2009 (Employment)
- DNA detection from female clothing, Adultery, Todd B., Cornersville, TN, Oct. 2008 (Plaintiff)
- DNA detection from male clothing, Adultery, Susan W., Beaufort, SC, Oct. 2008 (Plaintiff)
- DNA detection from female hairbrush & tampons, Maternity, Robbie W., Charleston, SC, Oct. 2008 (Plaintiff)
- Identification of semen / sperm in condom found in food at restaurant, Horace H, Marietta, SC, Sept. 2008 (Plaintiff)
- DNA Avuncular test, Estate of Mondell C. Greg K., Daytona Beach, FL, June 2008 (Plaintiff)
- Murder trial of State v. Billy Shirar, Moncks Corner, SC, May 2008 (Defense)
- Murder trial of State v. Alben Warren, Walterboro, SC, May 2008 (Defense)
- Court Martial of Naval Officer, Chris H., Drug offense, Marine Corps Air Station, May 2008 Beaufort, SC (Defense)
- Detection of single drug exposure in hair, Smith R., April 2008, Strousburg, France, (Plaintiff)
- DNA Siblingship Analysis, Estate of Mondell C., Jacquelyn B., Rolesville, NC, April 2008 (Plaintiff)
- Handwriting Analysis (Questioned Document) on defamatory letters, Pierce F., 2008, Charleston, SC (Plaintiff)
- Swabbing of home for Methamphetamine, Meth Lab, WSPA-TV, Greenville, SC, Jan. 2008 (Media)
- Salmonella poisoning by Peter Pan brand Peanut Butter, Detection of Salmonella in product, 2007, (numerous clients), Goose Creek, SC (Plaintiff)

- Human saliva detection on child's underwear, Aggravated Sexual Battery, Oral copulation of a minor, Thomas N., 2007, Roanoke, VA (Defense)

- Effect of Prescription drugs on the WCC death of Daniel A., 2007 Spartanburg, SC (Defense)

- Effect of Marijuana and Cocaine on causation of WCC leg injury, 2007 Spartanburg, SC (Defense)

- Fingerprint Identification on US Postal Service mail, Destruction of Mail 18 USC§ 1705, 2007, Bull Head City, AZ. (Plaintiff)

- Human semen detection on child's underwear, Aggravated Sexual Battery-minor child Arai P., 2007, Roanoke, VA (Defense)

- Handwriting Analysis (Questioned Document) on forged check cashing, 2007, Charleston, SC (Plaintiff)

- Fingerprint Identification on narcotic prescription bottle, narcotic theft, 2007 Charleston, SC (Plaintiff)

- Med-Mal, Physician & Pharmacist, Wrongful death, Prescription drug overdose, 2006, Bluffton, SC (Plaintiff)

- Female DNA extraction from male underwear, Private adultery case, 2006 Bull Head City, AZ. (Plaintiff)

- Back calculation of blood alcohol concentration, causation of WCC automobile accident, 2006 Greenville, SC (Defense)

- Cardiomegaly or chemical exposure, WCC, Wrongful death, Moore v. Santee Cooper, 2006, Charleston, SC (Plaintiff)

- Determination of psilocybin (Mushroom hallucinogen) in a hair specimen, Family Law, 2006, Charleston, SC (Defense)

- Anoxic brain damage, solvent exposure, WCC, Gary G. v. Powers Printing Co., Spartanburg, SC 2006 (Plaintiff)

- Evaluation of Amphetamine levels to determine drug abuse of Adderal, Kristen L., Family Law, 2006, Charleston, SC (Defense)

- Segmental assay of hair to determine time of cocaine use, J. B., Family Law, 2006 (Defense)

- William G. v. Americast Concrete, WCC Asthma injury of silica, chromates, tobacco, marijuana, Charleston, SC 2006 (Defense)

- Effect of OTC ephedrine from China on a hair drug test for methamphetamine on Travis P., Nucor Steel, Huger, SC 2006 (Employment)

- Parenting under effects of THC (marijuana), George C., Family Law, Charleston, SC 2006 (Plaintiff)

- Residual cocaine detection and evaluation in hair, Angela E., Family Law, Charleston, SC 2006 (Defense)

-Joe L. v. Savannah Marine Services, U.S. Coast Guard, WCC Injury under influence of Marijuana, State Court of Chatham County, Savannah, GA, 2006 (Defense)

- Effect of Coca based Herbal Supplement on Cocaine+ urine drug test of Omar G., Probation & Parole violation, Miami, FL 2006 (Defense)

- Effect of Alcohol containing OTC product on Alcohol test results of Deidre T., Dept. of Social Services, Charleston, SC 2006 (Defense)

