

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*
*Also admitted in Florida

807 Gervais Street, Suite 203
Columbia, SC 29201

Telephone: 803-608-5543
Fax: 803-926-3463

Email: lsb@boozerlawfirm.com
Website: www.boozerlawfirm.com

December 4, 2015

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

RECEIVED

DEC -7 2015

S.C. Supreme Court

The Honorable Jeanette W. McBride
Clerk of Court
1701 Main Street, Suite 205
Columbia, SC 29201

**RE: Ronald Tillman, #222153, v. State of South Carolina
2011-CP-40-7453**

Dear Mr. Shearouse and Ms. McBride:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Tillman in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Tillman in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Megan Harrigan Jameson, AAG
Loriene French, OAD
Ronald Tillman, #222153

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC - 7 2015

S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Case No. 2011-CP-40-7453

Ronald Tillman, #222153,Petitioner,

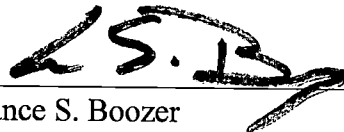
v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Robert E. Hood's Order dated November 13, 2015, denying post-conviction relief to the Petitioner and received by undersigned counsel on November 25, 2015. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Tele: 803-608-5543

December 4, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Case No. 2011-CP-40-7453

Ronald Tillman, #222153,Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Megan Harrigan Jameson, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 4th day of December, 2015.



Lance S. Boozer
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Tele: 803-608-5543

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Ronald Tillman, # 222153,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2011-CP-40-7453

ORDER GRANTING APPLICANT'S
MOTION TO BE RELIEVED OF
COUNSEL

2014 MAY 19 PM 4:37
JENNIFER W. HOBBS
C.C.P. & G.S.
RICHLAND COUNTY
FILED

This matter comes before the Court by way of the Applicant's Motion to be Relieved of Counsel. This matter previously came before the Court by way of an application for post-conviction relief (hereinafter "PCR") on November 19 and 21, 2013. The Court took this matter under advisement and allowed Ms. Shurling ninety (90) days to interview four additional witnesses. The Applicant filed a grievance against Ms. Shurling and filed a Motion to be Relieved of Counsel in February of 2014.

A hearing was conducted on April 3, 2014, at the Richland County Courthouse. Applicant was present at the hearing and represented by Tara Shurling, Esquire. The State was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. During this hearing, Ms. Shurling stated she had not interviewed the additional witnesses that she was previously directed to interview. Applicant stated that he strongly desired counsel other than Ms. Shurling.

Thus, Applicant's Motion to be Relieved of Counsel is GRANTED. Lance Boozer, Esquire, shall be appointed as the Applicant's new counsel. Ms. Shurling shall give her entire

file, including witness contact information, to Mr. Boozer. Mr. Boozer shall immediately order transcripts of the PCR hearing and the Applicant's Motion to be Relieved of Counsel hearing.

Once Mr. Boozer receives the above-mentioned transcripts, Mr. Boozer shall interview the four witnesses within one hundred and twenty (120) days. Mr. Boozer may depose those witnesses within sixty (60) days after those interviews.

After Mr. Boozer interviews and deposes those witnesses, the State may reply in affidavit form within thirty (30) days.

After the State has an opportunity to reply, the State and Mr. Boozer shall notify the Court, and proposed orders are due to the Court within forty five (45) days.

IT IS THEREFORE ORDERED that this motion to be relieved as counsel is **GRANTED**.

AND IT IS SO ORDERED this 16th day of May, 2014.



ROBERT E. HOOD
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Ronald Tillman, SCDC #222153,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2011-CP-40-07453

ORDER OF DISMISSAL

RECEIVED
 DISTRICT 17, RICHLAND
 NOV 17 11:13 AM '13

This matter is before this Court by way of an application for post-conviction relief filed November 3, 2011, and amended on November 18, 2013. Evidentiary hearings into this application were convened before this Court on November 19 and 21, 2013, at the Richland County Courthouse. Thereafter, a deposition was taken on May 13, 2015. After a thorough review of all testimony and evidence presented at the numerous hearings and the deposition, along with a review of the records from Applicant's trial, direct appeal, and other relevant proceedings, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

Applicant was indicted during the February 1989 term of the Richland County Grand Jury for murder (1989-GS-40-0745). He was represented by Jack B. Swerling, Esquire. On January 15-23, 1990, Applicant proceeded to a jury trial before the Honorable Don S. Rushing, where he was convicted as indicted. Judge Rushing sentenced Applicant to life imprisonment. Applicant was subsequently convicted on a federal bank robbery charge, was sentenced to twenty-five years imprisonment, and was taken into federal custody.



Applicant filed a notice of appeal and an appeal was perfected on his behalf. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Tillman, 304 S.C. 512, 405 S.E.2d 607 (Ct. App. 1991). Applicant's subsequent petition for rehearing was denied, as was his Petition for a Writ of Certiorari to the South Carolina Supreme Court.

Thereafter, Applicant, through counsel Tara D. Shurling, filed an initial application for post-conviction relief on July 17, 1995, while in federal custody (1995-CP-40-2449). Respondent filed its Return and Motion to Dismiss on September 22, 1995. On May 25, 1997, the Honorable L. Casey Manning issued an Order of Dismissal without Prejudice, dismissing the application because Applicant was incarcerated in another jurisdiction but granting Applicant leave to refile his application within a year of his release from federal custody. Judge Manning subsequently denied Applicant's Motion to Reconsider. Applicant appealed this Order of Dismissal without Prejudice, which was affirmed by the South Carolina Supreme Court on July 22, 1999.

Applicant filed a second application for post-conviction relief on March 1, 2002, while still in federal custody (2002-CP-40-971). Respondent filed a Return and Motion to Dismiss on June 12, 2002. On June 17, 2002, Applicant filed a Reply, Request for a Petition for Writ of Habeas Corpus Ad Testificandum and Motion for Appointment of Counsel. On June 13, 2002, the Honorable G. Thomas Cooper signed a Rule to Show Cause, giving Applicant twenty days to show why his application should not be dismissed. Applicant filed "Applicant's Show Cause" on August 14, 2002. A hearing was held before the Honorable Alison R. Lee on May 27, 2004. Applicant was not present but was represented by D. Christopher Shea, Esquire. On January 28, 2005, Judge Lee dismissed the application without prejudice for failure to prosecute.

CURRENT APPLICATION FOR POST-CONVICTION RELIEF

Applicant filed his current application for relief on November 3, 2011, alleging ineffective assistance of counsel for: failure to adequately investigate Applicant's charges, failure to investigate and interview potential witnesses, failure to investigate defenses prior to trial, failure to adequately review discovery materials with Applicant, failure to present Applicant as a witness at his trial, and failure to reveal a conflict of interest to Applicant. The State made its Return on November 8, 2011, requesting an evidentiary hearing on these allegations.

