

# The Law Offices of Alex Thomas Postic, P.A.

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May 15, 2013

**Hand Delivered**


Janet Johnson  
Clerk of Court's Office  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, South Carolina 29201

**RECEIVED**

MAY 15 2013

**S.C. Supreme Court**

Mark Ellis Brown, #313740 v. South Carolina; 2007-CP-40-01156

  
~~Dear Ms. Johnson,~~

Thank you for your call this week. Per your direction, I am providing you with a copy of Judge Cooper's Order in the above matter. This is to supplement the Notice of Appeal that I mailed last week. I am sorry not to email it to you, but I have scanner issues.

Please let me know if you need anything further. With warmest personal regards, I am,

Yours sincerely,



Alexandre Thomas Postic

ATP/  
Enclosures

cc: Mark Ellis Brown, #313740

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2007CP4001156

Mark Ellis #313740 Brown

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC;  Vol. No. suit;  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

SEARCHED  
SERIALIZED  
2013 MAR 11 AM 10:09  
RICHLAND COUNTY

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

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

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 11 March 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Mark Ellis #313740 Brown

Alexandre Thomas Postic

Brian T. Petrano

Mark Ellis #313740 Brown

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Janette W. McBride*

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

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

Mark E. Brown, #313740, )

2007-CP-40-01156 )

Applicant, )

v. )

ORDER OF DISMISSAL )

State of South Carolina, )

Respondent. )

FILED  
2013 MAR - 8 PM 3:38  
JEANETTE W. PROROCK  
C.C.P. & G.  
RICHLAND COUNTY

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed February 21, 2007. An evidentiary hearing into the matter was convened on Monday, January 14, 2013, at the Richland County Courthouse. Applicant was present at the hearing with counsel, Alex Postic, Esquire. 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 was Applicant's former plea counsel, Jake Moore, Sr., Esquire. This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, the relevant records of Applicant's prior post-conviction relief action and appeal, the transcript of Applicant's prior PCR hearing and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the October 2004 term of the Richland County Grand Jury for Criminal Sexual Conduct with a Minor – First Degree, Criminal Sexual Conduct

with a Minor – Second Degree and two (2) counts of Sexual Exploitation of a Minor – First Degree (2004-GS-40-2726, -5692, -5693, -5725). He was thereafter additionally indicted at the November 2004 term for six (6) counts of Criminal Sexual Conduct with a Minor – First Degree and three (3) counts of Sexual Exploitation of a Minor – First Degree (2004-GS-40-10262 through -10271). He was represented by Jake Moore, Sr., Esquire, on the charges. On February 6, 2006, Applicant appeared with counsel before the Honorable James R. Barber, III, where he pled guilty to the charges as indicted and was sentenced to an aggregate forty-one (41) year term of imprisonment. No direct appeal was filed.

On February 21, 2007, Applicant filed the current application for PCR. He was represented by attorney Bryan Jeffries, Esquire, on the action. On June 26, 2008, an evidentiary hearing was held before the Honorable William P. Keesley at the Richland County Courthouse, at which Applicant was present and testified. Also testifying was Applicant's former plea counsel, Jake Moore, Sr., Esquire. By order filed September 22, 2008, Judge Keesley denied and dismissed the application with prejudice. A notice of appeal was filed with the South Carolina Supreme Court, after which Applicant submitted a *pro se* letter to the Court alleging a conflict of interest with his appointed counsel. On June 24, 2009, the Supreme Court remanded the matter back to the circuit court for a hearing on the alleged conflict. On January 14, 2010, a hearing was held by circuit court judge L. Casey Manning; at the close of the hearing, Judge Manning ordered Applicant be granted a *de novo* PCR hearing due to the alleged conflict. By order filed February 9, 2010, Judge Keesley deferred to Judge Manning's ruling and a *de novo* hearing was granted. The January 2013 hearing followed.

In the current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. Failure to Challenge Arrest Warrant
  - b. Failure to Investigate Wife's Mental Health History
  - c. Failure to Challenge Evidence Seized as Result of Consensual Search
  - d. Failure to Challenge Faulty Indictments

### 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), SCRPC; 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).