- Trace analysis of cocaine & marijuana in hair specimens of Danny T., Dept. of Social Services, Hilton Head, SC 2006 (Plaintiff)

- Back calculation of blood alcohol concentration of Alonzo M., causation of automobile accident, Goose Creek, SC 2006 (Plaintiff)

- Effect of dilution on urine drug testing results, Janelle H., Dept. of Social Services, Charleston, SC 2006 (Plaintiff)

- Drug use evaluation to support Writ of Habeas Corpus in United States District Court to overturn murder conviction, March 2005, Charleston, SC. (Defense)

- Chemical exposure, WCC, Moore v. Johns Manville & Hoechst-Celanese Corp. 2005, Greenville, SC (Plaintiff)

- Fraudulent misrepresentation of identity of Carsheme D. by unknown individual to defeat Court Ordered drug testing, Summerville, SC 2005 (Judge's order)

- Automobile fatality, evaluation of cognitive skills vs. motor skills at the time of the accident with a high blood alcohol concentration, 2005, Charleston, SC (Plaintiff)

- Narcotic drugs and alcohol interaction evaluation. Family Law, March 2005, Charleston, SC (Plaintiff)

- Cocaine use detection in parents of minor child, State of New Jersey, Dept. of Human Services, March 2005, Charleston, SC (Plaintiff)

- Narcotic drug cognitive impairment re: the Estate of William P., Last Will contest, 2005, Charleston, SC. (Defense)

- Chronic Hypersensitivity Pneumonitis (CHP) caused by the drugs Isoniazid and Rifampin. March 2005, Charleston, SC. (Plaintiff)

- Establishing Grandpaternity with DNA testing after the death of the alleged father, March 2005, Charleston, SC. (Plaintiff)

- Pesticide poisoning of an employee of S.C. Dept of Transportation. WCC, Feb. 2005 (Plaintiff)

- Drug therapy & blunt force trauma effect on Hepaitis C, WCC Jan. 2005, Charleston, SC. (Plaintiff)

- Salmonella food poisoning. Edwin L. Hood v. Angler's Mini Mart dba Church's Fried Chicken, October 2004, Monck's Corner, SC. (Plaintiff)

- Wrongful death by Versed® drug overdose in a local outpatient Orthopedic office. August 2004, Charleston, SC (Plaintiff)

-Physical injury leading to ALS, Leila C-J v. Charleston County Dept. of Social Services, establishing causation, WCC, July 2004, Charleston, SC (Plaintiff)

- Toxicological Investigation into the death of Palmetto Bridge Constructers, Inc. employee Miguel Rojas Lucas, 2004, Charleston, SC. (Defense)

- Toxicological evaluation of drugs in hair from hairbrush of female homicide victim Molly W., 2004, Mt. Pleasant, SC. (Plaintiff)

- The Citadel v. Jason K. (Mediation) 2004, Drug test evaluation, establishing causation. (Defense)

- The Citadel v. Jason P. (Mediation) 2004,Drug test evaluation, establishing causation. (Defense)

- The Citadel v. Marion F. (Mediation) 2004, Drug test evaluation, establishing causation. (Defense)

- United States Coast Guard v. MK3 Officer Ian S., Drug test evaluation and re-test. October 2003, Charleston, SC. (Plaintiff)

- United States Department of the Army v. Major David T., Separation Board Hearing, Drug test results, October 2003, Charlotte, NC (Defense)

- Microscopic morphologic hair comparisons, Ira B., Wrongful termination, 2003, Charleston, SC (Defense)

-Toxicological Investigation into the suspicious death of John Dice II, 2003, Chambersburg, PA. (Plaintiff)

- Murder trial of State of S.C. v. Antwon Goodwin trial for the murder of Dewanye Brown, Crime Scene Reconstruction and Bullet Trajectory Analysis, 2003, Charleston, SC. (Defense)

- DNA Analysis evaluation of suspect Jerome C. for the rape and robbery of Margaret S., 2003, Darlington, SC (Plaintiff)

-Williams v. SCE&G, Wrongful Termination, (Mediation), 2002, North Charleston, SC (Defense)

- International Brotherhood Electrical Workers Union v. SCANNA (Arbitration), Wrongful Termination, 2002, Charleston, SC (Defense)

- The Citadel v. John K. (Mediation) 2002, Drug test evaluation, establishing causation. (Defense)

- Hudders, Smith v. Revco Discount Drug Center, Case # 1999-CP-23-4567, Chemical analysis of prescription ear drops that caused hearing loss and facial burns of the minor child, March 2001, Greenville, SC (Plaintiff)