Applicant thereafter filed an amended application for relief on November 18, 2013, alleging nineteen additional grounds for relief:

1. Trial Counsel was ineffective for failing to cross-examine Hayes Malloy concerning his understanding of the range of penalties he could have received for murder had that charge not been dismissed.
2. Trial Counsel was ineffective for failing to adequately cross-examine Hayes Malloy concerning the fact that his charge of murder in connection with the death of Donald Sutton was dismissed in exchange for his cooperation in the prosecution of Applicant.
3. Trial Counsel was ineffective for failing to cross-examine Hayes Malloy concerning his understanding of the law of accomplice liability and the fact that he could have been prosecuted for murder even if he was not the trigger man if he was present, aiding and abetting another in the commission of the murder of Donald Sutton.
4. Trial Counsel was ineffective for questioning Hayes Malloy about his sentencing exposure for murder for hire where said line of questioning emphasized the State's theory that the Applicant had been trying to hire him and others to kill Donald Sutton.
5. Trial Counsel was ineffective for failing to cross-examine Hayes Malloy concerning whether his murder charge had been dismissed with prejudice prior to the Applicant's trial.
6. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument wherein the prosecution advised the jury that the State didn't wait until after Hayes Malloy's testimony to drop all charges as they could make sure he testified the way they wanted him to where said testimony clearly misled the jury in that it, a) erroneously suggested *all* his charges had been dismissed when he was still facing a charge of Assault and Battery with Intent to Kill, b) erroneously lead the jury to believe the State had no leverage with this key witness at the time of his testimony and c) failed to acknowledge that the State had the power to bring back the murder charge at a later

- date where the charge was not dismissed with prejudice. *See* Tr. p. 1073, 1. 20- p. 1074, 1. 7.
7. Trial Counsel was ineffective for cross-examining Hayes Malloy in a manner which advised the jury that if Malloy didn't get the death penalty for murder his maximum sentencing exposure for murder would have been thirty (30) years. *See*, Tr. p. 294, II 9-15.
 8. Trial Counsel was ineffective for neglecting to cross-examine Hayes Malloy concerning the fact that he faced a potential life sentence for murder if he had been prosecuted and convicted of that offense.
 9. Trial Counsel was ineffective for failing to cross-examine Hayes Malloy about the fact that he would have faced a potential sentence of life without parole for murder because he had another violent charge pending for assault and battery with intent to kill and under South Carolina law, in effect at the time of this trial, a conviction for a second violent crime would render an offender ineligible for parole. *See*, S.C. Code Ann. § 24-21-640 (1989).
 10. Trial Counsel was ineffective for failing to object to the State's closing argument that "Hayes Malloy could be in Canada right now if he wanted to. Nothing that we could do to Hayes Malloy whatsoever is going to force him to come testify" where said argument was erroneous and mislead the jury where Hayes Malloy had a charge of Assault and Battery with Intent to Kill pending at the time of Applicant's trial, was on bond for that charge and was subject to the subpoena power of the State as well. *See* Tr. pg. 210, II. 21- 23.
 11. Trial Counsel was ineffective for failing to object to the trial court's refusal to issue an appropriate jury charge on the use of prior inconsistent statements where the charges given by the trial court limited the use of such statements to impeachment purposes when the law in South Carolina at the time of the Applicant's trial also permitted prior inconsistent statements to be considered for their substantive value under State v. Copeland, 278 S. C. 572, 581-582, 300 S.E.2d 63, 68-69 (S. Ct. 1982).
 12. Trial Counsel provided the Applicant with ineffective assistance of counsel when they failed to object the first time the State introduced testimony from witness, Bruce Hall, concerning the statistical frequency with which he sold Goodyear Vector tires at his Goodyear store. *See*, Tr. p. 852, 1. 7-20.
 13. When Trial Counsel's objection to the testimony of witness Bruce Hall concerning what percentage of his stores total tire sales were Goodyear Vector tires was sustained, Trial Counsel was ineffective for failing to request a mistrial and/or a curative charge. *See* Tr. p. 852, 1. 13-p. 853, 1. 18 and *State v. Tillman*, 304 S.C. 512, 519, 405 S.E.2d 607, 612 (Ct. App. 1991).

14. Trial Counsel was ineffective for failing to challenge the tire tread evidence in dispute during the Applicant's trial on the ground that the Sheriff's Department lacked probable cause to examine the Applicant' car at the time tire tread impressions were taken from the vehicle. See State v. Tillman, 304 S.C. 512, 521, fn 1, 405 S.E2d 607, 612, fn 1 (Ct. App. 1991).
15. Trial Counsel was ineffective for failing to disclose to the Applicant and the Court his potential conflict of interest in representing the Applicant where he had previously represented Hayes Malloy on a serious criminal charge.
16. Trial Counsel was ineffective for failing to renew his request for a jury charge on the law as it relates to the use of prior inconsistent statements at the end of the trial court's jury instructions. *See*, Tr. p. 1067, 1. 14-p. 1068, 1. 25; Tr. p. 1101, 1. 24- p. 1102, 1. 13 and Tr. p. 1103, 1. 24- p. 1104, 1. 11.
17. Trial Counsel was ineffective for failing to request a jury instruction pursuant to State v. Copeland, 278 S.C. 572, 581-582, 300 S.E.2d 63, 68-69 (S.Ct. 1982), for the proposition that prior inconsistent statements made by a declarant who testifies and is available for cross-examination may be used as substantive evidence in addition to being considered for their impeachment value.
18. Trial counsel was ineffective for neglecting to object to the trial court's repeated use of the phrase "failure to testify" where that phrase, contrary to the jury instruction in which it was used, implied some shortcoming on the part of the Applicant for exercising his *choice* not to testify in his defense and thereby weakened the language of the "no adverse-inference" instruction given by the trial court. *See* Tr. p. 1088, 1. 21- p. 1089, 1. 17.
19. Appellate Counsel was ineffective for failing to brief as an issue on direct appeal the failure of the trial court to grant the Applicant's request for a jury charge on the allowable uses of prior inconsistent statements by the jury.

Evidentiary hearings on this matter were convened on November 19 and 21, 2013, at the Richland County Courthouse before the Honorable Robert E. Hood. Respondent objected to Applicant's amendments, citing that they were made hours before the hearing, depriving both it and trial counsel ample time to review the allegations and prepare to respond accordingly. In response, this Court allowed Respondent to submit affidavits from trial counsel or any other party it deemed necessary to respond to these belated allegations. Applicant proceeded forward

to a merits hearing on the allegations as set forth in his amended application. Testifying at these hearings were Applicant, his father Thomas Tillman, trial counsel Jack B. Swerling, and law clerk to trial counsel, Aleksandra Chauhan.

At the start of the November 21, 2013, hearing, Applicant moved to have counsel, Tara D. Shurling, relieved as counsel, citing numerous witnesses he had requested she interview and present at the hearing that counsel had failed to contact. In the alternative, Applicant requested leave of court to interview and depose additional witnesses following the evidentiary hearing. Respondent objected to any additional amendments to Applicant's action or any further delay, citing that the underlying charges were from a 1989 indictment and 1990 conviction and that the application had been pending for more than two years. After a hearing on Applicant's motion, this Court denied Applicant's request to relieve counsel but granted Applicant's request to interview (and depose if necessary) four additional witnesses.¹ The Court gave Applicant and his counsel ninety days to interview these witnesses. Applicant did not object to the Court's ruling.

On January 10, 2014, Applicant filed a "Motion to Dismiss Counsel and for Stay or Continuance," once again requesting that counsel be relieved. A hearing on this motion was convened before this Court at the Richland County Courthouse on April 3, 2014. At this hearing, Applicant argued that counsel had failed to interview any of the four witnesses as instructed by the Court and requested that she be relieved as counsel. Respondent again objected to any additional delay of the case, arguing that the conviction was more than twenty-four years old and the application had been pending for more than two years.

By order filed May 19, 2014, the Court granted Applicant's motion to relieve counsel and appointed new counsel, Lance Boozer, Esquire, to represent Applicant. This Court requested that

¹ See PCR Hearing Transcript dated Nov. 19 and 21, 2013 pp. 97-180.

both parties order the transcripts from the previous evidentiary and motions hearings. This Court further ruled that Applicant's newly appointed counsel one-hundred-and-twenty days from the receipt of these transcripts to interview the four witnesses as set forth at the previous hearings, then an additional sixty days to depose of any of these four witnesses he deemed necessary. Once any and all depositions are completed of these four witnesses, this Court ordered that the State had thirty days respond to these depositions by affidavit. Following the submission of any affidavits, this Court ordered that both parties submit proposed orders within forty-five days. Applicant did not object to this ruling and filed no motions opposing it thereafter. However, on February 6, 2015, Applicant served this Court and Respondent with a "Motion for Leave to Conduct Discovery and Objection to Prior Order." Respondent filed a motion and opposition on February 9, 2015. This Court denied Applicant's motion on February 18, 2015.