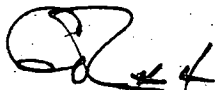
Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

#### *Failure to Challenge Invalid Warrant*

Applicant first contends counsel was ineffective for failing to challenge the arrest warrant issued as it was not "properly issued". Specifically, Applicant alleges the warrant simply bears an "X" on the signature line and, therefore, the warrant is not properly sworn by a magistrate judge as required. Applicant testified counsel never raised this issue nor was he aware of counsel ever researching this issue to be raised at trial.

Counsel's testimony in this regard was very brief. Counsel stated he did have the opportunity to review the arrest warrant prior to Applicant's plea hearing and noted the "X" shaped marking in the warrant is in fact the signature of Lexington County Magistrate Scott Whittle. Counsel noted he is very familiar with Judge Whittle and recognized his signature on the warrant immediately.

This Court finds this claim to be without merit. Based on counsel's **very credible** testimony in this regard, it is clear the arrest warrant was properly authorized and sworn by an



active Lexington County Magistrate Judge with the authority to issue such a warrant. Counsel is familiar with Judge Whittle's signature and recognized it on the warrant, thereby eliminating any need to raise a challenge based upon the alleged invalid signature. Accordingly, this Court finds counsel to have acted objectively reasonable in not challenging the validity of the warrant on that ground.

Further, this Court finds Applicant has failed to satisfy his burden in proving resulting prejudice. It is well-established by both the United States Supreme Court and the South Carolina Supreme Court that an unlawful arrest is **not** grounds for dismissal of the resulting charges. In U.S. v. Crews, 445 U.S. 463, 100 S.Ct. 1244 (1980), the Court specifically noted that "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." Id. at 474, 100 S.Ct. 1251. "The exclusionary principle", the Court went on to say, "delimits what proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness... Respondent is not himself suppressible 'fruit' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct." Id. See also Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509 (1952). The condemning evidence against Applicant was seized as a result of a consensual search of his house and Applicant was not arrested until *after* the search uncovered a videotape of Applicant performing sex acts on an incapacitated minor. Therefore, the alleged "unlawful arrest warrant" would not work to suppress the fruit of the search conducted on Applicant's house well in advanced of Applicant's arrest, nor would it deprive the state of its ability to prosecute Applicant on the charges. Accordingly, Applicant has failed to prove that had the arrest warrant been found invalid, there is a "reasonable probability" the outcome of the case would have been different.

*Failure to Challenge Search of Applicant's Home*

Applicant next contends counsel was ineffective for failing to challenge law enforcement's search of his home in an effort to suppress the evidence obtained during the course of that search at trial. In raising this contention, Applicant alleges counsel also failed to properly investigate his wife's mental health history to raise a challenge to her ability to give valid consent to such a search. Both of those allegations are addressed collectively herein.

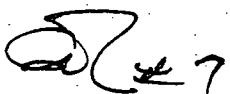
Applicant testified he was arrested July 21, 2004, on the current charges after which he spent roughly eighteen (18) months at the Lexington County Detention Center without making bond. He stated counsel and counsel's associate, Stanley Meyers, Esquire, met with him at the Detention Center a few times to review the charges he was facing and the state's evidence against him. Applicant said the state had seized his computer and numerous videotapes as a result of his wife's consent to search their home.

In reviewing the facts leading thereto, Applicant stated his wife alleged she had been ~~carjacked by a man fitting the description of a fugitive wanted at the time for killing a police~~ officer. Applicant said when his wife was taken to the police station to answer questions for law enforcement about the alleged carjacking, she gave full consent for them authorities to search the house to "clear" it, ensuring the perpetrator was not there. Applicant said he was called to the police station where law enforcement "told" him they were going to search the house, but did not ask for his permission. Once inside the house, Applicant said, police found and played a videotape loaded in the VCR which depicted Applicant having sexual intercourse with an incapacitated young child. Applicant noted he did not know how police went about finding the VCR videotape or why they decided to play the tape.

