VOLUME V OF V

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

RONALD TILLMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002499

APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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THE COURT: Okay.

All right. Swear him in.

THE CLERK: Yes, sir, Your Honor.

Please raise your right hand.

RONALD TILLMAN, after being duly sworn, testified as follows:

THE COURT: Okay.

THE DEFENDANT: Your Honor.

THE COURT: Let's -- let's go through kind of procedurally --

THE DEFENDANT: Okay.

THE COURT: I mean, here is the big issue for me today: The big issue that I'm focused upon right now is what to do with Ms. Shurling, okay; what to do with Ms. Shurling as your lawyer, okay.

THE DEFENDANT: Your Honor.

THE COURT: So let's start there, and maybe we make it into the other areas, maybe we don't but that's the biggest. That's the crux of the --

THE DEFENDANT: All right.

THE COURT: The rest of the stuff I can come back around to, but I have to deal with that issue. So let's talk about that.

THE DEFENDANT: As far as Ms. Shurling representing me, Your Honor, I don't feel that Ms. Shurling will

represent me in the best of my interest. I don't have any confidence in her representing me.

THE COURT: Okay.

THE DEFENDANT: Because of what we have already gone through.

THE COURT: And the -- I want to -- now, you say that ow, Mr. Tillman --

THE DEFENDANT: Yes, sir.

THE COURT: -- and you've seen me before, so you know how I act.

THE DEFENDANT: Yes.

THE COURT: I will probably say something back to you, not to question you --

THE DEFENDANT: Right.

THE COURT: -- but to make sure that I'm hearing -- what I hear you say is what you're saying. Does that make sense to you?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. So what I just heard you say is that you do not feel comfortable with Ms. Shurling representing you because of what we just discussed, and that would be what took place at the PCR hearing we had, what took place coming up to the PCR hearing and then actually what happened during the hearing and then what has happened since that hearing. That's what you're

referring to?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Go ahead.

THE DEFENDANT: Okay. I feel that way because, Your Honor, when I talked to Ms. Shurling -- when I -- my very -- my very first interview when I talked with her, the first thing we talked about was my sentence. That was the issue.

THE COURT: The sentence?

THE DEFENDANT: Yes, sir.

THE COURT: The actual sentence?

THE DEFENDANT: My actual sentence, Your Honor.

THE COURT: Okay.

THE DEFENDANT: And I have a letter that I received from her, and on that letter, Your Honor, if I may -- if the Court will indulge me.

(Pause).

This letter, Your Honor, is dated April 4, 2011.

THE COURT: Okay.

THE DEFENDANT: It's from Ms. Shurling. It says, "Your father, Mr. Thomas E. Tillman, has retained me to review and evaluate your case for possible post-trial proceedings. Therefore, in the next few weeks, I will be compelling all documents or records necessary and effectively to review your case. I understand that the

South Carolina Department of Corrections is not adequately applying your sentence," okay.

Then at the very end, she states that "I will be coming to see you in person. I will review all the documents relevant to your sentencing before I come to see you," okay.

Your Honor, this is one of the issues that my father -- my father thought that I was hiring her just for my sentencing issue, and when she came to see me on her initial visit, I specifically told her that no, ma'am, it's just not my sentencing. I'm innocent of this murder charge.

So she said -- well, we went into the financial part. You know, I'm going to have to talk with your father you know, about -- she charged him a certain fee thinking it was just going to be this.

So I told her, I said, "Well, I'll call my father and let him know that you're going to get back in touch with him, and you're going to redo this thing."

Okay. Your Honor, with this said, when she filed me, she sent this to me, and I'm thinking she is going to put this in my PCR motion, this issue, she never even added it to my PCR application. Then when I -- when I called her on it, we was talking about it, and I was telling her about the sentencing hearing, she said, "Well, the South

Carolina" -- she said, "When you came back to the South Carolina Department of Corrections, South Carolina seen that you had prior -- prior bank robbery charges. That's the charge that they're using to give you life without the possibility of parole."

I said no. So we got into a tit for tat going back and forth, because she was telling me that the South Carolina Department of Corrections did it. She said they did this in 2005 when I was in Beaumont, Texas in the federal penitentiary.

They sent me a letter stating that I had two prior violents and that I was not eligible for parole. Sixteen years later, when I got -- when I sentenced in January -- I mean, it was February of 1990, I was sentenced before Judge Rushing to a life sentence with the possibility of parole for 20 years, okay. Then 16 years later, they changed it to life without parole. They sent me a letter in the mail.

So that was one of the issues I brought to her, but not only that, Your Honor, in my -- in my original PCR application that Ms. Shurling filed with the Court, the application that she filed -- and I want to go to page -- let me find it. It's in here, the PCR application.

What it -- what it -- what it boils down to, Your Honor, she -- she raised claims, the claims that I asked

her to raise concerning Mr. Swerling's representation of me at my -- at my trial.

This is one of the counts that I had. It's on page three and -- at 11 -- well, yes, at ten. It says, "Trial counsel failed to adequately investigate Applicant's charge, failed to investigate and interview potential witnesses, failed to investigate events, discovery, materials and such."

Your Honor, when I came to this PCR hearing, before I came here, I asked Ms. Shurling for discovery. I asked her for materials that -- from the lieutenant, so the same witnesses that I asked her about was the same thing that she had in this application, the same things that I charged against Mr. Swerling. She did the exact same thing that I'm accusing Mr. Swerling of doing: She didn't interview any of my witnesses.

THE COURT: You mean lack of?

THE DEFENDANT: Yeah, lack of. She didn't -- she didn't -- she didn't interview any of my witnesses. She didn't even subpoena any of them.

We talked about it. We went over -- Your Honor, we went over our witness list. Me and her went over these witness lists together. We went through and said, "Okay. We want this one. We don't want this one." We went over all of these witnesses, and she had the names -- because

my father supplied them to her -- the names -- and I supplied it to her, as well.

She had the names, addresses, and telephone numbers of these individuals, but when we got to court, we went over all of this stuff, and then when we get to court, she don't even -- she don't even have them here. Not only does she not even have them here, she never even talked to any of them.

We hired her in 2011, Your Honor. We came to court in 2013. Like I told you, Your Honor, when I came here for -- to this PCR hearing in November, that I've only seen Ms. Shurling two times. Out of the two times I've seen her, I've only -- we only had three hours.

The first -- the initial visit she came to see me, I seen her for about an hour-and-a-half. The second time she came to see me was four days before this PCR hearing.

When she interviewed me that day, she had six or seven other inmates to interview that same day. I only talked to her for an hour-and-a-half. She never told me that she was not going to have these people in court. She never said that -- I never knew that these people wasn't going to be in court until that day.

THE COURT: You mean the witnesses?

THE DEFENDANT: The witnesses. I never knew. It was under my understanding that these people were going to be

in court. She never told me they was never going to be in court, okay, and she said that I received -- I received something. I haven't had any correspondence with Ms. Shurling since the -- the day of the PCR hearing. I talked to her one time on the telephone, and then when she found out I filed a grievance on her, that's when she -- she called my family members first and told my father for me to call her.

I hadn't called home, so when I -- when I -- when I ended up getting a telephone call, I was -- we was on lockdown at McCormick Correctional Institution, and they called me up there, said I had a lawyer visit. I get up there, and it's a telephone. It was Ms. Shurling, so when I get on the telephone, she said, "Well, you filed a grievance on me." I said yes.

So we talked about it, and I told her, I said, "I filed a grievance on you because of the fact that you have all but ruined my chance at a fair hearing, at the PCR hearing, because I asked you to call these witnesses to court."

I said under -- under 17-27-90 if I come before this court and I don't have -- if the court...

(Pause).

It's 17-27-90, Your Honor. It states that there is -- if there is no evidence to support a Post Conviction

Relief PCR hearing, the defendant fails to present any evidence supporting his PCR claim, such a vacation from orders of evidence was required, as well as for a PCR hearing in March -- these courtrooms -- they said this can -- what they're essentially saying, Your Honor, if I don't have my witness, if I have affidavits and I don't have my witnesses before this Court, I'm waiving that.

THE COURT: And we discussed that in your last hearing.

THE DEFENDANT: I'm not -- I'm not -- well, that's been...

THE COURT: Yes. That was the topic of discussion in your last hearing.

THE DEFENDANT: Yes, because -- because -- as a matter of fact, you brought it up to her because of the fact that she was calling these -- she was calling these names, and you stopped her and said, "Well, do you have these witnesses here?" She said no. Then you told her, "You're wasting the Court's time."

THE COURT: Well, I don't know that I used that word.

THE DEFENDANT: Well, I mean, in essence, you know, because of the fact -- like I said --

THE COURT: But I -- the line of questioning was are these people going to be here to testify to these issues that you're raising --

THE DEFENDANT: And --

THE COURT: So that's what I was referring to.

THE DEFENDANT: Right. And then -- and then her response to you was she was only doing it to satisfy me. She couldn't satisfy me unless she had them here because that's what I -- I wanted these witnesses to do, come before this court and testify in open court, Your Honor.

Because some of them is going to come in here and tell a lie, and some of them is going to come in here and tell the truth. But I wanted them to be -- I wanted this in open court because, Your Honor, I am actually innocent of killing this guy.

If I had killed him, I know -- if I had killed somebody, I would know if I killed him or not, and that's why -- that's why it was crucial for me to have these people here.

But see, the Court has only allowed me -- allowed her -- she is saying it was three people. It was four people that the Court allowed for her to do depositions on.

Your Honor, she talked to -- when she called me on the telephone, Your Honor --

THE COURT: You're talking about the lawyer visited in prison?

THE DEFENDANT: When Ms. Shurling called McCormick Correctional Institution, she didn't -- she didn't -- she

called for me to give her permission. She wanted me to write her a letter stating that I wanted her to go do these interviews because she didn't want to be held liable if they didn't say something that I wanted them to say.

I don't want them to say anything. I want them to come to court and tell the truth, you know, to be -- have their testimony in open court. So she wanted me to write a letter, and I told her I wasn't going to write a letter because you -- the judge gave you an order. He ordered you to go interview these people.

So what I got to say, if you ordered her -- you gave her 90 days to do depositions of these individuals, she waited two weeks.

THE COURT: I gave her 90 days to interview and/or do depositions.

THE DEFENDANT: Right and -- and when she called me, she had -- it was about two weeks left before, you know. She had -- she had -- she said well, she didn't go down to Lee County because Lee County was locked down because they had food fights going on. So they had a quarantine.

But my question I was going to ask her -- we was -- you know, she -- you know, she was like being kind of rude, so I didn't -- I didn't want to go there with her, so I was going to ask her well, he said you do depositions of four people.

If you didn't do depositions of -- you couldn't do depositions of Hayes Malloy, why not go talk to some of these other people. She said, "Well, I arranged to talk to Herman Whaley. I'm going to do depositions with him."

I said Herman Whaley moved to Virginia. He was in Virginia. The day that she called him, he told her that he was going to be right here in Richland County or he had -- because he had -- I guess he had a case here in the courtroom.

He was going to be here from -- December of 2013, he was going to be here from December 10th to a certain date. He talked to her about that.

She said not -- she hasn't talked to anybody. The last time I talked to her was in February whenever we had that phone conversation. She hadn't talked to anybody.

If she did, she didn't -- she didn't say anything to me, and -- and the reason that I asked her for discovery, Your Honor, I got letters that I've written to her asking her to -- asking her for discovery and all of this stuff.

Your Honor, I haven't received not one piece of paper from Ms. Shurling except for the letters that she sent me and a copy of my transcripts and a PCR application that she filed on my behalf.

I've looked at her invoices for her legal fees that she was charging my father and the stuff that she did on

her -- on her print out.

The mileage -- she -- Ms. Shurling has tried to work this case just in her office, Your Honor. This case is 25 years old. Just -- when she was cross-examining Mr. Swerling -- and every time he says something, he said, "Well, this case is 25 years old. I don't have no recollection, no recollection of this. It's 25 years old."

If she was -- if she had brought the people in like I asked her to, we wouldn't -- we wouldn't be here today. I wouldn't have -- I wouldn't have -- I wouldn't have to stand up here and -- and -- and do this because I would have had my witnesses in here and -- that everything would have fell to the Court like it -- you know, if it went like it was supposed to have been.

But because of Ms. Shurling's failure to -- to put the issues in there that I asked her to, when I received that amended application, Your Honor, before the PCR hearing started, I told her that I didn't agree to the -- her amended application.

She -- she was trying to tell me those were the best issues that she could raise for me, but I asked her where are the issues that we talked about that you said that -- in her letter that she wrote to me -- let me go back to one of the letters she wrote to me.

She asked me, Your Honor -- she asked me to -- when I -- she asked -- she told me, she said, "I'm going to send you a transcript from the District Attorney." She said, "I'm going to get the transcripts."

She said, "When I get the transcripts to you, a complete transcript," she said, "I want you to go over these transcripts, and I want you" -- I'm going to -- I'm going to read -- I think I have it right here.

She said, "Your case is not on the docket for upcoming PCR hearing for Richland County. I have been notified by Jack Swerling he will not be available as a witness during the next PCR term of hearing in Richland County for the week of March 2013."

I think Alison Lee was going to be the judge, but here -- let me -- I'm trying to get to it. "Remember, I would be -- it would be very helpful for me if you can sit down and write out any issues that she want to -- you want me to consider raising in addition to those that are already in your original post conviction. I want you to be -- I want you to be -- I want to be well prepared on all issues. Do not hand me any issues at the last minute and expect me to present them to the Court."