On May 13, 2015, Applicant deposed Herman Whaley at his counsel's office with Respondent present. A copy of this transcript was filed with the Richland County Clerk of Court on June 5, 2015. Thereafter, Respondent filed a responsive affidavit from trial counsel on July 6, 2015.

After a thorough and exhaustive review of all pleadings, transcripts, witness testimony, and evidence presented, this Court finds that Applicant has failed to meet his requisite burden of establishing any constitutional deprivations or other grounds on which post-conviction relief can be granted and is denying this application with prejudice.

SUMMARY OF EVIDENCE ADDUCED AT TRIAL

Several times during the month of November 1988, Applicant told Clarence Gabby Wells he was going to kill Donald "Duck" Sutton. He repeated these comments in December 1988.

Also during the month of December 1988, Applicant asked Hayes Malloy if he knew anybody who would kill Donald; Hayes replied negatively. Applicant then offered him \$5,000.00 to kill Donald. Although he planned to go straight to the police with this information, Hayes told Applicant that he accepted the offer. On December 21, 1988, Hayes met with Federal Bureau of Investigation (hereinafter referred to as FBI) Agents Randy Mondor and Jim Davis and told them of Applicant's offer. He thereafter continued to go to Applicant's party shop between that date and December 26th and talk to him.

While standing with some other men across the street from Applicant's shop on December 26, 1981, Hayes was approached by Applicant who told him that Donald was coming down to the shop and that he had to get rid of him. Believing that Applicant wanted Donald killed that night, Hayes unsuccessfully tried to reach an FBI Agent. He, however, stayed where he was for the remainder of the afternoon, drinking and talking with his friends. Applicant, who apparently divided his time that afternoon between his shop and Hayes's group across the street, left between 6:00 and 7:00 p.m. to run some errands. He informed Hayes that he would return shortly.

While Applicant was gone, Donald arrived at the shop. In an attempt to get him to leave before Applicant returned, Hayes told him that Applicant had gone to the "Fountain Bleu." Donald left and at 8:30 p.m., approximately thirty minutes later, Applicant returned with Vito McKie. After talking with Applicant, Hayes got in the car with him to go somewhere. In the car, Applicant pulled out a small caliber, black, pearl-handled pistol and showed it to Hayes; he told him that Vito had given it to him.

As they drove down Shop Road, Donald pulled up behind them and flashed his high beam headlights. Apparently after signaling to Donald to follow them, Applicant asked Hayes if he was going to take care of Donald for him; Hayes replied negatively. Applicant then offered to give him \$10,000.00; Hayes's reply was still negative.

Applicant drove behind a church where he parked his car. He then got out and approached Donald who had pulled up behind them. Putting his arm around Donald, Applicant walked with him toward a corner of the building. As he talked, Applicant pulled the pistol from his pocket and shot Donald in the head. Donald fell to the ground and Applicant, bending over him, shot him again. As Applicant ran back to his car, Hayes jumped out and went over to Donald. Applicant drove off leaving Hayes with Donald, who was dead. Hayes, who feared for his life, wandered around before eventually calling the police.

When the police responded to his call, Hayes, afraid of the consequences of his presence at a murder scene, simply reported that he knew where a body was located. He was taken to the Sheriff's Department and, after submitting to various tests and giving a statement, was allowed to go home. The following morning, the members of the Sheriff's Department processed the murder scene, which included examining and photographing tire tracks, and then went to Applicant's party shop. There, they looked at the tires on Applicant's car; they were discovered to be Goodyear Vector tires.

The next day, December 27th, Hayes saw Applicant at his party shop. Referring to the murder, Applicant asked Hayes "how [he liked] that shit." Without responding, Hayes walked out of the shop.

Within the next few days, Hayes was arrested and located in the same prison facility as Applicant. Through the door of his prison cell, Applicant told Hayes that he wanted him to "take the murder charge for Donald Sutton 'cause the Feds [had] him by the balls."

Several times during December 1988 and January 1989, Applicant told Kenneth L. Gardner, who was also in the same prison facility as Applicant, that he killed Donald. Applicant also boasted that the police were not going to be able to prove he did it.

On January 3, 1989, Hayes finally told the police that he actually witnessed Applicant's murder of Donald Sutton. On the following day, Applicant gave a statement to the police in which he denied any involvement in the shooting and placed himself somewhere other than the murder scene at the time of the murder.

SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED DURING THE POST-CONVICTION RELIEF ACTION

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from his father, Thomas Tillman, trial counsel Jack B. Swerling, and law clerk to trial counsel, Aleksandra Chauhan. Swerling testified that he had been practicing law for approximately seventeen years at the time of Applicant's trial and had tried numerous murder cases. He testified that although Applicant's trial was nearly twenty five years ago, he recalls representing Applicant and still had his complete file. He testified that he represented Applicant on the murder charge subject to this application, as well as a federal bank robbery charge that resulted in a conviction after trial, an armed robbery from Dillion that was dismissed by the State, and another armed robbery charge from Columbia that resulted in an acquittal after trial. He testified that he was retained by Applicant on all charges and met with Applicant and his family frequently.

Swerling testified that State's witness Hayes Malloy was an important witness for the State and that his cross-examination of Malloy was lengthy and thorough. He testified that he had fully prepared his questioning of Malloy and believes it is the best cross-examination he had ever conducted. He testified that the cross-examination was very beneficial to Applicant he was able to extract the necessary information from Malloy, particularly in regards to his inconsistent and self-serving statements to law enforcement. Swerling testified that his cross-examination spanned more than one-hundred-and-fifty pages of the trial transcript and covered a litany of topics. He expounded that he questioned Malloy on potential sentences he faced in connection to the underlying murder of Donald Sutton, the dismissal of his own murder charge shortly before trial, and the use of his prior record to enhance his sentence. He testified that Malloy's charges associated with Sutton's murder were dismissed without prejudice only a few days before Applicant's trial and could have been resurrected. Swerling testified that he not only highlighted this during his questioning of Applicant, but also argued this numerous times to the jury during his closing argument. Swerling testified that he highlighted to the jury that Malloy's testimony was in exchange for favorable treatment from the State, including a low bond amount and dismissal of pending charges.

Swerling testified that Malloy gave several inconsistent statements to law enforcement and he highlighted this to the jury multiple times during his questioning of Malloy. He testified that he was able to move Malloy's numerous inconsistent and contradictory statements into evidence, which was rare and beneficial as the State typically objects and the trial court excludes the statements from substantive evidence in similar situations. He testified that the introduction of these statements was beneficial to Applicant, although the statements included negative

comments about Applicant's involvement, because the statements show that Malloy was a habitual liar with an ever-changing story. He also noted that the jury would be able to have those statements as evidence to use during deliberations, showing how Malloy's version of events was fluid. He testified that he highlighted this to the jury in his closing argument, focusing on all Malloy had to gain by naming Applicant as the murder while removing any suspicion as to his own involvement in Sutton's murder.

Swerling also testified that Malloy's statements as to how the murder occurred and what happened to Sutton's body after the shooting were contradicted by the physical evidence. Swerling elaborated that Malloy testified that Sutton's body was not moved following the murder, but the pathologist testified that Sutton had numerous abrasions indicating he had been dragged post-mortem. He testified that he was able to highlight this to the jury during his closing argument.