*DLG*

Applicant alleges counsel was ineffective for failing to argue for suppression of that videotape and the other evidence obtained during the consensual search. He did concede counsel filed two (2) motions to suppress the evidence prior to trial, both of which Applicant received copies of, but said counsel failed to ensure the motions were heard and ruled upon. Applicant stated counsel should have challenged the search as it exceeded the scope of his wife's consent and because his wife lacked the ability to consent to such a search due to her mental health issues. Applicant testified law enforcement found anti-psychotic medication in his wife's car and alleged his wife had a long history of mental health problems affecting her competency, including bipolar disorder. Applicant stated his chances at trial hinged entirely on the state's ability to admit the videotape, and on the day of trial counsel informed him the trial judge intended to admit the tape at trial. Applicant contends had counsel pursued the suppression hearing based on the grounds above, the videotape would have been suppressed and he would not have pled guilty.

Finally, Applicant alleges he was not aware at the time that he was waiving his ability to challenge the admissibility of the tape on direct appeal by pleading guilty and, had he known a guilty plea without a suppression hearing would waive that issue, he would have insisted on proceeding with the suppression hearing. Applicant noted counsel *did* tell him he would be waiving his ability to raise almost all meritorious issues on appeal by pleading guilty, but said he did not believe that included the issue of suppression. On cross-examination, Applicant readily conceded the plea judge had advised him that by pleading guilty he would "give up [his] right to suppress any evidence that [he] might think might be suppressed in [the] matter or attack the state's case in any way", which he said he understood. Applicant also agreed on cross-examination that the videotapes recovered by police were "not pretty" and "very incriminating".

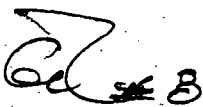


Counsel testified he recalled his representation of Applicant on the challenged charges and stated he was retained by Applicant in the matter. He noted Applicant is a friend of his whom he had represented in the past on unrelated litigation and said he "was sorry [Applicant] had these problems". Counsel stated on the day of the incident, Applicant received a call from Applicant stating "something was going on" with Applicant's wife and they were with law enforcement officers at SLED. He noted that when he arrived at SLED, Applicant and his wife were in separate rooms and the consensual search of Applicant's house had already been conducted and the videotape already uncovered.

Counsel stated the videotape showed Applicant having sex with a child roughly eight (8) years old while the child was drugged and incapacitated. Applicant's wife, counsel said, could be heard speaking from behind the camera as she filmed and there was no question the man in the video was Applicant. Counsel explicitly noted he did not recall any sex case he had seen in his career with such clearly documented evidence of the act. He plainly testified there "was zero chance of winning" at trial if the video was admitted.

Counsel stated he reviewed with Applicant the option of arguing for suppression through a pretrial hearing, and said he filed the appropriate motion to suppress after "serious research" on how to most effectively attack admissibility. Specifically, counsel said, he did extensive research on arguing for suppression due to Applicant's wife's alleged "inability to consent" as a result of her mental illnesses including bipolar disorder, but said his research revealed the chances of winning suppression on that basis were "nil".

On the day of trial, counsel met in chambers with the prosecuting solicitor, Luck Campbell, and the trial judge scheduled to hear the case, the Honorable Reggie Lloyd. Counsel noted he believed Judge Lloyd was a very strict judge and said he generally did not want to go to



trial before Judge Lloyd, but the solicitor was calling the case that day and Judge Lloyd was not going to continue the matter. During the meeting, counsel articulated the bases for suppression to Judge Lloyd, including exceeding the scope of consent and Applicant's wife's inability to consent. Counsel said Judge Lloyd was "not impressed" with those arguments and, although the judge was not ruling on the motion at that time in chambers, there was "no way in the world he was granting the motion" to suppress. Counsel plainly stated Judge Lloyd made it clear he would deny the motion and allow the evidence to be admitted.

