

Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730
Telephone (803) 327-4192
Facsimile (803) 329-1344

June 16, 2017

Mr. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

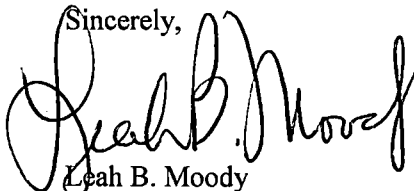
RE: Toby Moore v. State of South Carolina
Case No.: 2014-CP-42-2768

Dear Mr. Shearouse:

The Spartanburg County Court of Common Pleas appointed my office to represent Toby Moore in his Post-Conviction Relief action. Please find enclosed for filing the original and one (1) copy of the Notice of Appeal and Proof of Service, a copy of the Order Dismissing Post-Conviction Relief Application in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/lt

Enclosures

cc Toby Moore
Valerie G. Giovanoli, Esquire
Sharon Graham, SCCID
Hope Blackley, Clerk of Court, Spartanburg County

**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas**

The Honorable R. Ferrell Cothran, Jr., Presiding in Spartanburg County

Case No. 2014-CP-42-02768

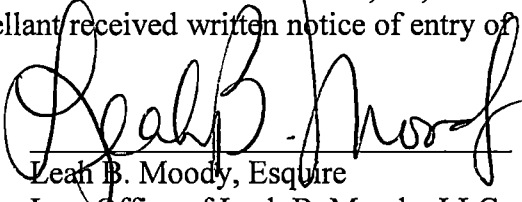
Toby Moore, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Toby Moore appeals the order of the Honorable R. Ferrell Cothran, Jr., dated May 23, 2017 and mailed on May 30, 2017. Appellant received written notice of entry of the final order on June 15, 2017.



Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

Other Counsel of record:
Valerie G. Giovanoli, SC Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

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S.C. SUPREME COURT

**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas**

The Honorable R. Ferrell Cothran, Jr., Presiding in Spartanburg County

Case No. 2014-CP-42-02768

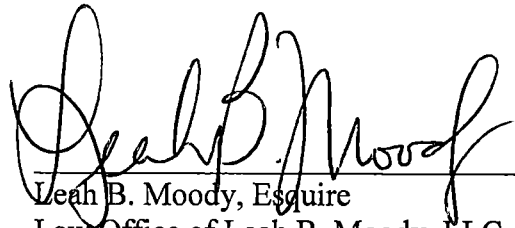
Toby Moore, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Valerie G. Giovanoli by depositing a copy of it in the United States Mail, postage prepaid, on June 16, 2017 addressed to its attorney of record, Valerie G. Giovanoli, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

June 16, 2017

cc Toby Moore
Sharon A. Graham, SCCID
Daniel E. Shearouse, Clerk of Court, SC Supreme Court
Hope Blackley, Spartanburg County Clerk of Court

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S.C. SUPREME COURT

2014 CP-2768

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

Toby Moore, #350242,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-42-2768

ORDER OF DISMISSAL

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H. HOPE BLANCHARD

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 10, 2014. Respondent made a Return on November 18, 2014. The Court convened an evidentiary hearing into the matter on June 16, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Leah B. Moody, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Tanya Jones, Esquire testified by telephone,¹ and John T. Mobley, Esquire, Applicant's appellate counsel, also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections and appellate records, the pleadings, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In June 2011, the Spartanburg County Grand Jury indicted Applicant for possession with intent to distribute

¹ At the time of the hearing, Jones resided outside of South Carolina. The parties consented to allow her to appear by telephone.