Your Honor, she is -- she is telling me this in this letter, but she did the exact same thing to me that she is telling me not to do.

She placed these -- this amended, she put this amendment in the day that we came to this PCR hearing, Your Honor. When I -- when I seen this PCR -- the amended application that she put before this court, I was the last one to get it. I've never even seen it until that day. Then when I went over it, I told her, I didn't agree with this.

She -- we talked about it. She got mad, and she walked off with it. She wouldn't even finish the conversation with me.

So for those reasons, Your Honor, I do not want Ms. Shurling representing me because -- because of the fact that she has -- in the two-and-a-half years she had to work on this case, Your Honor, she hasn't done anything.

THE COURT: Okay. Thank you.

THE DEFENDANT: Thank you.

THE COURT: All right. Ms. White, go ahead.

MS. SHURLING: Your Honor, may I at some point briefly respond to Mr. Tillman's remarks?

THE COURT: Maybe.

Go ahead, Ms. White.

MS. WHITE: Thank you, Your Honor.

The State has no position, really, on the motion to relieve counsel and obviously leaves it in the Court's

discretion other than our objection to any kind of additional delay. I don't know even --

THE COURT: Those two arguments are counterintuitive, Ms. White.

MS. WHITE: Well, that's very -- that's very true, and it might --

THE COURT: I mean, you can't -- you take no position. You take no position on --

MS. WHITE: I would object to her being relieved if it causes additional delay.

THE COURT: Okay.

MS. WHITE: Let me rephrase that, Your Honor.

THE COURT: Now that -- now that makes sense.

MS. WHITE: Thank you.

THE COURT: Okay.

MS. WHITE: In this position, obviously -- and I think we went through this in November the fact that the case has been, and it's clearly been stated, is an old case and difficulties have been in pulling files and pulling records and memories.

So I think at this point, you know, it's in the best interest to proceed so that we cannot delay the case any further, but obviously, we would leave it in your discretion based on your decision with how to proceed.

THE COURT: All right.

So Ms. Shurling, tell me what work that you did that I ordered be done between November 21st, 2013 and February 5th, 2014?

MS. SHURLING: Your Honor, over -- from the time of the hearing -- of course, we went into Thanksgiving and Christmas, but the first of January, I ascertained where each of the witnesses were and that I had contact information for them and was setting up a time to conduct interviews, Your Honor.

My recollection -- and I hate that Megan Harrigan is not here, but I believe the record will reflect that Your Honor gave us 90 -- gave me 90 days to interview the witnesses and then an additional 90 days to conduct depositions if it were determined that depositions were necessary.

THE COURT: Okay.

MS. SHURLING: I would like to note a couple of things. One is -- he is actually right -- and I had forgotten the context of this. When I received the grievance in the mail --

THE COURT: No, ma'am. No. This is a very specific question to which I want a very specific answer. I want to know exactly what you did between November 21st, 2013 and February 5th, 2014 to comply with the Court's order of November 21st, 2013.

MS. SHURLING: I located the witnesses that were to be interviewed and confirmed their contact information and went over the trial notes that I had, all my notes from the record, to determine what the relevant points of inquiry would be and planned, generally speaking, what questions I wanted to ask of these witnesses when I had the opportunity to interview them with an eye toward making a decision about whether or not to do a deposition after speaking with them personally.

THE COURT: So on February 5th, 2014, how many witness interviews did you have scheduled?

MS. SHURLING: Your Honor, the following week, it was my -- I was going to Lee. I was going to interview Lieutenant Sultan by telephone, and I -- contrary to what Mr. Tillman says, when I spoke with the gentleman, Mr. Herman Whaley, by phone the day of the second part of the hearing, he told me he was out of town but that he would be back December 10th and that he would be happy to talk with me anytime thereafter, just to give him a call.

So -- I said, "Is this a good contact number for you?" He said yes, it was. So I had -- he did not tell me he was getting ready to move. He didn't tell me that would only be a good number for a short period of time, so I deferred.

I -- it was my belief, and still is, that it was the

best thing for me to do to interview Mr. Hayes Malloy first. I intended to do so right after the first of the year, and there was a very bad flu outbreak at Lee.

I don't have the exact figures, Your Honor, but I think they were on complete lockdown for three weeks. Call me a coward if you want, but the day -- you know, when the -- when the quarantine was ended, I didn't want to rush back in there the week after the quarantine was lifted, but I -- but I did make sure that I had plenty of time to go and interview him and evaluate his responses before the 90-day period given by the court had expired.

THE COURT: So is the answer to the question one?

MS. SHURLING: I believe I -- I'm sorry, Your Honor.

THE COURT: I'm looking for a number.

MS. SHURLING: A number of...

THE COURT: How many witness interviews were scheduled by February 5th, 2014.

MS. SHURLING: I had not --

THE COURT: That's a numerical number: One, two, three, or four?

MS. SHURLING: I hadn't physically scheduled any of them.

THE COURT: Okay. So the answer is zero.

MS. SHURLING: I mean -- Your Honor, Hayes Malloy is at Lee Correctional. All I have to do is give them 24

hours' notice to schedule an attorney visit.

THE COURT: Okay.

MS. SHURLING: And the other individuals were available by telephone. You know, if I called them, they weren't available at that moment, I could return the call the next week.

I had three weeks left in the 90-day period to conduct those interviews. I did make sure that I had contact information for these people.

THE COURT: Okay. All right. So Mr. Tillman --

MS. SHURLING: Now, I -- what I wanted to clarify, if I might, Your Honor.

THE COURT: No, ma'am.

MS. SHURLING: Please.

THE COURT: Mr. Tillman, stand up, please.

THE DEFENDANT: Yes, sir.

THE COURT: All right. Here is my question: If I let Ms. Shurling go, do you have the ability to retain your own lawyer?

THE DEFENDANT: I don't -- I don't -- I don't --

THE COURT: Just be candid with me.

THE DEFENDANT: No, sir. I don't think I have.

THE COURT: Okay.

THE DEFENDANT: Because I don't want to put my family through the strain of hiring another lawyer for me

because -- you know, it's too much. I don't want to put my family through that again.

If -- if the Court deems -- if the Court rules that you're going to let Ms. Shurling go, if all else, if I can have another attorney, if I can get one appointed -- because there's -- there's stuff that's being said by her that's not true.

THE COURT: Okay. Well, don't get on that.

THE DEFENDANT: Yeah.

THE COURT: Stick with the question now.

THE DEFENDANT: Okay.

THE COURT: The question is --

THE DEFENDANT: Uh-huh.

THE COURT: -- if I let her go --

THE DEFENDANT: Right.

THE COURT: -- can you afford to hire another attorney?

THE DEFENDANT: No.

THE COURT: Here is what I don't want to get, okay.

THE DEFENDANT: Right.

THE COURT: And I'm not saying I'm letting her go --

THE DEFENDANT: Right.

THE COURT: -- but I'm trying to play all these different scenarios out, okay.

THE DEFENDANT: Right.

THE COURT: Do you follow me? What I don't want to happen is I decide to let her off the case --

THE DEFENDANT: Right.

THE COURT: -- and then we play this waiting game of figuring out whether or not y'all are hiring an attorney. That's not fair to the State. That's not fair to the State's witnesses.

THE DEFENDANT: Right.

THE COURT: And, frankly, they're not fair to you either.

THE DEFENDANT: Right.

THE COURT: But money is -- doesn't grow on a tree in the backyard, okay.

THE DEFENDANT: Yes.

THE COURT: And I understand that.

THE DEFENDANT: Yes.

THE COURT: Undertaking a case like yours, for any attorney that knows what they're doing, is extremely expensive.

THE DEFENDANT: I understand.

THE COURT: So I just want to make sure if I do let her go, you're okay with me appointing somebody to represent you.

THE DEFENDANT: Yes, sir. Can I -- can I confer with my father?

THE COURT: Sure.

Officer, can you -- can they talk to each other?

THE DEPUTY: Yes.

THE COURT: Just stay right there on the front row --

THE DEFENDANT: Okay.

THE COURT: -- Mr. Tillman.

(Pause.)

MS. SHURLING: Your Honor, I'm just stepping sufficiently far away to give them their privacy.

THE COURT: That's fine.

(Pause.)

THE DEFENDANT: Your Honor, we're not going to be able to afford another attorney.

THE COURT: Okay. All right. Mr. Tillman, I know you don't know me personally. That's not meant to be embarrassing or anything else.

THE DEFENDANT: Yes.

THE COURT: Do you understand that? I'm just -- I don't -- I'm just trying to -- if I'm going to keep things flowing and keep things moving, that's something that -- especially with you being in prison and me having to avoid bringing you back and bringing you back and all that kind of stuff --

THE DEFENDANT: Yes.

THE COURT: That's not meant to embarrass or cause

anybody embarrassment.

These cases are extremely expensive and extremely time consuming, and I understand that. I just needed to know that --

THE DEFENDANT: Right.

THE COURT: -- in the process of working through in my mind what decision I make on the case.

All right. Is there anything else that you want to tell me before we break, Mr. Tillman?

THE DEFENDANT: Like I say, I -- Your Honor, I've been -- as far as myself, I've been working on this case for 25 years, and I've put all -- everything I have to try -- to bring the issues out before this Court and in a way where it would be, you know, easier to have done. You know, where I wouldn't be a burden on the Court.

I don't -- you've been -- you've been good at listening to me, and I just wanted to be able to be heard because of the fact that this is my shot.

THE COURT: Well, and I understand that, and I respect that. I mean, you're right. I mean, you know, absent extreme circumstances, a PCR is a one-shot deal, and I understand that.

I have a respect for that, and that's why I know that you weren't happy that I didn't let everybody under the sun be interviewed and supplemented, but that's why I did

take the steps that I did take at the last hearing --

THE DEFENDANT: Right.

THE COURT: -- to give you an opportunity to get that done. So I mean -- I understand that you wish I would have taken that a few steps further.

THE DEFENDANT: Right.

THE COURT: I respect your position on that, but I mean, it was -- I mean, I allowed the additional information to be taken out of an abundance of caution and out of making sure that your one -- you know, absent extreme circumstances shot at a PCR --

THE CLERK: Right.

THE COURT: -- is covered. So I understand that, and I appreciate that. I know that this is very personal to you and that, you know, lawyer/client relationships can be difficult over time and I understand that. I appreciate that. I respect that, Mr. Tillman so...

THE DEFENDANT: And -- and -- and one other thing. What -- when you -- we talked about the people that you allowed her to interview, there was -- there was one individual that I didn't -- like I say, I didn't know.

This -- back when Ms. Shurling -- my father -- when my father initially called and talked to Ms. Shurling concerning Hayes Malloy, I guess he thought he was dying. He was sick, and he thought he was dying.

In that process, when I got -- when I got to McCormick Correctional Institution, Your Honor, I guess somebody heard somebody calling my name, and this guy was saying, "Well, who are you talking about?"

They called my name. What it was, this individual happened to be a cellmate of Hayes Malloy, and Hayes Malloy thought he was dying. So in the process of him thinking he was -- he was going to die, he actually told this guy that he committed this murder.

I relayed that. I wrote Ms. Shurling a letter. Not only did I talk to her personally and asked her to interview this person, get an affidavit for me from him, and the first thing she told me is that well, she remembered the name. His name is Bynum. His name is Jeremy Bynum.

She said, "Well -- well, he might be -- he -- he -- he" -- I'm trying to figure out what she told me. She was telling me that he might be saying that because his -- his uncle testified against me, but this guy -- I didn't know this guy from a hole in the wall.

When I got locked up, he was about eight or nine or ten years old, and he -- when he found me at McCormick, he told me, he said, "Man, I know you didn't do it." He said, "The guy told me he did it."

That's why -- like I said, that's one of the other

guys that I asked -- I added to the list. I added to the witness list. I wanted to be brought before the Court because this individual was this man. He was Hayes Malloy's cellmate.

He told me this -- he -- like I say, he thought he was dying. So he was -- you know, he was I guess getting stuff off his chest. So that's why -- I don't know who got in touch with my father, and he wanted to talk to my father.

I guess he wanted to talk to somebody in my family, so that's why my father called Ms. Shurling and told her, told somebody in her office that they needed to go down there and get an affidavit from this guy.

This was in 2011 or 2012 when -- I don't know the date that she -- my father gave her that are information, but this is what happened. So that's one of the guys that I had wanted to -- the Court to allow to go to the deposition from him -- or for her to interview him but, you know, that was -- that was about it.

Like I said, I just wanted -- like I said, I knew by reading some of this stuff, like I say, I've been working on this thing for years. So by reading some of the case laws and everything that I read, I knew if I didn't bring my issues before the PCR court -- if I didn't win in here -- if I didn't win these claims up here, I

wouldn't -- I wouldn't be able to bring them up on appeal later. So I wouldn't be protected. That's why I'm making sure I put it on the record because if it's not on the record, there's no record of it, Your Honor, I don't stand a chance on any type of appeal because they're not going to entertain it.

That's why I wanted to bring it to the Court's attention that I'm not waiving my rights to not having my witnesses here or anything. It's just the fact that she didn't bring them in here, you know.

THE COURT: Thank you.

THE DEFENDANT: Thank you.