- Shelton v. Louis Rich Meat Co., Case # 1991-CP-36-180, September 1997, Greenville, SC

-Louisiana DSS v. Addison, Court Order 1170374-02 for DNA test

-Louisiana DSS v. Chandler, Court Order 951337-01 for DNA test

STATE OF SOUTH CAROLINA)
) S.S.
COUNTY OF RICHLAND

DATE: 3-16-05

TIME: 1216

Personally appeared before me, this date, an officer duly and legally authorized to adminsister oaths in the above-named county and state aforesaid, comes one Mike Crickland W/M 9-17-57
504 Summerland Ct. Pelion SC

(Phone Day) (Phone Night)

Who makes the following statement under oath to wit:

Q Was Gene and Stephanie at your house by your request on Oct. 16, 2004?
A Yes I asked them over for a cook out. My son was there. Kimberly wouldn't come over unless I had Company over. Most of the time it was Graven & Stephanie. They arrived shortly before dark. Graven and I went down to the store and got some charcoal. That's where I did the last of the meth I had with him.
Q Both of you smoked some?
A. We smoked (Both Graven and I) a small, sizeable amount. We pulled off of a side road and finished it off.

This statement was made in the presence of C.K. Barnes of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS ____ DAY OF __________ 19__.

SIGNED: Mike Crickland

WITNESS: [signature]

WITNESS: ____________

____
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES ________.

WITNESS STATEMENT

Mike Crankford
(CONTINUED)

DATE: 3-16-05 TIME: 1216

Q Did Stephanie do any meth?
A. I didn't see her do any. I wouldn't be surprised if she had. I've seen her do it before
Q How late did the party go?
A. That's the question. Kimberly and her children left about 30 minutes prior to Grover and Stephanie. I thought it had been around 12:30 - 1 am, but after talking with my son it could very well have been closer to 11:30 pm. It may have been earlier - I was drunk. I also cleaned up afterward and I could be recalling the time after I finished cleaning.
Q Do you know of any other drugs that Grover has been using?
A. I had a small amount of cocaine that Grover and Stephanie used with me. Grover was always involved in cocaine. He had a line on some cocaine just about all

This statement was made in the presence of E.K. Barnes of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS ____ DAY OF __________ 19__.

SIGNED: X Mike Crankford
WITNESS: [signature]
WITNESS: ____________

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES ________.

WITNESS STATEMENT

Mike Crawford

(CONTINUED)

DATE: 3-16-05 TIME: 1216

the time. Grover still had cocaine connections after Stephanie passed.

Q Who were they?

A. I don't know

Q Do you recall anyone ever ripping Grover off on drugs or visa versa?

A. Not as I recall.

Q Did Kimberly have meth that night?

A. Yes

Q Did Grover get the meth from you?

A. No I think he got it from Kimberly. It was in a plastic bag - maybe a gram. Not a large quantity. A personal use size sack.

Q Did you have any involvement in the murder of Stephanie Dance?

A No I did not

This statement was made in the presence of G. K. [illegible] of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME THIS ____ DAY OF ____________ 19__.

SIGNED: X Mike Crawford

WITNESS: [signature]

WITNESS: ____________

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES ________.

WITNESS STATEMENT

Mike Crankford
(CONTINUED)

DATE: 3-16-05 TIME: 1216

Q Do you know who killed Stephanie

A. No I do not.

Q Do you know anyone who has a .45 handgun?

A. Kim's friend Doug had a .45 Colt (off brand) He was going to sell it right before this incident and move to Alaska. I don't know if he sold it. It was a semi auto .45 handgun. I never saw the gun. I think it was a Llama. It has no ejection pin on the side of the barrel.

Q Do you know if Gene ever made any drug deals off of I-20?

A. Not that I know of.

Q. Did Gene ever buy any pistols that you know of?

A. I don't know if he did. I know Doug tried to sell it to him just like he's tried to sell it to a lot of people.

This statement was made in the presence of E.K. Barnes of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME THIS ____ DAY OF __________ 19__.

SIGNED: [signature]

WITNESS: [signature]

WITNESS: __________

____
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES ________.

WITNESS STATEMENT

Mike [illegible]

(CONTINUED)

DATE: 3-16-05 TIME: 1216

Q Anything else?

A. They chased the Tom cat out of their car, packed up the kids and left

Q When was the first time you heard something was wrong?

A. It was maybe 5:30am. The Richland County Sheriff Dept or Columbia police called and said someone had shot Stephanie. They called me at my house and woke me up.

Q Who was driving when they left your house

A. Grover. Stephanie had a head ache and Grover decided he would drive. Then the Tom cat jumped out of the driver's seat and scared Grover.