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("PWID") cocaine base within one-half mile of school (2011-GS-42-2965), PWID marijuana (2011-GS-42-2966), PWID methamphetamine or cocaine base (2011-GS-42-2967), trafficking in cocaine 28-100 grams and possession of a weapon during the commission of a violent crime (2011-GS-42-2969(A)), and attempted murder (2011-GS-42-2968). Applicant was subsequently indicted in January 2012 for three additional counts of attempted murder (2012-GS-42-0064, -0065, and -0066). Tanya R. Jones, Esquire, represented Applicant. On March 23, 2012, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty of all charges as indicted. Judge Cole sentenced Applicant to concurrent terms of 30 years for each count of attempted murder, 25 years for trafficking cocaine, ten years for PWID cocaine base within a half-mile of a school, five years for PWID marijuana, and five years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal. John T. Mobley, Esquire represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Moore, Op. No. 2014-UP-025 (S.C. Ct. App. filed January 22, 2014). The Remittitur was returned on February 7, 2014.

II. ALLEGATIONS

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

1. Ineffective assistance of trial counsel; specifically
 - a. "trial counsel failed to object where the trial court neglected to instruct the jury on a critical element on the charges of attempted murder"
 - b. "trial counsel failed to pursue a motion to quash the indictment for attempted murder . . . where such indictment is rendered invalid and void"
 - c. "trial counsel failed to move the General Sessions Court to quash the indictment for possession with intent to distribute methamphetamine or cocaine base . . . where such indictment lacked sufficient information to place the Applicant on notice of what he must be

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- prepared to meet at trial”
- d. “trial counsel failed to move the General Sessions Court to quash the indictment for possession with intent to distribute cocaine base within one-half mile of school”
 - e. “trial counsel failed to pursue her objection and preserve for appellate review that the trial court abused its discretion to admit into Applicant’s trial evidence which prejudicial effect outweighed any probative value”
 - f. “trial counsel failed to object to the trial court instructing the jury that they were permitted to consider the ‘hand of one is the hand of all’ theory where such charge was not only burden shifting but, also highly prejudicial and inapplicable”
 - g. “trial counsel failed to object where the trial court shifted the burden from the State to the Applicant by giving the jury a bias, prejudicial and erroneous jury charge on actual and constructive possession”
 - h. “trial counsel failed to object where the trial court defectively and inadequately charged the jury that, they were permitted to consider a lesser included offense of possession of cocaine base but, neglected to instruct the jury that, ‘such finding would bar them from convicting the Applicant of ‘possession with intent to distribute cocaine base within one-half mile of a park’”
 - i. “trial counsel failed to object where the trial court deliberately refused to sufficiently or concisely answer the jury’s question on the term malice “aforethought.”
 - j. “trial counsel failed to request a post-trial motion for a new trial where there was overwhelming facts and evidence of outrageous police conduct and perjured testimony”
 - k. “trial counsel failed to object to the trial court instructing the jury: ‘your sole objective is simply to reach the truth in the matter.’”
2. Ineffective Assistance of Appellate Counsel
 - a. “appellate counsel allowing the applicant to be denied and deprived of due process and equal protection . . . by refusing to honor or respect the Applicant’s request . . . to submit a timely Petition for Rehearing”
 - b. “appellate counsel allowing the Applicant to be denied due process and equal protection of the law by refusing to honor or respect the Applicant’s request to submit . . . the issue of the trial court abusing its discretion . . . and depriv[ing] him of his due process and fundamental right to ‘retained effective assistance of counsel of his choice.’”

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The

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Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Summary of Evidence Adduced at Trial

The Spartanburg Public Safety Department sent a tactical team to Applicant's residence to execute a no-knock search warrant in connection with a narcotics investigation on January 6, 2011. (Tr. at 58-60; Tr. at 218). When the team arrived, they set up a perimeter around the house. Part of the team went to the front door to prepare to breach the door, and another part of the team deployed a distraction device called a "flashbang" in a different part of the house. (Tr. at 67). The flashbang emits a very bright light and very loud noise for the purpose of distracting the inhabitants from the front door where the breach takes place. (Tr. at 67; Tr. at 87). When the flashbang was deployed, the tactical team began screaming: "Police, search warrant! Police, search warrant!" and continued shouting this as they used a battering ram to breach the door and enter the home. (Tr. at 67; 88). Officer James Bogan testified that the purpose of yelling this is so that the suspects know it is the police and not an intruder. (Tr. at 185). The house was pitch black when Officer Harris—who was the first to enter—walked inside. (Tr. at 116). Seconds after he entered, the inhabitants began firing at the officers. (Tr. at 117-20). Officer Harris was shot first and went down to the ground. (Tr. at 117). Officer Morrow also testified that the shots that hit Harris came from the back bathroom. (Tr. at 261). Officer Hillers returned fire as the inhabitants continued firing at the other officers who had entered behind Harris. (Tr. at 118).