Swerling testified that he requested a jury instruction on prior inconsistent statements and submitted two proposed charges to the trial court. He elaborated that one of the proposed jury instructions is similar to the prior inconsistent statement instruction given in federal court and both dealt with the use of the prior statements being used to address the credibility of witnesses. He testified that the trial court declined to use either of his proposed instructions, but did give his own jury charge on the use of prior inconsistent statements. He testified that he did not request an instruction on using the prior inconsistent statements for substantive purposes because he thinks such a charge is confusing to the jury and does not yield beneficial results. He elaborated that he does not request such a charge as a matter of strategy. Additionally, he testified that he made a strategic decision to focus on the impeachment value of Malloy's prior statements

because he thought it would be of more benefit to Applicant and have less risk of confusing the jury. Additionally, he testified that the underlying statements had negative information about his client, so he did not want to highlight that information to the jury by requesting charge indicating the statements could be used as substantive evidence in addition to impeachment value. He testified that he thinks a jury instruction pursuant to Copeland² as suggested in Applicant's allegations would have been of little benefit, if any, to Applicant and likely would have confused the jury.

Swerling testified that he recalled tire tread evidence being admitted during Applicant's trial, although he could not recall whether he or his associate and co-counsel, Jennifer Shealy, handled this particular evidence. He testified that this issue was addressed during Applicant's direct appeal and the Court of Appeals determined the issue was not preserved for appellate review. He testified that he respectfully disagrees with the Court of Appeal's assessment, noting several portions of the transcript where he did object. He testified that he recalled objecting several times to issues regarding Applicant's care and its custody within the police station. He testified that his client had given consent for his vehicle to be searched by the FBI, and that while in FBI custody, the Richland County Sheriff's Department took the tire impressions without a warrant. He testified that although Applicant had given the FBI consent to search his vehicle, he argued to the trial court that Applicant's consent did not transfer to the Richland County Sheriff's Department and did not allow them to take tire impressions. Swerling testified that a review of the transcript shows that he did object to the tire evidence coming in based on a lack of probable cause on page 641, but the trial court apparently did not rule on the issue.

² State v. Copeland, 278 S.C.572, 581-82, 300 S.E.2d 63, 68-69 (1982).

Swerling testified that the State presented Bruce Hall, a manager of a Goodyear tire store, who testified that the tire impressions taken from Applicant's car matched Goodyear Vector tires. Swerling testified that he objected to Hall testifying about the frequency in which his store sold this model of tire this year, which was ultimately granted by the trial court. He testified that he did not ask for the court to strike the testimony because he did not want to highlight it to the jury. Similarly, he testified that he did not move for a mistrial based on strategy and his conversations with Applicant. He elaborated that he discussed a mistrial with Applicant and that both agreed that the trial was going very favorably, particularly in terms of rulings from the trial court. Swerling testified that he and Applicant concluded it was best to continue on with the trial rather than move for a mistrial over this relatively minor testimony given by Hall when compared to the overall trial and previous rulings from the court.

In response to Applicant's claims of a conflict of interest for previously representing Malloy in a 1987 incident at his father's party shop, Swerling testified that he had not previously represented Malloy, but that his office records contained a file with Malloy's name and an indication that one of his previous law partners had represented him in an earlier action. Swerling testified based on his recent investigations to prepare for the hearing, he learned that the matter was dismissed by the State in exchange for Malloy paying Applicant and his father restitution. He testified that he cross-examined Malloy thoroughly about this previous incident at the party shop during Applicant's trial. He further testified that both Applicant and his father would have known about McCullough's representation of Malloy prior to Applicant retaining him, as Malloy and Applicant were friends. He testified that he and his office staff search for the file prior to the

evidentiary hearing but were unable to locate it.³ He stressed again that his cross-examination of Malloy was incredibly vigorous and thorough and there is nothing to suggest that he held back on his questions based on any alleged conflict of interest or prior relationship with Malloy. He further testified that any prior relationship or representation of Malloy by anyone in his office would have been fully disclosed and discussed with Applicant. He further testified that he is confident that Applicant knew of any prior involvement of his firm with Malloy because the community on Shop Road where the party shop was located was very close knit and it would have been highly unlikely for Applicant and his father to not have known who was representing Malloy. He again commented that his cross-examination of Malloy was "really aggressive" and there is nothing to even remotely suggest that he held back on Malloy based on an alleged prior relationship. He highlighted that he questioned Malloy in-depth about the altercation at the party shop during cross-examination.

Swerling testified that he interviewed countless witnesses on Applicant's behalf, as evidenced by the numerous bankers' boxes he brought to court containing his file on Applicant's murder charge. He testified that he used private investigators to assist in Applicant's defense. He testified that the file was meticulously organized into notebooks and sub-files in preparation for trial. He testified that each witness or potential witness has their own sub-file within the larger

³ Following the evidentiary hearing, Swerling and his staff located the files pertaining to the firm's representation of Malloy by happenstance while looking for another file. It appears that the file for Hayes Malloy had been located within the file Swerling had created in response to a previous federal habeas action Applicant had filed against him in 1997 alleging ineffective assistance of counsel on the same ground – a conflict of interest regarding Swerling's law partner representing Malloy. Swerling provided all documents to this Court, along with an affidavit explaining how the documents were found and his firm's involvement in the Malloy case and an affidavit from his paralegal, both signed and dated April 3, 2014. The documents and affidavit reveal that Malloy was represented by Swerling's law partner, Joseph M. McCulloch, Jr., who was able to get Malloy's charges dismissed in exchange for restitution paid to the Tillmans, and that it is clear that the Tillmans were aware that Swerling's law partner represented Malloy in 1987. The documents and affidavit reveal that Applicant himself received a check from Swerling's law firm for restitution. In his affidavit, Swerling states that it is clear that he had "absolutely nothing to do with the Hayes Malloy case, and may not even have known that Mr. Mulloch was representing him."

file and he had prepared possible cross-examinations for every possible witness. He testified that he also subpoenaed numerous witnesses, some of which he ultimately elected not to call based on his extensive trial experience and strategy. He testified that Applicant had seen the entire file, including all discovery from the State, all investigative reports, and subpoenas sent. He testified that his office policy to share such information and documentation with clients and keep his clients as well-informed as possible so he or she can be fully involved in the trial preparation and decision-making process. He testified that based on his review of his file, he interviewed nearly one hundred witnesses in anticipation for Applicant's trial. He testified that of those witnesses, over sixty were subpoenaed for trial. He characterized his investigation of this case as "exhaustive." He testified that he called ten witnesses on Applicant's behalf during the trial. He testified that whether or not to call a witness who had been subpoenaed was a "game time decision" made during the trial, with Applicant's input, based on strategy and his vast trial experience.

Swerling testified that he made hundreds of objections during the trial and defended Applicant vigorously. He noted that he succeeded in excluding any evidence relating to the Burger King robbery for which he got Applicant acquitted. He elaborated that the State wanted to introduce evidence as to the robbery as a motive for Sutton's murder, but that he ultimately prevailed and the State was not allowed to delve into the robbery.

Swerling testified that he believes that he was able to provide Applicant excellent representation in this trial. He elaborated that the trial court commended him for his work on Applicant's behalf, as evidenced at the end of the trial on pages 1119 and 1121. He testified that Applicant was able to get the benefit of numerous favorable rulings from the trial court. He also

highlighted that the trial court had to repeatedly admonish Malloy while on the stand, all in front of the jury, which was also beneficial for Applicant. Swerling testified that he and Applicant had a "great relationship" and that Applicant was "totally involved in this case and the decision-making process." He testified that based on a review of his file, he or someone from his office met with Applicant at least thirty-seven times in preparation for the murder trial, notwithstanding their numerous meetings for the various other charges Applicant was facing.