Q What strip clubs would Grover hang out at?

A Platinum Plus is the only Columbia club that I remember. What struck me odd was his friends from where he grew up (maybe his brother) took him to the titty bar night after this happened. Grover used to say that he and Stephanie would go to bars together and pick up strippers.

This statement was made in the presence of [illegible] Barnes of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME THIS ____ DAY OF __________ 19__.

SIGNED: [signature]

WITNESS: [signature]

WITNESS: __________

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES __________.

WITNESS STATEMENT

Mike Crookland

(CONTINUED)

DATE: 3-16-05 TIME: 1216

Q Anything else?

A. No sir not as I can think of.

Q Has Kimberly mentioned anything like a possible dope deal involving Grover in which Grover might be selling a package for her or Eric Carlton that night?

A No she is a very secretive person.

Q Anything else?

A. I never sold large amounts of meth to anyone. It was just to casual friends MC

This statement was made in the presence of C.K. [illegible]
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS _____ DAY OF ___________ 19__.

SIGNED: Mike Crookland

WITNESS: [signature]

WITNESS: ____________

____
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES ________.

Statement of

Grover "Gene" Derrick
5928 Hwy 215 South
Jenkinsville, SC 29065

Made at
Columbia, South Carolina, this 18 day of October, 2004 at 1620 hours, in the presence of Inv. Faust of the Richland County Sheriff's Department.

I, Gene Derrick, understand that I have the right to remain silent. Anything I say can be used against me in court. I have the right to talk to a lawyer for advice before you ask me any questions, and to have a lawyer with me during any questioning. If I cannot afford a lawyer, one will be appointed for me before any questioning, if I wish. If I decide to answer questions now, without a lawyer present, I still have the right to stop answering at any time. I also have the right to stop answering at any time until I talk to a lawyer.
Do make the following statement:
Q= Inv. Faust
A= Gene Derrick
Q= Can you tell me what you did Saturday, Oct. 16, starting around midday?
A= We got up, had breakfast, loaded up the kids & went to the Barnyard flea market on Highway 1 in Lex. Left the flea market around 4 o'clock, and went to Mike Lankford's house. We started cooking around 6 to 6:30, steaks & potatoes. Ate dinner. It was me, Stephanie, my 2 boys Zack & Cody, Mike, his girlfriend Kim, and their kids. He has a boy and she has a girl. Finished eating dinner around 10:30 PM, I had a couple of drinks, 4 to 5 beers & a margarita. Left there around 12 o'clock. Stop at the Citgo station on 302. I bought 4 packs of cigarettes. Stephanie stayed in the car with the kids. Left the Citgo, and went to Hwy. 6, & got on I-20. We are talking about making our wedding plans going down I-20. Came up on a truck in the middle lane at Broad River and I 20. It was a dark colored, possibly black, Chevy truck, step side, shot bed, 99 to possibly a 2000. No sliding glass back window, it was a solid rear window. No markings on the tailgate. I passed them in the slow right lane. I was doing about 70-75 with the cruise control. I passed the truck, and got to the driving range, which is off to the right of the

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

Witness: ____________________ Signed: Grover E. Derrick

Witness: ____________________

This is to certify that I have read or have read to me the foregoing statement consisting of 3 pages and a true copy has been given to me this 18 day of October, 2004

Sworn to and subscribed before me
This 18 day of October, 2004

Signed Grover E. Derrick

[signature]
Notary Public for South Carolina
My commission expires 07242000.

highway. I noticed in the mirror that the lights were coming back up. Passenger side of the truck got to the driver's side rear door. I heard gunshots, about 4 or 5. I looked over and saw an arm that had his shoulder all the way against the door. I think I dropped the passenger side off the side of the road. The truck was to my left, maybe splitting the far lane and the middle lane, maybe 15 to 20 feet away. The truck went to the outside fast lane. I got in the middle lane. The truck was maybe 10 to 15 feet ahead of me at that time. I started chasing them. The truck cut back across. We got up to the Monticello Road exit and he stuck what looked like his left arm out the window and started shooting at us again. Right there, it was at least 4 or 5 shots. Every time he would start shooting, it would be the same pattern. When we got on up to where that CAT rental sign is off the right side of the road, he shot about the same amount of times. He was a good 20 to 25 feet ahead of me. He was coming back across the highway to the slow lane, and I was already there. The truck got of on Fairfield road, took a right on Sharpe Road. I lost sight of him for about 3 to 4 seconds. When I topped the hill. I saw him hang a left on Red Hill Road. At that time, I asked Stephanie for my phone. I realized that she had been shot. I turned around on Sharpe Road, just past Red Hill Road. I went back to Flying J. That is when the clerk called 911 inside.