QJC/ Officer Hillers testified that Amanda Gentry and William Rogers were on the couch in the front room when they entered. (Tr. at 135). Officer Shane Morrow testified he saw a weapon in Rogers' hand. (Tr. at 262). Rogers at first did not present a threat but then pointed a weapon at the officers and Officer Jeff Cooper started firing on him and continued until Rogers dropped the

weapon. (Tr. at 219, lines 21-24; Tr. at 221). Officer Shane Morrow also shot at Rogers. (Tr. at 247-48). Officer Adrian Patton pulled Rogers out of the house and made sure an ambulance was on the way. (Tr. at 269-70). Rogers ultimately died at the hospital. (Tr. at 361).

The officers then proceeded to the back of the house, where Applicant was in the bathroom, holding his hands out of the door in response to the officers' instructions to "Let me see your hands." (Tr. at 248-49). Officer Hillers testified that when he returned inside of the home to check to make sure Applicant was not shot, Applicant "turned, looked at him dead in [the] eye and grinned ear to ear as he was being handcuffed. (Tr. at 127). A black, loaded gun was found near Applicant. (Tr. at 145). A subsequent search of the residence revealed additional weapons, cocaine, crack cocaine, marijuana, and pills. (Tr. at 73-79). A Hi-Point 45 caliber handgun was found in the bathroom. (Tr. at 339, lines 6-17; 348, line 12). The fired bullet collected from Officer Harris matched that weapon. (Tr. at 261; 309-10; 339, lines 6-15; 348, lines 9-14; 368-69, line 12; 370, lines 2-4).

B. Summary of PCR Testimony

Applicant testified that Counsel was not prepared for trial and that he wanted to hire John Mobley instead. Applicant testified he did not know what constituted trafficking and that he did not have an opportunity to speak with Counsel about defenses. Applicant testified he talked to Counsel about the flashbang and the search warrant. Applicant denied he had any discussions with Counsel about defenses.

Applicant testified he spoke with Counsel only twice and that the judge would not allow Mobley to take over. Applicant testified Counsel failed to explain that attempted murder requires a specific intent to kill. Applicant also complained that the indictment was invalid because the elements did not constitute a crime of attempted murder and that the evidence did not constitute

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attempted murder. Applicant also testified that the indictment was invalid because it did not contain the amount or weight of the cocaine. Applicant testified that Counsel failed to object to the charge on accomplice liability (hand of one, hand of all) on the basis that he lived there. Applicant testified that Counsel failed to object to a burden shifting jury charge. He also argued she failed to object to the charge to the jury that it could consider the lesser included offense of the proximity charge and that the indictment did not have the weight of the drugs.

Applicant alleged Counsel should have objected to the charge on malice aforethought. Applicant testified Counsel failed to request a post-trial motion to set aside the verdict. Applicant testified that Counsel allowed in perjured testimony by the officers.

Applicant's mother, Viola Moore, testified that the residence where the incident took place was 1.8 miles from a school or park.