Applicant also testified on his own behalf at the evidentiary hearing. He testified that he was never friends with Hayes Malloy, although he did acknowledge that he knew Malloy quite well and Malloy hung around his father's party shop where he worked. He testified that prior to Sutton's murder, Malloy was charged with firing shots into the party store during an altercation. He testified that the shooting caused physical damage to the store and his father pressed charges against Malloy. He testified that the charges were ultimately dropped when Malloy paid restitution to fix the damages to the shop. He testified that he had no direct involvement in the dismissal of the charges and that his only peripheral involvement was as a mediator between Malloy and his father about dismissal if Malloy paid restitution. He testified that he originally retained Swerling to represent him on other pending charges that arose before the murder. He testified that he was charged with two armed robberies - one in Columbia and one in Dillon - and that he retained Swerling to represent him on those in 1987. He testified that he was not sure if he had already retained Swerling to represent him on the pending armed robbery charges when Malloy shot up the party shop. He testified that he was also charged with federal bank robbery charges before he was charged with Sutton's murder and that Swerling represented him on the federal charges too. He testified that he never told his father that Swerling was representing him

until he was charged with Sutton's murder in 1988. He acknowledged that his father had known Swerling's firm had represented Malloy and that Swerling had been representing him for two years prior to the trial in 1990, but asserted that his father never told him of the potential conflict of interest regarding Malloy. He acknowledged that he raised this issue in his federal habeas corpus petition.

Applicant acknowledged that Swerling did a good job cross-examining Malloy, particularly with his impeachment of Malloy's prior inconsistent statements. He testified that neither Swerling nor anyone at his firm ever revealed that the firm had previously represented Malloy. He testified that he found out that Swerling's firm had represented Malloy when his child's mother, Sophia Pringle, wrote to him while he was housed in a federal institution in Atlanta. He testified that he never spoke with his father regarding Swerling's firm representing Malloy until 1995 when he received Pringle's letter. He testified that he would not have retained Swerling to represent him had he known Swerling's firm had previously represented Malloy. He testified that he thinks that Swerling did not vigorously represent him because of his prior alleged relationship with Malloy; however, Applicant failed to name any specific things during Swerling's questioning of Applicant that were improper and acknowledged that Swerling's examination of Malloy was excellent. Applicant testified that he provided Swerling with the names of potential witnesses to testify at his trial and that he thinks Swerling did speak to those witnesses, but he could not be certain. He testified that he was actively involved in his defense, including the decision to pursue an alibi defense.

Applicant also called his father, Thomas Tillman, on his behalf. He testified that he owned the party shop, formally named A&A Enterprises, with his business partner, Ronald Paul.

He testified that he owned two liquor stores and the party shop, where his son worked. He testified that Malloy did not "shoot up" the party store, but rather, was involved in an altercation where Malloy shot into the store, causing physical damage to the door and store interior. He testified that he did not know Malloy before this incident. He testified that once Malloy paid restitution for the damages, he dropped the charges against Malloy. He testified that the restitution check was written from Swerling's firm account and listed Swerling's name. He testified that he learned of his son's murder charge after the incident with Malloy. He testified that he did not think to tell his son that Swerling's firm had previously represented Malloy because he did not think it was important or relevant. He testified that he finally discussed it with Applicant in 1995 after Applicant inquired following Pringle's letter. However, he did testify that he asked Swerling about his representation of Malloy during the murder trial.

Respondent called Swerling's law clerk, Aleksandra Chauhan, to testify. She testified that she helped Swerling prepare for this hearing by thoroughly reviewing all of Applicant's files and documenting the case for Swerling's review. She testified that she created a timeline of events, a summary of all witnesses contacted by Swerling or his staff, and other summaries of Applicant's case file. These documents were introduced into evidence.

Following the evidentiary hearings on November 19 and 21, 2013, Respondent submitted Affidavits from Swerling and his paralegal, Kellie Switzer, along with supporting documentation, pertaining to the firm's prior involvement with Malloy. These affidavits are dated April 3, 2014, and reveal that Malloy was represented by Swerling's law partner, Joseph M. McCulloch, Jr., who was able to get Malloy's charges dismissed in exchange for restitution paid to the Tillmans. Based on the affidavits and accompanying documents, it is clear that both

Applicant and his father were explicitly aware that Swerling's law partner represented Malloy in 1987. Applicant himself received a check from Swerling's law firm for restitution and signed a confirmation letter (on Swerling's firm letter head), dated May 16, 1988, stating, "This is to confirm that Mr. Hayes Malloy has made full and complete restitution to me for damages to the premises at 1744 Shop Road."

On May 14, 2015, Applicant took the deposition of Herman Whaley at the office of his counsel, Lance Boozer. Respondent was present and represented by Megan Harrigan Jameson. Whaley testified that he is 53 years old and lives in Columbia. He testified that he had known Applicant and his family for decades. He testified that around the time of the Sutton murder, he frequented the party shop owned by Applicant's father. He testified that Applicant worked at the party shop and he saw him frequently. He testified that he is not related to the Tillman family, but acknowledged that he "could have" told Swerling that he was Applicant's cousin. He testified that he is still in communication with Applicant and his family. He testified that he spoke with Applicant's father two weeks ago to tell him he would testify on Applicant's behalf. He testified that had spoken with Applicant in the past year to discuss this case and whether he would testify for Applicant. He testified that he discussed Hayes Malloy with Applicant and that Malloy is presently incarcerated at Lee Correctional Institute.

Whaley testified that he and his brother David were interviewed by law enforcement officers with the Richland County Sheriff's Department about the murder. He testified that he gave a statement to law enforcement, but could not recall whether it was an oral or written statement. He testified that he believes he talked to law enforcement more than once, but is not certain. He testified that he recalled seeing Applicant with Sutton on the day of the murder, but

did not see Applicant pick Sutton up on Walcott Street as his statement indicates. He testified that he had come and gone from the party shop all day, drinking and hanging out with friends, but that he ultimately left the party shop for the evening around 6 p.m. He testified that when he left, Applicant was still working at the party shop, which did not close for another hour. He testified that he was socializing outside of the club and saw Sutton talking with Hayes Malloy near a car. He testified that when he left at 6 pm., the two were still talking near a car. However, he could not recall what type of car it was or provide any description of the car. He testified that he does not know what happened after he left the party shop at 6 p.m. He acknowledged that he was not close enough to hear what Sutton and Malloy were discussing or whether it was a friendly conversation. He testified that he was consistently drinking alcoholic beverages on the day of the murder, starting around noon.

Whaley testified that he recalled testifying as a defense witness at Applicant's trial and that he was only asked a few questions. He testified that he recalled meeting with Swerling and an investigator before Applicant's trial, but could not recall when these meetings took place. He testified that he cannot recall how many times they met, but he thinks it was more than once. He testified that he never volunteered any information to Swerling or law enforcement and only answered the questions he was asked. He testified that he cannot recall what he discussed with Swerling or his investigators because the meetings took place so long ago. He testified that he never told anyone he saw Sutton and Malloy talking the day of the murder. He testified that he was hesitant to get involved in the case and was still apprehensive to be involved.

In response to Whaley's deposition, Swerling responded by affidavit dated July 1, 2015. In the affidavit, Swerling affirms that his investigators attempted to interview Whaley, but that

Whaley said he did not want to get involved. Swerling avers that numerous memorandums in his file indicate that Applicant asked him to contact Whaley to be a possible witness. Swerling affirms that either he nor his associate spoke with Whaley prior to Applicant's trial and decided to call Whaley as a witness. He testified that his associate, Jennifer Shealy, handled Whaley when he was called as a witness and only asked him the few questions they believed to be beneficial to Applicant's case. He testified that he did not ask Applicant any other questions because the information was either not credible or would not have been beneficial to Applicant's case.

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. Specifically, this Court finds that Swerling is a very credible witness and his testimony should be afforded great weight. In contrast, this Court finds that Applicant, his father, and Whaley's testimony is significantly less credible and is also weighed 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).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), *cert. denied*, — U.S. —, 128 S.Ct. 370, 169 L.Ed.2d 247 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517).