— 1

— 2

Q= At the time of the shootings, what were you doing & was your window up or down?

A= We were talking about the wedding, she had just handed me her cigarette to throw out the window. Her window will not roll down, the motor is broke. I threw her cigarette out. I had my left arm on the door. I had about two more draws on my cigarette and I was going to throw it out. That is about the time the shootings happened.

Q= Where was the truck when you threw the first cigarette out?

A= Coming up the middle lane, I am not sure far how back, but I remember seeing the headlights coming up.

Q= How was your window?

A= At that time when I threw her cigarette out, I am pretty sure it was only about half way down, but I rolled it the rest of the way down with my left arm resting on the window seal. A short time later is when the shots happened.

Q= Describe the people in the truck that shot at you?

A= The driver looked to be a black male. He did not have a hat on. It looked to be bushy hair. The passenger was the shooter, he looked to be black. When I passed him, I looked

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward or hope of reward of any kind.

Witness: ____________________

Witness: ____________________

Signed: [signature]

This is to certify that I have read or have read to me the foregoing statement consisting of 3 pages and a true copy has been given to me this 18 day of October, 2004

Sworn to and subscribed before me
This 18 day of October, 2004

Signed [signature]

[signature]
Notary Public for South Carolina
My commission expires 07242008

in the mirror and he was a black male. He was probably in his mid to early 20's. His hair looked to be cut real short. If I saw a picture of him, I could pick him out. When they were getting off Fairfield Road and the passenger's side door was facing me, I got a good look at the guy. He was looking back at me to see if I was coming behind them.

Q= When I talked to you the other night at the hospital, what was you state of mind?

A= Shocked, scared & confused.

Q= In today's statement have you had time to calm down and remember the events better after we drove the same drive you did that night.

A= Yes.

Q= Is this the truth

A= Yes sir, it helped taking that drive, I was able to focus better.

I hav de the foregoing statement freely and voluntarily without fear, threat, promise or reward or ho f reward of any kind.

Witne ______________________

Witnes ______________________ Signed: [signature]

This is ify that I have read or have read to me the foregoing statement consisting of 3 pages a e copy has been given to me this 18 day of October, 2004

Sworn to bscribed before me
This 18 October, 2004

Signed [signature]

[signature]
Notary Pu outh Carolina
My commi ires 07242008

INFO, INC.
Investigations

Post Office Box 5415
Columbia, SC 29250
phone (803) 331-1968
fax (803) 781-8597

John Joseph Moore Report

January 24, 2008

Beth Lankford
235 Sandspur Road
Pelion, South Carolina 29123
(803) 894-9871

This morning, I conducted a telephone interview with Beth Lankford, wife of Mike Lankford who is currently serving time in North Carolina. Beth informed me that she had never met Stephanie Dover, but did know Grover Derrick as he worked with Mike at Gregory Electric. When asked how Grover felt about Stephanie, Beth indicated that he would sometimes call her (Stephanie) his wife and other times his girlfriend. He mentioned that they had 2 boys. It was Beth's impression from the way Grover talked that Stephanie was much younger and that Grover was pretty much the boss of what went on in their lives and that Stephanie was more interested in getting married than Grover was. But, Beth had only known Grover for a few months before she discovered that Mike was heavily involved in the drugs business–found a bag of cocaine on the night stand and left him around April 14, 2004.

After Mike and Beth split up, Beth tried to see Mike as little as possible, but because they have a 12 year old son, Ian, (he has special needs) they did see each other. On the Sunday morning of the incident, it was about 6:30 A.M., and Mike began banging on Beth's door. Mike had brought Ian home from his visitation (Ian had been at Mike's house for the weekend) and was extremely upset. Mike asked Beth if she had heard the news and when she asked what, Mike said "Someone at my house last night got killed." Mike went on to say that the victim had been Grover's girlfriend, Stephanie. According to Mike, Grover called him (Mike) and said, "Stephanie is dead."

Later on that day, Beth spoke with Ian about the weekend and asked what had happened. Ian said that Mike had gotten a phone call early, early that morning and that he (Mike) had been upset ever since.

Still later that day, Beth was watching the news and Ian turned to her saying that the news reports were not true. When Beth asked what was not true, Ian said a "bunch" of it. Ian told Beth that Grover, Stephanie and the kids had left Mike's house at 11:00 P.M., not the time the news was saying. Ian indicated that he knew the time because he was watching Futurama (Beth won't let him watch that at her house) on Mike's 1 tv on the couch. The program had just come on when Grover, Stephanie and the 2 kids were leaving. Grover was so drunk that he fell on Ian as he was trying to go out the door. According to Ian, Grover could not have driven, he was too drunk, he could hardly walk.