Counsel testified she has been practicing law for about 15 years. She testified she recalls that she was appointed to represent Applicant in May 2011. She testified she met with him approximately five times prior to trial. Counsel testified she filed Rule 5 and Brady motions for discovery, that she received that discovery and that she reviewed it with Applicant. She testified that he was not very cooperative because he was focused on the fact that his friend, Rogers, had been shot and killed during the incident. She testified she generally always discusses the charges against her clients and the elements of those charges and provides further explanation if they have any questions. Counsel testified she discussed with Applicant his version of what happened, that he basically indicated this was not his residence and that it was all one big lie. She testified he really wanted to focus on the fact that Rogers was killed. Counsel testified she discussed possible defenses with Applicant but that the defenses were limited because the search warrant was valid on its face and that she challenged this prior to trial. Counsel described the State's

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evidence against Applicant as "very strong." Counsel testified that Applicant provided no potential witnesses or leads for investigative purposes. She testified that she spoke with the third individual who was present in the home, Amanda Gentry, but that she was not helpful. Counsel also testified that she drove by the scene, consulted with a touch DNA expert, reviewed all of the photographs taken at the scene, and spoke with the solicitor. Counsel testified that though she met much resistance from Applicant because he wanted a private attorney, she felt that she had ample time to prepare for trial. Counsel testified that her strategy was to bring out the fact that Applicant had previously been the victim of a home invasion and did not know it was officers entering the home. Counsel testified that she reviewed the officers' reports and cross-examined them on inconsistencies. She testified that she saw nothing objectionable about the jury charges that were given.

John Mobley ("Appellate Counsel") also testified. He testified that he represented Applicant on appeal. He testified he spoke with Applicant about his appeal and that he gave him a copy of the investigative file, but that the appeal is limited to what is in the record and that the information a client gives him is not relevant for purposes of briefing the issues on appeal. He testified that an appeal is limited to areas of law and is based on exhibits and trial transcripts. Appellate Counsel testified that he looked at all issues that could have been viable on appeal. He testified he raised the only potentially viable issue and that it was not a strong issue. He stated there were no other issues that would have been successful on appeal. Appellate Counsel testified he would not have been successful in raising an argument on appeal that the Court erred in denying Applicant's request to continue the case so that Appellate Counsel could take over as trial counsel. Appellate Counsel testified this would not have been successful on appeal because there is no right to an attorney of Applicant's choosing where he was represented by competent

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qualified counsel. He further testified there was no merit in filing a petition for rehearing after the Court of Appeals affirmed Applicant's conviction.

C. Ineffective Assistance of Trial Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

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D. J. C.

Failure to Object to Jury Charges

Applicant alleges Counsel was ineffective for failing to object to the charge on attempted murder, hand-of-one, hand-of-one, actual versus constructive possession, the charge on lesser included offense of possession of cocaine base, and the trial judge's instruction that jury's objective was to reach the truth in the matter. This Court finds Applicant has failed to satisfy his burden of proving either deficiency or prejudice with respect to Applicant's allegation that Counsel failed to object to jury instructions.

"In reviewing jury charges for error, [the reviewing court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "[A] charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)). If the charge "is substantially correct and covers the law [it] does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citing State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)). "Moreover, '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011)). An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583-84 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)).

Counsel testified the jury charges were all standard charges, that she was anticipating a charge on accomplice liability or "hand-of-one-hand, hand-of-all" and that she did not see anything objectionable about the charges. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d

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578, 584 (2010) (“It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense.” (quoting State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000)). Counsel also characterized the State’s evidence against Applicant as very strong. This Court finds that Applicant has failed to show that the instructions were incorrect, especially when taken as a whole. This Court further finds that given the significance of the evidence against Applicant, Applicant has made no showing that there is a reasonable probability that but for the alleged deficiency, the outcome would have been different. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583–84 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (“An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion”). Accordingly, Applicant has failed to show Counsel was deficient for not objecting or that had Counsel objected, the outcome would have been different.

Failure to Move to Quash Indictments

This Court finds Applicant’s allegations that Counsel was ineffective for failing to move to quash his indictments for PWID cocaine base, PWID cocaine base within a half mile of a school, and attempted murder are wholly without merit.