Counsel said after his meeting with Judge Lloyd, he explained all of this to Applicant and let him make the independent decision as to how he wanted to proceed. He said he told Applicant they would lose the motion to suppress and then likely lose the trial, but he could then challenge the issue of suppression on direct appeal. Counsel articulated that, based on those discussions, he was "positive" Applicant was aware that by pleading guilty without conducting the suppression hearing he would be waiving his right to such a hearing and his ability to challenge admissibility of the tape on direct appeal.

Counsel said he "did everything in his power" to get plea concessions from the state during plea negotiations, but the prosecuting solicitor was "absolutely determined" to convict Applicant and therefore did not extend *any* plea offers prior to trial. Counsel said he discussed this with Applicant, and Applicant himself testified at the PCR hearing he was aware there were no plea offers on the table. Counsel went on to say there was some indication from Judge Lloyd during their pretrial in-chambers meeting that he would give some consideration to Applicant in sentencing if he pled guilty. Counsel also noted the state was willing to let the plea be heard by Judge Barber rather than Judge Lloyd if Applicant did decide to plead, which counsel thought

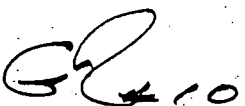
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would be beneficial for Applicant. Counsel finished by stating it was ultimately solely Applicant's decision whether to plead guilty or go to trial where he could argue for suppression.

After a thorough review of the record and testimony presented at the evidentiary hearing, this Court finds counsel was not ineffective in his representation of Applicant in this regard. Counsel's testimony regarding his discussions with Applicant, preparation/evaluation of the case, and in-chambers discussions is **very credible** to this Court. Conversely, to the extent it contradicts with counsel's clear and convincing testimony or the underlying record, this Court finds Applicant's testimony to be **not credible**. Counsel undertook an extensive, diligent and objectively reasonable investigation into the issue of potential suppression of the evidence obtained by law enforcement during the search of Applicant's house. All the while, Applicant was continuously, sufficiently informed of all relevant matters pertaining to potential suppression by counsel.

The credible testimony reflects counsel meticulously reviewed the facts leading to the search, the execution of the search, the evidence obtained as a result of the search and a plethora of law to compile an argument in support of suppression. Applicant was well aware of counsel's potential arguments to support such a motion, as well as the fact that he would waive his right to argue for suppression and appeal the outcome if he pled guilty. With all of this in mind, Applicant made the informed, intelligent and voluntary decision to waive his right to raise such an issue, both at trial and on appeal, in order to enter a plea before Judge Barber.

Applicant has failed to present any evidence or legal argument as to why trial counsel's conclusion about their being "zero chance" of suppression was in error. Further, counsel articulated valid strategic reasons for not attempting to present a meritless argument at the



suppression motion hearing any that by pleading guilty, concessions would be available for Applicant.

Further, the record before this Court is clear in showing Applicant's wife was mentally evaluated prior to the February 6, 2006, plea hearing and found to be competent and able to stand before the plea judge. Applicant failed to produce any credible evidence to convince this Court that counsel failed to uncover some mental health issue(s) with Applicant's wife that could have been effectively presented in support of suppression. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Applicant's lay testimony regarding his wife's mental capacity is unpersuasive, not credible and insufficient to carry his burden in proving his wife in fact suffered from a mental defect so pervasive it rendered her consent to the search invalid. For all of these reasons, this Court finds counsel's performance was not deficient.

~~Additionally, this Court finds Applicant has failed to prove resulting prejudice as this~~ Court can find no "reasonable probability" that had counsel prepared the suppression motion in some other manner and argued it to the trial judge, the outcome of Applicant's case (either at trial or on direct appeal) would have been different. Counsel's credible testimony reflects Judge Lloyd fully intended to deny the motion if argued in pretrial. Applicant failed to provide this Court with any evidence or argument to contest that such a ruling would have resulted. Further, Applicant failed to convince this Court such a denial would be overturned by the Court of Appeals if preserved and raised thereafter. "When reviewing the circuit court's ruling on a motion to suppress based on the Fourth Amendment, 'an appellate court must affirm if there is any evidence to support the ruling', and will reverse only when there is clear error." State v.