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. The standards do not establish mechanical rules;

the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668

After careful review of the entire record, including the testimony and exhibits presented at the evidentiary hearing, deposition of Whaley, and responsive affidavits, based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's rulings in regards to each of Applicant's specific allegations of ineffective assistance of counsel:

Allegation One, Two, Three, Four, Five, Seven, Eight, and Nine: Trial Counsel was ineffective regarding his cross-examination of Hayes Malloy as to possible penalties for Sutton's murder and the dismissal of his murder charge in exchange for his cooperation, and possible enhancement of his sentence based on prior convictions

Applicant alleges that Swerling was ineffective for failing to cross-examine Malloy as to the possible penalties he faced for the Sutton's murder, for which he was also charged, before the charges were dismissed by the State. Applicant asserts that Swerling did not question Malloy on the possible sentences he could have received had he not cooperated with the State and had his charges dismissed. Applicant asserts that Swerling should have made it clear to the jury that Malloy was facing a sentence of life imprisonment had his charges not been dismissed by the State. Applicant also alleges that Swerling did not adequately highlight to the jury that Malloy's charges were dismissed in exchange for his testimony and that the dismissal was without prejudice. Applicant also alleges Swerling was ineffective for questioning Malloy about possibility receiving a death sentence if convicted of murder for hire, as it highlights to the jury

that Applicant had solicited the assistance of several other people in murdering Sutton. Applicant alleges Swerling also failed to adequately question Applicant that he was facing an enhanced sentence based on his prior record for charges still pending at the time of Applicant's trial.

In response, Swerling testified that he questioned Malloy vigorously concerning the enormous benefit he received from the dismissal of his murder charge, including the possibility of life imprisonment if convicted of murder. Swerling also testified that he questioned Malloy on why his charges had been dismissed a mere five days before Applicant's trial, showing that his testimony against Applicant was in exchange for the dismissal of the murder charge. He testified that he also thoroughly cross-examined Malloy about his prior and pending record.

A review of the trial transcript supports Swerling's testimony and shows that Malloy was vigorously cross-examined as to the penalties for murder, possible sentences he could have received either as the principal or accomplice in Sutton's murder, and extremely beneficial dismissal of his charge as a cooperating witness. See Trial Tr. pp. 261-270, 293-295. This Court finds that Swerling's cross-examination of Malloy highlighted to the jury that the charge could be brought back based on Malloy's testimony and the dismissal was not with prejudice. This Court also finds that Swerling's questioning of Malloy as to a possible death sentence if convicted of murder for hire was appropriate based on the facts of the case and Malloy's previous testimony and statements to law enforcement. This Court also finds that Swerling appropriately questioned Malloy about his prior record and remaining pending charges. In sum, this Court finds that Swerling's cross-examination of Malloy was well-prepared, exhaustive, and effective. This Court finds that Applicant has failed to show any deficiency of counsel as to

allegations Allegation One, Two, Three, Four, Five, Seven, Eight, and Nine, which must be denied and dismissed with prejudice.

Allegation Six and Ten: Trial counsel was ineffective for failing to object to portions of the State's closing argument as to the dismissal of Malloy's charges

Applicant alleges that Swerling "was ineffective for failing to object to a portion of the State's closing argument wherein the prosecution advised the jury that the State didn't wait until after Hayes Malloy's testimony to drop all charges as they could make sure he testified the way they wanted him to where said testimony clearly mislead the jury in that, a) erroneously suggested all his charges had been dismissed when he was still facing a charge of Assault and Battery with Intent to Kill, b) erroneously lead the jury to believe the State had no leverage with this key witness at the time of his testimony and c) failed to acknowledge that the State had the power to bring back the murder charge at a later date where the charge was not dismissed with prejudice. See Tr. p. 1073, l. 20-p. 1074, l. 7." Applicant further alleges that Swerling "was ineffective for failing to object to the State's closing argument that 'Hayes Malloy could be in Canada right now if he wanted to. Nothing that we could do to Hayes Malloy whatsoever is going to force him to come testify,' where said argument was erroneous and mislead the jury where Hayes Malloy had a charge of Assault and Battery with Intent to Kill pending at the time of Applicant's trial, was on bond for that charge and was subject to the subpoena power of the State as well. See Tr. pg. 210, ll. 21-23." This Court finds that both of these allegations are lacking in merit and must be dismissed with prejudice.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914-15 (2009) (citing Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). "The

argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." *Id.* at 609-10, 602 S.E.2d at 744. "While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). "The solicitor's closing argument must, of course, be based on this principle." *Id.*

A reviewing court will "view the alleged impropriety of the solicitor's argument in the context of the *entire record*, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*; see *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.")

As an initial matter, this Court notes that the entire opening and closing arguments were not transcribed in this case, but rather, only portions pertaining to specific objections made during such arguments. See Trial Tr. p. 1069, 1071 ("During [Applicant's/the State]'s closing argument, the following objections were made.") This was in accordance with standards in place at the time of Applicant's trial in early 1990, as was noted by both Swerling and the trial court

during the evidentiary hearing. Therefore, the Court is not able to view the entire closing argument as a whole in accordance with the standard discussed above. However, this Court finds that Applicant has failed to satisfy his burden of showing that Swerling was ineffective for failing to object to these portions of the State's closing argument. This Court finds that both of the excerpts from the State's closing argument are proper and based on facts in evidence or reasonable inferences to facts in evidence. Neither misleads the jury nor improperly prejudices Applicant. Therefore, this Court finds that these allegations must be denied and dismissed with prejudice.

Allegation Eleven, Sixteen, and Seventeen: Trial Counsel was ineffective for his handling of jury instructions pertaining to Malloy's prior inconsistent statements

Applicant alleges that Swerling was ineffective for: "failing to object to the trial court's refusal to issue an appropriate jury charge on the use of prior inconsistent statements where the charges given by the trial court limited the use of such statements to impeachment purposes when the law in South Carolina at the time of the Applicant's trial also permitted prior inconsistent statements to be considered for their substantive value under State v. Copeland, 278 S.C. 572, 581-582, 300 S.E.2d 63, 68-69 (1982); failing to renew his request for a jury charge on the law as it relates to the use of prior inconsistent statements at the end of the trial court's jury instructions; and failing to request a jury instruction pursuant to State v. Copeland, 278 S.C. 572, 581-582, 300 S.E.2d 63, 68-69 (S.Ct. 1982), for the proposition that prior inconsistent statements made by a declarant who testifies and is available for cross-examination may be used as substantive evidence in addition to being considered for their impeachment value."

In response to these allegations, Swerling testified that he was thrilled that he was able to introduce Malloy's prior statements as substantive evidence so that the jury would be able to see

all of Malloy's ever-evolving statements while deliberating. Swerling testified that he requested a jury instruction on prior inconsistent statements and submitted two proposed charges to the trial court. He elaborated that one of the proposed jury instructions is similar to the prior inconsistent statement instruction given in federal court and both dealt with the use of the prior statements being used to address the credibility of witnesses. He testified that the trial court declined to use either of his proposed instructions, but did give his own jury charge on the use of prior inconsistent statements. He testified that he did not request an instruction on using the prior inconsistent statements for substantive purposes because he thinks such a charge is confusing to the jury and does not yield beneficial results. He elaborated that he does not request such a charge as based on a strategic decision to focus on the impeachment value of Malloy's prior statements because he thought it would be more beneficial to Applicant and have less risk of confusing the jury. Additionally, he testified that the underlying statements had negative information about his client, so he did not want to highlight that information to the jury by requesting charge indicating the statements could be used as substantive evidence in addition to impeachment value. He testified that he thinks a jury instruction pursuant to Copeland as suggested in Applicant's allegations would have been of little benefit, if any, to Applicant and likely would have confused the jury.

This Court agrees with Swerling's assessment of his case and his strategic decision not to request a charge pursuant to Copeland. Counsel articulated a well-reasoned and thoughtful strategy in why he requested the particular jury instructions he did. His decision not to request a charge pursuant to Copeland was just that — *a decision* — not mere inadvertence or neglect as Applicant opines. Therefore, this Court finds that this allegation must be denied and dismissed

with prejudice. See Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517 (“[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.”))

Court finds that these allegations must be denied and dismissed with prejudice.