An indictment is a “notice document.” State v. Tumbleston, 376 S.C. 90, 95, 654 S.E.2d 849, 852 (Ct. App. 2007) (citing S.C. Const. art. I, § 11; S.C. Code Ann. § 17-19-10 (2003)). That an “indictment could be more definite or certain is irrelevant.” State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007) (citing State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005)). An indictment is sufficient if “it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.” State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972) (citing State v. McIntire, 221 S.C. 504, 509, 71 S.E.2d 410, 412 (1952) (“The general rule on this question is

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that the offense must be so described that the accused may know how to answer the charge, the court what judgment to pronounce, and conviction or acquittal thereon may be pleaded in bar to any subsequent prosecution.”).

Applicant has made no showing that the indictments were insufficient on their face or that he was not on notice of what he must be prepared to meet at trial.² Further, Counsel testified that she saw no issues with the indictments. This Court has reviewed the indictments and finds the indictments were sufficient to place Applicant on notice of the charges for which he would have to answer. Therefore, Applicant has made no showing that Counsel was deficient for not objecting to or moving to quash the indictments. In addition, given the discovery provided to Applicant, any lack of specificity in the indictments did not prejudice Applicant because he was on notice concerning the allegations. Accordingly, Applicant has also failed to demonstrate there is a reasonable probability the outcome would have been different but for the alleged deficiency. This allegation is therefore denied and dismissed.

² The indictment for the attempted murder of Officer Harris alleged Applicant “did in Spartanburg County on or about January 6, 2011, with malice aforethought, attempt to kill Officer Jason Harris, by shooting the victim in the right hip, with the intent to kill the said victim, in violation of § 16-3-29 of the Code of Laws of South Carolina.” (2011-GS-42-2968). The indictments for each count of attempted murder for the remaining victims alleged that Applicant “did in Spartanburg County on or about January 6, 2011, with malice aforethought attempt to kill [the victim], a Spartanburg City Police Officer, by discharging a firearm in his direction in violation of § 16-3-29 of the Code of Laws of South Carolina” (2012-GS-42-0064, -0065, and -0066). Each individual indictment listed the respective victim for that charge. The indictment for PWID methamphetamine or cocaine base alleged that Applicant “did in Spartanburg County on or about January 6, 2011, manufacture, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt or conspire to manufacture, distribute, dispense, deliver or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a quantity of methamphetamine or cocaine base, a schedule II controlled substance under provisions of §44-53-375, of the Code of Laws of South Carolina.” (2011-GS-42-2967). Lastly, the indictment for PWID cocaine base within a half-mile of a school alleges Applicant “did in Spartanburg County on or about January 6, 2011, distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute, a quantity of cocaine base, a schedule II controlled substance, while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle or secondary school; a public playground or park; a public vocational or trade school or a technical educational center; or a public or private college or university, to wit: Duncan Park under provisions of § 44-53-445 of the Code of Laws of South Carolina.” (2011-GS-42-2965).

Counsel Failed to Move for a New Trial

Applicant alleged Counsel was ineffective for failing to move for a new trial “where there was overwhelming facts and evidence of outrageous police conduct and perjured testimony.” This Court finds this allegation is wholly without merit.

Rule 29, SCrimP, governs post-trial motions and motions for new trials based on after-discovered evidence. Applicant has presented no evidence that Counsel was deficient for failing to move for a new trial. Applicant has failed to show Counsel had any basis to do so. He has set forth no evidence of any “outrageous police conduct,” nor has he established that any perjured testimony was presented or that Counsel had any reason to believe perjured testimony was presented. Further, this Court notes that Counsel reviewed the officers’ reports and cross-examined them on any inconsistencies between their reports and their trial testimony. Lastly, Applicant has failed to show that there is a reasonable probability that such a motion would have resulted in a different outcome, particularly where he has set forth no evidence to substantiate this claim. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to Preserve

Applicant alleges Counsel “failed to pursue her objection and preserve for appellate review that the trial court abused its discretion to admit into Applicant’s trial evidence which prejudicial effect outweighed any probative value.” This Court finds this allegation is vague and Applicant produced no evidence supporting this allegation at the evidentiary hearing. “Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[.]” Strickland v. Washington, 466 U.S. 668, 689 (1984). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Applicant points to no specific evidence that Counsel failed to object to. Therefore, Applicant has