Cheeks, 400 S.C. 329, 334, 733 S.E.2d 611, 614 (Ct. App. 2012), *quoting State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). Applicant presented nothing to show such a denial would not have been supported by *any* evidence, or that such a denial would have been a *clear error of law* on Judge Lloyd's part. Accordingly, this Court finds Applicant has entirely failed to carry his burden in proving resulting prejudice as well.

*Failure to Move to Quash Defective Indictments*

Applicant finally argues counsel was ineffective for failing to move to quash the indictments against him as they were defective. In particular, Applicant alleges the indictments failed to set forth any victim's name. Counsel testified he did not see any basis to move to quash the indictments against Applicant and noted that had he done so, there was nothing to prevent the state from simply procuring a new indictment for the charges against Applicant.

This Court finds Applicant has failed to meet his burden in proving counsel was ineffective in this regard. In State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007), the South Carolina Court of Appeals opined:

"An indictment is sufficient if the offense is stated with [enough] certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead acquittal or conviction thereon. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether 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."

Id. at 97 – 98, 654 S.E.2d at 853. "Therefore, an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." Id. Applicant's indictment on the charges challenged tracks the statutory language of each charge precisely. Further, counsel

plainly noted making such a motion would not stop subsequent prosecution on the charges. Accordingly, counsel's performance was not objectively unreasonable based on professional norms in failing to file a motion to quash the indictment(s).

Further, this Court finds Applicant cannot prove resulting prejudice. Even if counsel had filed such a motion and been successful in quashing the indictments, the state could have reindicted Applicant on the same charges and subsequently pursued prosecution. Under S.C. Code Ann. § 17-19-90 (2003), "every objection to any indictment for any defect apparent on the fact thereof shall be taken... on motion to quash such indictment before the jury shall be sworn and not afterwards." Since the Double Jeopardy Clause of the Fifth Amendment attaches in a jury trial only once the jury is sworn, a successful motion to quash, by its very definition, will not work to bar subsequent prosecution on the same allegation on that grounds. See State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983). Likewise, jeopardy does not attach in a guilty plea setting until the defendant's plea is actually accepted by the plea judge. State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992). Accordingly, any motion to quash the indictment would not have prevented the state from pursuing the charges at a later date. Therefore, Applicant was not prejudiced by this alleged error.

Having found the allegations raised by Applicant at the PCR hearing to be wholly without merit, this Court finds the current application for post-conviction relief must be denied and dismissed **with prejudice**.

#### 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

 13

application. Therefore, this application for post conviction relief must be denied and with prejudice.

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

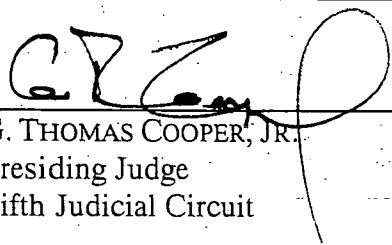
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an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

GU #14

**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 8 day of MARCH, 2013.

  
\_\_\_\_\_  
G. THOMAS COOPER, JR.  
Presiding Judge  
Fifth Judicial Circuit

Columbia, South Carolina.

# The Law Offices of Alex Thomas Postic, P.A.

1830 Marion Street  
Post Office Box 11926

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Columbia, South Carolina 29211

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May 8, 2013

**RECEIVED**

MAY 13 2013

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211-1330

PCR

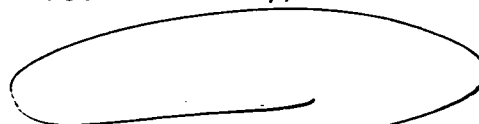
S.C. SUPREME COURT

Mark Ellis Brown, #313740 v. South Carolina; 2007-CP-40-01156

Dear Mr. Shearouse:

Enclosed please find the original and two (2) copies of my Notice of Appeal in the above-captioned action. I would appreciate your filing the original, clocking the copies, and returning the two (2) clocked copies to me in the envelope provided. Inasmuch as I was court-appointed in this matter, I will now be turning this file over to the South Carolina Commission on Indigent Defense, Office of Appellate Defense for perfection of this appeal. I would note that Judge Cooper issued a written Order Denying The Defendant's Motion To Reconsider in this case which was filed with the Richland County Clerk of Court's Office on April 23, 2013. A copy of that Order is also enclosed. With my thanks for your assistance in this matter and my best regards, I am,