THE COURT: All right. Now, you may respond, Ms. Shurling.

MS. SHURLING: Thank you, Your Honor. First, just factually because I'm always careful to be truthful with the Court -- he -- he has jarred my memory about something.

I said that Mr. Tillman called me within a day or so of getting the grievance. I recall now what he was talking about. It was because I was going to leave on Monday to interview Hayes Malloy.

I did call Mr. Tillman, Sr. and asked him if they happened to talk to Ronald Tillman if they would ask him to call me. When I didn't hear from him, I called his

institution and asked someone in operation if they could get a message to him to call me. The lady was nice enough to say, "I'll bring him up here at a certain time, and you can call him."

It was that conversation when I told him, "Look, I just need to know what to do. You filed a grievance. You say you don't want me to be your lawyer anymore. I am perfectly willing to continue, to do these interviews, but I'm not comfortable doing them unless you tell me in writing that that's what you want me to do."

Mr. Tillman has -- and I'm sorry to say this, but he has misrepresented countless things that I have said to him in the course of this proceeding, and sadly, I wasn't going to put myself in the position of going forward with these interviews with these people after not only had he filed a grievance but unless he dropped me a note and said, "I know what I said in the grievance, but I still -- I want you to go interview these people."

That's what I told him; that if he dropped me a note and said, "You know, notwithstanding all of this other stuff, I want you to follow the judge's instructions and go ahead and interview these people, that I would go ahead and do it."

At that point, he was ranting and raving with me. I said, "I'm just going to have to wait for guidance from

Judge Hood."

I would note that my recollection of what happened at the previous proceeding was that Mr. Tillman ultimately, after lengthy discussion, agreed to the procedure that Your Honor ordered.

He agreed for me to interview these witnesses within 90 days and to then do their depositions if I deemed they were appropriate to his claims within 90 days thereafter, and yet, the record reflects that he started filing all of these papers and complaining before I had a chance to follow the Court's directive within the time given by the court.

The other thing is that I -- you know, I have to say that in my conversations with Mr. Tillman, he conveniently forgets that 25 years ago when he was serving a federal sentence for armed robbery, as a court-appointed lawyer, I went all the way to Atlanta to interview him and to visit with him and explain to him why the Court was trying to dismiss his PCR because he was in federal custody.

I fought his PCR being dismissed because I'm the one that fought tooth and nail arguing with the Court that he should not have to wait 25 years to litigate his Post Conviction Relief case.

Unfortunately, beyond my control, the Court did just that, dismissed that original PCR, and without getting

into matters that are attorney/client privilege, I will tell you that Mr. Tillman and I did talk at length days before this hearing, and at that time, he indicated that he trusted my judgment. Evidently, he doesn't any longer. I will do, obviously, whatever Your Honor tells me to do.

Mr. Tillman may not believe this, but I know the Court knows me by reputation. I've done more -- I think more private Post Conviction Relief work than any lawyer I know.

I have, I believe, an excellent representation for doing a good job in those cases. I want Mr. Tillman to understand whether -- just so he knows that I've never deliberately not done anything that would be beneficial to a client and that if Your Honor directs me to go forward with these interviews, the Court has my word and Mr. Tillman has my word, that I would, obviously, do the very best I'm capable of with an eye towards seeing if these individuals can help his case.

Having said that, there were strategic and tactical reasons why I felt his other issues were stronger, and -- but I -- I do whatever the Court tells me to do at this point.

MS. WHITE: Just briefly, Your Honor, I had an additional thought and wanted to -- in regards to the continuation of this if another attorney is appointed how

we would proceed kind of procedurally with -- since we've already had several days of testimony and hearings and whether or not this Court was of the mindset to continue just at the point where we are with the four witnesses or if it was going to start anew.

THE COURT: Well, we're not starting anything new.

MS. WHITE: Okay. And that's what our concern was delaying this to the point that it would be a whole new thing; that we would ask if it did, the issues have already been litigated, be considered resolved at that point and any new issue or any issue, I guess revolving around these core witnesses be allowed to proceed forward.

And also, Your Honor, this is probably something that can possibly be changed at this time, but you had left the record open for an affidavit from Mr. Swerling in regards to testimony about whether or not he or his firm represented Hayes Malloy.

THE COURT: Yes.

MS. WHITE: I have -- Megan Harrigan has forwarded this information to Ms. Shurling. They did find their file from his federal habeas, and we have got affidavits from Mr. Swerling so --

THE COURT: He's -- regardless of what I do in this, he is still allowed to supplement after --

MS. WHITE: Okay.

THE COURT: -- the interview/deposition stages.

MS. WHITE: Okay. So when it's appropriate, if you would like, we can introduce those.

THE COURT: Okay. That's fine.

MS. SHURLING: And I would move, Your Honor --

THE COURT: Just make that a State's Exhibit.

MS. SHURLING: I was provided those materials, and they actually also include an affidavit from Mr. Swerling that was executed in 1997 in response to a grievance that was filed against Mr. Swerling, and I provided Mr. Tillman copies of both Mr. Swerling's current affidavit, the 1997 affidavit, and copies of all of the materials that are relevant to the conflict issue, much of which appears to have been provided to Mr. Swerling by Joe McCullough and providing clarification of the nature and scope of his representation of Hayes Malloy. "His" being Joe McCullough's representation of Hayes Malloy.

MS. WHITE: We can just put -- the affidavits are in this packet, so if we could just put it all in as State's Exhibit 1 --

THE COURT: Or --

MS. WHITE: -- or whatever it is at this point.

THE COURT: Whatever it is.

MS. WHITE: Whatever it is at this point, yes.

(WHEREUPON, State's Exhibit No. 1 was marked for

identification only.)

MS. WHITE: And, Your Honor, those are the originals, but I have copies for you if you need them now.

THE COURT: I'd like them.

MS. WHITE: Your Honor.

MS. SHURLING: Your Honor, I stand corrected. Mr. Tillman says he did not file a grievance against Jack Swerling.

I will note that there is a 1997 affidavit attached to Jack Swerling's current affidavit. Given the structure of the affidavit and its content, it was my belief that it was done in response to a previous grievance, but apparently, it was done for some other purpose. But it is clearly responding to allegations of misconduct for ineffective assistance by Mr. Swerling in 1997.

MS. WHITE: And I believe it actually reflects -- I think that the affidavit was filed because Mr. Tillman raised the same issues in his federal habeas in 1997, and Mr. Swerling did an affidavit at that point regarding the conflict, as well.

MS. SHURLING: That makes sense.

THE COURT: Okay. Anybody else want to say anything else?

THE DEFENDANT: I'm good. I'm good, sir.

THE COURT: Okay. All right. I'm going to make this

decision fairly quick. It's not going to be today, but I'm not going to let it linger that long. I will probably decide and have an order prepared by the end of next week because this case doesn't need to be delayed any further.

Anything else before we break?

MS. WHITE: Nothing, Your Honor.

THE DEFENDANT: No, sir.

THE COURT: I'll send you a copy of it --

THE DEFENDANT: Okay.

THE COURT: -- in SCDC.

Okay.

MS. SHURLING: I would just ask Your Honor that in the event you decide that it's best for me to stay on the case and us move forward from this point that Your Honor, I'd respectfully ask that you consider that we do testimony in some format from those witnesses on the record.

THE COURT: All right.

MS. SHURLING: Thank you.

THE COURT: All right. For future reference, Ms. Shurling, the next time that there is a court order filed and somebody files a grievance with you, you will continue to do the work whether a grievance is filed or not without express permission from this Court otherwise.

Your hypothetical into what would or would not have

happened based upon those interviews is not reason to not comply with a court order. Neither is a grievance being filed against you reason to not comply with the court order.

MS. SHURLING: Yes, sir, Your Honor. Respectfully, I didn't just quit. I wrote the Court and asked if I --

THE COURT: I know that you did, and you should have kept working on the file.

Thank you.

(Whereupon, the proceedings were concluded.)

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 3rd day of April, 2014.

July 28, 2014

s/Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	**IN THE COURT OF COMMON PLEAS** **FOR THE FIFTH JUDICIAL CIRCUIT**
Ronald Tillman, # 222153, **Applicant,** **v.** **State of South Carolina,** **Respondent.**	**Case No. 2011-CP-40-7453** **ORDER GRANTING APPLICANT'S MOTION TO BE RELIEVED OF COUNSEL**

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

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

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 12, 2014

Via U.S. Mail, First Class and E-Mail
The Honorable Robert E. Hood
P.O. Box 192
1701 Main Street, Ste. 222
Columbia, SC 29202

Re: Ronald Tillman, #222153 v. State of South Carolina
2011-CP-40-794

Dear Judge Hood:

As your Honor is aware, I was appointed to represent Mr. Tillman in the above-referenced matter following an Order dated May 16, 2014, relieving Ms. Shurling from the case. Part of the same Order allowed Mr. Tillman, through newly appointed counsel, to interview and potentially depose four (4) witnesses. The Order further instructed that the State could reply to any deposition testimony with affidavits and then proposed Orders would be submitted to your Honor for review and final ruling. These instructions were similarly given to Ms. Shurling and the State at the original PCR hearing on November 21, 2013, however, it is my understanding no formal objection was raised.[1]

After receiving and reviewing the transcript of the PCR hearing previously held November 19 and 21, 2013, the transcript of the Motion to Relieve Counsel hearing held April 3, 2014, and meeting and corresponding with Mr. Tillman, he has indicated to me he objects to the Court's prior rulings and instructions outlined above. Mr. Tillman stated to me he was unaware he would not be returning to Richland County in a PCR hearing setting. In addition to his general objection, Mr. Tillman objects to the limit placed on the number of witnesses he is allowed to interview and depose. Mr. Tillman further requests that this Court allow him to

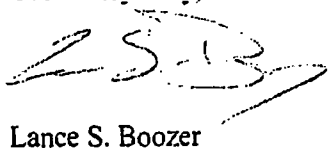
[1] At the subsequent hearing into Mr. Tillman's Motion to Relieve counsel on April 3, 2014, Mr. Tillman testified, "That's why I wanted to bring it to the Court's attention that I am not waiving my rights to not having my witnesses here or anything. It's just the fact that she didn't bring them in here, you know." Tr. at 42:7-10.

present live testimony of these witnesses. in addition to other witnesses he feels are necessary to support his PCR claim. before your Honor in Richland County.

As the facts giving rise to my appointment are unique and for purposes of protecting the record on behalf of my client, please accept this letter as a request for a hearing and ruling on Mr. Tillman's objection and requests. Upon reviewing the South Carolina Rules of Civil Procedure and case law. it is my opinion there are no other means, either through procedural motion or otherwise, to validly raise Mr. Tillman's objection and request. By copy of this letter. I am also filing the same with the Richland County Clerk of Court.

I certainly appreciate the Court's time and consideration.

Yours very truly,



Lance S. Boozer

cc: Megan Harrigan, AAG
Ronald Tillman, #222153
Clerk of Court, Richland County

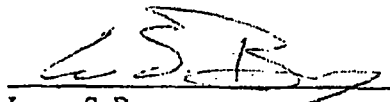
CERTIFICATE OF SERVICE

I, Lance S. Boozer, Esq., certify that I have served on December 12, 2014, a copy of the **Letter to the Honorable Robert E. Hood, dated December 12, 2014,** on the individuals listed below by delivering a copy of the same via e-mail and regular first class mail to:

PERSON SERVED:

The Honorable Robert E. Hood
P.O. Box 192
1701 Main Street, Ste. 222
Columbia, SC 29202

Megan Harrigan. Esq.
SC Attorney General's Office
Post Office Box 11549
Columbia. SC 29211-1549



Lance S. Boozer
THE BOOZER LAW FIRM, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Phone: (803) 608-5543
Fax: (803) 926-3463
Email: lsb@boozerlawfirm.com

ATTORNEY FOR APPLICANT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO: 2011-CP-02-7453
	)	
Ronald Tillman, #222153,	)	
	)	
Applicant,	)	
	)	**NOTICE OF MOTION AND MOTION**
v.	)	**FOR LEAVE TO CONDUCT DISCOVERY**
	)	**AND OBJECTION TO PRIOR ORDER**
State of South Carolina,	)	
	)	
Respondent.	)	

The Applicant, through appointed counsel below, respectfully moves for this Court to allow Applicant to conduct further discovery, present live testimony of witnesses before this Court and also objects to this Court's previous rulings and Order dated May 16, 2014.

By Order dated May 16, 2014, this Court relieved Applicant's prior PCR counsel, Ms. Tara Shurling, and appointed undersigned counsel. The Order further allowed Applicant to interview and potentially depose four (4) witnesses. The State could reply to any deposition testimony with affidavits and proposed Orders would be submitted to this Court for review and final ruling on Applicant's pending PCR application. These instructions were similarly given to prior PCR counsel and the Respondent at the original PCR hearing on November 21, 2013, however, no formal objection was entered.[1]

Undersigned counsel, pursuant to this Court's prior Order, received and reviewed the transcript of the PCR hearing previously held November 19 and 21, 2013, the transcript of the Motion to Relieve Counsel hearing held April 3, 2014, and met and corresponded with

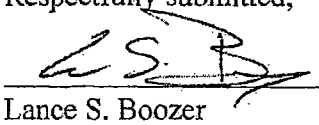
[1]At the subsequent hearing into Applicant's Motion to Relieve Counsel on April 3, 2014, Applicant testified "That's why I wanted to bring it to the Court's attention that I am not waiving my rights to not having my witnesses here or anything. It's just the fact that she didn't bring them in here, you know." Tr. at 42:7-10.