The more Beth thought about the situation and heard the conflicting stories that Grover was giving–about when he had first said that the shooter was in a dark colored car and that they had been shot at and he had followed the car off of the road, then that the shooter had been in a big dark pick-up truck (Mike owned a similar truck)–the more concerned she got.

Beth knew that Mike kept in touch with Grover because of comments that Mike would say. It seemed that Grover had recovered really well, even getting a new girlfriend about 2 months after the incident. According to Beth, Grover went right on living the way he had been.

Eventually, Beth contacted the authorities and told them about the inconsistences in what Ian was saying and what Grover was saying. The police actually called her in and showed Beth a cd of the parking lot where Grover pulled in. It showed him running inside, yelling that "she's been shot." At the beginning of the tape, though, a dark colored truck was shown following a car similar to Grover's past the gas station going down a frontage road. About 8 minutes later, the same car came back to the gas station from the opposite direction and that was when Grover got out to tell of the shooting. Beth informed me that basically the police were saying that there was more to the story than Grover was telling. All Beth could say about the truck was "it's not Mike's." Mike drove a Chevy and the one on tape was like a big Dodge ram–it had a rounded front.

Because of the inconsistent times that Grover told the police, Beth suspects that perhaps he, Stephanie and the children made a drug stop after leaving Mike's and something went wrong causing the shooting.

Beth believes that whoever did kill Stephanie deserves the death penalty, but "it is extremely unlikely that they have the right person."

Special Notes

1. Mike was muling drugs for someone in North Carolina.
2. Mike's house was about 20 minutes from where the shooting occurred.
3. Neighbors of Mike's would call Beth asking if she could do something about the parties Mike was having.
4. At the time of the shooting, Mike dated a girl named Kim (does not know her last name). She was married to a guy who was doing time for drugs and her father was in jail for drugs, too. She also had a record. Kim and her kids (2 or 3) moved in with Mike after her house blew up in a fire (drugs).
5. The party at Mike's was an "adult party."
6. Everyone that Mike hung around with at the time was involved in drugs.
7. Of the party, Ian has said that everyone was drunk and that Mike let him taste a margarita. Ian was impressed with the margarita glasses that Mike had bought.
8. One of Mike's cats was also shot at the same party and then thrown into the swimming pool to drown. Mike said it was an accident.

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9. After Mike was arrested, Beth went to the house. She found a microwave glass dish underneath the bed with cocaine already lined out. She found video tapes whose insides had been hollowed out to put inserts with needles. She found brown boxes in the closet full of vials. There were used syringes in the bathroom. There was not a single t-spoon in the whole house.

10. Mike warned Beth not to speak to the police about Grover.

11. Beth thinks she remembers RCSD telling her that Grover had called Mike's cell phone around the same time that Stephanie had been shot. Beth thinks that perhaps Grover was warning Mike that something might be going down.

12. Beth saw the news story of the 2nd anniversary of Stephanie's death and thinks that the news paper overstated Grover's involvement in his children's lives.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN JOSEPH MOORE,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred by refusing to dismiss the charge of possession of a firearm by a person under the age of twenty-one, as *S.C. Code Section 16-23-30* (which has since been amended) was found to violate *Article 17, Section 14* of the *South Carolina Constitution* in *State v. Bolin*, 378 S.C. 96, 662 S.E.2d 38 (2008).

STATEMENT OF FACTS

On January 28 through February 1, 2008, John Joseph Moore stood trial in Richland County, before Judge William P. Keesley and a jury, on indictments charging him with murder, possession of a firearm during the commission of a violent crime, and possession of a firearm by a person under the age of twenty-one. The State alleged that Moore had shot Stephanie Dover once in the head during an episode of road-rage between her fiancé, Gene Derrick, and Moore. Based on the testimony of Moore's passenger, Kerwyn Phillips, that Derrick had been the aggressor, the judge instructed the jury on voluntary manslaughter and self-defense, in addition to murder and the firearm charges. The jury found Moore guilty of voluntary manslaughter and the two firearm charges, and the judge sentenced him to thirty years for manslaughter, five years concurrent for possession of a firearm during the commission of a violent crime, and five years consecutive for possession of a firearm by a person under the age of twenty-one.

ARGUMENT

The trial judge erred by refusing to dismiss the charge of possession of a firearm by a person under the age of twenty-one, as *S.C. Code Section 16-23-30* (which has since been amended) was found to violate *Article 17, Section 14* of the *South Carolina Constitution* in *State v. Bolin*, 378 S.C. 96, 662 S.E.2d 38 (2008).