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be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. Appellate counsel is not ineffective for failing to raise on appeal an issue that was not preserved for review. Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005) (citing Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002)). To prove prejudice, an applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Here, Appellate Counsel testified he reviewed the record and raised the issue he thought had the most merit on appeal. He testified he did not file a Petition for Rehearing because such a petition would have had no merit. This Court finds that Applicant has failed to satisfy his burden of showing that Appellate Counsel's performance fell below an objective standard of reasonableness. Furthermore, Applicant has made no showing that there is a reasonable probability the outcome would have been different had Appellate Counsel raised these issues. Appellate Counsel testified that based on his review of the record, the issue of whether the trial judge erred in refusing to allow Applicant a continuance in order to proceed with different Counsel was without merit. Appellate Counsel also testified the Petition for Rehearing would have had no merit. Therefore, this Court finds Applicant has failed to demonstrate any prejudice resulting from the alleged deficiency of Appellate Counsel. Accordingly, this allegation is denied and dismissed.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

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high and aggravated nature and assault and battery in the first degree. In addition, this Court finds Applicant has failed to show there is a reasonable probability that had Counsel objected, the outcome would have been different. Therefore, this allegation is denied and dismissed.

Ineffective Assistance of Appellate Counsel

Applicant alleges Appellate Counsel was ineffective for failing to submit a timely Petition for Rehearing, and for failure to argue that the trial judge erred in refusing to allow Applicant to have retained effective assistance of counsel of his choice.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Generally, in analyzing allegations of ineffective assistance of appellate counsel, this court applies the same test set forth in Strickland. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Therefore, this Court must assess whether appellate counsel's performance was deficient, and whether Respondent was prejudiced by appellate counsel's alleged deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where 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). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will

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APPELLATE COUNSEL
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established no deficiency or prejudice with respect to this allegation, and it is without merit and is denied and dismissed.

Failed to Object to Court's Recharging Law of Malice Aforethought

Applicant alleged Counsel failed to object "where the trial court deliberately refused to sufficiently or concisely answer the jury's question on the term malice 'aforethought.'" A charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)). "Moreover, '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011)). At trial, the jury requested that the trial judge "reinstruct . . . on the term malice aforethought as well as the crimes of assault and battery of a high and aggravated nature and assault and battery in the first degree." (Tr. at 479, lines 17-21). The judge re-charged the jury as requested and Counsel did not object. (Tr. at 479-82). The charge was the same as that the judge gave prior to the start of deliberations, (Tr. at 458-62), and covered the applicable law. Counsel testified she saw no reason to object to the charges. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency where "it would have been futile for Attorney to have made such arguments"). In addition, Applicant has failed to set forth any evidence that there is a reasonable probability the outcome would have been different had Counsel objected. See State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016). ("An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion.") (quoting State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)).

Accordingly, this Court finds Applicant has failed to show that Counsel was deficient for not objecting to the judge's recharge on the law of malice aforethought, assault and battery of a

IV. CONCLUSION

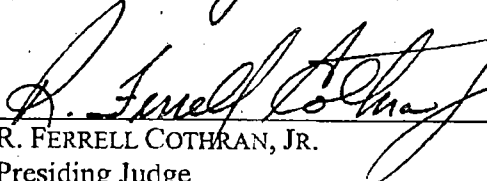
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 23 day of May


R. FERRELL COTHAN, JR.
Presiding Judge
Seventh Judicial Circuit

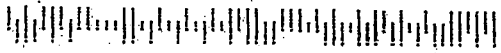
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Law Office of Leah B. Moody, LLC
Post Office Box 1015
Rock Hill, South Carolina 29730

TO:

Daniel Shearouse
The Supreme Court of South Carolina
PO Box 11330
Columbia SC 29211-1330