Yours sincerely,



Alexandre Thomas Postic

ATP/

Enclosures

cc: Robert Corney, Assistant Attorney General (w/ Notice of Appeal)  
Sharon Graham, South Carolina Office of Appellate Defense (w/ Notice of Appeal)  
Mark Ellis Brown, #313740 (w/ Notice of Appeal)

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

G. Thomas Cooper, Jr., Presiding Judge

2007-CP-40-01156

**RECEIVED**

MAY 13 2013

S.C. SUPREME COURT

MARK E. BROWN, #313740,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Mark Ellis Brown, #313740, appeals the Order of Dismissal denying his Application for Post-Conviction Relief, and the Order Denying Rule 59(E) Motion received by counsel on April 26, 2013, issued by the Honorable G. Thomas Cooper, Jr., presiding judge.

Alex Thomas Postic  
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC  
P.O. Box 11926  
Columbia, SC 29211  
803-771-8081 Phone  
803-771-4888 Fax  
[alex@posticlafirm.com](mailto:alex@posticlafirm.com) E-mail

ATTORNEY FOR PETITIONER

This 8 day of May, 2013.

Other Counsel of Record:  
Robert Conrey, Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
Attorney for Respondent  
(803) 734-3737

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

G. Thomas Cooper, Jr., Presiding Judge

2007-CP-40-01156

MARK E. BROWN, #313740,

Petitioner,

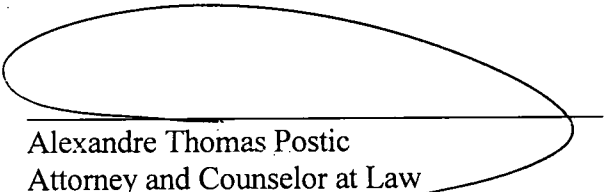
v.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Robert Corney, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211, by mailing in an envelope properly addressed with postage prepaid on this 8 day of May 2013.

  
Alexandre Thomas Postic  
Attorney and Counselor at Law

SWORN TO BEFORE me this 8<sup>th</sup> day  
of May 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: 07-19-2015

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2007CP4001156

Mark Ellis #313740 Brown

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Non-suitt);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

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

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

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk :

**INFORMATION FOR THE PUBLIC INDEX**

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

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

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

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

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 24 April 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Mark Ellis #313740 Brown

Alexandre Thomas Postic

Brian T. Petrano

Mark Ellis #313740 Brown

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

*Jeanette W. McBride*

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

RICHLAND COUNTY  
 FILED  
 2013 APR 24 AM 10:15  
 JEANETTE W. MCBRIDE  
 C. O. J. & G.S.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
Mark E. Brown, #313740 )  
 )  
 )  
Applicant, )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

2007-CP-40-01156

**ORDER DENYING DEFENDANT'S  
MOTION TO RECONSIDER**

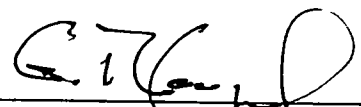
2013 APR 24 AM 8:56  
FILED  
RICHLAND COUNTY  
JANETTE W. HIGBIBEE  
C.C.P. & C.S.

This matter comes before the Court by way of Defendant Mark E. Brown's Motion to Reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure (SCRPC). Specifically, Defendant asks this Court to reconsider its denial of Post Conviction Relief.

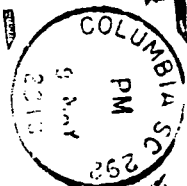
After careful consideration of the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded. Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRPC to reconsider. Pursuant to Rule 59(e) the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

April 23, 2013  
Columbia, South Carolina

  
G. Thomas Cooper, Jr.  
Judge, Fifth Judicial Circuit

The Law Offices of Alex Thomas Postic, P.A.  
1830 Marion Street  
Post Office Box 11926  
Columbia, South Carolina 29211



The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211-1330