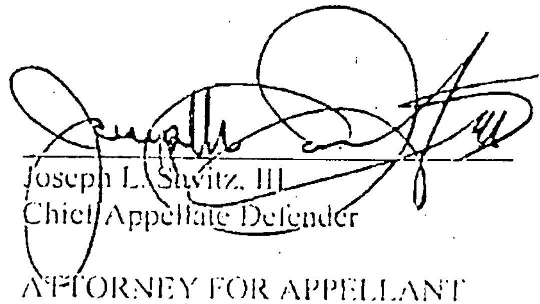
John Joseph Moore was born October 2, 1985. On the date of the incident, October 17, 2004, he was nineteen. ROA p. 1, line 16 – p. 2, line 20.

Moore was charged with having violated *S.C. Code Section 16-23-30*, which, prior to its amendment in 2004, prohibited persons under the age of twenty-one from possessing handguns. In *State v. Bolin*, 378 S.C. 96, 662 S.E.2d 38 (2008), the Supreme Court found that this statute violated *Article 17, Section 14*, of the *South Carolina Constitution*.

Defense counsel moved to dismiss the charge for precisely that reason. ROA p. 3, line 21 – p. 5, line 15. The judge denied the motion. ROA p. 5, line 16.

Since Moore's conviction for violating *Section 16-23-30* is unconstitutional under *State v. Bolin*, the Court should vacate that conviction.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

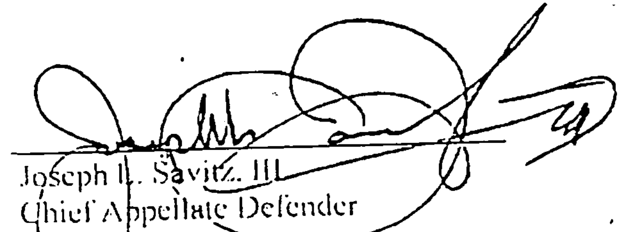
ATTORNEY FOR APPELLANT

This 27th day of July, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 27, 2009



Joseph L. Savitz, III
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
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Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JOHN JOSEPH MOORE,

APPELLANT

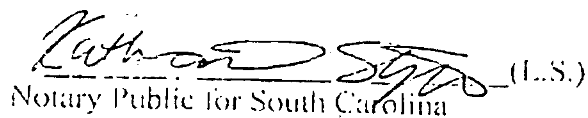
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Norman Mark Rapoport, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of July, 2009.

Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of July, 2009.



_____________________ (L.S.)
Notary Public for South Carolina

My Commission Expires: July 1, 2019.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOHN JOSEPH MOORE,

Appellant.

FINAL BRIEF OF RESPONDENT

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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STATEMENT OF ISSUE ON APPEAL

Should Moore's conviction for possession of a pistol by a person under twenty-one be set aside?

STATEMENT OF THE CASE

John Joseph Moore was tried in Richland County on January 28 through February 1, 2008, before the Honorable William P. Keesley, and a jury, for murder, possession of a firearm during the commission of a violent crime, and possession of a firearm by a person under the age of twenty-one. Moore was convicted of voluntary manslaughter and both firearms charges. He was sentenced to thirty years imprisonment for voluntary manslaughter, five years concurrent for possession of a firearm during the commission of a violent crime, and five years consecutive for possession of a firearm by a person under the age of twenty-one. A Notice of Appeal was filed and served.

ARGUMENT

This Court may find that Moore's conviction for possession of a pistol by a person under twenty-one should be set aside. (Moore's Issue).

Moore was convicted of voluntary manslaughter, possession of a firearm during the commission of a violent crime, and possession of a firearm by a person under the age of twenty-one. Moore appeals his conviction for possession of a firearm by a person under the age of twenty-one. He argues S.C. Code Ann. §16-23-30(c) (2003) is unconstitutional.[1]

In State v. Bolin, 378 S.C. 96, 662 S.E.2d 38, 39-40 (2008), the Supreme Court held §16-23-30(c) violated the South Carolina Constitution to the extent it prohibited possession of pistols by people over the age of eighteen. Since Moore was nineteen years old when he shot and killed Stephanie Dover, this Court may find the Bolin decision mandates setting aside his conviction under §16-23-30(c) for possession of a pistol by a person under the age of twenty-one.