Applicant. Following these meetings and correspondence, Applicant indicated he objected to this Court's prior rulings and instructions outlined above. Applicant indicated he was unaware he would not be returning to Richland County in a PCR setting.

As part of this Motion and Objection, Applicant objects to the limit placed on the number of witnesses he is allowed to interview and depose. He further requests that this Court allow him to present live testimony of these witnesses, in addition to other witnesses he feels are necessary to support his PCR claim, before this Honorable Court in Richland County.

Accordingly, Applicant respectfully requests that this Court allow Applicant to interview and present live testimony of the four (4) witnesses in a PCR hearing setting and that Applicant be allowed to interview and present live testimony of additional witnesses in the same hearing.

Respectfully submitted,



Lance S. Boozer
Attorney for Applicant
THE BOOZER LAW FIRM, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201
Phone: (803) 608-5543
Fax: (803) 926-3463

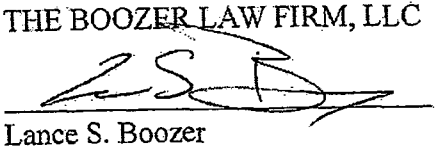
Columbia, South Carolina
February 6, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO: 2011-CP-02-7453
	)	
Ronald Tillman, #222153,	)	
	)	
Applicant,	)	
	)	**AFFIDAVIT OF SERVICE BY MAIL**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

I, the undersigned, of the Boozer Law Firm, LLC, Attorney for Applicant, do hereby certify that I served the foregoing Notice of Motion and Motion for Leave to Conduct Discovery and Objection to Prior Order upon the persons below-listed by placing a copy, postage prepaid, in the United States Mail, addressed as follows:

Megan Harrigan Jameson
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

THE BOOZER LAW FIRM, LLC



Lance S. Boozer
Attorney for Applicant
807Gervais Street, Suite 203
Columbia, SC 29201
Phone: (803) 608-5543
Fax: (803) 926-3463

Columbia, South Carolina
February 6, 2015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Ronald Tillman, #222153, Applicant, v. State of South Carolina, Respondent.	Case No. 2011-CP-40-07453 **RETURN TO APPLICANT'S MOTION FOR LEAVE TO CONDUCT DISCOVERY AND OBJECTION TO PRIOR ORDER**

This matter is before this Court by way of an application for post-conviction relief filed November 3, 2011. On February 6, 2015, Applicant served the State with a "Motion for Leave to Conduct Discovery and Objection to Prior Order." This Return follows.

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 Rushing, where, he was convicted as indicted. Judge Rushing sentenced Applicant to life imprisonment. Applicant was subsequently convicted for 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 Petitioner 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. The State 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. A hearing on this application was held before the Honorable Alison R. Lee, who dismissed the application for failure to prosecute on January 28, 2005.

CURRENT POST-CONVICTION RELIEF ACTION

Applicant filed his most recent application for relief on November 3, 2011. Applicant thereafter filed an amended application for relief on November 18, 2013, alleging nineteen additional grounds for relief. Evidentiary hearings on this matter were convened on November 19 and 21, 2013 at the Richland County Courthouse before the Honorable Robert E. Hood. 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 counsel 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. The State objected to any additional amendments to Applicant's action or any further

delay, citing that the underlying charges were from a 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 at the Richland County Courthouse before Judge Hood 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. The State 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. The Court requested that both parties order the transcripts from the previous evidentiary and motions hearings. The Court further ruled that Applicant's newly appointed counsel one-hundred-and-twenty days[2] 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, the Court ordered that the State had thirty days respond to these depositions by affidavit. Following the submission of any affidavits, the Court ordered that both parties submit proposed orders within

[1] See PCR Hearing Transcript dated Nov. 19 and 21, 2013 pp. 97-180.
[2] Both parties were in receipt of the previous hearings transcripts on October 10, 2014, setting the one-hundred-and-twenty day deadline for Applicant to interview the four witnesses as Saturday, February 7, 2014.

forty-five days. Applicant did not object to this ruling and filed no motions opposing it thereafter.

MOTION BEFORE THIS COURT

On February 6, 2015, Applicant served the State with a "Motion for Leave to Conduct Discovery and Objection to Prior Order." In this motion, Applicant and his counsel ask for this Court to allow him to present the four witnesses previously indicated in a live hearing rather than by deposition and also requested the Court allow him to present additional witnesses. Essentially, Applicant is moving for this Court to allow him to conduct discovery, amend his application based on wherever the discovery may lead, and provide him with an additional post-conviction relief hearing.

In non-capital post-conviction relief actions, discovery is not allowed without a showing of good cause. SC Code Ann. §17-27-150(A) states:

> A party in a non-capital post-conviction relief proceeding shall be entitled to invoke the process of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, *the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise*. (emphasis added).

In the present case, there have not been any previous orders granting Applicant discovery. Applicant has failed to set forth what additional witnesses need to be interviewed or what other discovery needs to be conducted. His blanket request amounts to a fishing expedition to see what additional allegations may be uncovered more than three years after his application was initially filed. Additionally, this Court already allowed Applicant to interview the witnesses he stated were paramount to his case during his previous evidentiary hearing. Respondent submits that Applicant has wholly failed to satisfy the "good cause" requirement and this Court should deny Applicant's motion.

Furthermore, Respondent submits that Applicant's motion should be denied as a matter of judicial economy and efficiency. Applicant has been afforded a full two day hearing to litigate the numerous allegations set forth in both his original application and his lengthy amended application. He is now asking that this Court allow him leave to pursue endless potential allegations without any limitation. Applicant's request impedes judicial efficiency and economy that is necessary for our judicial system to work.

Based on the above reasons, Respondent respectfully requests that this Court deny Applicant's request for discovery and an additional hearing as good cause does not exist to do so. Alternatively, should this Court grant Applicant's request to invoke the discovery process and allow him to present additional witnesses, Respondent respectfully requests this Court hold a hearing on Applicant's motion and then enter a formal order outlining and limiting the scope of the investigation to the specific, detailed items which Applicant seeks to obtain.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General

BY: Megan Harrigan Jameson
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

Feb. 9, 2015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND RONALD TILLMAN Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS 2011-CP-40-07453 AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return to Applicant's Motion for Leave to Conduct Discovery and Objection to Prior Order** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Lance S. Boozer, Esquire
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201

DATED this 9th day of February, 2015.

Sara B. Moore

Sara Moore, Legal Assistant
For Respondent

2052

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011-CP-~~02~~-07453 40

Ronald Tillman
PLAINTIFF(S)

State of South Carolina
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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other Dismissed without prejudice

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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 : Defendant's Motion for Leave to Conduct Discovery is Denied

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
		$
		$
		$

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 Pearce **Judge Code** 2164 **Date** February 5, 2015

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 19 day of July, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

Lance Boozer
ATTORNEY(S) FOR THE PLAINTIFF(S)

Megan Jameson
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

Garber
Reporting Service
& Videoconferencing

1226 Pickens Street
Columbia, South Carolina 29201
info@garberreporting.com
Telephone: (803) 256-4500 | Fax: (803) 256-1999

DEPOSITION OF:
HERMAN WHALEY

MAY 13, 2015

RONALD TILLMAN (#222153)

vs.

STATE OF SOUTH CAROLINA

2011-CP-40-7453

REPORTER: LISA F. HUFFMAN

COPY

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	THE FIFTH JUDICIAL CIRCUIT
RONALD TILLMAN, #222153,	)	C.A. NO.: 2011-CP-40-7453
	)	
Applicant,	)	
	)	
V.	)	Deposition of
	)	HERMAN WHALEY
STATE OF SOUTH CAROLINA,	)	May 13, 2015
	)	
Respondent.	)	
_____	)	

Deposition on oral examination of HERMAN WHALEY, reported by Lisa F. Huffman, Verbatim Court Reporter and Notary Public in and for the State of South Carolina; said deposition taken pursuant to notice of deposition, by agreement and in accordance with South Carolina Rules of Civil Procedure, at The Boozer Law Firm, LLC, 807 Gervais Street, Suite 203, Columbia, South Carolina, on May 13, 2015, at the hour of 2:07 p.m.

APPEARANCES

LANCE S. BOOZER, ESQUIRE
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, South Carolina 29201
lsb@boozerlawfirm.com
ATTORNEY FOR THE APPLICANT

MEGAN HARRIGAN JAMESON, ESQUIRE
Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549
MJameson@scag.gov
ATTORNEY FOR RESPONDENT

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4	Black/ White Google Map Photograph	26

LEGEND OF THE TRANSCRIPT

dashes [-]	intentional or purposeful interruption
[ph]	denotes phonetically written
[sic]	written as said

STIPULATIONS

It is hereby stipulated and agreed by and between counsel for the respective parties that the Witness will waive the reading and signing of the deposition transcript.

Whereupon,

HERMAN WHALEY,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

(By Mr. Boozer)

Q. Mr. Whaley, you and I, of course, have spoken on the telephone and just met just today in person. And just for the record, my name is Lance Boozer. I'm an attorney here in Columbia. And I'm going to be taking your deposition today for a case that I got appointed to for a gentleman named Ronald Tillman. He's filed what called a post-conviction relief application. And we appreciate you being here. Have you ever been -- I'm going to start off, I'm going to ask you some background questions, and I'm going to kind of tell you about the deposition process. Have you ever been deposed before?

A. Explain that.

Q. Sure. Normally a deposition looks a little bit like this, where you have a court reporter, you have some attorneys, and then you're asked questions by some lawyers and it's taken down, as though she's doing right now. And I'm not talking about in the court. Normally in court you're testifying. This is a deposition, where we're doing it at my office. Have you ever been in this kind of setting before in any sort of case?

A. No.

Q. And I ask you that, just because if you haven't, some things may seem a little bit odd to you which we may do today, and so I just want you to understand the process, and it will help it probably run a little bit smoother. As I've said, this is our court reporter today, and she's going to be taking down everything that you say. And a lot of times when we're talking, it's easy when we get into conversations to answer questions "uh-huh" for "yes" and "uh-uh" for "no" and mumble and whatnot. And I'm bad about it, and I'll probably do it today. But I ask you to try and remember just to say "yes" or "no" where it's appropriate, and also to speak up so that she can hear you, because we've got to take everything down.

Now, there may be a time during this deposition when either the lawyer for the state from the Attorney General's Office may say "Object to the form" or I may do the same. If one of us makes an objection, allow that person to go ahead and make that objection and then answer the question. The only time that you will not answer a question is if one of us instructs you to not do so. I don't suspect that will happen, but it may. So if one of us objects, go ahead, let the person object and finish the objection, then you go ahead and answer the question. They're just making a record.

This is your deposition, so if at any time you get uncomfortable, you need to take a break, you want some water, just let me know and we'll take a break. And I don't suspect this is going to take very long, so we should get you here in and out. Do you have any questions for me before we get started?

A. No, sir.

Q. Mr. Whaley, if we can do this, we're going to take this question off the record, but I'm going to ask you where you currently live.

(Off the record.)

EXAMINATION CONTINUES:

Q. Thank you, Mr. Whaley. If you could, and I don't know if you've already done this, but go ahead and state your name for the record.

A. My name's Herman Whaley.

Q. And spell that last name for me.

A. W-H-A-L-E-Y.

Q. And how old are you?

A. Fifty-three.

Q. Fifty-three. What do you do for a living?

A. I work for my sister.

Q. What kind of job do you do?

A. Maintenance.

Q. Do you do that here in Columbia? Or you do that kind of all over?

A. No. Can we go off the record for a minute?

MR. BOOZER: Let's go off the record.

MS. JAMESON: Just for a minute, yeah.

THE WITNESS: Yeah, please.

(Off the record.)

EXAMINATION CONTINUES:

Q. So you just do odd jobs for your sister?

A. Yes.

Q. Are you originally from Columbia?

A. Yes.

Q. And do you still live in Columbia?
A. Yes.
Q. Have you lived in Columbia your whole life, pretty much?
A. Yes, other than being in the military.
Q. Now, I'm going to go back quite a few number of years and I'm going to ask you where you lived in December of 1988.
A.
Q. How old were you in December of 1988?
A. Twenty-five or so, somewhere in there.
Q. Were you working at the time?
A. No, I don't think so. I can't remember.
Q. Where's ? Tell me about the area in Columbia. It's over near the stadium?
A. It's past the fairground, by the -- near the football stadium.
Q. Now during that time in December of 1988, did you know a gentleman by the name of Ronald Tillman?
A. Yes.
Q. And how did you know Mr. Tillman?
A. From the party shop on Shop Road that we used to stop in. It was a party shop/liquor store.
Q. And when I say Ronald Tillman or I say Mr. Tillman, I'm referring to a gentleman who I probably would

imagine is your age at this time. I know there's a father that I guess went by Mr. Tillman. Now you're talking about the son, right?

A. Yes.

Q. And so they had -- his father had a party shop over there?

A. Yes.

Q. Do you know the address of that party shop?

A. No.

Q. Was it on Shop Road?

A. It's on Shop Road. The address, I'm not sure.

Q. And y'all, I guess, lived in the same area?

A. Yes, sir, next block over.

Q. So had y'all known each other pretty much your whole lives at that point?

A. No. Ronald didn't grow up in that area. His dad some years later acquired the store. But ever since they've been working -- ever since his dad took over the store, I've been knowing him, so I don't know.

Q. Do you know -- and again, anytime that I say "Mr. Tillman," unless I tell you "the father," I'm talking about Ronald Tillman, the son.

A. Yes, sir.

Q. Did Ronald Tillman, Mr. Tillman, did he work at the

party shop?

A. Yes, he worked in the -- he worked at the liquor store.

Q. And that's what the party shop was, place that sold liquor, beer?

A. Yeah, it's a liquor store and pool hall type deal.

Q. Now, you're aware that there was a trial sometime January 1990 here in Columbia, where the state alleged that Ronald Tillman killed a gentleman by the name of Donald Sutton?

A. Yes, sir. I'm aware of that.

Q. And before we get to the -- and it may sound like some of my questions may be kind of dumb or obvious, but I have to ask them for the record, and that may have been one of them. But before we get to the trial, were you ever interviewed by police in connection with that case?

A. Yes.

Q. And I'm going to show you a document that I've got, and we'll go ahead -- this is going to be Petitioner's Exhibit 1.

[MARKED FOR IDENTIFICATION AS PETITIONER'S EXHIBIT NO. 1.]

Q. And if you could, just take a second and take a look at that, and you can kind of start at the top,

and then go down through it.

(The witness reviews the document.)

A. Okay.

Q. Have you had a chance to look at it?

A. Yes, sir.

Q. Now I'm going to kind of go through this with you a little bit. Looking up there at the top, it says "Richland County Sheriff's Department Investigative Report"; is that right?

A. Yes, sir.

Q. And it says "offense date" over there on the top left, 12/26/88.

A. Yes, sir.

Q. And it says "Location of offense, is that right?

A. Yes, sir.

Q. Is that over in that general area of where we're talking about where the party shop is and where you grew up on Andrews Road, or lived at Andrews Road?

A. Barnes Street is not by the party shop. It's across Bluff Road where -- I'm thinking that's where the church is in Authortown, is the area they called it.

Q. But that's pretty close.

A. Yes, not far.

Q. And if we look down, it says "date, time" on the left, "12/31/88," and then it says "Herman and David Whaley."
A. Yes.
Q. Is that referring to you? And who's David Whaley?
A. David's my brother.
Q. Is David still alive?
A. Yes.
Q. Where's he located?
A. Here in Columbia.
Q. Here in Columbia. All right, so on the first line it says "IO," and I'm going to take that as, I guess, shorthand for "investigating officer went to and talked with Herman and David Whaley." So that's your house or where you lived?
A. My parents, yes.
Q. Do you recall an officer coming out there and talking to you?
A. Yes, sir.
Q. Do you know who that officer would have been?
A. No, sir.
Q. And I understand this has been a long time ago, so you're not going to -- some things you're probably just not going to remember. "Herman stated that he and Gordon and Scott English left and went to

Boogie's Club on Zion Church Road at a little after six." Do you recall if that's what you had told the officer at that point?

A. Yes, sir.

Q. He said "He drank a couple of drinks and then left after about an hour." Would that be right?

A. Yes, sir.

Q. "Scott and Gordon English then took him home." Would that be you, that they're saying they took you home?

A. Yes, sir.

Q. Did that happen?

A. Yes. I went home at some point, and I -- I can't remember exactly what time. But yes, that's what happened.

Q. Then it says "Changed his story and then said that they left -- or let him off at house around nine, but he never said he was not at the party shop." Do you know what that means?

A. No, sir.

Q. Let me ask you this before we kind of get going through this statement a little bit more. Do you know how many times you spoke with any officers in connection with this case?

A. I think they came to pick me up at least twice.

Q. So would this have been the second time, you think?
A. If they said I changed my story, yes, this would be the second.
Q. Do you have any idea what you may have told them the first time?
A. Well, I mean, my story didn't change. So whatever I told them the first time would be probably consistent with what's here.
Q. It says he -- then we go down. It says "He did see Tillman at the party shop earlier that afternoon. Said he did not see Tillman pick anybody up on Walcott. David Whaley says he was out with brother and that he was probably working out at" -- is that Living Well on Garners Ferry Road?
A. Yes, sir.
Q. "Does not hang out at party shop. Did not see Tillman pick up anybody on Walcott." Did they talk to you and your brother together?
A. No.
Q. They spoke to you separately?
A. Yes, sir.
Q. Now in looking at this, it says "date completed" at the bottom "12/31/88, Page 1 of 1." You didn't sign this, did you?
A. No.

Q. So this isn't a statement in the fact what we think of when we think of a statement.

A. No.

Q. Did you ever give a written statement to any officer?

A. I -- I thought I did because they picked me up twice. The first time they came to get me and then after they spoke with Gordon and Scotty, they came back to pick me up. So I was -- I was taken down there a couple of times.

Q. So you think you may have given a written statement, but you're not sure?

A. Yeah. Yes, sir.

Q. Now, of course, I've interviewed you before we're sitting here talking today. And is this everything that you know about this case that's written in this investigative report? And that's a yes or no question; then we'll get into details here in a moment.

A. Ask the question again.

Q. Sure. Everything that's written here is -- this officer's entitled this "investigative report." Is that everything that you know about --

A. No.

Q. Do you remember -- you testified at Mr. Tillman's

trial, right?
A. Yes, sir.
Q. And do you remember that? I know it's been a long time ago, but you remember being there and testifying?
A. Yes, sir.
Q. I'm going to show you another document that we're going to go ahead and mark Petitioner's Exhibit 2.

[MARKED FOR IDENTIFICATION AS PETITIONER'S EXHIBIT NO. 2.]

Q. And before you take a look at that, I'll go ahead and tell you that this is a page from the transcript which is the written account of what happened at the trial, just like Madam Court Reporter is doing right now. There was a court reporter at Mr. Tillman's trial and she typed out or he typed out everything that was said over the course of that trial, and this is an excerpt from that trial. Okay?
A. Yes, sir.
Q. So if you would, I want you to just take a look at this, and I'm going to kind of walk you through it, because it is a little disorienting if you're just looking at it and don't know what it is. But if you look at it, if you see, there's some numbers

going down the left side of this page. If you look at No. 7, it says "Herman Whaley, after being duly sworn by the clerk, testifies as follows." Now is that you --

A. Yes, sir.

Q. -- who they're talking about?

A. Yes, sir.

Q. And it says "Direct examination by Mrs. Shealy." Do you see that?

A. Yes, sir.

Q. Do you remember who Mrs. Shealy was?

A. Not for sure.

Q. Could she have been one of Mr. Tillman's lawyers?

A. Could be.

Q. Now, I'm sitting here looking at this. And if you would, go ahead and just to yourself read through Line 11 down through Line 22.

(The witness complies.)

A. Okay.

Q. Now it says at Line 11, "Mrs. Shealy," it says question: "Mr. Whaley, where are you living at this time?" Answer: , Columbia." And you were telling her where you lived; she asked you that.

A. Right. Yes, sir.

Q. And then she asked you "Let me ask you a question. Did you ever see Ron Tillman pick up a boy on Walcott Street around 8:30 on December 26th, 1988?" And you said "No, I can't say I saw that." She asked you that, right?

A. Yes, sir.

Q. And is that a correct statement?

A. No. Yes, it's correct, but the question is misleading.

Q. Okay. Why is it misleading?

A. Because none of this took place off -- on Walcott.

Q. And when you say "this," you're referring to what your understanding of where the crime occurred?

A. Where -- where they're saying pick -- pick some -- pick the boy up off of Walcott, we were never on Walcott.

Q. And there's a question that says "Did you ever tell Hayes Malloy that you did?" And you said "No." Is that right? Well, is that what she asked you?

A. Right. That's what she asked me.

Q. And then by Mrs. Shealy, she tells the Court "I have no further questions. Answer any questions the Solicitor has." And then the Solicitor, as Mr. Morton, "No questions, Your Honor." So during this trial, while you were called to testify, you

answered 1, 2, 3 questions.
A. Right.
Q. You were not asked any other questions.
A. No, sir.
Q. Do you recall that Mr. Tillman was represented by a gentleman, a lawyer named Jack Swerling?
A. Yes, sir.
Q. Are you familiar that Jack Swerling is a lawyer in Columbia?
A. Yes. Yes, sir.
Q. Did you ever meet with Mr. Swerling or Ms. Shealy or any lawyers affiliated with Mr. Swerling or any of his investigators prior to Mr. Tillman's trial?
A. Yes, sir.
Q. Who did you meet with?
A. I can't remember.
Q. Do you know if it would have been Mr. Swerling or if it would have been an investigator?
A. Well, both an investigator and Mr. Swerling.
Q. Do you know about how many times you met with them?
A. I can't recall.
Q. Do you think it was more than once?
A. Yes.
Q. More than five times?
A. I -- I can't recall.

Q. Do you know where you would have met with them?
A. At his office, across the street from the courthouse.
Q. If you can remember, do you know what you discussed with them when you met with them?
A. I can't remember. It's 25 years ago. I just -- I can't be specific, you know, what -- what -- I'm sure it was about the case, but I can't -- I can't recall to tell you exactly what was discussed.
Q. Now as I've stated earlier when we started this deposition, I was appointed to represent Mr. Tillman and I was directed to interview various witnesses, and you were one of those witnesses I was directed to interview on Mr. Tillman's behalf. And you and I have actually spoken before back in February; do you recall that?
A. Yes, sir.
Q. And as you stated and as you alluded to earlier, you may have some more information than what is in this statement and information than what is in marked as Exhibit 2, your trial testimony, those three questions that you were asked. You may have more information than what is contained in there; is that right?
A. Yes.

Q. And now tell me -- and you understand that this is a deposition, that you're under oath today and sworn to tell the truth, just like you did at trial. You understand all that, correct?

A. Yes, sir.

Q. Now tell me, what would your testimony have been at trial, had you been asked other questions as far as your knowledge of what you saw on December 26th, 1988?

A. Well, if you go back to this first statement when they talk about we left -- I guess this is Exhibit 1 -- where it says "After Scotty left, we went to the Boogie's Grill on Zion Chapel [sic] Road around six." Okay, at that time, we left around six o'clock to go to Boogie's. And Ronald was working in the liquor store. He ran the liquor store, and they close at seven. So when they said the guy, I think Donald Sutton, he didn't get in the car with Ronald because Ronald was still working in the liquor store. And it was around six o'clock and the liquor store closes at seven.

Q. So you're saying that -- says you left around six to go to Boogie's. Where were you?

A. Oh, we're actually -- all right, that goes back to -- excuse me, it's another question where -- all

right, when it speaks on -- talk about Walcott Street here, "Did you see Ronald Tillman pick up a boy off of Walcott." Walcott's two -- two -- two -- three blocks over. All this -- this incident started at whatever the address is on -- on Shop Road and Sands Street. Walcott's never in -- that's why when they asked me the question about Walcott, I just said "no" because nothing -- no -- I was -- I wasn't even on Walcott Street, so I couldn't see anybody because I wasn't there.

Q. So what time were you at the party shop on December 26th, 1988?

A. It -- it was around six.

Q. What time did you get there?

A. I can't -- I -- I don't know, maybe five, you know, because we -- we was drinking. It's Christmastime, so everybody's just drinking.

Q. So y'all are partying --

A. Yeah.

Q. -- it's Christmas.

A. Yeah.

Q. So you got there at five. Who were you with?

A. Alex -- I meant Gordon English and Scotty English.

Q. And were y'all hanging out in the party shop? Or were y'all outside? Where were you?

A. Well, kind of in and out because it's a pool hall and you, you know, it's like a hangout spot back in those days.

Q. I'll show you another document. We'll try this --I don't know how well this is going to work, but let's go ahead and mark this Petitioner's Exhibit 3.

[MARKED FOR IDENTIFICATION AS PETITIONER'S EXHIBIT NO. 3.]

Q. If you would, take a look at that. That's an overhead map view that I downloaded off of Google Maps, specifically with the address 1746 Shop Road. And just take a second and get yourself oriented with that.

MS. JAMESON: If we could quickly, when was this printed? Is this a map from --

MR. BOOZER: Oh, it's at the top right, 4/1/15.

MS. JAMESON: Do you know when Google took the satellite image?

MR. BOOZER: Megan, I cannot tell you that.

MS. JAMESON: Okay. Just for the record, I would object to this, based on we don't know if it's the same as it looked back in 1988.

Q. Mr. Whaley, you're pretty familiar with that area, correct?
A. Yes, sir.
Q. Looking at this, can you tell from this overhead shot that that's an area that we're talking about where the party shop was located?
A. Yes, sir.
Q. Now, of course, over the course since 1988, certainly some things, I guess, would change. But looking at it, are you able to pick out where the party shop is on that map?
A. Yeah, it's right here.
Q. And let me do this because --
A. It's where you have the address, where the address is, 1746 Shop Road.
Q. Hang on one second for me. Because she's having to write everything down, it won't make sense if we're just saying "Here it is." I want you to draw a circle around where the party shop is located on that map.

(The witness complies.)

Q. And you've actually circled, I guess, sort of the icon that's there on this map?
A. Yes, sir.
Q. All right now, is that where the party shop was

located in 1988?
A. Yes, sir.
Q. I'm not talking about people who own it, but the physical building of the party shop, that's where it was in 1988?
A. Yes, sir.
Q. Now tell me where you and Scott would have been. Would y'all have been in front of the party shop?
A. Yes, sir. Right in the front.
Q. I want you to draw for you where you were located. Just draw an "H" for me.

(The witness complies.)

Q. All right now, who else did you see, if anybody, out there that day while you were at the party shop?
A. Just in specifics that I can -- it was so many people out there that particular day. Donald Sutton, the victim.
Q. He's the victim.
A. Yes, sir.
Q. Who else did you see?
A. Hayes Malloy, my friend Gordon and Scotty, myself.
Q. Where did you see Donald Sutton and Hayes Malloy on that map?
A. Would be over here. (Witness indicating.)

Q. So you're pointing -- and I'm going to stand up for a moment -- you're pointing over there, it looks like that there's a street that runs perpendicular to Shop Road called Sands Street.

A. Right. And just -- yeah.

Q. Is that how it looked in 1988, to your knowledge?

A. Yes, sir.

Q. What is it that you're pointing to across the street?

A. This is where -- this area right here in front of this building is where everybody, you know, if it's not enough parking, we'd just this as a parking space. And it would be -- and I saw Hayes and Donald over there.

Q. Where did you -- let's do this for a moment. Let me show you another photograph, and we're going to mark this Petitioner's Exhibit 4.

[MARKED FOR IDENTIFICATION AS PETITIONER'S EXHIBIT NO. 4.]

Q. If you could take a look at that, and I'll tell you that this is also an image from Google Maps or Google Earth that I printed on April 1st, 2015, it looks like at almost 11 a.m. of 1746 Shop Road. What is that a photo -- or what is that --

A. That's the party shop.

Q. Is that how the party shop looked in 1988?
A. Yes, sir, I guess pretty much. It still looks like that.
Q. So what you were looking at on the overhead map that's marked as Exhibit 3, that's an image of the front on Exhibit 4?
A. Yes, sir.
Q. Mark on this exhibit for me with an "H" -- strike that, back up. You just said a moment ago that on Exhibit 3 you were pointing to an area that's across the street on Sands and Shop Road that you said you saw Donald Sutton and Hayes Malloy?
A. Yes, sir.
Q. Did you see them out there interacting?
A. I thought they got in the car together.
Q. So there was a car also over there?
A. Yes, sir.
Q. Whose car was it?
A. Now, I'm not sure whose car it was.
Q. What did the car look like, if you remember?
A. I can't remember.
Q. But it was a car.
A. Yes, sir.
Q. Wasn't a truck?
A. No.

Q. Wasn't a motorcycle?
A. No.
Q. Mark on the Exhibit 4 -- now, what's that area over there called across the street? Did it have a name then?
A. It -- it was a box company.
Q. A box company?
A. Yeah.
Q. What did they do, make boxes?
A. Make -- yes, sir, make cardboard boxes.
Q. You know if they still do that there?
A. I'm not -- I don't know.
Q. Mark over there on that side where you would have -- with an "HM" where you would have seen Hayes Malloy and a "DS" where you would have seen Donald Sutton.

(The witness complies.)

Q. Where would the car have been? And just mark the car with an "X".

(The witness complies.)

Q. So you're at the party shop at this time and what you're telling me is that you saw Hayes Malloy and Donald Sutton over there by a car.
A. Yes, sir.
Q. Do you know what time that would have been?

A. It was prior to us going to Boogie's Grill.
Q. And what time do you think you went to Boogie's?
A. Around six.
Q. So do you think it was close to -- when you left Boogie's, where did you see Hayes Malloy and Donald Sutton? Or when you left to go to Boogie's, where did you see Hayes Malloy and Donald Sutton?
A. Right here, where the -- where the box company, where the car was.
Q. Are you pointing to generally where the X is on --
A. Yes, sir.
Q. -- that, Exhibit 4?
A. Yes, sir.
Q. What, if anything, did they do as you left to go to Boogie's?
A. I don't know. I can't be honest to say.
Q. Did you see them get in the car or anything like that?
A. I thought they got in the car, but I can't -- yeah, they -- I think they got in the car.
Q. Did they drive off anywhere? Or do you think they were just sitting in the car?
A. I don't know. I can't -- because I left.
Q. Where was Ronald Tillman at that time when you left?

A. He was working the counter at the liquor store.
Q. **Did you talk to Ronald while he was working the counter at the liquor store?**
A. At some point that day, I had.
Q. **Do you recall anything about what conversations y'all would have had?**
A. No, sir.
Q. **Do you know when he was getting off that evening?**
A. No. No, sir.
Q. **So you left at around six, and Donald Sutton and Hayes Malloy may have been in the car at that point, but y'all left and went -- you and your buddies left and went to Boogie's. And is that -- and that's it?**
A. Yes, sir.
Q. **Now let me ask you this, because there's a statement -- or we won't call it a statement because it's an investigative report and we've marked that as Exhibit 1. And then you've got trial testimony where you were asked three questions. Did anyone ever ask you any of those questions when you were being interviewed?**
A. No, sir.
Q. **Did you ever tell investigators or any attorneys that may have been representing Mr. Tillman at the**

time, that you saw --

A. I didn't volunteer any information. They didn't ask me any -- any questions, and so I didn't -- they didn't ask me anything about it, and so --

Q. You were only telling them what they -- you were just responding to their questions.

A. Yes, sir.

Q. And no one at any time asked you any of these questions.

A. No, sir.

Q. And you were a young man at that time, right?

A. Yes, sir.

Q. Mr. Whaley, that's all the questions I have for you at the moment. Please answer any questions that the Attorney General might have for you.

CROSS-EXAMINATION

(By Ms. Jameson)

Q. Just for the record, I'm Megan Jameson from the Attorney General's Office. I'm going to start kind of in reverse with the line of questioning you were just answering from Mr. Tillman's counsel. You testified that you didn't give the version of events to anyone you talked to back in 1988, correct?

A. Yes, ma'am.

Q. So your testimony is that you met with Jack Swerling more than once and he never asked you what happened?

A. I'm sure he asked what happened. But the questions that they were asking -- like I said, when you go back to Exhibit 1 -- they're asking me questions about something on Walcott Street. And I thought that they would know more about what's going on than I did, because I didn't want to be a part of it. And so when they asked me did I see anybody on Walcott Street, I just said "No" because I was never on Walcott.

Q. Mr. Whaley, you understand that Petitioner's No. 1 is the statement from law enforcement, that you gave to the Richland County Sheriff's Department. I'm asking you --

MR. BOOZER: Object to form.

Q. You also spoke to Mr. Swerling, correct?

A. Yes.

Q. You were interviewed by him and his investigators. You couldn't recall who, but --

A. Yes, ma'am.

Q. -- you recalled it was Jack and definitely an investigator --

A. Yes.

Q. -- some time between one or more times.
A. Yes, ma'am.
Q. And your testimony is that Mr. Swerling only asked you what happened on Walcott Street. He didn't ask you to just "overall give me your knowledge."
A. At the time, it was a young man that had been killed in the neighborhood. And you just -- everyone wanted to just stay as far away from it as -- as you possibly could. And when he came to ask me these questions, it was -- you just -- you try to answer them to the best that you could, by not putting yourself at jeopardy.
Q. Do you recall what kind of questions you were asked by Mr. Swerling and his investigators?
A. Not specifically, no, ma'am.
Q. And that was 27 years ago, correct?
A. Yes, ma'am.
Q. And independent from being interviewed by Mr. Swerling, you were interviewed by the Richland County Sheriff's Department twice, correct?
A. Yes, ma'am.
Q. And you testified previously that you think you gave a written statement.
A. Yes, ma'am.
Q. Do you recall when that was?

A. Well, if I could tell you -- the 31st, that was -- if -- I could tell you which one was first and which one was second because they picked me up on a Saturday morning for the second time. The second time they came to get me it was a Saturday morning, because my aunt was cooking breakfast. I remember that.

Q. You remember that from 27 years ago.

A. Yes, ma'am.

Q. Do you recall what you were doing on the Saturday morning after Christmas 17 years ago?

A. No, ma'am.

Q. Seven years ago?

A. No, ma'am.

Q. Twenty-five years ago.

A. That particular reason I can recall that is because it was a lot going on and someone came to pick me up from my house. That was -- that was one of my first encounters with the law.

Q. And this Saturday was the second time you were interviewed.

A. Yes, ma'am.

Q. Do you recall who took this signed statement from you?

MR. BOOZER: Object to form.

A. No, ma'am.
Q. Do you recall how many officers interviewed you?
A. How many of them was in the room when they interviewed me?
Q. Uh-huh.
A. Two.
Q. Do you recall what they looked like?
A. One was black and one was white. The black guy was from Winnsboro. I remember that because he told me that.
Q. And you don't recall their names?
A. No, ma'am.
Q. If you'll look at Petitioner's No. 1, the statement --
A. Yes, ma'am.
Q. -- it says on here that the investigating officer went to .
A. Yes, ma'am.
Q. Which you testified was your parent's address, correct?
A. Yes, ma'am.
Q. Did law enforcement pick you up and take you down to the sheriff's department? Or did they talk to you at your parent's house?
A. Took me to the sheriff's department.

Q. Both times.

A. Yes, ma'am.

Q. How long did you talk to law enforcement each time?

A. I don't know. I'm not for sure. But the second time it was that morning until it was maybe lunchtime or better, something like that, by the time they let me out of there.

Q. And how about the first time?

A. I can't really recall how long I was there the first time as well.

Q. More than an hour?

A. Yes, ma'am.

Q. Was your brother taken down to the station with you both times?

A. No. Not -- I was never -- maybe my brother -- maybe we was together at the first one because the second time I went by myself, because -- and I can't understand it. I don't -- I don't know. I can't remember how that got mixed up because they said I changed my story here. But the second time they came to get me, this is what they were saying, he said "You didn't tell us the truth." I didn't tell them everything, or something of that nature.

Q. Do you have any independent recollection of this interview, other than what's contained in this

document?

A. No, ma'am.

Q. So the testimony you're giving during this deposition is based off of this document, not any independent knowledge you have from 27 years ago.

MR. BOOZER: Object to form.

A. No, no, no. Rephrase what you're saying. I want to make sure I understand what you're saying. You're saying "independent knowledge," that -- just what I know of the case or something of that nature; is that what you're asking me?

Q. No. This statement, what time it happened, the date it happened, are you remembering that independent of looking at this? Or has looking at this helped you to recall those things? Or can you recall anything beyond this document?

MR. BOOZER: Object to form.

A. I'm not understanding what you're saying.

Q. Did you recall -- when did you first see this document?

A. Just now when you saw it.

Q. It wasn't provided to you when you talked to Mr. Tillman's counsel in February?

A. No.

Q. Did you know what date you were interviewed --

A. No.
Q. -- before looking at this document?
A. No.
Q. Did you know you were interviewed with your brother one of the two times, beyond looking at this document?
A. No.
Q. Did you know you were interviewed twice, beyond looking at this document?
A. Yes.
Q. You testified you think you gave a written statement, correct?
A. Yes.
Q. Do you recall that independent from looking at this document and seeing that it says your story changed?
A. No.
Q. How long have you known the Tillman family for?
A. Thirty-plus years, I guess. Yeah, over 30.
Q. Are you related to the Tillman's in any way?
A. No.
Q. Did you ever tell Jack Swerling or any of the defense team that you were cousins with Ronald Tillman?
A. Could have.

Q. Why would you have told them that?
A. Because we're not related but, you know, people -- you know, that's your cousin because his -- some married on your other -- some other side, but it's not actually your cousin.
Q. Do you use the term "cousin" to refer to someone or a family that you're close with, that you know quite well?
A. Yes, sometimes.
Q. So in 1988, how would you characterize your relationship with the Tillman family?
A. Pretty close.
Q. Did you know Ron's father well?
A. Yes, ma'am.
Q. What's his name?
A. Ronald Tillman.
Q. Ronald's father. Is it Thomas?
A. Tillman. His -- his dad's name is the same; is it -- I thought --
Q. I'm asking you.
A. His dad name was -- well, I always called him "Mr. Tillman."
Q. You don't recall what Mr. Tillman's first name is, though.
A. I'm thinking his -- his first name is the same as

his dad's, but no, no.

Q. And you met -- how did you meet the family?

A. After they purchased the party shop.

Q. When did they purchase the party shop? A rough estimate?

A. Maybe '85, '86, somewhere like that.

Q. So you'd only known the Tillmans for approximately two to three years at the time of Donald Sutton's death.

A. I guess.

Q. And you were close enough with the Tillmans to refer to them as your cousins.

A. Okay. They were referred to as cousins because my dad's sister -- they were -- his -- my dad's sister, her husband was related to them. And they're -- I mean that -- so he would be considered cousin to my aunt, but he actually no cousin of mine. And so that's where the cousin came -- thing came in.

Q. So you actually know the Tillmans beyond the party shop. You know them through more of a distant family relationship.

A. Not before they came to the party shop.

Q. So you think you first met them around '85 or '86?

A. Yes, ma'am.

Q. Are you familiar with any other members of the Tillman family beyond Ronald and his father?

A. Well, yes and no. I know his moms, but not like --

Q. Anyone else?

A. No, ma'am.

Q. When was the last time you spoke to anyone in the Tillman family?

A. I called his dad and told him that I would be in town doing this, what I'm doing here today.

Q. How long ago was that?

A. Probably two weeks ago.

Q. How often do you speak to the Tillmans?

A. Holidays, or if I go down toward the -- go down to the party shop, in that area. But I don't -- I don't frequent that area anymore.

Q. Are you still pretty close with the Tillman family?

A. I mean, we're friends.

Q. Do you call all of your friends on holidays?

A. I never called them on holidays.

Q. You don't call the Tillmans on holidays.

A. No. I said I'll see them at holidays when I go down to the party shop. If I'm -- you know, it's holidays you go down in the area you grew up at because everybody's in town, or something of that nature. But I don't call him and wish him Happy

Thanksgiving.

Q. When was the last time you spoke to Ronald?

A. I don't know.

Q. A rough approximation?

A. Last year sometime.

Q. 2014?

A. Yes, ma'am.

Q. Did he contact you?

A. Yes, ma'am.

Q. What did he contact you about?

A. I mean, he -- well, he was actually telling me that he was trying to go and work on his case on this, what you're doing here, what we're doing here today.

Q. Did he ask you if you'd be willing to testify in his PCR hearing?

A. Yes, ma'am, I think he did.

Q. What else did you talk to Ronald about?

A. That's pretty much it.

Q. What about the case did you discuss with Ronald?

A. Nothing specific.

Q. So your testimony is that he called you, told you he was working on his case, asked you to testify and nothing else was discussed?

A. Well, I mean, he didn't -- it's like you -- I don't

know, you're trying to turn a knife in me. He didn't give me -- he didn't tell me what to come in here and say, all right. He -- okay, we talked about that it's another person's name in here, where he's -- where that particular person's at.

Q. What person?

A. I can't remember.

Q. You don't recall what other person you discussed with Ronald last year on the phone about this case.

A. Yes, I do, okay.

Q. What person?

A. On Exhibit 2, the name mentioned in Question 17.

Q. Hayes Malloy?

A. Yes, ma'am.

Q. So in 2014, you discussed Hayes Malloy with Mr. Tillman.

A. Well, I mean, just where -- I mean, yes, his name did come up.

Q. How did it come up?

A. I can't recall.

Q. You can't recall things from a discussion last year with Mr. Tillman.

A. Can I plead the Fifth? That's what I'm trying to do.

Q. If you could please answer the question.

A. Ma'am?

Q. If you could please answer the question. We're not in court. There's no judge to rule on.

MS. JAMESON: Can we go off the record for a second?

(Off the record.)

EXAMINATION CONTINUES:

Q. Can you please tell me what you discussed with Mr. Tillman in 2014 in regards to Hayes Malloy?

A. In specifics?

Q. Yes.

A. Okay. Some of the -- some of the -- some of the -- that he's -- he's incarcerated for some other acts that has been committed, that he's committed, or whatever, and apparently he's at Lee County. That's where he's presently.

Q. Did you bring up Mr. Malloy? Or did Mr. Tillman bring up Mr. Malloy in this conversation in 2014?

A. I can't recall.

Q. Did Mr. Tillman volunteer that Mr. Malloy was in Lee County? Or did you ask?

A. I can't remember. I -- I got a cousin down at Lee County as well, so --

Q. How long have you known Hayes Malloy?

A. I didn't know him that well. I mean, just from,

you know, being around back in '88.

Q. Do you recall when you met him or knew of him for the first time?

A. No, not for sure.

Q. Can you give an approximation?

A. Probably in '83.

Q. Have you known Mr. Malloy for a longer than you've known the Tillman family?

A. Probably.

Q. And how do you know Mr. Malloy?

A. We grew up in the same area. Well, I mean, I grew up there and then he -- they moved there.

Q. When is the last time you spoke with Mr. Malloy?

A. I have no earthly idea.

Q. Have you spoken with him since this trial?

A. No, ma'am.

Q. Do you know anyone in his family?

A. No, ma'am. I moved away.

Q. Where did you move to?

A. What year was that? '88? Charleston.

Q. When did you move to Charleston?

A. Before Hugo.

Q. An approximate year?

A. That was '88.

Q. So at the time of the trial --

A. They came to get me. I was in Charleston at the time.

Q. Who came to get you?

A. Somebody. One of Jack's people. They got in touch with my -- that's when they got in touch with me, I was actually -- that's where I was at when they -- I was living in Charleston. Moncks Corner, actually, to be specific.

Q. Why did you move to Moncks Corner?

A. Go to work.

Q. Where were you working at the time?

A. I was working for engineering firm out of Baltimore. They had a project they had landed in Charleston, and I was working on that project.

Q. I just want to be clear on dates here. Your testimony is that you moved away to Charleston in '88.

A. Sometime, yeah.

Q. So at the time of Donald Sutton's murder, you weren't living in Columbia; you were living in Charleston.

A. This '88 number, is that -- this is when it actually -- this is the -- okay. Okay, you're getting me confused, but I can explain it. Now when this actually happened. When the trial came

up, this is where I was living when the trial -- whenever the trial was, I was in Charleston.

Q. So what year did you move to Charleston?

A. This happened in -- the first of the -- this is December '88. So Hugo came in '88, '89. Prior to Hugo. The same year Hugo came is when I moved to Charleston.

Q. You don't recall an exact date of when you moved to Charleston for employment.

A. I need to get my resume. No, ma'am, I can't.

Q. But that was after you were interviewed twice by police, correct?

A. Yes, ma'am.

Q. When were you first contacted regarding Ronald's post-conviction relief action?

A. That's what we're doing here now?

Q. Yes. About his case. Who was the first person who contacted you and when was that?

THE WITNESS: (To Mr. Boozer) You contacted me, was that last year or the first of this year or something.

MR. BOOZER: I can't testify.

A. It was some time this year. When I came -- I -- I can't remember exactly. I just can't remember exactly, ma'am. It was some time this year.

Q. But you did speak to Ronald about his case in 2014.
A. Yes, ma'am. That he was trying to get -- yes, ma'am.
Q. Before that, had Ronald or anyone else in his family contacted him about his case?
A. Contacted me?
Q. Yes.
A. Yes.
Q. When was that?
A. I don't know, but it was earlier last year that he said he contacted me and he asked me had a lawyer -- it was somebody -- it's a lawyer that was supposed to get in touch with me or something -- or something on his case. That lawyer never contacted me, never did anything or whatever. And at some point, this is when Mr. Boozer contacted me.
Q. Did Mr. Tillman's father or mother ever contact you regarding his case?
A. No, ma'am.
Q. After talking to Ronald in earlier 2014 and later 2014 about his case, have you talked to him about the case any other times?
A. No, ma'am.

MR. BOOZER: Just speak up for the court reporter.

A. No, ma'am.
Q. When was the last time you spoke to Ronald?
A. Some time last year.
Q. What did Ronald tell you about his case during those conversations in 2014?
A. He said that he was trying to get appeal or whatever -- what -- whatever this is, and -- and he was working on it. And I gave -- he's given the lawyer my name and number so he could -- they could contact me and --
Q. Do you have a copy of those exhibits in front of you?
A. Yes, ma'am.
Q. You testified that -- if I could see No. 4 -- you drew letters for where you think Hayes Malloy and Donald Sutton were standing, correct?
A. Yes.
Q. What were they doing?
A. I have no idea.
Q. Do you know what time you saw them stand together?
A. Around six.
Q. What time did you get to the party shop that day?
A. I don't know, maybe around five'ish or so, something like that.
Q. Do you recall being asked by Mr. Swerling or his

investigator what time you got to the party shop?

A. I don't recall.

Q. Did you ever tell anyone you got to the party shop mid-morning?

A. I don't -- I don't think so because I don't think I was at the party shop mid-morning -- that's a bit early -- but go ahead.

Q. Were you at the party shop at any time earlier in the day?

A. Possible. Yes, ma'am.

Q. What time?

A. I'm not sure. It's a block from my house. So if I left my house, I could stop by, so --

Q. How many times a day did you stop by the party shop usually? More than once?

A. Yes, ma'am.

Q. More than twice?

A. Probably.

Q. More than three times?

A. I can't say.

Q. Do you recall how many times you were there the day of Donald Sutton's murder?

A. No, ma'am.

Q. More than once?

A. Yes, ma'am.

Q. Do you know what time you got there the first time and what time you left?

A. No, ma'am, I don't.

Q. But you know you left for the final time around 6 p.m.?

A. Yes, ma'am.

Q. And your testimony is that Ronald had to work until seven that day?

A. Yes, ma'am.

Q. How do you know that?

A. Wasn't anybody else there to work the liquor store.

Q. But you left at six, correct?

A. Yes, ma'am.

Q. So you don't know what happened after six.

A. No, ma'am.

Q. You testified that Donald Sutton and Hayes Malloy were by a car, correct?

A. Yes, ma'am.

Q. And you think they might have gotten into the car together, but you're not sure.

A. Right.

Q. What type of car?

A. I have no idea.

Q. Was it a truck?

A. No.

Q. Was it a sedan?
A. (Witness pauses.)
Q. Was it a sedan?
A. No, ma'am.
Q. Was it a station wagon?
A. It wasn't a station wagon. I --
Q. What type of car was it?
A. I don't know.
Q. What color car was it?
A. I don't know. I -- I can't recall.
Q. You don't recall the make or model of it.
A. No, ma'am.
Q. Can you give any description of the car?
A. No, ma'am.
Q. Where were Donald Sutton and Hayes Malloy standing in relation to this car?
A. Beside the car is all I could tell you.
Q. Were the doors open to the car?
A. I don't recall that. I don't recall.
Q. Then what makes you think you saw them get into the car?
A. When they went over to get in the car, I don't know if they got in it or not because I got in the car and left. That's when I went to Boogie's Grill. So I can't tell you if they got in it or they

didn't.

Q. Did they walk from the party shop to the car? Or were they already standing by the car?

A. They walked from the party shop.

Q. Was it just the two of them?

A. Yes, ma'am.

Q. How many other people were at the party shop?

A. I have no idea.

Q. More than five?

A. Yes, ma'am.

Q. More than ten?

A. It's possible.

Q. How long were Donald Sutton and Hayes Malloy outside by a car?

A. I don't know.

Q. More than five minutes?

A. I -- I don't know, ma'am.

Q. Were they talking?

A. Yeah. Yes, they appeared that they were talking.

Q. Did it appear to be a heated exchange?

A. I didn't -- I didn't detect that.

Q. Were you close enough to hear?

A. No.

Q. How far away were you standing from Donald Sutton and Hayes Malloy?

A. If you look, I was --
Q. Can you draw on the map where you were located with your initials on Petitioner's No. 4? Not the map, the picture of the party shop. Can you draw where you were standing? Put your initials where you were standing.
(The witness complies.)
Q. So it appears you were standing close to the party shop door, correct?
A. Yes, ma'am.
Q. And it appears that from the HM and the DS listed, that Hayes Malloy and Donald Sutton were across the side street to the right of the party shop?
A. Yes, ma'am, that's where it's Sands Street, over at this building here.
Q. When was the last time you were by the party shop recently?
A. I know I was there July.
Q. Of 2014?
A. Yes, ma'am.
Q. Is the party shop still open?
A. Yes, ma'am.
Q. Does the Tillman family still own it?
A. Yes, ma'am. To the best that I know.
Q. And if you'll look at Exhibit No. 4, is there

anything on here that indicates what date this picture was taken?
A. It says one -- I meant 4/1/15.
Q. If you'll look under the address.
A. November 2014.
Q. So more than 25 years after the day Donald Sutton was murdered.
A. Yes, ma'am.
Q. And your testimony is the party shop looked like that 25 years ago.
A. Yes, ma'am.
Q. What type of car was Ronald driving at the time?
A. I can't recall.
Q. Did Ronald have a car?
A. Yes, ma'am.
Q. Do you recall the type of vehicle? Was it a truck?
A. No.
Q. A sedan?
A. Car.
Q. Did you have a car at the time?
A. Yes.
Q. What kind of car did you have?
A. Buick Regal, green, t-top.
Q. What time did you first see Donald Sutton and Hayes Malloy talking on the day of Donald Sutton's

murder?

A. I guess it was all around that six'ish time, prior to me getting ready to leave.

Q. Were they talking -- strike that. Your testimony is you arrived -- at least for that time, whether it was the second or -- strike that.

A. Third.

Q. Third time. So you recall it was the third time --

A. No.

Q. -- you were there.

A. I said second or third; I don't know.

Q. You got there at 5 p.m.

A. Yes.

Q. So you were for approximately an hour before you left around 6 p.m.

A. Yes, ma'am.

Q. What was Donald doing when you got there?

A. I don't know.

Q. What was Hayes doing when you got there?

A. It wasn't where I was trying to see what everybody else was doing because I was -- I was drinking. It was like --

Q. How much were you drinking?

A. I don't know, ma'am. I was drinking all day.

Q. What time did you start drinking that day?

A. I don't know. I can't -- probably around noon'ish or something.

Q. So you had been drinking for approximately five hours by the time you got there.

A. It could have been three; I don't know. I just don't know.

Q. What were you drinking?

A. I don't know, what was I drinking then? I'm down to Bud Light, or it could have been the regular Bud, or was it Seagrams; I don't know.

MR. BOOZER: Make sure you speak slowly and up so she can hear you.

A. I can't remember. I -- I don't recall.

Q. Was it liquor?

A. I don't recall.

Q. What was your drink of choice in 1988?

MR. BOOZER: Object to form.

A. You waiting on me?

Q. Yeah. What did you like to drink around then?

A. I was young. It -- it really didn't matter.

Q. Were you still drinking when you got there at five?

A. It's possible, yes, ma'am. And it's possible I wasn't, but I can't recall. Yeah, I'm sure I was drinking. I was drinking.

Q. Was Donald Sutton drinking?

A. He wasn't with me. We didn't run in the same social circle.

Q. When did you -- did you know Donald Sutton at the time?

A. Just in passing.

Q. How had you met him?

A. Ma'am?

Q. How had you met him?

A. He was friend's of Ronald's.

Q. Was he good friends with Ronald?

A. I thought so.

Q. What do you mean by you thought so? Can you elaborate what you mean by that?

A. (No response.)

Q. I need you to answer, sir.

A. I said I thought so.

Q. To the best of your knowledge, in 1988 they were close.

A. Yes, ma'am.

Q. Was Hayes Malloy drinking that day?

A. It's party shop. Everybody comes there drinking.

Q. So it's a yes, Hayes Malloy was drinking.

MR. BOOZER: Object to form.

A. I can't say that he was, but it's the party shop. Everybody that goes there, we -- that's what we

normally do. I know that's what I go to a party -- when I go there, I'm drinking.

Q. What was Hayes doing when you got there at five?

A. I have no earthly idea. I don't recall.

Q. Do you recall what Hayes was doing the hour between when you saw him and when you left?

A. Ma'am?

Q. You didn't recall what he was doing when you got there at five, correct?

A. Right.

Q. Do you know what he was doing during that hour when you were at the party shop?

A. I think he was inside.

Q. Where were you?

A. Everywhere.

Q. Can you be a little more specific for me?

A. I was in and outside. I -- I mean, I was just busybody.

Q. Pardon?

A. I was a busybody.

Q. If we could look at the map, which has been marked at Petitioner's No. 3 for a second. Think you've got a copy right there. You marked with an "H" where you were at the party shop? Or is that for where Hayes Malloy was?

A. That's where I was at.
Q. The "H" is where you were.
A. Uh-huh.
Q. And you testify -- you recall on Petitioner's No. 1 that there's mention of a Walcott Street, correct?
A. Yes.
Q. Can you identify for me where on Petitioner's No. 3 Walcott Street is?
A. Walcott's two blocks over, yes.
Q. Could you circle that for me on --
A. On the map?
Q. -- on the map?
A. Walcott Street?
Q. Uh-huh.
(The witness complies.)
Q. And does it also continue over Shop Road?
A. Ma'am?
Q. Does it continue over Shop Road? I know you've circled the top portion. Is it --
A. Oh, okay.
Q. The street runs through, correct?
A. Yes, ma'am. Yes, ma'am. Do I need to circle the whole thing?
Q. No. Just for the record, I wanted to identify. And you would say it's approximately two blocks

from the party shop --

A. Yes, ma'am.

Q. -- correct?

A. Yes, ma'am.

THE WITNESS: I got a ticket on my car.

Q. And you testified that you saw Hayes Malloy on Sands Street the day of the murder, correct?

A. Yes, ma'am.

Q. What time did you see him on Sands Street?

A. Well, I was leaving around six'ish. And I'm not being specific. It could have been 6, 6:30. But anywhere in that period of time, I saw him.

Q. On Sands Street.

A. Yes, ma'am.

Q. Was he by himself?

A. No.

Q. Was he with Donald the whole time you saw him --

A. No.

Q. -- on Sands Street? When did you see him with Donald?

A. I just saw them walking together from the party shop over, because I was out front. They just walked over to where the cars were, you know together.

Q. When did you first learn that Donald Sutton had

been murdered?

A. The next day, I guess.

Q. Who told you that he'd been murdered? Or how did you first hear about it?

A. Oh man, this is getting way out of -- I grew up in this neighborhood. Everybody in that neighborhood knew -- knew us. I'm never in trouble or anything of that nature, so every -- you know, my dad was preacher. I don't know who told me.

Q. You testified before you left at six, but then a moment ago you said it might have been 6:30. So you're not exactly sure what time you left.

A. No.

Q. Could it have been as late as seven?

A. No.

Q. If we could look at Petitioner's No. 2, your testimony from the trial. You testified you never saw anyone get picked up on Walcott Street, correct?

A. Yes. Yes.

Q. So your testimony is that you saw someone get picked up on Sands Street?

A. I can't say that -- I can't -- I didn't see nobody pick him up on Sands Street either. I saw them walking together toward the car, which was at the

box company across from -- on Sands Street from the party shop. I didn't see anybody get picked up on Walcott Street because I wasn't on Walcott Street.

Q. And around 8:30 p.m., you were at the -- what was the club's name?

A. Boogie's Grill.

Q. Boogie's Grill. So around 8:30, you were at Boogie's Grill, correct?

A. Yeah.

Q. What time did you get to Boogie's Grill?

A. I -- I can't be -- I can't -- 25 years ago, I can't tell you exactly what time I got to Boogie's Grill.

Q. Do you recall what time you left Boogie's Grill?

A. I -- I don't know. Maybe by nine, maybe. I don't know. Thinking maybe eight, nine.

Q. What did you do for the rest of the evening.

A. I was trying to sleep it off.

Q. So you were pretty intoxicated that day.

A. Yeah, just a little bit.

MS. JAMESON: One second.

(Brief pause.)

Q. Do you know what this -- you said Barnes Street is across Bluff Road, but it's close to the party shop and in the neighborhood, correct?

A. I guess.

Q. Do you know if Ron or anyone in the Tillman family has contacted your brother in regards to this case?

A. No.

Q. Did Ronald ask you to contact your brother in regards to this case?

A. No.

Q. Did Ronald ask you to contact anyone else in regards to this case?

A. No.

Q. When you were on the phone with Ronald last year in regards to this case, did you bring up Hayes Malloy? Or did Ronald bring up Hayes Malloy?

A. You asked me that. No, I don't recall.

Q. And to the best of your recollection, your only conversation about Hayes Malloy was where he's currently incarcerated.

A. Yes.

Q. Did law enforcement provide you a copy of your handwritten statement back in 1988?

A. No, they were very nasty. They didn't give me anything.

Q. Are you certain you gave a handwritten statement?

A. I'm not absolutely sure.

Q. What makes you think you did?

A. Because they came back and got me the second time.

I mean -- I -- I don't even know. And it's about right now is where I don't even care.

Q. Petitioner's No. 1, this is the second time you spoke to police, correct?

A. I guess.

Q. Have you contacted anyone else in regards to this case?

A. No.

MS. JAMESON: I don't have any further questions.

MR. BOOZER: No questions.

(Off the record.)

(Whereupon, the deposition concluded at 3:34 p.m.)

CERTIFICATE OF REPORTER

I, Lisa F. Huffman, Verbatim Court Reporter and Notary Public in and for the State of South Carolina, do hereby certify that I reported the deposition of HERMAN WHALEY, on Wednesday, the 13th day of May, 2015; that the witness was first duly sworn by me and that the foregoing 65 pages constitute a true and correct transcription of the said deposition.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript was thereafter sealed by me and delivered to LANCE S. BOOZER, ESQUIRE, The Boozer Law Firm, LLC, 807 Gervais Street, Columbia, South Carolina, who will retain this sealed original transcript and shall be responsible for filing same with the Court prior to trial or any hearing which might result in a final order on any issue.

In witness whereof, I have set my hand and seal this 26th day of May, 2015.

Lisa F. Huffman

Lisa F. Huffman, Court Reporter
My Commission Expires July 11, 2015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND RONALD S. TILLMAN, Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT **AFFIDAVIT OF JACK B. SWERLING**

Personally appeared before me, Jack B. Swerling, who being duly sworn states:

1. I was admitted to the South Carolina Bar in 1973.
2. My practice is almost exclusively dedicated to the defense of criminal cases on both the trial and appellate level.
3. I, along with Jennifer Shealy, represented Ronald Tillman in the above referenced murder trial.
4. I have previously testified in the Post Conviction Hearing held in November, 2013.
5. This affidavit is a supplement to my Post Conviction Relief testimony regarding Herman Whaley whose deposition was taken after the completion of the Post Conviction Relief Hearing.
6. Herman Whaley was a witness that had been identified in the case. My investigator, Sam Frierson (formerly of SLED), attempted to interview Mr. Whaley on May 16, 1989. Mr. Whaley told Mr. Frierson that he did not want to get involved.

7. As evidenced from the attached memo done by "Jim" (who was either my investigator or law clerk at the time), Mr. Tillman specifically wanted us to ask Mr. Whaley whether he ever told Hayes Malloy that he saw Tillman pick up somebody on Walcott Street. (Memo attached.)

8. Apparently, sometime prior to the trial, Mr. Whaley did speak with my associate Jennifer Shealy or myself (I cannot remember which one of us), because we decided to call him as a witness in the trial.

9. From the trial transcript, it appears that Ms. Shealy called Mr. Whaley for the specific purpose of refuting Hayes Malloy's prior statement that Mr. Whaley had told Hayes Malloy that he saw Ronald Tillman pick up a "boy" on Walcott Street. Mr. Whaley told us and testified at trial that he never saw that and never told Hayes Malloy that.

10. Since this trial was some twenty-five (25) years ago, I have no independent recollection of the discovery, evidence, or investigation that was done in this case except by reference to the trial transcript or my case file.

11. By 1990, I had handled and tried numerous murder cases as well as other serious felony cases. If I or Mr. Shealy were aware of and thought any additional testimony was warranted, we would have pursued it. Apparently, the questions that were asked are the questions we felt were most relevant and helpful to Mr. Tillman's case.

(Signature appears on next page.)

Jack B. Swerling

July 1, 2015

Sworn to and subscribed before me
this 1st day of July, 2015

Notary Public for South Carolina
My Commission Expires: 10/02/2019

M E M O R A N D U M

TO: JBS, JENNIFER AND THE RON TILLMAN FILE

FROM: JIM

DATE: 10/25/89

I met with Ron Tillman at the Richland County Detention Center. Mr. Tillman states that we need to make a special effort to talk with Scott English and Gordon English and Herman Wayley who supposedly saw him pick somebody up on Walcutt Street per Hayes Malloy's statement. Mr. English and Mr. Wayley state that they did not see Ron Tillman pick anybody up on Wayley Street or Walcutt Street.

END MEMO/kc

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Ronald Tillman, SCDC #222153, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2011-CP-40-07453 **ORDER OF DISMISSAL**

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 depravations 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.

SCANNED

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 Testifcandum 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 mislead 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, l. 20- p. 1074, l. 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, ll. 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, ll. 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, l. 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, l. 13- p. 853, l. 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, l. 14-p. 1068, l. 25; Tr. p. 1101, l. 24- p. 1102, l. 13 and Tr. p. 1103, l. 24- p. 1104, l. 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, l. 21- p. 1089, l. 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 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 depravations 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 a 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 EVIENCE 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 he 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[2] 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 discussced 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 previous 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 cause 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 mediatory 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 premised 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 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 is 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 . . . 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 Sherriff'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 compressions 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 premised 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 Swerling[4] 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.

Robert E. Hood

ROBERT E. HOOD
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

2167

WITNESSES

DOCKET NO. 89GS400745

THE STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

COURT OF GENERAL SESSIONS

#06 FEBRUARY TERM 1989

THE STATE

vs.

ARREST WARRANT NO. C295208 RONALD S. TILLMAN

ACTION OF GRAND JURY

TRUE BILL

FOREMAN OF GRAND JURY

VERDICT

Guilty

1/23/90

FOREMAN OF PETIT JURY DATE:

INDICTMENT FOR

MURDER

S. C. Code 16-3-20

(116)

bk

ATTEST.
TRUE COPY

C. C. C. P. & G. S.

FORM 5 (9/86)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT FOR MURDER

At a Court of General Sessions, convened on February 9, 1989,
the Grand Jurors of Richland County present upon their oath:

COUNT ONE - MURDER

That RONALD S. TILLMAN
did in Richland County on or about December 26, 1988,
feloniously, wilfully and with malice aforethought, kill one
Donald I. Sutton
by means of a pistol
and that the said victim died as a proximate result thereof.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

ATTEST
A TRUE COPY
Barbara C. Pratt

James E. Anderson
SOLICITOR

C C C P & G. S.

SENTENCE

Murder

STATE OF SOUTH CAROLINA

CASE NO. 89-GS-0145

RICHLAND COUNTY

#114178 8/27/86 Spinx

The defendant Ronald S. Tillman is committed to the State Department of Corrections/County for a term of Life IMPRISONMENT years, and/~~or to pay a fine of $_____, provided upon the service of _____ months/years and/or payment of $_____, plus pay/waive costs and assessments as applicable*, the balance suspended with probation for _____ months/years.~~ NO CREDIT FOR TIME SERVED, OR AWAITING TRIAL.

Restitution Yes/No

For physical injury $_____

property damage $_____

to be paid _____

to clerk for _____.**

Other conditions _____

Date January 23, 1990

Presiding Judge

*Costs and Assessments

Non-waivable $_____

Not waived $_____

Total $_____

Barbara A. Scott

Clerk of Court

**Pay to Victim's Compensation Fund if subrogated.

SCCA Form 217 (3/86)

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