Allegation Twelve and Thirteen: Trial Counsel was ineffective for failing to object to the testimony of State’s witness Bruce Hall, and following the omission of said testimony, failing to move for a mistrial or to have the testimony stricken from the record.

Applicant asserts that Swerling was ineffective for failing to initially object to testimony from State’s expert witness Bruce Hall, a manager of a Goodyear Tire retail location in Columbia for six years, concerning the statistical frequency that his particular store sold Goodyear Vector tires. At trial, the State introduced evidence showing tire tracks leading to the location of the victim’s body at the crime scene, as well as tire impression taken from Applicant’s vehicle while in federal custody. Hall opined that the tire tracks located near Sutton’s body were Goodyear Vector tires and that Applicant’s vehicle had Goodyear Vector tires. Hall testified that approximately two percent of the tires sold in the store he managed were Goodyear Vectors. While Swerling did not initially object to Hall’s testimony, he later objected to Hall’s statistical testimony about the frequency in which Vector tires were sold at his store and the trial court sustained the objection. Swerling did not move for a mistrial or for the testimony to be stricken.

Applicant raised this issue on appeal, arguing that Hall’s testimony that only two percent of the tires sold in his store were Goodyear Vectors was improperly admitted. In its opinion, the South Carolina Court of Appeals stated “we first note this testimony initially came in without

objection. Further, when the appellant later objected, the trial judge sustained his objection. We therefore find no error.” State v. Tillman, 304 S.C. 512, 519 405 S.E.2d 607, 612-13 (Ct. App. 1991). Applicant alleges that this shows that the issue was not properly preserved for appellate review.

In response to this allegation, Swerling testified that he objected to Hall testifying about the frequency in which his store sold this model of tire this year, which was ultimately granted by the trial court. He testified that he did not ask for the court to strike the testimony because he did not want to highlight it to the jury. Similarly, he testified that he did not move for a mistrial based on strategy and his conversations with Applicant. He elaborated that he discussed a mistrial with Applicant and that both agreed that the trial was going very favorably, particularly in terms of rulings from the trial court. Swerling testified that he and Applicant concluded it was best to continue on with the trial rather than move for a mistrial over this relatively minor testimony given by Hall when compared to the overall trial and previous rulings from the court.

This Court finds that Applicant has failed to meet his burden of proof as to these allegations. As to allegation twelve, this Court finds that Swerling properly objected to this testimony, as noted in the Court of Appeals opinion. This Court finds that Applicant’s assertion that the Court of Appeal’s opinion finds the issue not preserved for appellate review is a mischaracterization of the opinion; the opinion does not say that the issue is not preserved for appellate review, but rather, states that the objection was sustained, and therefore, there is no error. Additionally, this Court finds that Swerling was not ineffective for failing to move for a mistrial or for the testimony to be stricken from the record. If Swerling had moved for a mistrial, it is highly unlikely that such a motion would have been granted by the trial court, and thus,

Applicant cannot show any deficiency or resulting prejudice. Furthermore, Swerling articulate a valid, strategic reason for not moving for a mistrial or to have the testimony stricken from the record. This Court finds these allegations must be denied and dismissed with prejudice.

Allegation Fourteen: Trial counsel was ineffective for failing to challenge the tire tread evidence on the ground that the Sheriff's Department lacked probable cause to examine Applicant's car at the time

Applicant alleges that Swerling was "was ineffective for failing to challenge the tire tread evidence in dispute during the Applicant's trial on the ground that the Sheriff's Department lacked probable cause to examine the Applicant's car at the time tread impressions were taken from the vehicle." In support of this allegation, he cites to the Court of Appeals opinion from his direct appeal, where the Court notes neither trial nor appellate counsel raised the issue of whether the Richland County Sheriff's Department had probable cause to examine Applicant's vehicle, where the Court of Appeals notes in a footnote that neither trial nor appellate counsel raised the issue as to whether the Sheriff's Department had probable cause to examine Applicant's automobile. See State v. Tillman, 304 S.C. 512, 521, fn 1, 405 S.E.2d 607, 612, fn 1 (Ct. App. 1991). This Court finds that Applicant's allegation is without merit, as he gave consent for his vehicle to be searched, and even if that consent was in some way invalid, the Richland County Sheriff's Department had probable cause to search Applicant's vehicle.

Applicant gave the FBI consent to search his rental vehicle in connection with an unrelated federal bank robbery charge. The consent stated as follows:

I, Ronald Stafford Tillman . . . hereby authorize James H. Davis, Michael Marchant and R.D. Johnson, special agents of the Federal Bureau of Investigation . . . to conduct a complete search of my premises located at 208 Meadowbury Drive . . . and my briefcase and my vehicle, a 1988 Buick Riviera. These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

Thereafter, the F.B.I. agents took possession of the vehicle, impounding it, and later made it available to the Richland County Sheriff's Department. While Applicant had not yet been charged with Sutton's murder, the Richland County Sheriff's Department already had developed Applicant as a suspect based on Malloy's statements and had tire impressions from the murder scene.

The Sheriff's Department then made ink impressions and photographs of the tire treads by means of cranking the automobile and moving it. At trial, Swerling objected to the introduction of the tire impression evidence, arguing that the scope of consent was exceeded when the FBI allowed the Richland County Sheriff's Department. The trial court overruled Swerling's objection and allowed the evidence to be admitted, finding that "written consent authorized the impoundment and ruling there were no violations in appellant's Fourth and Fourteenth Amendment rights and that the harmless cranking of the vehicle and moving of it was reasonable, not intrusive, and not within appellant's expectation of privacy." Tillman, 304 S.C. 512, 515, 405 S.E.2d 607, 609 (Ct. App. 1991). On appeal, Applicant contended that his consent to search was exceeded when the FBI allowed the Sheriff's Department to make impressions of the tires, and, because the search went beyond the scope of consent, the evidence was not admissible. The Court of Appeals concluded that Applicant's Fourth Amendment rights were not violated when FBI, to which he had given consent to take possession of his vehicle in connection with an unrelated charge, made the vehicle available to sheriff's officers who made ink impressions and photographs of the tire treads by means of cranking the automobile and moving it. Id. the Court elaborated that even though defendant's consent to impoundment of vehicle by FBI may have been limited and may not have extended to sheriff's department which

was conducting unrelated investigation, he did not have legitimate expectation of privacy while the automobile was in the custody of the FBI which would prevent the sheriff's department from lawfully obtaining photographs and ink compressions of tires. Id.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable *per se* unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, "warrantless searches [and seizures] are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." Kentucky v. King, ___ U.S. ___, 131 S. Ct. 1849, 1858 (2011).

South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) *the automobile exception*; (5) the plain view exception; (6) *the consent exception*; and (7) the abandonment exception. State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). (Emphasis added). Pursuant to the various accepted exceptions to the warrant requirement, a warrantless search or seizure will withstand constitutional scrutiny so long as the circumstances establish the existence of an exception along with the existence of probable cause. State v. Bultron, 318 S.C. 323, 331-332, 457 S.E.2d 616, 621 (Ct. App. 1995).

One of the recognized and accepted exceptions is the automobile exception. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). That exception is based on: (1) the ready mobility of automobiles along with the potential that evidence may be lost or removed before a

warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). Under the automobile exception, law enforcement officers can conduct a warrantless search of an automobile based on probable cause alone. Bultron, 318 S.C. at 332, 457 S.E.2d at 621. "If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Weaver, 374 S.C. at 320, 649 S.E.2d at 482; see also State v. Moore, 377 S.C. 299, 310, 659 S.E.2d 256, 262 (Ct. App. 2008) (recognizing that the rationale for a vehicle search under the automobile exception is not negated even if the vehicle is immobilized or taken into police custody); State v. Willard, 374 S.C. 129, 135, 647 S.E.2d 252, 255 (Ct. App. 2007) ("[T]emporary immobility may still be considered readily mobile so as to qualify for the automobile exception.")