---

[1]Moore does not appeal his convictions for voluntary manslaughter and possession of a firearm during the commission of a violent crime.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted this Court may find the conviction for possession of a pistol by a person under twenty-one should be set aside.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

WARREN B. GIESE
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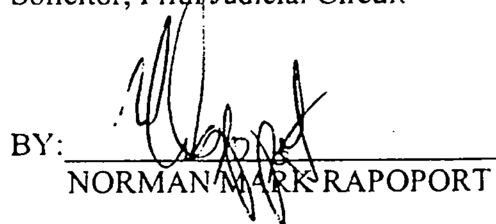

BY:______________________
NORMAN MARK RAPOPORT

Office of the Attorney General
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Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 12, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOHN JOSEPH MOORE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

WARREN B. GIESE
Solicitor, Fifth Judicial Circuit

By:
NORMAN MARK RAPOPORT

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ATTORNEYS FOR RESPONDENT

August 12, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOHN JOSEPH MOORE,

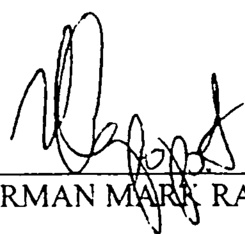
Appellant.

PROOF OF SERVICE

I certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Joseph L. Savitz, III, Chief Attorney, S.C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 12th day of August, 2009.



NORMAN MARK RAPOPORT

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Columbia, South Carolina 29211-1589
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Facsimile: (803) 734-1397

April 8, 2009

Mr. John Joseph Moore, #326455
Lee Correctional Institution
990 Wisacky Hwy.
Bishopville, SC 29010

Re: Your appeal

Dear John:

The most that we will be able to accomplish in this direct appeal is to have your conviction for unlawful possession of a firearm – and consecutive sentence of five years – vacated. As to the manslaughter conviction, you will need to file an application for post-conviction relief once the Court vacates this conviction. I regret that I was unable to find any issues upon which to attack the manslaughter conviction in this proceeding, but getting the consecutive sentence vacated is at least a start.

Sincerely,

Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosure

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

Division of Appellate Defense
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Columbia, South Carolina 29201-3332

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Facsimile: (803) 734-1397

June 25, 2009

Mr. John Joseph Moore
#326455
Broad River Correctional Institution
4460 Broad River Rd.
Columbia, SC 29210

Dear Mr. Moore,

I am a law clerk with the Division of Appellate Defense. Mr. Savitz asked me to respond to your letter.

Mr. Savitz has not yet reviewed your record. When Mr. Savitz reviews your record he will do so with all potential issues in mind and will craft his final brief to include the issues which he believes to be the most meritorious and persuasive. Thank you for the time and effort spent on your suggestions as to what the issues should be.

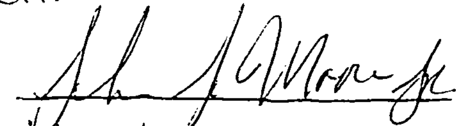
Sincerely,

Ruston Neely

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 11th, 2015



This ___ day of June, 2015.

John J. Moore
Murray 125
4460 Broadriver Rd.
Cola, S.C. 29210
Pro Se

On the 11th day of June, 2015
Susan H. Frye

Commission Expires
March 5, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case NO. 2014-000786

John J. Moore,

Petitioner,

V.

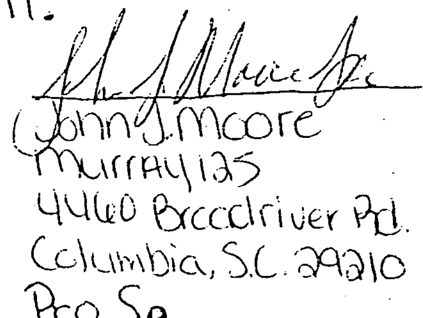
State of South Carolina.

Respondent,

PROOF OF SERVICE

I certify that I have served the Record on Appeal by despositing a copy of it in the United States Mail, postage prepaid on June 11th, 2015, addressed to Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly St., Rm 519, Cola., S.C. 29201 and Daniel E. Shearouse, Clerk of the Supreme Court of S.C. P.O. Box 11330, Cola., S.C. 29211.

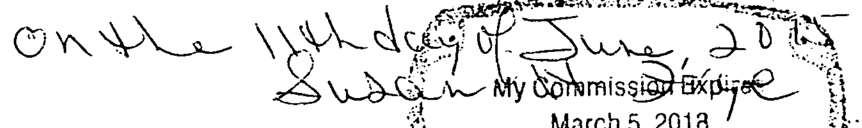
June 11th, 2015



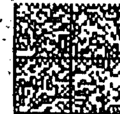
John J. Moore
Murray 125
4460 Broadriver Rd.
Columbia, S.C. 29210
Pro Se

This 11 day of June 2015,

On the 11th day of June, 2015



ohn J. Moore Jr. #326455
Murray 125
4460 Broadriver Rd.
Columbia, S.C. 29210



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