If probable cause exists supporting the search of a lawfully stopped automobile, the search can be extended to every part of the vehicle and all of its contents potentially containing the object of the search. Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see also Wyoming v. Houghton, 526 U.S. 295, 307 (1999) ("We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."). "The scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause." United States v. Ross, 456 U.S. 798, 823 (1982). "The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found." State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

Probable cause is "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). "Probable cause may be found somewhere between suspicion and sufficient evidence to convict." State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). However, the probable cause standard does not require absolute certainty. In re Care and Treatment of Brown v. State, 372 S.C. 611, 619, 643 S.E.2d 118, 122 (Ct. App. 2007).

In the present case, Applicant gave valid consent for a search of his vehicle to the FBI. The Court of Appeals already properly rejected his argument that his consent was in some way limited to prevent the Richland County Sheriff's Department from accessing his vehicle. Tillman, 304 S.C. 512, 405 S.E.2d 607. See also Hoffman v. County of Delaware, 41 F.Supp.2d 195 (N.D.N.Y.1999) (concluding that an individual's consent to search could not be delimited to exclude an officer from a different agency). Therefore, this allegation must fail, as Applicant gave valid consent for the search of his vehicle.

Furthermore, Applicant's argument must also fail under the automobile exception. As set forth above, law enforcement can search an automobile without a warrant so long as there is probable cause for the search. The present case contains the necessary probable cause to allow for a warrantless search of Applicant's vehicle. The Richland County Sheriff's Department had statements implicating Applicant in Sutton's murder and tire impressions taken from near

Sutton's body when they took tire impressions from Applicant's car. Therefore, any objection on this ground would have been overruled and the evidence would have been admitted. This Court finds that Applicant has failed to meet his requisite burden of proof as to this allegation, which must be denied and dismissed with prejudice.

Allegation Fifteen: Trial counsel was ineffective for failing to disclose to Applicant and the Court his potential conflict of interest in representing Applicant where he had previously represented Hayes Malloy on a serious criminal charge.

Applicant alleges that Swerling was ineffective for failing to disclose that he or a member of his firm that previously represented Hayes Malloy in an incident involving an altercation and shooting at the party shop. Applicant alleges that he did not learn of this potential conflict until 1995, well after his murder trial. He asserts that he would not have retained Swerling to represent him had he known that he or a member of his firm had previously represented Malloy. Similarly, Applicant's father, Thomas Tillman, testified that although he knew that Swerling or someone from his firm had previously represented Malloy, he did not tell his son until 1995 because he did not think it was important or relevant. Applicant alleges that based on this alleged prior relationship between Swerling and Malloy, he was deprived his right to fair and effective representation. This Court finds that Applicant and his father are wholly lacking in credibility as to this allegation, which must be denied and dismissed with prejudice.

During the evidentiary hearing, Swerling testified that he had not previously represented Malloy, but that his office records contained a file with Malloy's name and an indication that one of his previous law partners had represented him in an earlier action. Swerling testified based on his recent investigations to prepare for the hearing, he learned that the matter was dismissed by the State in exchange for Malloy paying Applicant and his father restitution. He testified that he

cross-examined Malloy thoroughly about this previous incident at the party shop during Applicant's trial. He further testified that both Applicant and his father would have known about McCullough's representation of Malloy prior to Applicant retaining him, as Malloy and Applicant were friends. He testified that he and his office staff search for the file prior to the evidentiary hearing but were unable to locate it. He stressed again that his cross-examination of Malloy was incredibly vigorous and thorough and there is nothing to suggest that he held back on his questions based on any alleged conflict of interest or prior relationship with Malloy. He further testified that any prior relationship or representation of Malloy by anyone in his office would have been fully disclosed and discussed with Applicant. He further testified that he is confident that Applicant knew of any prior involvement of his firm with Malloy because the community on Shop Road where the party shop was located was very close knit and it would have been highly unlikely for Applicant and his father to not have known who was representing Malloy. He again commented that his cross-examination of Malloy was "really aggressive" and there is nothing to even remotely suggest that he held back on Malloy based on an alleged prior relationship. He highlighted that he questioned Malloy in-depth about the altercation at the party shop during cross-examination.

Following the evidentiary hearings on November 19 and 21, 2013, Respondent submitted Affidavits from Swerling and his paralegal, Kellie Switzer, along with supporting documentation, pertaining to the firm's prior involvement with Malloy. These affidavits are dated April 3, 2014, and reveal that Malloy was represented by Swerling's law partner, Joseph M. McCulloch, Jr., who was able to get Malloy's charges dismissed in exchange for restitution paid to the Tillmans. Based on the affidavits and accompanying documents, it is clear that both

Applicant and his father were explicitly aware that Swerling's law partner represented Malloy in 1987. Applicant himself received a check from Swerling's law firm for restitution and signed a confirmation letter (on Swerling's firm letter head), dated May 16, 1988, stating, "This is to confirm that Mr. Hayes Malloy has made full and complete restitution to me for damages to the premises at 1744 Shop Road." This Court finds that this allegation is without merit and must be denied and dismissed with prejudice.

Allegation Eighteen: Trial counsel was ineffective for neglecting to object to the trial court's repeated use of the phrase "failure to testify" where that phrase, contrary to the jury instruction in which it was used, implied some shortcoming on the part of the Applicant for exercising his choice not to testify in his defense and thereby weakened the language of "no adverse inference" instruction given by the trial court.

Applicant alleged that Swerling was ineffective for failing to object to the trial court's use of the phrase "failure to testify" during his jury instruction. Applicant failed to present any testimony or other evidence pertaining to this allegation at the evidentiary hearings. Therefore, this Court finds that Applicant has affirmatively abandoned this allegation, which is thereby denied and dismissed with prejudice.

Notwithstanding Applicant's abandonment of this issue, this Court also finds that this allegation is without merit. Applicant failed to establish how he was prejudiced by the court's use of this phrase, particularly in light of the trial court's jury charge as a whole. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation Nineteen: Appellate counsel was ineffective for failing to brief as an issue on direct appeal the failure of the trial court to grant the Applicant's request for a jury charge on the allowable uses of prior inconsistent statements by the jury

Applicant alleged that Swerling⁴ was ineffective for failing to brief whether the trial court erred in refusing to instruct the jury on the use of Malloy's prior inconsistent statements pursuant

⁴ Swerling also represent Applicant during his appeal.

to Copeland. Applicant failed to present any testimony or other evidence pertaining to this allegation at the evidentiary hearings. Therefore, this Court finds that Applicant has affirmatively abandoned this allegation, which is thereby denied and dismissed with prejudice.

Notwithstanding Applicant's abandonment of this issue, this Court also finds that this allegation is without merit. This Court finds that Applicant has failed to establish his burden of both deficiency of appellate counsel and requisite prejudice entitling him to relief and that this allegation must be denied and dismissed with prejudice.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

“Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is ‘difficult to demonstrate that counsel was incompetent.’” United States v. Mason, No. 3:06-607-CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While 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). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). “‘Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.’” Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

“To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

This Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel’s performance was deficient, where there is no standard requiring appellate counsel to brief every possible meritorious issue on Applicant’s behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had the issue been raised.

Both the United States Supreme Court and the South Carolina Supreme Court have consistently ruled that appellate counsel has no duty to raise all meritorious issues on appeal. See Jones, 463 U.S. 745; Smith, 528 U.S. at 288; Tisdale, 357 S.C. 474, 594 S.E.2d 166. When appellate counsel reviews all possible issues and elects to raise those issues he deems most meritorious, he has performed in accordance with professional standards and is not deficient. As appellate counsel raised meritorious issues on appeal, his performance was in accordance with professional norms and this Court finds that this allegation must be denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record 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 post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 13 day of Nov, 2015.

Re Hood

ROBERT E. HOOD
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina